LSC

OFFICE OF LEGAL AFFAIRS

THIS MEMORANDUM SUPERCEDES THE APRIL 12, 2007 STAFF REPORT MEMO ON THIS SUBJECT

MEMORANDUM

TO: Operations & Regulations Committee

THROUGH: Helaine M. Barnett HMB
President

FROM: Victor M. Fortuno VMF
Vice President & General Counsel

DATE: April 25, 2007

SUBJECT: Staff Report on 2007 Rulemaking Agenda

Introduction

The Operations & Regulations Committee asked Management for recommendations on what regulations, if any, the Committee should consider reviewing for revision in 2007. This Staff Report responds to that request. In addition, this Report provides Management's comments on the rulemaking recommendations put forth by LSC's Office of Inspector General (OIG) in the OIG's memo to you of December 21, 2006 and on recommendations received from and on behalf of recipients.

2007 Regulatory Agenda – Management Recommendations

While the LSC Strategic Directions 2006-2010 requires that "every year the LSC board will review the need for regulatory changes," there is no requirement that LSC must adopt new regulations or revise existing regulations as part of the annual review. Upon consideration of recommendations from and on behalf of LSC recipients, the OIG's recommendations and its own review of the issues, Management has determined that there is no need for extensive rulemaking. Management does, however, believe that a specific new lesser sanction could be a helpful addition to those already available to us. Therefore, Management recommends consideration of the development of a rule for the imposition of special grant conditions during a grant year. This item is discussed in greater detail below.

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New Regulation on "Lesser Sanctions" - Imposition of Special Grant Conditions During the Grant Year

Management has a variety of enforcement mechanisms available to ensure compliance. Among these are: the imposition of Corrective Action Plans, temporary suspension of funding, questioned cost proceedings, and termination (in whole or part) of a recipient's grant (any of which may be imposed during a grant year); placing recipients on month-to-month funding (which may be done only at the outset of a grant term); and imposing special grant conditions (which may be done at the outset of a grant term or between grant years of a multi-year grant term). These mechanisms, along with informal consultations and compliance training, usually suffice to ensure that recipients remain in compliance with applicable requirements and come back into compliance when violations occur. However one item in particular, the authority to impose special grant conditions during the term of a grant would further enhance our ability to tailor sanctions to the particular circumstances of any given case..

As noted above, LSC's current grant assurances provide that special grant conditions may be imposed on a recipient prior to the awarding of a new grant or between years of a multi-year grant term. Special grant conditions may not currently be imposed on a recipient during the course of a grant year. It would be helpful to LSC to be able to impose special grant conditions, pursuant to regulatory criteria, during the course of a grant year in instances in which a recipient has been found to be in violation of an applicable requirement. Although Corrective Action Plans can be imposed during a grant year and often contain similar requirements as special grant conditions, Management's experience is that imposing such requirements as special grant conditions is a particularly effective way of capturing a recipient's attention and securing compliance.

Management believes that a regulation providing express authority for imposing special grant conditions during a grant year will ensure that recipients have notice that special grant conditions may be imposed and will not constitute a modification of the grant agreement inconsistent with principles of contract law underlying the grant agreement. Having a regulation setting forth the criteria for the imposition of special grant conditions during a grant year will help ensure that when such special grant conditions are imposed, they will be appropriate and of greatest efficacy.

Management Comments on the OIG's Regulatory Agenda Recommendations

45 CFR Part 1635 – Timekeeping

Rulemaking to revise the timekeeping rule, 45 CFR Part 1635, is unnecessary. Management believes the information the OIG appears interested in is obtainable through the recipients' accounting records. Requiring recipients to record this information as part of the timekeeping records appears redundant and, therefore, to be an undue administrative burden. Moreover, Management is concerned that such a requirement would be problematic in that the timekeepers may not know at the time they record their hours exactly which source of funds are

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being used to support their activity. Accordingly, having to record that information would become burdensome. In addition, since timekeeping records are required to be maintained on a contemporaneous basis, such a requirement would force recipients to assign funding sources on a contemporaneous basis. This would restrict the flexibility recipients currently have to use their various funding sources in the most advantageous way possible during their fiscal year.

Management also notes that prior drafts of what became the timekeeping requirement in the FY 96 appropriations legislation contained a requirement that tied the timekeeping requirement to the account to be charged. However, the final version adopted by Congress does not contain such a requirement and the final language adopted specifically separates timekeeping and accounting. Moreover, the legislative history of the timekeeping requirement does not reflect any particular concern on the part of Congress that time records need also to indicate funding source.

45 CFR Part 1612 – Restrictions on Lobbying and Certain Other Activities

Rulemaking to revise the lobbying restrictions rule, 45 CFR Part 1612, is unnecessary. In particular, Management questions what the OIG means in referencing activities which "go beyond what is permissible" but are "short of what is prohibited." Any given activity is either permissible or prohibited. Management respectfully disagrees with the OIG that the current regulation is unclear. The Office of Legal Affairs (OLA) is available to provide guidance to LSC staff (including the OIG) and to recipients on questions of interpretation of the regulations.

Management notes that OLA has two external opinions and no internal opinions on the current version of the regulation and that there is a generous amount of guidance which, although predating the current version of the regulation, is nonetheless still applicable since the operative language in the regulation remains unchanged. The paucity of requests OLA has received for either external or internal guidance since the adoption of the current version of the regulations indicates that neither recipients nor LSC staff have found the regulation to be so confusing as to justify rulemaking.

45 CFR Part 1608 – Prohibited Political Activities

Rulemaking to revise the prohibited political activities rule, 45 CFR Part 1608, is unnecessary. Management respectfully disagrees with the OIG that the current regulation is unclear. OLA is available to provide guidance to LSC staff (including the OIG) and to recipients on questions of interpretation of the regulations. OLA has two internal opinions dealing with the specific issue identified by the OIG and no external opinions on that issue (other than public release of those two internal opinions). The paucity of requests OLA has received for either external or internal guidance since the adoption of the current version of the regulations indicates that neither recipients nor LSC staff have found the regulation to be so confusing as to justify rulemaking.

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New Regulation on "Lesser Sanctions" – Authorizing Imposition of Limited Reductions in Funding[1]

Management believes the OIG's suggested rulemaking to authorize limited reductions in funding is unnecessary. As noted above, however, Management is recommending its own "lesser sanctions" rulemaking. With the exception of the one change which Management is recommending, Management believes the current sanctions and enforcement tools available are sufficient to enable us to ensure that recipients remain in compliance with all applicable requirements and come into compliance when violations occur. Imposing monetary penalties on recipients for violations will only have the unfortunate effect of reducing their already overstretched resources. Management believes that such penalties would be counterproductive because they would likely reduce resources available for the delivery of client services and would reduce resources necessary to implement corrective action (e.g., hiring consultants, developing compliance mechanisms and conducting training).

New Regulation – Addressing when it is Permissible for Recipients to Perform Work Without a Client

Management disagrees that a problem exists with respect to this issue. It appears that what the IG is concerned about is the solicitation of clients, and this is a matter already subject to regulatory restriction.

Management Comments on Regulatory Agenda Suggestions Submitted by or on Behalf of LSC Recipients

Management solicited comments from Executive Directors on what rulemaking, if any, they would like to see LSC undertake in the coming year. To date, we received four comments, one from the Center for Law and Social Policy (CLASP) on behalf of the National Legal Aid and Defender Association (NLADA), one from Charles Greenfield on behalf of the Legal Aid Society of Hawaii (LASH), one from Lee Richardson on behalf of Legal Aid of Arkansas (supporting the LASH comment) and one from the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA/SCLAID). Copies of these the first three comments are included in your Board materials and copies of the ABA/SCLAID comments were sent to you separately.

CLASP/NLADA Comments

CLASP/NLADA suggests that there is no necessity for LSC to engage in any rulemaking at the current time. CLASP/NLADA is of the opinion that the current regulations are working

[1] The OIG has also suggested some potential legislative changes to increase LSC's authority to debar, or impose a trustee to replace, certain senior level employees or Board members responsible for serious malfeasance or violations of applicable laws and regulations. Management is concerned that actions of this nature would constitute an unnecessary interference with the independence of recipients and are incompatible with the structure of the legal services system (whereby each recipient is an autonomous organization, separate from LSC).

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well. Further, they oppose the regulatory changes proposed by the OIG. While Management concurs that regulatory changes are generally unnecessary, it is the view of Management that a rulemaking to adopt a "lesser sanctions" regulation allowing the imposition of special grant conditions during a grant year is the exception.

LASH Comments

LASH suggests that LSC engage in rulemaking to change the provision of Part 1626, Restrictions on Legal Assistance to Aliens, which limits eligibility of citizens of the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI) and the Republic of Palau to services provided in those respective nations (unless the applicant is otherwise eligible under Parts 1611 and 1626). Management believes that rulemaking is not appropriate at this time.

Management continues to believe that the Corporation's longstanding reading and interpretation of the Compact of Free Association under which service is provided in FSM, RMI and Palau is correct. Management notes that LSC has attempted, both informally and formally, to obtain further guidance on this very question from both the Department of State and the Office of Insular Affairs of the Department of the Interior (which has administrative authority over a variety of issues relating to FMS, RMI and Palau). Neither agency has provided us with any response. As such, we have no basis upon which to determine that LSC's reading of the Compact has been incorrect. We remain convinced that, unless and until there is a change in the law, LSC is without authority to unilaterally change its regulatory provisions on this issue.

As LASH notes in its comments, legislation was introduced in Congress which, if passed, will amend the language of the Compact to provide eligibility for legal services from LSC recipients to citizens of FSM, RMI and Palau outside of those respective nations. If and when legislation amending the Compact is enacted, LSC can revisit this issue and engage in appropriate rulemaking. It is our understanding that a Senate bill on this subject introduced during the current session was reported favorably and without amendment by the Senate Committee on Energy and Natural Resources, but there has been no movement on it since then. Moreover, we are not aware of any similar House bill having been reintroduced this session.

ABA/SCLAID Comments

ABA/SCLAID suggests that there is no necessity for LSC to engage in any rulemaking at the current time. ABA/SCLAID is of the opinion that the current regulations are working well. Further, they oppose the regulatory changes proposed by the OIG. While Management concurs that regulatory changes are generally unnecessary, it is the view of Management that a rulemaking to adopt a "lesser sanctions" regulation allowing the imposition of special grant conditions during a grant year is the exception.