

**LEGAL SERVICES CORPORATION****45 CFR Part 1603****State Advisory Councils****AGENCY:** Legal Services Corporation.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rulemaking would remove the Legal Services Corporation's (LSC) regulation on state advisory councils. LSC believes this action is appropriate because the state advisory councils are no longer active and their oversight functions have been replaced adequately by other offices and processes established by Congress or LSC. Executive Orders 13563, "Improving Regulation and Regulatory Review," and 13771, "Reducing Regulation and Controlling Regulatory Costs," direct agencies to review their existing regulations and repeal or revise any that are obsolete or unnecessarily burdensome. Although LSC is not an agency of the Federal government subject to either executive order, LSC regularly reviews its regulations and has determined that this regulation can be eliminated.

**DATES:** Comments must be received by March 5, 2018.**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal Rulemaking Portal:* Follow the instructions for submitting comments.

- *Email:* [lscrulemaking@lsc.gov](mailto:lscrulemaking@lsc.gov).

Include "Part 1603 Rulemaking" in the subject line of the message.

- *Fax:* (202) 337-6519.

- *Mail:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1603 Rulemaking.

- *Hand Delivery/Courier:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1603 Rulemaking.

*Instructions:* LSC prefers electronic submissions via email with attachments in Acrobat PDF format. LSC will not consider written comments sent to any other address or received after the end of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007; (202) 295-1563 (phone), (202) 337-6519 (fax), or [sdavis@lsc.gov](mailto:sdavis@lsc.gov).

**SUPPLEMENTARY INFORMATION:****I. Background**

Section 1004(f) of the Legal Services Corporation Act of 1974 required that

"within six months after the first meeting of the Board, the Board request the Governor of each State to appoint a nine-member advisory council for each state." 42 U.S.C. 2996c(f). If ninety days elapsed without the Governor's appointing the advisory council, then "the Board [was] authorized to appoint such a council." *Id.* LSC implemented this statutory requirement in 1975 at 45 CFR part 1603.

The state advisory councils' primary duty was to notify LSC of any "apparent violation" by a recipient. 45 CFR 1603.5. LSC defined "apparent violation" as "a complaint or other written communication alleging facts which, if established, constitute a violation of the [LSC] Act, or any applicable rules, regulations or guidelines promulgated pursuant to the Act." *Id.* 1603.2(b).

LSC met the requirements of section 1004(f) of the LSC Act by requesting state governors to appoint state advisory councils within the period established by the Act and part 1603. In 1976, 46 state advisory councils were in existence, but later reports reflect that many of these councils rarely, if ever, met. Letter from Suzanne B. Glasow, Senior Counsel for Operations and Regulations, Office of General Counsel, to Mike Sims, Office of Rep. Pete Laney at 1 (Sept. 19, 1989). By 1983, only six state advisory councils appeared to be operational and by 1989, only Colorado and Indiana had functioning state advisory councils. *Id.* To the best of LSC's knowledge, there currently are no active state advisory councils. Furthermore, LSC has no records of complaints forwarded from the state advisory councils.

**II. History of This Rulemaking**

In 2014, LSC's Office of the Inspector General (OIG) recommended that LSC either ensure that the state advisory councils are established and operational or rescind part 1603. LSC proposes to rescind part 1603 for four reasons: (1) LSC complied with the requirements of section 1004(f) of the LSC Act by requesting state governors to appoint state advisory councils within the period established by the Act and part 1603; (2) section 1004(f) of the LSC Act and part 1603 provide LSC with discretion to exercise or not exercise the option to appoint state councils; (3) to LSC's knowledge, there are no functioning state advisory councils; and (4) there are now numerous oversight mechanisms that fulfill the function of the state advisory councils.

At its January 2015 meeting, the Operations and Regulations Committee (Committee) of LSC's Board of Directors

(Board) recommended including the repeal of part 1603 on LSC's regulatory agenda, but made the initiative a low priority.

On January 30, 2017, the President signed Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs." Through this Executive order, the President directed the heads of executive departments and agencies to identify at least two prior regulations to be repealed for each new regulation issued. By operation of the LSC Act, LSC is not an executive department or agency subject to the Executive order. 42 U.S.C. 2996d(e). Consistent with the intent of the Executive order to reduce unnecessary regulations, however, LSC prioritized the repeal of part 1603.

Prior to initiating rulemaking, LSC conducted an analysis of the oversight mechanisms that have developed since the LSC Act was passed in 1974. LSC determined that the state advisory councils' oversight functions have been replaced adequately by other offices and processes established by Congress or LSC since 1974. Complainants not only have more audiences—including LSC's OIG, LSC's Office of Compliance and Enforcement (OCE), and state bodies—for their complaints, but they also have more vehicles for filing complaints, including by phone, postal mail, email, online, and through grantee grievance procedures. Furthermore, the OIG, OCE, and state bodies go beyond the state advisory committees' narrow role of collecting alleged violations by also investigating the allegations and using various tools to ensure grantee compliance. LSC's analysis of these existing oversight mechanisms is covered in greater detail in the Justification Memorandum for Rulemaking to Rescind 45 CFR part 1603—State Advisory Councils, available at [www.lsc.gov/rulemaking](http://www.lsc.gov/rulemaking).

On April 23, 2017, the Committee approved Management's proposed 2017–2018 rulemaking agenda, which included rescinding 45 CFR part 1603 as a priority rulemaking item. On October 15, 2017, the Committee voted to recommend that the Board authorize LSC to begin rulemaking on part 1603. On October 17, 2017, the Board authorized LSC to begin rulemaking. On January 21, 2018, the Committee voted to recommend that the Board authorize publication of this NPRM. On January 23, 2018, the Board authorized publication of the NPRM with a 30-day comment period.

**III. Discussion of the Proposed Changes**

LSC proposes to remove part 1603. In an NPRM published elsewhere in this

issue of the **Federal Register**, LSC proposes to add to part 1603 a regulation governing requests for testimony and subpoenas for documents in cases to which LSC is not a party.

#### List of Subjects in 45 CFR Part 1603

Advisory committees; Legal services.

■ For the reasons discussed in the preamble and under the authority of 42 U.S.C. 2996g(e), LSC proposes to remove 45 CFR part 1603.

#### PART 1603—[REMOVED AND RESERVED]

Dated: January 25, 2018.

Stefanie K. Davis,

Assistant General Counsel.

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### LEGAL SERVICES CORPORATION

#### 45 CFR Part 1603

#### Requests for Documents and Testimony

**AGENCY:** Legal Services Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Legal Services Corporation (LSC) proposes to create a rule governing subpoenas and requests for LSC documents and testimony by non-federal litigants in cases in which LSC is not a party. Currently, LSC has no internal or external procedures in place to process such requests. This rule provides the public with guidance on where to send requests and establishes procedures by which those requests will be processed.

**DATES:** Comments must be received by March 5, 2018.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal Rulemaking Portal:* Follow the instructions for submitting comments.

- *Email:* [lscrulemaking@lsc.gov](mailto:lscrulemaking@lsc.gov).

Include "Touhy Rulemaking" in the subject line of the message.

- *Fax:* (202) 337-6519.

- *Mail:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Touhy Rulemaking.

- *Hand Delivery/Courier:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Touhy Rulemaking.

- *Instructions:* LSC prefers electronic submissions via email with attachments in Acrobat PDF format. LSC will not

consider written comments sent to any other address or received after the end of the comment period.

**FOR FURTHER INFORMATION CONTACT:**

Stefanie K. Davis, Assistant General Counsel, 202-295-1563, [sdavis@lsc.gov](mailto:sdavis@lsc.gov).

**SUPPLEMENTARY INFORMATION:**

#### I. Background

LSC proposes to create a new regulation, known as a *Touhy* regulation, that will establish a process by which litigants in cases where LSC is not a party may obtain documents or testimony from LSC and its employees. Arising from the Supreme Court's decision in *U.S. ex rel Touhy v. Ragen*, 340 U.S. 462 (1951), *Touhy* regulations define agencies' procedures for responding to document or testimony requests, as well as individual agency employees' obligation to follow such procedures.

Between 2013 and 2017, LSC and its Office of the Inspector General (OIG) received several subpoenas and requests for testimony or documents, but did not have internal or external guidance in place regarding such requests. At the OIG's recommendation, LSC added rulemaking on requests for documents and testimony to its rulemaking agenda in 2015. On October 15, 2017, the Operations and Regulations Committee (Committee) of LSC's Board of Directors (Board) voted to recommend that the Board authorize rulemaking on part 1603. On October 17, 2017, the Board authorized LSC to begin rulemaking.

Regulatory action is justified for four reasons. First, a *Touhy* regulation will promote efficiency and timeliness by identifying those LSC officials with the authority to respond to requests or subpoenas for documents or testimony and establishing a procedure for LSC's consideration of such requests. Second, it will minimize the possibility of involving LSC in controversies not related to its functions. Third, it will prevent the misuse of LSC's employees as involuntary expert witnesses for private interests or as inappropriate expert witnesses as to the state of the law. Fourth, it will maintain LSC's impartiality toward private litigants.

On January 21, 2018, the Committee voted to recommend that the Board approve this notice of proposed rulemaking (NPRM) for publication. On January 23, 2018, the Board accepted the Committee's recommendation and voted to approve publication of this NPRM with a 30-day comment period.

#### II. Discussion of Proposed Rule

In an NPRM published elsewhere in this issue of the **Federal Register**, LSC

proposes to remove the existing version of part 1603 pertaining to state advisory councils. In its place, LSC proposes to add this regulation.

#### 1603.1 Scope, Purpose, and Applicability

LSC proposes to prescribe which proceedings and employees will be governed by the rule. All LSC employees, including former employees, members of the Board of Directors, and employees of the OIG, are governed by this rule concerning information acquired during the performance of official duties or because of such person's official capacity with LSC. This rule applies to all non-federal litigants in civil, criminal, or administrative proceedings to which LSC is not a party.

Congress created LSC through the Legal Services Corporation Act, 42 U.S.C. 2996 *et seq.* and appropriates funds for LSC annually. *See, e.g.,* Consolidated Appropriations Act, 2017, Public Law 115-31, 131 Stat. 135 (2017). These funds are appropriated for LSC to fulfill its congressionally-mandated mission. Therefore, it is appropriate to mirror traditional federal entities in creating LSC's *Touhy* regulation.

#### 1603.2 Definitions

LSC proposes to define the following terms.

*Certify:* LSC proposes to define this term to mean that it will authenticate copies of any document produced by affixing its seal to the document.

*Employee:* LSC proposes to define this term to include current and former employees of LSC and the OIG, as well as members of its Board of Directors.

*LSC:* Consistent with the § 1602.2 definition, *LSC* refers to both the Legal Services Corporation and the LSC Office of the Inspector General, unless otherwise specified.

*Testify and testimony:* LSC proposes to define these terms to mean written or oral statements made under oath before any tribunal or official body.

#### 1603.3 What is LSC's policy on presentation of testimony and production of documents?

LSC proposes to prohibit current and former employees from providing documents or testimony in response to requests covered by this rule without prior authorization from the General Counsel or OIG Legal Counsel.

#### 1603.4 How does a person request voluntary testimony from an employee?

LSC proposes to require parties to submit requests for testimony from LSC employees to its General Counsel as