

the LSC Board of Directors Meeting on November 9, 2002.

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SUPPLEMENTARY INFORMATION:

Background

The Legal Services Corporation is authorized by Congress to issue regulations as necessary to carry out its mission. *See* 42 U.S.C. 2996(e). LSC, however, is not a “department, agency, or instrumentality of the Federal Government.” 42 U.S.C. 2996(d). As such, LSC is not subject to the requirements of the Administrative Procedures Act, which governs the rulemaking activities of Federal agencies. Rather, LSC is required to “afford notice and reasonable opportunity for comment to interested parties prior to issuing rules, regulations, and guidelines, and it shall publish in the **Federal Register** at least 30 days prior to their effective date all its rules, regulations, guidelines and instructions.” 42 U.S.C. 2999(g).

Throughout its history, LSC has conducted its rulemaking in compliance with the statutory requirements described above, but has not had a written statement of the Board of Directors (“Board”) setting forth the procedures to be followed in the course of LSC rulemaking activities. The Board determined that, while there is no legal requirement for LSC to have a written protocol related to rulemaking, having one would serve to advance LSC’s policy of conducting its rulemaking activities in a spirit of cooperative dialog with our recipients and other interested parties. Accordingly, on September 18, 2000, at a meeting of its Board of Directors, the Legal Services Corporation adopted a new Rulemaking Protocol to govern its rulemaking activities.

At its September 2002 meeting, the Board discussed how the Rulemaking Protocol and how rulemaking has proceeded under the Protocol, citing concerns over cost of the Negotiated Rulemakings being undertaken while endorsing the collaborative rulemaking approach promoted by the Protocol. The Board requested that staff provide at the next meeting a report detailing experience with the Rulemaking Protocol, to date, and recommending changes, as necessary to improve the Protocol. The requested report, including proposed changes to the

LEGAL SERVICES CORPORATION

Rulemaking Protocol

AGENCY: Legal Services Corporation.

ACTION: Announcement of adoption of revised rulemaking protocol.

SUMMARY: This notice sets forth the text of a revised rulemaking protocol adopted by the LSC Board of Directors which will govern LSC rulemaking activities.

DATES: This Rulemaking Protocol became effective upon its adoption at

Protocol was provided and taken up by the Board at its meetings on November 8–9, 2002. The Board adopted the proposed revised Protocol, with some minor amendments. The text of the Protocol, as revised, is set forth below.

It should be noted that, since this Protocol is a statement of LSC internal procedure and is not a “rule, regulation, guideline or instruction,” LSC is not required by law to publish this Protocol or seek public comment. LSC is choosing to publish this Protocol in the **Federal Register** (and has also posted it on the LSC website at <http://www.lsc.gov>) in furtherance of LSC’s interest in and policy of conducting its business in a fair and open manner.

LSC Rulemaking Protocol (as Revised by the LSC Board of Directors 11/9/02)

This Rulemaking Protocol is intended to reflect the policy of LSC to conduct its rulemaking activities in a spirit of cooperative dialog with our recipients and other interested parties¹ and has the following six objectives:

1. Enhanced implementation of the will of Congress as expressed in the LSC Act, amendments thereto and other statutory enactments;
2. Increased public participation in the manner and method in which LSC promulgates rules;
3. The adoption of procedures that reflect the best practices in rulemaking as articulated in the Administrative Procedures Act, the Negotiated Rulemaking Act of 1990 and Executive Order 12866;
4. Implementation of LSC’s strategic initiatives as set forth in Strategic Directions, 2000–2005 (adopted January 29, 2000);
5. Formalization of LSC’s policies governing rulemaking and specifically reserving specific responsibilities and authorities unto the Board; and
6. Development of a rulemaking protocol that is efficient and effective.

Regulatory Policy Direction

The Board, through the Operations and Regulations Committee (“Committee”), provides direction on LSC regulatory policy and establishes priorities for LSC rulemaking activities. The Committee will look to staff to effectuate LSC rulemaking policies and priorities through this Protocol. Final authority over LSC rulemaking policies and actions rests with the Board.

¹ Although this Protocol reflects LSC policy, it is not intended to and shall not create or confer any rights for or on behalf of any person or party and shall not establish legally enforceable rights against LSC or establish any legally enforceable obligations on the part of LSC, its directors, officers, employees and other agents.

Initiation of Rulemaking

The impetus for a rulemaking² may come from any one of several sources; Congressional directive; internal LSC initiative (Board or Committee members and/or staff); or a formal request from a member of the regulated community or general public. Decisions on whether to undertake rulemakings will be made by the Board upon the recommendation of the Committee.

In most instances,³ prior to undertaking a rulemaking LSC’s Office of Legal Affairs (“OLA”), in close consultation with appropriate Corporation staff, will develop a Rulemaking Options Paper (“ROP”). The ROP will contain a discussion of the subject for the potential rulemaking, and will include an outline of the policy and legal issues involved. The ROP shall also recommend whether the potential rulemaking should be accomplished by Notice and Comment Rulemaking, including whether holding a Rulemaking Workshop would be appropriate, or whether it should be Negotiated.

Once the ROP is developed and approved by the LSC President, it will be submitted to the Committee. The Committee will have the opportunity to deliberate and determine whether to recommend to the Board that the Board initiate a rulemaking. If the Committee recommends that the Board initiate a rulemaking, the Committee deliberations will also provide an opportunity for the Committee to recommend policy direction on the scope and issues expected to be involved in the rulemaking. As noted above, the Board will make decisions regarding whether to undertake a rulemaking, the method to be used for the rulemaking, and any policy direction to be given to staff at the outset. The appropriate rulemaking process shall be selected on a case-by-case basis consistent with the objectives of this Protocol.

If the Board decides to undertake a rulemaking, notice that a rulemaking proceeding has begun will be posted on the LSC website, indicating the subject matter of the rulemaking and whether the rulemaking will be accomplished through Notice and Comment, including whether the Corporation anticipates holding a Rulemaking Workshop, or be

² Rulemaking includes both the development of new rules and regulations and the amendment of existing rules and regulations.

³ The Committee and the Board retain the authority to initiate a rulemaking whether or not a ROP has been prepared. The ROP process is intended to aid the Committee and the Board in their respective deliberations and decisionmaking process.

Negotiated. In addition to website notice, notice by mail will also be given those who have previously requested such notice and are included in the Corporation’s mailing list dedicated to that purpose.

Notice and Comment Rulemaking; Rulemaking Workshops

In Notice and Comment Rulemaking, LSC develops rulemaking proposals and receives comment on them in writing and at certain publicly designated meetings of the Committee. As an adjunct to the Notice and Comment Process, LSC will, when appropriate, conduct Rulemaking Workshops. Rulemaking Workshops will enable LSC Board members and staff to meet with stakeholders prior to the development of a draft NPRM to discuss, but not negotiate, LSC rules and regulations. LSC believes the Notice and Comment process, including Rulemaking Workshops, will allow for an effective dialog between LSC and its recipients and other interested parties, in those instances in which Negotiated Rulemaking is not used.

When the Board has decided to initiate a rulemaking and to conduct a Rulemaking Workshop, OLA will work with the Board and staff to select a date for the Rulemaking Workshop and will invite participants from the interested stakeholder community. The Workshop will be a meeting at which the participants hold open discussions designed to elicit information about problems or concerns with the regulation (or certain aspects thereof) and provide an opportunity for sharing ideas regarding how to address those issues. The Workshop is not intended to develop detailed alternatives or to obtain consensus on regulatory proposals. Upon the conclusion of the Workshop, the Board shall provide LSC staff with policy guidance on the issues discussed to aid staff in the development of the Draft Notice of Proposed Rulemaking (“NPRM”).

OLA will have the primary responsibility for the drafting of the Draft NPRM, which includes both the proposed regulatory text and the proposed preamble, working with management, appropriate staff and the Office of Inspector General (“OIG”). The Draft NPRM will be shared with the OIG for review and comment. The Draft NPRM will be submitted to the President. The President may then approve the Draft NPRM for submission to the Committee for its consideration or return the Draft NPRM to OLA for revisions as necessary.

Once approved, the Draft NPRM will be set for consideration by the

Committee at a public meeting. The Draft NPRM will be provided to the Committee sufficiently in advance of the meeting to permit appropriate consideration. The notice of the meeting announcing the placement of the Draft NPRM on the Committee agenda will be published in the **Federal Register** and will recite that the Draft NPRM will be publicly available and will be posted on the LSC Web site. In addition, the Draft NPRM will be distributed to each participant in the Rulemaking Workshop, if one has been held. Posting of the Draft NPRM to the LSC Web site and distribution to Workshop participants will be made upon distribution of the Draft NPRM to the Committee and sufficiently in advance of the Committee meeting to permit appropriate consideration by interested parties.

At the Committee meeting, management will present the Draft NPRM with the assistance of OLA and opportunity for public comment will be provided. The Committee will then deliberate and shall decide whether to publish the NPRM, return it to staff for revisions, or recommend to the Board that the Board terminate the rulemaking.

Once the NPRM has been approved, OLA will make any necessary technical revisions to document before it is published in the **Federal Register** for comment.⁴ The comment period will be at least 30 days and, it is anticipated, in most instances will be 60 days (but could, under appropriate circumstances, be longer). However, the decision as to whether to limit the notice period to 30 days or to provide a longer comment period is a matter entirely within discretion of the Board.

Copies of all comments received will be provided to the Committee and made available to other Board Members upon request. Copies of all comments will also be placed in a public docket available for inspection and copying in the FOIA Reading Room at the Corporation's offices. Copies of comments received in electronic format, along with an index of all comments received, will be placed into an electronic docket on the LSC website.

Upon the close of the comment period, OLA will draft a Final Rule (which consists of the regulatory text and preamble).⁵ The draft of the Final Rule will be shared with the OIG for

review and comment. The draft of the Final Rule will be submitted to the President. The President may then approve the draft of the Final Rule for submission to the Committee for its consideration or return it to OLA for revisions as necessary.

Once approved, the draft of the Final Rule will be set for consideration by the Committee at a public meeting. The draft of the Final Rule will be provided to the Committee and the Board sufficiently in advance of the meeting to permit appropriate consideration. In addition, a notice of the meeting announcing the placement of the Final Rule on the Committee agenda will be published in the **Federal Register**. At the Committee meeting, management will present a summary of the Comments and the draft Final Rule with the assistance of OLA. It is anticipated that the Committee will accept public comment as needed to assist in its deliberations. The Committee will vote on whether to recommend the Final Rule to the Board, return it to staff for revisions, or recommend that the Board terminate the rulemaking.

If the draft Final Rule is approved by the Committee for review by the Board, the Board will consider the draft Final Rule and vote to adopt it, to return it to the Committee for further action, or to terminate the rulemaking. At its discretion, the Board may request the participation of members of the public during its deliberations. Once the Final Rule is adopted by the Board, OLA will make any necessary technical revisions to it and submit the final version for approval for publication to the Board's designee (for example, the Board Chair or the Committee Chair). The Final Rule will then be published in the **Federal Register** and placed on LSC's Web site.

Negotiated Rulemaking

In a Negotiated Rulemaking, a group comprised of LSC representatives and affected and/or interested parties will meet under the direction of a trained, neutral facilitator, ("Working Group") with the intention of developing consensus-based positions leading to regulations. The key feature of Negotiated Rulemaking is its collaborative approach, which seeks consensus where possible and decisionmaking by LSC after full dialog with the regulated community and other interested parties. LSC intends to use negotiated rulemaking in instances in which LSC believes that the Notice and Comment process, including the use of Rulemaking Workshops, will not suffice and that the Negotiated Rulemaking process is necessary to properly address

complex and/or controversial issues posed by the rulemaking.

The President, in consultation with the Committee Chair, will solicit suggestions for appointment to the Working Group from the regulated community, its clients, advocates, the organized bar and other interested parties. The President, working in consultation with the Committee, acting through its Chair, will make appointments of individuals and organizations to the Working Group, including the facilitator and the OLA representative. Working Groups will have no more than 15 members, representing the diversity of the legal services community and other interested parties. All groups or organizations asked to participate in a Working Group shall be responsible for selecting and designating their representatives. No members will be appointed to a Working Group after the Working Group had held its first meeting.

The Working Group shall meet as necessary to develop a draft NPRM. The members of the Working Group will, drawing upon their substantive expertise, discuss the subjects prompting the need for rulemaking and work toward developing a consensus on solutions to the problems identified. During this process, staff will provide detailed status reports to the Committee during Committee meetings, including briefings on the substance of tentative areas of consensus and disagreement in order to provide the Committee with an opportunity to provide additional policy guidance to LSC staff (and other Working Group members in attendance at the Committee meeting) at that time.

The OLA representative on the Working Group, with the assistance of a subgroup of the membership, shall draft the regulatory language consistent with achieved consensus. The Working Group will review the regulation to ensure it reflects any consensus reached, although the Corporation retains ultimate responsibility for crafting the regulatory language.

The consensus proposal of the group, once developed, must go through the formal rulemaking process as an NPRM. At this point the Notice and Comment process described above will be followed.

On occasion it may happen that no consensus can be reached by the Working Group on a regulatory proposal or some element thereof. In those instances, the President will report this to the Committee and seek direction from the Committee, acting through its Chair, on whether to continue the rulemaking using the Notice and

⁴ During the comment period, LSC may, in its discretion, hold a public hearing at which interested parties make oral presentations, followed by written comments.

⁵ On rare occasions, it may become necessary for LSC to raise additional issues for comment. In such a case, LSC may issue a Revised NPRM and repeat the comment process.

Comment process or to terminate the rulemaking.

Victor M. Fortunato,

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