Comptroller General
of the United States

Washington, D.C. 20548

B-241591

March 1, 1991

David L. Wilkinson
Inspector General
Legal Services Corporation
400 Virginia Avenue, S.W.
Washington, D.C. 20024-2751

Dear Mr. Wilkinson:

This is in response to your letter of October 1, 1990, questioning whether the Legal Services Corporation and certain other organizations identified as "designated Federal entities" pursuant to the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515, are subject to the provisions of the Office of Management and Budget (OMB) Circulars. As you agreed, we are limiting our consideration to the applicability of OMB Circulars to the Legal Services Corporation (LSC). For the reasons outlined below, we have concluded that LSC is not subject to the provisions of the OMB Circulars, but may use those provisions for guidance.

As you pointed out in your letter, LSC was established as a private, nonmembership, nonprofit corporation in the District of Columbia by the Legal Services Corporation Act, 42 U.S.C. §§ 2996 et seq. (1988). Subsection 2996d(e)(1) provides that "[E]xcept as otherwise specifically provided in this subchapter, officers and employees of the Corporation shall not be considered officers or employees, and the Corporation shall not be considered a department, agency, or instrumentality of the Federal Government."

In examining this subsection we have stated that "[E]ven though Government corporations generally are executive agencies as defined by 5 U.S.C. 105, it is our view that these specific provisions applicable to the Legal Services Corporation take the Corporation out of the Executive Branch of the Government." B-210338, Apr. 5, 1983. We have also held that LSC is not an agency or establishment of the government subject to the GAO accounts settlement authority. See Tann, Brown and Company, Ltd., B-204886, Oct. 21, 1981.

There have been a number of judicial determinations that, as a result of subsection 2996d(e)(1), LSC's funding decisions are not reviewable under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1988), which by its own terms applies to

authorities of the United States government. See National Clearinghouse for Legal Services, Inc. v. Legal Services Corporation, 674 F.Supp. 37 (D.D.C. 1987); Spokane County Legal Services, Inc. v. Legal Services Corporation, 614 F.2d 662 (9th Cir. 1980). Courts have also held that neither LSC, its president, nor local legal service organizations funded by LSC are federal actors for purposes of liability for constitutional violations. See Newman v. Legal Services Corporation, 628 F.Supp. 535 (D.D.C. 1986); Gerena v. Puerto Rico Legal Services Inc., 538 F.Supp. 754 (D.P.R. 1982).

The legislative histories of the Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378, and the Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, 91 Stat. 1619, reveal not only Congress's general intention to ensure the independence of the Corporation but also its specific intention to insulate the Corporation from OMB.1/ In reporting on the Legal Services Corporation Act Amendments of 1977, the House Committee on the Judiciary stated that "[T]he Corporation, unlike its predecessor agencies--the Office of Economic Opportunity and the Community Services Administration--was set up to be independent of the Executive Branch and free from political interference."2/ The Committee went on to state that:

> "Key provisions in the Legal Services Corporation Act designed to protect the Corporation from inappropriate control by the Executive Branch are Section 1005(e)(2), that authorizes the Corporation to submit its annual budget requests directly to the Congress (subject to review and comment by the Office of Management and Budget), and Section 1010(a), that authorizes the Corporation to receive its appropriation in one installment at the beginning of the fiscal year without apportionment by OMB. The Committee reaffirms these two provisions, as well as the entire statutory scheme that makes clear the congressional understanding of the critical importance of the Corporation's independence from control by OMB.
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> "The Legal Services Corporation Act assures that the Corporation is accountable directly and only to the

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1/ See H.R. Rep. No. 93-247, 93rd Cong. 1st Sess. (1973) reprinted in 1974 U.S. Code Cong. & Admin. News, 3872, 3874; H.R. Rep. No. 95-310, 95th Cong. 1st Sess. (1977) reprinted in 1977 U.S. Code Cong. & Admin. News, 4503, 4504.

2/ H.R. Rep. No. 95-310, supra.

Congress. That accountability mechanism has worked well and must be preserved."3/

In accordance with the provisions of 42 U.S.C. § 2996f(d), the Corporation must monitor, evaluate and provide for independent evaluation of programs supported by LSC. In connection with this evaluation, LSC is to conduct or require to be conducted annual financial audits of all recipients of LSC funds and is directed to submit those audits to the Comptroller General. See 42 U.S.C. § 2996h(c). The Corporation itself is to be audited annually and a copy of the audit is also to be filed with the Comptroller General. See 42 U.S.C. § 2996h(a). The Comptroller General is also given the authority to conduct an audit of the Corporation. See 42 U.S.C. § 2996h(b). Several courts have concluded that these provisions evidence a scheme of Corporation and Congressional oversight. See Hedges v. Legal Services Corporation, 663 F.Supp. 300 (N.D. Cal. 1987); Gerena v. Puerto Rico Legal Services, Inc., supra.

Therefore, in light of subsection 2996d(e)(1), the entire LSC statutory scheme, and its legislative history, we conclude that LSC does not fall within the authority of OMB to oversee management of the Executive Branch as contemplated by the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, as amended, the Budget and Accounting Procedures Act of 1950, ch. 946, 64 Stat. 832, as amended, Reorganization Plan No. 2 of 1970, and Executive Order No. 11541.

The fact that an Inspector General's office was created at the Legal Services Corporation does not change our opinion on this question. The legislative history of the Inspector General Act Amendments of 1988 clearly shows that the identification of LSC as a "designated Federal entity" was not intended to change its status. In its report, the House Committee on Government Operations specifically stated that:

> ". . . an entity's status as a 'designated Federal entity' in this Act is solely for purposes of the Inspector General Act of 1978 and is not intended to change the entity's status under any other law. For example the Committee recognizes that it has taken may [sic] years of litigation for the National Railroad Passenger Corporation (i.e. AMTRAK) to establish that it should not be considered an agency of the United States. Including AMTRAK as a

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3/ H.R. Rep. No. 95-310, 95th Cong. 1st Sess. (1977) reprinted in 1977 U. S. Code Cong. & Admin. News, 4503, 4508.

'designated Federal entity' is not intended to overturn this result."4/

Inspector Generals at "designated Federal entities" were given the same duties and responsibilities as other Inspector Generals operating under the original Inspector General Act of 1978. These include the duty and responsibility "to provide policy direction for and to conduct, supervise and coordinate audits and investigations relating to the programs and operations" of their establishment. The statute provides that in performing these responsibilities, the Inspector General shall comply with audit standards established by the Comptroller General. 5 U.S.C. App. §§ 4(a)(1) and (b), 8E (1988).

That is not to say that as Inspector General you could not adopt standards which provide for additional requirements. For example, you point out that OMB Circular A-133 prescribes audit requirements for nonprofit institutions similar to the provisions of the Single Audit Act of 1984, 31 U.S.C. §§ 7501 et seq., and requires an auditor to state an opinion on a grantee's compliance with program and financial requirements.

Therefore, we conclude that although LSC is not bound to follow OMB Circulars, we see no reason why you could not adopt the requirements of OMB Circular A-133 as LSC has adopted, through its own regulations, the guidance of the OMB Circulars regarding allowable cost questions. See 45 C.F.R. § 1630.4g (1990).

We trust that this is responsive to your inquiry.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

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4/ See H.R. Rep. No. 100-171, 100th Cong., 2nd Sess. 16, reprinted in 1988 U.S. Code Cong. & Admin. News, 3154, 3169.