Sent by email to: *aramirez@oig.lsc.gov*

January 14, 2016

Anthony M. Ramirez
Office of the Inspector General,
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

RE: NLADA Comments to Draft 2015 Compliance Supplement (80 Fed. Reg. 75847) (December 4, 2015)

Dear Mr. Ramirez:

The submission of this letter is in response to the LSC's Office of Inspector General (OIG) request for comments on their proposed revisions to the 1998 Compliance Supplement for Audits of Recipients (Compliance Supplement), referenced in this document as the Draft Supplement. The comments are made on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations and Policy Committee.

NLADA commends the OIG for its willingness to obtain and consider input on the extensive and significant proposed revisions to the Draft Supplement. Generally, NLADA supports the revisions to the Compliance Supplement, particularly since the last update was several years ago and does not include subsequent revisions made by LSC to a number of LSC regulations and policies. For example, revisions to the section regarding 1639, Welfare Reform, now correctly and in accordance with the *Velazquez* case, indicate that recipients may represent an individual eligible client who is seeking specific relief from a welfare agency, without regard to whether the relief sought involves an effort to amend or otherwise challenge existing welfare reform law.

There are several revisions, however, that are inaccurate and/or problematic which negatively impact LSC funded programs' ability to effectively carry out their mission of providing high quality legal services to people with low-incomes who cannot afford representation.

1. **<u>2015 Retroactive Effective Date</u>**

The proposed changes in the Draft Supplement state: *"This Compliance Supplement is effective for audits of fiscal years ending on or after December 31, 2015 and supersedes the previous edition of the Compliance Supplement issued in December 1998, including all previously issued Audit Bulletins and related audit guidance."* Page 3.

This language indicates that revisions which will not be made until 2016 will be retroactively applied to 2015 audits. A number of NLADA's member programs have voiced strong concerns that this revised Draft Supplement should not be retroactive. The retroactive application of the proposed changes to the current Compliance Supplement would result in additional audit costs and needless diversion of program resources for a number of reasons that include:

- The audit process for grantees with fiscal years that end in December 2015 has already started. Programs have finalized agreements with auditors for 2015 based on the current Supplement and some have even started the auditing process. Engagement letters for these audits reference the current Compliance Supplement. In order to comply with the revised Draft Supplement, once finalized, auditors will be required to re-visit their audit procedures and determine if they need to complete any additional steps required in the revised supplement, and if so, complete these steps. The need to complete additional steps is virtually certain given the extensive revisions. Retroactive application of the final revisions will add more work, costs and, most likely, delay the issuance of audit reports.
- Many programs have numerous other funders, in addition to LSC, who expect the audits to be complete by the end of April; a delay may result in the loss of funding from some of these sources, and needless disruptions to LSC-grantees' relationships with funders.
- Retroactive audit issues may also result in programs being unable to file their Form 990s on a timely basis.

2. **<u>1604 Outside Practice of Law</u>**

This section does not fully list all the permissible circumstances for the outside practice of law, specifically those contained in 45 C.F.R. 1604.4(c) (2) and (c) (3). If not all the permissible circumstances are contained in the final version of the revised Draft Supplement, auditors may

erroneously identify compliance concerns related to the outside practice. In order to avoid this unnecessary and time-consuming situation, NLADA suggests amending the following language in the Draft Supplement for this section as indicated in blue type below.

> A recipient's outside-practice policies may permit full-time attorneys to engage in outside practice of law if:
>
> (a) The recipient's director (or the director's designee) determines that a particular representation would be consistent with the attorney's responsibilities to the recipient's clients;
>
> (b) Except in the case of court appointments, the attorney undertaking outside practice does not intentionally identify the case or matter with the Corporation or the recipient; and
>
> 1. The attorney, is newly employed, has a professional responsibility to close cases from a previous law practice, and does so as expeditiously as possible on his or her own time; or
> 2. is acting on behalf of him or herself, a close friend, family member or another member of the recipient's staff; or
> 3. is acting on behalf of a religious, community, or charitable group; or
> 4. is participating in a voluntary pro bono or legal referral program affiliated with or sponsored by a bar association, other legal organization or religious, community or charitable group.

3. <u>1609 Fee Generating Cases</u>

The language in the Draft Supplement regarding fee-generating cases does not accurately indicate that the restrictions in 45 C.F.R. 1609 only apply to LSC and private funds. The preamble to the final rule, effective May 27, 2011, makes clear that the LSC's restrictions regarding fee-generating cases only apply to the use of LSC and private non-LSC funds, not public funds. 76 FR 23502. To insure that auditors do not erroneously identify a compliance issue if a program uses public non-LSC funds to handle a fee generating case, this section should include language that clarifies that the restrictions only apply to LSC and private non-LSC funds and not public non-LSC funds.

4. <u>1611 Client Eligibility</u>

Overall, the revisions to this section are very useful as they clarify important areas of eligibility criteria. For example, the Draft Supplement articulates key criteria to use when assessing the financial eligibility of a domestic violence victim that excludes the income and assets of the alleged perpetrator. Nevertheless, two of the proposed revisions to this section are problematic and need revision. The revision regarding the representation of persons over 60 years old, if funded in part with Older Americans Act (OAA) funds, is particularly troubling.

<u>Older Americans Act Revision</u>

This section significantly changes longstanding guidance regarding eligibility determinations for senior citizens that would result in a reduction of services available to individuals age 60 and over. The proposed changes reads as follows: *"Please note that recipients who receive Older Americans Act (OAA) funds for the representation of senior citizens are not permitted to use a means test in determining eligibility of clients represented with OAA funds. For this reason,* ***LSC funds may not be used for the representation of clients whose representation is funded, in part, under an OAA grant****. (emphasis added)"* Draft Supplement, Page 19.

This revision represents a significant change from current practice explicitly endorsed by guidance from LSC (enclosed) years ago. The revision appears to be the result of an erroneous understanding of a provision in the Older American's Act (OAA) regulation that indicates that a means test cannot be used to deny services to citizens age 60 and older. The OAA regulations specifically state that:

> "*Means test,* as used in the provision of services, means the use of an older person's income or resource(s?) to deny or limit that person's receipt of services under this part." 45 C.F.R. 1321.3

This language does not mean that providers cannot inquire as to financial resources of persons to be served with funding from the OAA for the purposes of assessing eligibility for other services and programs; **only that a program cannot deny or limit the provision of services based on an older person's income or resources**. The OAA funding specifically requires that programs inquire and report whether an applicant age 60 or over has income above or below federal poverty guidelines. Often, an applicant is eligible for both LSC and OAA funded services. In fact, programs are required by LSC's Case Reporting Services Manual (CSR) to report cases where there is dual financially eligibility even when only non-LSC funds are used. The CSR states "…all cases in which there has been an eligibility determination showing that the client meets LSC eligibility requirements regardless of the source(s) of funding supporting the cases, provided such cases are completed by the recipient or by PAI attorneys." *CSR Handbook 2008 Edition, as amended 2011, Section 4.3, page 9.*

Applicants age 60 and older are free to decline to provide financial information to determine if they are eligible for LSC services. If an older adult does not consent to provide this information, the program continues to process the application, but records and reports the applicant as not LSC-eligible.

OAA grants are a major funding source for many LSC grantees. There is no reason to prohibit a program from using LSC funds, as well as OAA funds, to provide services to elderly clients who are LSC financially eligible and extremely compelling reasons to continue this current longstanding practice. The growing expanding need for legal services for low-income individuals and woefully inadequate available resources make it critical for programs to have as many funding sources as possible to serve clients, especially senior citizens.

Financial Eligibility Suggested Audit Procedures (page 25, c.)

The Draft Supplement discusses what the auditor should determine if LSC funds are used and a client's gross income exceeds the maximum income level of 125% of the federal poverty level (FPL), but does not exceed 200% of the FPL. The Draft Supplement indicates that the auditor should "establish that recipient decided **to waive** (*emphasis added*) the eligibility requirements on the basis of one or more factors set forth in 45 C.F.R. 1611.5(a)." However, under the LSC regulation, if the applicant's income does not exceed 200% of the applicable FPL amount, the recipient may determine that the **applicant is considered financially eligible** based of one or more of the factors listed in 45 C.F.R 1611.5(a). In this situation **the eligibility requirements are not "waived", the applicant is eligible** based on one or more of the factors listed. **Waiver** of the eligibility factors is only applicable to asset limits and serving persons whose income is over 200% of the FPL.

This language needs revision so that an auditor does not waste time looking for evidence of a waiver determination, but rather reviews whether the appropriate factors allowing income eligibility have been identified for households with income between 125% and 200% of the FPL.

5. **1612 Restrictions on Lobbying and Certain Other Activities**

The language in the first page of this section regarding the prohibitions in 1612.6(c) as drafted is overly broad and/or confusing. The proposed revision states: "Recipient employees are prohibited from soliciting or arranging testimony or the provision of information in connection with legislation or rulemaking (45 CFR § 1612.6(c))." While it is correct that the regulation does, subject to certain exceptions, prohibit programs from soliciting or arranging for testimony in connection with legislation and rulemaking, the language, as drafted, also appears to indicate that employees may not provide information in connection with legislation or rulemaking under any circumstances. This is because key words contained in 1612.6(c) are missing which specify

that employees are prohibited from soliciting or arranging **for a request from any official** (*emphasis added*) to testify or otherwise provide information in connection with legislation or rulemaking. The regulation does not contain a general prohibition on providing information in connection with legislation or rulemaking. Recent guidance from LSC in Program Letter 13-5 and the Office of Legal Affairs (OLA) Advisory Opinion 2014-005 discuss a number of circumstances when a recipient may provide information in connection with legislation or rulemaking and what type of information they can provide.

NLADA recommends that the sentence in the proposed revision quoted above be revised as follows:

> Recipient employees are prohibited from soliciting or arranging for a request from any official to testify or otherwise provide information in connection with legislation or rulemaking subject to the exceptions noted in 45 C.F.R. 1612.5, Permissible activities using any funds, and 1612.6, Permissible activities using non-LSC funds.

This language accurately states the prohibitions in 45 CFR § 1612.6(c) and insures auditors do not waste time improperly identifying concerns that are not compliance violations.

6. <u>1613 Restrictions on Legal Assistance with Respect to Criminal Proceedings</u>

This section is missing an important exception that allows the use of tribal funds without restrictions, including the constraints on representation in criminal proceedings, if the funds are used for the purposes they were provided for. LSC's OLA Advisory Opinion AO-2013-008, page 3, states:

> "Unlike the other provisions placing restrictions on the use of non-LSC funds, section 1010(c) of the LSC Act and Section 504(d)(2)(A) place no restrictions on the use of tribal funds other than that they be used in accordance with the specific purposes for which they were provided. 42 U.S.C. § 2996i(c); Pub. L. 104-134, Tit. V, § 504; see also 45 C.F.R. § 1610.4(a) (implementing section 1010(c) and section 504(d) (2) (A)). Consistent with the statutory language, subsection (a) of 45 C.F.R § 1610.4 places no restrictions on the use of tribal funds, other than that the funds be used for the specific purposes for which they were provided."

The opinion specifically discusses and concludes that tribal funds may be used to provide public defender services – criminal representation - if that is the purpose of the funding. This information should be included in the revised Supplement.

7. 1614 Private Attorney Involvement

The new paragraph on page 31, Private Attorney Involvement (PAI), omits an important clause that appears in section 1614.4(b) (1) of the regulation in the first listing of activities that may be undertaken by the recipient to meet their PAI requirements. The sentence in the Draft Supplement currently only references including “support provided by private attorneys to the recipient”. The regulation actually states, “support provided by private attorneys to the recipient **or a subrecipient** (*emphasis added*). NLADA recommends revision of that sentence to more accurately read (addition in all caps):

> “Activities undertaken by the recipient to meet the requirements of this Part may also include, but are not limited to: (1) support provided by private attorneys to the recipient, OR A SUBRECIPIENT, as part of its delivery of legal assistance…”

Although the Draft Supplement does state that the list is not comprehensive, omission of an entire category of organizations that may receive PAI support is significant.

8. High Risk Designation

The paragraphs on page 3 of the Draft Supplement that address LSC OIG policy regarding “high-risk vs low-risk auditee” can be confusing to Auditors, recipient boards of directors, non-LSC funders and others who may review and rely on LSC grantee audits. The “high-risk” designation is due to the LSC OIG mandate and not based on the independent public accountant (IPA)’s objective assessment and judgment. Generally, based on the normal Uniform Rules, an organization deemed “high-risk” is expected to work toward achieving the more preferable “low risk” status. Because the high-risk designation is the result of the OIG’s policy, not the IPA’s assessment, achieving low risk status is not possible. “High-risk” designations expand the audit testing requirements and result in higher audit fees.

It is also not unusual for IPA’s and management to have to explain to interested parties (Grantors/Boards/Lenders) that the “high risk” designation in their audit is not necessarily based upon the IPA’s objective assessment and judgment but rather due to an OIG’s directive which is out of the control of the auditee or the auditor. This designation also places grantees at risk of having parties draw erroneous conclusions about the organization and cause them to conclude that a reported “high risk” designation is due to a grantee’s lack of systems or controls.

NLADA recommends the elimination of this blanket designation by the OIG.

9. Internal Controls

Each section regarding audits for compliance with specific regulations indicates, in the suggested audit procedures section, that the auditor should obtain an understanding of the internal controls in place. Since the bulk of the areas for audit addressed in the Draft Supplement is regulatory, rather than fiscal, NLADA assumes the reference to understanding internal controls means that the auditor has identified that there are systems in place to assure compliance. NLADA recommends that the OIG include this clarification for auditors in the final Compliance Supplement.

Thank you again for this valuable opportunity to provide our comments on matters of critical importance to our members. If you have any questions, please contact Robin C. Murphy at r.murphy@nlada.org or 202-452-0620.

Sincerely,

Anthony L. Young, Chair, Civil Policy Group (CPG)
Silvia Argueta, Chair, CPG Regulations and Policies Committee
Don Saunders, Vice President Civil Legal Services,
Robin C. Murphy, Chief Counsel for Civil Programs,
National Legal Aid and Defender Association