

OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
AO-2014-004

SUBJECT: Method to Determine Compliance With Governing Body Composition Requirements Under 45 C.F.R. 1607

DATE: April 17, 2014

QUESTION PRESENTED

To assess whether a recipient's governing body is in compliance with the percentage composition requirements set forth in 45 C.F.R. 1607, should the percentage requirements be applied to the number of members prescribed in the bylaws or to the number of positions actually filled on the governing body at the time of the computation? For example, if the bylaws of a recipient's governing body provide for 25 members, but the body currently has 24 members, should the body's compliance be measured based on the 25 members authorized under the bylaws, or on the 24 members currently serving?

BRIEF ANSWER

There is no statutory or regulatory requirement that a governing body's compliance with the percentage composition requirements be determined by application of the percentages to the number of members prescribed in the bylaws. Accordingly, compliance with Part 1607's composition requirements for recipients' governing bodies may be calculated by applying the percentage requirements to the number of positions actually filled at the time of the analysis, so long as that number is not below the number of members required to satisfy quorum requirements set forth in recipients' bylaws.

ANALYSIS

I. The LSC Act, the McCollum Amendment, and LSC's Regulations

LSC's requirements for recipients' governing bodies originate in the LSC Act and LSC's annual appropriations statutes. In relevant part, § 1007(c) of the Act provides:

§ 1007(c) Recipient organizations.

In making grants or entering into contracts for legal assistance, the Corporation shall insure that any recipient organized solely for the purpose of providing legal assistance to eligible clients is governed by a body at least 60% of

which consists of attorneys who are members of the bar of a State in which the legal assistance is to be provided...and at least one-third of which consists of persons who are, when selected, eligible clients who may also be representatives of associations or organizations of eligible clients.

42 U.S.C. § 2996f(c).

Section 502 of LSC's FY 1983 appropriations act, commonly referred to as "the McCollum Amendment," after its sponsor Rep. William McCollum, imposed additional governing body requirements on LSC grantees. Pub. L. 97-377, 96 Stat. 1874 (1982). Congress has included some version of the McCollum Amendment in all of LSC's subsequent appropriations, including Section 502 of LSC's 1996 appropriations act, which has been incorporated by reference every year thereafter. The McCollum Amendment, in its current form and relevant part, provides:

None of the funds appropriated in this Act to the Legal Services Corporation shall be used by the Corporation to make a grant, or enter into a contract, for the provision of legal assistance unless the Corporation ensures that the person or entity receiving funding to provide such legal assistance is—...

(2) a qualified nonprofit organization, chartered under the law of a state or the District of Columbia, that—

(A) furnishes legal assistance to eligible clients; and

(B) is governed by a board of directors or other governing body, the majority of which is comprised of attorneys who—

(i) are admitted to practice in a State or the District of Columbia; and

(ii) are appointed to terms of office on such board or body by the governing body of a State, county, or municipal bar association, the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance;...

Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Title V, § 502(2)(B), 110 Stat. 1321 (April 26, 1996), incorporated by reference in subsequent appropriations. Thus, while the LSC Act requires a 60% attorney majority on a recipient's

governing body, the McCollum Amendment complements that requirement by mandating how most of that majority is to be selected.

Part 1607 of LSC's regulations implements the requirements imposed on recipients' governing bodies by the LSC Act and the McCollum Amendment. As an initial matter, section 1607.2(d) defines the term "governing body" as "the board of directors or other body with authority to govern the activities of a recipient..." The composition requirements for recipients' governing bodies are stated in section 1607.3, which provides:

- (a) A recipient shall be incorporated in a State in which it provides legal assistance and shall have a governing body which reasonably reflects the interests of the eligible clients in the area served and which consists of members, each of whom is supportive of the purposes of the Act and has an interest in, and knowledge of the delivery of quality legal services to the poor.
- (b) At least sixty percent (60%) of a governing body shall be attorney members...
- (c) At least one-third of the members of a recipient's governing body shall be eligible clients when appointed...
- (d) The remaining members of a governing body may be appointed by the recipient's governing body or selected in a manner described in the recipient's bylaws or policies...
- (f) Members of a governing body may be selected by appointment, election, or other means consistent with this part and with the recipient's bylaws and applicable State law.
- (g) Recipients shall make reasonable and good faith efforts to insure that governing body vacancies are filled as promptly as possible.

II. Analysis Under the LSC Act, the McCollum Amendment and 45 C.F.R. Part 1607

While Part 1607 implements the LSC Act and the McCollum Amendment's governing body composition requirements, the regulation itself is silent on the method to be used in determining compliance. There is no requirement in Part 1607, § 1007(c) of the Act, or in the McCollum Amendment that compliance with the composition requirements be calculated based on the full membership prescribed in a recipient's bylaws.

The conclusion that a governing body's full membership as prescribed in a recipient's bylaws is not the required benchmark for the composition requirements is supported by the fact that most such bylaws permit a governing body to act in the presence of a quorum – a number

falling short of full membership. See October 25, 1993, Memorandum to Phyllis Doriot, Manager of the LSC Grants & Budget Division, from Suzanne Glasow, Senior Counsel for Operations & Regulations, page 2 (there is no requirement in the Act or regulations that a recipient's governing body "must, in order to *govern* as a *body*, have filled all the board membership positions that are envisioned in the program's bylaws") (emphasis in original). As a result, even if a recipient's board has vacancies, as long as the board can govern, "it is the governing body envisioned in Part 1607." *Id.* Because a governing body with a quorum satisfies the requirements of Part 1607, compliance may be measured based on its composition at the time.¹

A governing body with vacancies that can still act also comports with the plain language of the LSC Act and the McCollum Amendment. The LSC Act requires that a recipient be "governed by a body." 42 U.S.C. § 2996f(c). The McCollum Amendment applies to a recipient's "board of directors or other governing body." Pub. L. No. 104-134, Title V, § 502(2)(B), 10 Stat. 1321 (April, 26, 1996). Neither the Act nor the Amendment requires that a board fill all of its authorized positions before governing as a body.

This conclusion is also supported by section 1607.3(g), which states that "Recipients shall make reasonable and good faith efforts to insure that governing body vacancies are filled as promptly as possible." Section 1607.3(g) thus explicitly recognizes that governing bodies will operate at times with vacancies. If the composition requirements were measured by reference to full membership, any time an attorney or eligible client left the board a recipient might well fall out of compliance with the composition requirements. For example, with respect to a governing body whose bylaws authorized 24 members, the Part 1607 composition standards would require at least 15 attorney members ($24 \times .6 = 14.4$) and 8 eligible client members ($24 \times .33 = 8$). If two attorney members and one eligible client member left such a 24-member board which originally had 15 attorney members and 8 eligible client members, that governing body would immediately fall below the 60% attorney-member and 33% eligible client-member standards, if those standards are measured against the 24-member full-capacity board. By contrast, such a board with 13 remaining attorney members and 7 remaining eligible client members would meet both standards if measured against the 21 members remaining on the board.² It does not make sense that Part 1607 would recognize that board vacancies can occur and, at the same time, would create a regulatory violation almost any time such a vacancy in fact occurred.

CONCLUSION

Compliance with Part 1607's composition requirements for recipients' governing bodies may be calculated based on the number of filled positions as long as that number is not below the number of members required to satisfy quorum requirements, because there is no statutory or regulatory requirement that compliance be measured by the number of members prescribed in recipients' bylaws.

¹ This analysis is inapplicable if a recipient's bylaws state that all positions in the governing body *must* be filled for it to act. If a recipient has not followed its own mandate, it is not compliant with Part 1607.

² $.6 \times 21 = 12.6$ required attorney members and $.33 \times 21 = 7$ required eligible client members.

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