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Re: Comments on Revisions to Part 1628

This letter is submitted in response to LSC's request for comments on proposed revisions to the regulation on Recipient Fund Balances, § 45 C.F.R. 1628. The comments are submitted 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 not only strongly supports LSC's proposed revisions to this regulation, but also commends LSC's Office of Legal Affairs for taking the initiative in recommending regulatory changes that support LSC-funded programs in delivering high quality legal services.

NLADA concurs with LSC's statement regarding grantee fund balances above 25% of grantee's annual support that result from unexpected occurrences not listed in 45 C.F.R. § 1628.3(c) :

LSC grantees have experienced various unexpected occurrences [not listed] in 45 C.F.R. § 1628.3(c) that caused them to accrue fund balances in excess of 25% of their annual support. These occurrences have included an end-of-year transfer of assets from a former grantee to a current grantee, a natural disaster that resulted in a significant infusion of use-or-lose disaster relief funds from non-LSC sources, and receipt of a large attorneys' fees award in an LSC-funded case near the end of the fiscal year. In each of these situations, LSC determined that part 1628 currently prevents some recipients with legitimate reasons for having fund balances exceeding 25% of their annual LSC support from seeking and obtaining needed waivers.¹

¹ 45 C.F.R 1628 Summary (2015). Available at:

<https://www.federalregister.gov/articles/2015/04/20/2015-08948/recipient-fund-balances>

The regulatory restrictions currently placed on LSC-funded programs only permit three specified situations to be considered “extraordinary and compelling circumstances”² that would justify granting a waiver of carryover fund balance in excess of 25%. This regulatory provision is overly restrictive and penalizes programs and their client community when programs have fund balances over 25% for legitimate reasons. In addition to extraordinary and compelling circumstances identified by LSC, there may be other situations where a program has legitimate reasons for having a fund balance in excess of 25%. Recipients may also have excess fund balances when they have budgeted for anticipated funding reductions that, fortunately, do not occur. Programs in these situations should also not be penalized for exercising prudent management to maintain program stability by anticipating, in advance, predicted funding cuts.

NLADA also fully concurs with LSC that the list of extraordinary and compelling circumstances should be illustrative, rather than limited, so that LSC has the ability to approve waivers of fund balances in excess of 25% for legitimate reasons other than the three narrow circumstances currently delineated in the regulation.

NLADA further supports LSC’s proposal to add a new section to 1628 that would allow recipients seeking a waiver to retain a fund balance in excess of 25% to make the waiver request prior to the submission of their annual audited financial statements. According to LSC, their “... staff determined that incorporating the current preamble language on permitting waiver requests prior to the close of the fiscal year into the regulatory text of part 1628 would benefit grantees by allowing them to seek assurance that they will not have to return or spend a large portion of excess LSC funds by the end of the fiscal year, thereby enabling them to plan for the following fiscal year with greater certainty.”³

This same rationale should also apply to fund balances in excess of 10% and up to 25%. Grantees seeking waivers for these fund balances would benefit from having assurances from LSC that they will not have to return or spend a large portion of excess funds by the end of the fiscal year. NLADA recommends that LSC further revise this regulation so that all programs seeking waivers in excess of 10% be permitted to apply for a waiver prior to the submission of their annual audited financial statements. Regardless of whether fund balances for LSC programs exceed 10 to 25% or are over 25%, the programs, their staff, and the client community they serve would benefit from the ability to plan for the next fiscal year with the greater certainty afforded by obtaining a waiver in advance of finalizing their annual audited financial statements.

² 45 C.F.R. 1628.3 (2015).

³ II. LSC Consideration of Potential Revisions to Part 1628 (2015). Available at:

<https://www.federalregister.gov/articles/2015/04/20/2015-08948/recipient-fund-balances>