

ORIGINAL

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS & REGULATIONS COMMITTEE

OPEN SESSION

Sunday, February 21, 1999

3:00 p.m.

Key Biscayne Room
Eden Roc Hotel
4525 Collins Avenue
Miami Beach, Florida 33140

COMMITTEE MEMBERS PRESENT:

LaVeeda M. Battle, Chair
F. William McCalpin
John Erlenborn
Ernestine Watlington (via telephone)
Douglas Eakeley
Edna Williams-Fairbanks
Nancy Rogers
Maria Luisa Mercado

LSC STAFF PRESENT:

Linda E. Perle, CLASP
Suzanne Glasow, Sen. Ass't. Gen. Counsel
Karen Sarjeant, VP- Programs
Laurie Tarantowicz, OIG Gen. Counsel

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P R O C E E D I N G S

1
2 CHAIR BATTLE: I'd like to call to order this
3 meeting of the Operations and Regulations Committee.
4 This is February 21, 1999. We have all of the members
5 of the committee with us and we are also joined by Edna
6 Fairbanks-Williams and Nancy Rogers. I know Doug
7 Eakeley is somewhere in the room as well and we have
8 Maria Luisa Mercado with us. And I thank you all for
9 joining us this morning.

10 You should have before you a copy of the
11 agenda which has been placed in your booklet. I will
12 entertain a motion to adopt the agenda as written.

M O T I O N

13
14 MR. McCALPIN: So moved.

15 MR. ERLNBORN: Second.

16 CHAIR BATTLE: It's been properly moved and
17 seconded. All in favor?

18 (Chorus of ayes.)

19 CHAIR BATTLE: All opposed? Motion carries.

20 We have the minutes of the Committee meeting
21 of November 15 as the first item in our booklet. And
22 you should have a copy of those minutes. Are there any

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1 corrections to the minutes? Suzanne?

2 MS. GLASOW: I have a correction and it's on
3 page 22 at the top of the page. This was a correction
4 actually to the previous minutes and in the line where
5 insert is up at the top of the page where it said
6 delete this reg, dealt with short-term funding and then
7 the insert says this reg dealt with denial of refunding
8 and hearing rights, that is incorrect. It should be
9 this reg dealt with denial of refunding hearing rights.

10 In addition --

11 CHAIR BATTLE: That makes sense.

12 MS. GLASOW: The transcript was wrong. The
13 person who did these minutes read it right out of the
14 transcript.

15 In addition, we made another correction to the
16 minutes at that meeting and we deleted the sentence so
17 it should show that we deleted the sentence "recipients
18 cannot carry over more than 10 percent of any balance
19 left over from LSC granted funds absent extraordinary
20 circumstances."

21 MR. McCALPIN: Where does that go?

22 MS. GLASOW: It would be inserted in the

1 minutes as another correction. There's no mention of
2 that correction in the minutes but we did make that
3 correction at the last meeting.

4 CHAIR BATTLE: So was that a correction of
5 earlier minutes?

6 MS. GLASOW: That's correct.

7 CHAIR BATTLE: What was the date of the
8 earlier minutes?

9 MR. McCALPIN: September 11. Look at the top
10 of the page, 22.

11 CHAIR BATTLE: September 11? Okay.

12 MS. GLASOW: It was a correction made at the
13 November 15 meeting and it was of -- I'm not sure --

14 MR. McCALPIN: Of September 11.

15 MS. GLASOW: Okay; thank you.

16 CHAIR BATTLE: Okay. Are there any other
17 corrections to the minutes? Hearing none, I'll
18 entertain a motion to adopt the minutes as corrected.

19 M O T I O N

20 MR. ERLNBORN: So moved.

21 MR. McCALPIN: Second.

22 CHAIR BATTLE: It's been properly moved and

1 seconded. All in favor?

2 (Chorus of ayes.)

3 CHAIR BATTLE: All opposed? Motion carries.

4 We do have one item I'd like to take out of
5 order on the agenda only because I think that number
6 five, Develop for proposed adoption by the Board a
7 mechanism for setting of the compensation level for the
8 Corporation's Inspector General, is an item that the
9 board members may or may not have all gotten the memo
10 on and I just -- I know that there are some members
11 that mentioned to me that they did not get the
12 information on this so we're going to defer that item
13 to give the board members an opportunity to review the
14 background information on it.

15 We do have as the next item on the agenda
16 Report on proposed rule 45 CFR Part 1625 (sic),
17 Recipient Fund Balances as item three. Suzanne?

18 MS. GLASOW: Thank you.

19 CHAIR BATTLE: I'm sorry; and Karen. That's
20 right.

21 MS. GLASOW: I'm going to let Karen give an
22 introduction and then I'll do the specifics of the

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1 rule.

2 CHAIR BATTLE: Okay; thank you.

3 MS. SARJEANT: What I'd like to do is just
4 give a brief overrule of this rule and the staff
5 recommendation. In October of 1998, this rule was
6 published for public comment with proposed revisions to
7 the regulation 1628 on recipient fund balances. The
8 purposes of the proposed published rule is to delineate
9 LSC policies and procedures applicable to recipient
10 fund balances and to assist the Corporation in ensuring
11 the timely expenditure of LSC funds.

12 What the proposed rule says and does is that
13 it would provide LSC with increased discretion when
14 determining whether to permit a recipient to maintain a
15 fund balance of up to 25 percent of LSC support. The
16 proposed rule also added additional requirements and
17 limitations on the use of fund balances and included
18 structural and clarifying positions.

19 Our recommendation at this time is that the
20 committee not take any final action on this rule and
21 the reasons for that are the following. When the rule
22 was put out for comment, we received I think 19

1 different comments and these comments have raised some
2 issues that require additional research before our
3 staff can come back to the committee with a recommended
4 final ruling.

5 For example, the committee sought information
6 in the request for public comments on the appropriate
7 level of fund balance and the comments gave a wide
8 range of suggestions on that issue. What our staff now
9 needs to do is to complete a thorough review of these
10 issues.

11 We need to take a look at both the LSC
12 experience with fund balance requests, a review of non-
13 LSC fund balance issues and information, a review of
14 our own history with equipment approvals and our
15 program's expenditures and also do some additional
16 research outside with some other organizations because
17 we did not receive any definitive information on what
18 an appropriate fund balance amount is and since the
19 whole issue of maintaining and permitting recipients to
20 maintain a fund balance is clearly and solely a policy
21 issue for this board to decide, we want to be in a
22 position to give you a firm basis on which to review

1 our recommendation.

2 So at this point in time, we are asking that
3 the committee not take final action. However, there
4 was one set of comments that raised two issues that
5 because of the issues that were raised, and these were
6 the comments of the American Farm Bureau, would
7 basically raise issues on the legal sufficiency of the
8 proposed rule and the Corporation's rulemaking process
9 and the legality of permitting balances with LSC funds.
10 Suzanne is going to address those two issues for the
11 committee because of kind of the threshold nature of
12 those two issues.

13 CHAIR BATTLE: Okay; Suzanne?

14 MS. GLASOW: Thank you. These are two
15 threshold issues because in essence they speak to the
16 sufficiency of our rulemaking and also the legality of
17 our current fund balance rule so I thought I should
18 prepare for this committee and for public distribution
19 our analysis of those two main points.

20 The first point raised by the Farm Bureau was
21 on the legal sufficiency of the proposed rule. The
22 American Farm Bureau basically stated that the proposed

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1 rule lacks sufficient information for meaningful
2 comment and was in violation of the Administrative
3 Procedure Act.

4 Our response to that is basically that our
5 rulemaking is governed by 1008(e) of the LSC Act which
6 says that LSC rules must be published for comment and
7 notice before they are published as final. We are not
8 subject to the APA, which is the Administrative
9 Procedure Act, and that has been found to be so because
10 we are not an agency, department or instrumentality of
11 the federal government; we are a private non-profit
12 corporation. And several federal court cases have
13 found that. A couple of courts have basically said
14 that we are subject to the rationality standard of the
15 pre-APA standard that was used for federal agencies.

16 Nevertheless, we feel that our rulemaking
17 really does generally follow the standards set out in
18 the APA. The APA requires federal agencies to provide
19 notice and an opportunity to comment on substantive
20 proposed rule. Judicial interpretations of appropriate
21 notice have found that there must be sufficient
22 information detail and issue description in a proposed

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1 rule so that anyone wishing to comment on that rule can
2 do so in a meaningful way.

3 Also, all vital supporting data information
4 used by the agency to come to their final decision
5 should be available for review and comment. The Farm
6 Bureau, and this is an assumption, perhaps assumed
7 because our published rule did not have a docket number
8 published with it that we didn't have a rulemaking
9 record.

10 This is not correct. We have always
11 maintained a rulemaking record really sufficient under
12 the APA because that is what any federal court will
13 look at, the administrative record, if we are ever
14 challenged on our rulemaking in court. And we have
15 always maintained a thorough rulemaking record. We
16 simply do not give it a docket number.

17 Many federal agencies, executive agencies,
18 it's just a system that's been developed for executive
19 agencies that they have these docket numbers which is
20 the number given to the administrative file for a
21 particular rulemaking. In that file are contained all
22 the information to the proposed rule, the information

1 used by the agency to make their decision on a
2 rulemaking.

3 It usually includes all the public comments
4 that come in on a rule and at any day or time during a
5 rulemaking period, the public can either request to
6 come in and look at the public documents that are used
7 as a source for the rulemaking or the public comments
8 that are being submitted. And one commentor can
9 comment on the comments of another commentor,
10 apparently.

11 However, there's always a cutoff date when
12 comments are available and rulemakings could go on
13 forever if someone could complain that I don't have
14 time to comment on those last comments that came in
15 yesterday and I only have two or three weeks to develop
16 a response to those comments. So although the public
17 can come in and look at comments as they're submitted,
18 there is a cutoff point at some point.

19 Basically there's a growing trend in the
20 courts to require agencies to provide more information
21 on their rulemaking but this has largely been developed
22 for the large regulatory agencies that regulate

1 organizations such as utilities that really have no
2 choice but to be regulated and because their rulemaking
3 is really involving some very sensitive or scientific
4 information, it's hard for the public to understand.
5 So the courts are required more or more that they
6 provide it in such a way that interested parties can
7 understand the information and provide meaningful
8 comment.

9 I reviewed a lot of published rules in the
10 Federal Register and I find -- and I also talked to a
11 person at the Federal Register and found the following.
12 Agencies have different ways of publishing their
13 proposed rules. Some will provide a docket number,
14 some will give an address where you can come in and
15 look at the documents, some agencies require that
16 someone make an appointment before they come in and
17 view the document, so it's really across the board.
18 Some are starting to put their information up on web
19 sites so it's -- although they have to make it
20 available, there's no real absolute set way that they
21 have to do that.

22 The Corporation has always made our documents

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1 available. We often -- it's not a huge amount of
2 requests but we do get requests to see comments by
3 other commentors, we do get requests to look at
4 documents that we've cited in a proposed rule. You
5 don't have to publish everything in the proposed rule
6 that you rely on but you have to make it clear what it
7 is you're relying on and then someone can call the
8 agency and ask for the information and we've always
9 done that.

10 Basically in this rulemaking, we allowed for
11 60 days comment period. On November 2, we received a
12 request for the GAO report that was cited in that and
13 it was a request by -- at the time we didn't know that
14 -- but it was an agent for the Farm Bureau. And we
15 immediately faxed that GAO opinion and made it
16 available.

17 During the week of December 14, we were called
18 again by this agent and asked about -- there was a
19 citation to public comments in the preamble to the
20 proposed rule and they wanted to know if those were
21 available and we said well, those were oral comments
22 made at the board meeting and they're available in the

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1 transcript. And I made arrangements to have that
2 transcript sent. There was a clerical error and they
3 didn't get it.

4 When we discovered that problem, we promptly
5 made it available to the requestor and actually gave
6 them extra time to comment. But you'll find that the
7 very last comment in the compilation of public comments
8 basically said that why should they be able to comment
9 when we didn't make those available to the rest of the
10 world but they were still under the misunderstanding
11 that we were subject to the APA and for some reason
12 just didn't seem to feel this information was
13 available.

14 Some of the information, the earlier comment
15 that they complained about not having, nobody asked
16 for. So my number was the number that was available,
17 the request for information that I did receive,
18 information was made available. So I have provided the
19 document you have in front of you to the Farm Bureau
20 agent at this point and actually have had a
21 conversation on the phone so I hope that now there's a
22 better understanding of the Corporation's rulemaking

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1 requirements and I feel that we have complied with the
2 law that we are subject to. So I'm hoping that that's
3 not an issue that will be raised again.

4 Any questions on that point?

5 CHAIR BATTLE: Essentially what you're saying
6 is that at this point we have several other comments
7 that we're not going to get into that really get to the
8 substance of this particular proposed rule --

9 MS. GLASOW: That is correct.

10 CHAIR BATTLE: -- and that these are
11 procedural issues that were raised and the crux to the
12 procedural concern that they had had to do with their
13 perception that somehow we were under the
14 Administrative Procedures Act which would have certain
15 specific requirements that possibly they could argue we
16 didn't meet; however, since we don't have those
17 requirements, we don't have a problem with a violation
18 of the APA but it was instructed to go through the
19 process of responding to and raising the procedure that
20 we do have in place which essentially meets most of the
21 fairness and notice requirements for participation in
22 the comment process.

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1 MS. GLASOW: This is correct.

2 CHAIR BATTLE: Okay. Bill?

3 MR. McCALPIN: I was just thinking that I hope
4 we have the politics of the situation in mind if we're
5 going to reply to the Farm Bureau and that we soft
6 pedal the fact that since we're not a federal agency
7 we're not subject to the APA because there has been a
8 certain movement abroad to make us a federal agency and
9 I wouldn't want to put that on the agenda of the Farm
10 Bureau who have been difficult sometimes to deal with
11 in the past to get them to push, get behind that push
12 to put us in the Justice Department or some other
13 agency of the federal government. I'd soft pedal --

14 MS. GLASOW: I hope I have done that by
15 pointing out that we're generally in compliance with
16 the APA anyway. I mean, really do -- we're very well
17 aware of the standards of the APA and we really do try
18 to follow them. I think it was really the
19 misunderstanding of the fact that we didn't have a
20 docket number, which is really just a technical point,
21 but we really do -- I mean, I'm constantly reading APA
22 cases to make sure that we're following standards and

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1 living up to that so I hope that that point got across
2 in this.

3 CHAIR BATTLE: John?

4 MR. ERLENBORN: Do I understand correctly that
5 the delay in addressing this in the committee is not
6 based upon the Farm Bureau Federation objections but
7 rather some other comments that you need to look into?

8 MS. GLASOW: That is correct.

9 MR. ERLENBORN: I'm pleased to hear that
10 because I don't think the Farm Bureau, first of all, is
11 a natural party to this but secondly, they have the
12 right to make comments. They're troublemakers in my
13 opinion and they want to make trouble.

14 MR. McCALPIN: You should know.

15 MR. ERLENBORN: I should know. I've had
16 experience with them. But the fact is that they had an
17 uninformed complaint. The fact is they didn't know
18 what they were talking about and if that is the case,
19 as I am quite convinced from what you've told us, that
20 certainly shouldn't slow down our process.

21 MS. GLASOW: That is correct. Our process is
22 a little slower this time simply because as a matter of

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1 course, we want to make sure we fully understand the
2 information and we're ready to bring you a
3 recommendation that's based on sufficient information
4 and detail.

5 CHAIR BATTLE: Certainly. We have 19
6 comments, which is a little bit more than the usual and
7 we want to be completely informed by the time we make a
8 decision to set policy with regard to what the
9 appropriate fund balance should be, so we're in a good
10 place.

11 Thank you for that report. Do we have
12 anything else that we need to hear on 63(a)?

13 MS. GLASOW: We have the second issue that the
14 Farm Bureau raised which basically is whether we are --
15 the fact that we do currently allow our grantees to
16 have fund balances, whether that is in accord or
17 consistent with federal law.

18 Many agencies that receive federal
19 appropriations are federal agencies and the use of
20 those funds is governed by a lot of federal law.
21 Again, we are not a federal executive agency.
22 Basically Corporation's appropriations, although we do

1 receive them from a federal appropriation, have always
2 been treated differently. The Corporation's
3 appropriations are paid by the Treasury to the
4 Corporation in an annual sum rather than by advances
5 and reimbursements for specific obligations as is done
6 for federal agencies.

7 The Corporation's equipment and property are
8 not owned by the government and OMB has no authority to
9 revise the Corporation's budget request or to control
10 the manner of LSC expenditures and there have been
11 several Comp. Gen. opinions on that point.

12 LSC is not an agency or establishment of the
13 government subject to the GAO accounts settlement
14 authority and we do not fall under the authority of OMB
15 to oversee management of the executive branch as
16 contemplated by the Budget and Accounting Act.

17 Because of the nature of LSC funds, the GAO
18 opinion cited in our proposed rule found that -- did
19 not find that having recipients have fund balances was
20 inconsistent with the law. They simply felt that we
21 were allowing too large excessive fund balances and
22 they recommended the Corporation regulate that, which

1 is why we promulgated our first fund balance rule back
2 in 1983, I think.

3 So again, it was a misunderstanding of the
4 nature of the Corporation, what the law that governs
5 our expenditure of funds is so we just wanted to make
6 sure that this committee knows that there are no legal
7 impediments to fund balances held by our recipients and
8 it really, as Karen pointed out earlier, most of the
9 proposed revisions to this rule will be policy
10 decisions made by this board and currently the policy
11 decisions that we're operating on is that a reasonable
12 fund balance is 10 percent and that a waiver of that up
13 to 25 percent for extraordinary circumstances is
14 appropriate and those are the issues we'll come back to
15 you with, among others, when we are ready to make
16 recommendations on going forward with the proposed
17 rule.

18 CHAIR BATTLE: Okay; John?

19 MR. ERLENBORN: I don't want this to be taken
20 too seriously but I thought you might put a P.S. on
21 your letter to the Farm Bureau Federation telling them
22 that it might be wise next time they comment on

1 something like this to consult with legal counsel
2 first.

3 CHAIR BATTLE: Okay. Are there any other
4 concerns that we need to address on 1628?

5 MR. McCALPIN: I made the mistake of reading
6 the draft of 1628 before I knew it was going to be
7 withdrawn. I'd like to make three quick comments for
8 the staff to consider as you're going forward with
9 this. In 1628.3(f) at page 32, the last sentence, I
10 assume that what we mean is that at termination all
11 unexpended funds will be returned to the Corporation.
12 It says all unexpended funds under the grants will be
13 returned but I assume we're talking about at the
14 termination of the grant they would be returned.
15 Otherwise, you could read that as at any given point in
16 time, unexpended funds return to the Corporation.

17 Secondly, I wonder why in 1628.4(a) we ask for
18 another document about the fund balance. I would
19 assume that the fund balance will appear on the audited
20 annual statement which is required to be sent to us.
21 Why then do we need to ask the program, the grantee, to
22 send us another notice of what I assume will already

1 appear on the financial statement, the audit statement?

2 MS. GLASOW: It's a good question. That is
3 something we plan to look into.

4 MR. McCALPIN: And finally, 1628.4(e)(3) at
5 the top of page 34, we give consideration to reserve
6 necessary to pay attorneys. What about other
7 contractual obligations that would not have matured up
8 to that point? This is a particular contractual
9 obligation but what about other contractual obligations
10 facing a program for which they might prudently
11 reserve? Those are my points.

12 MS. FAIRBANKS-WILLIAMS: That's very good
13 because in the past, Vermont Legal Aid had a loan note
14 that was out for, I don't know, nine years, something
15 like that, and it was hard to pay it down.

16 MR. McCALPIN: Thank you, Madame Chair.

17 CHAIR BATTLE: Any other comments?

18 (No response.)

19 CHAIR BATTLE: We also have the timekeeping
20 requirement in 1635 before us.

21 MS. SARJEANT: Thank you. I'm going to do the
22 same thing, give a brief overview of a proposed rule

1 that was published and the staff recommendation which
2 you will see includes some new proposed language and
3 then we will walk through the changes and why the
4 different proposals are made.

5 This rule was published for public comment in
6 October of '98 also and it's my understanding that this
7 rule came about, the changes to it, primarily because
8 of the need to respond to some issues that were raised
9 in an inspector general's report on compliance review
10 of selected grantees of the new restriction.

11 The proposed rule that was published requires
12 all full-time attorneys and paralegals to put a date on
13 their timekeeping record, it requires part-time
14 attorneys and paralegals to also work for an
15 organization engaged in restricted activity to put
16 dates and exact time of day for each case matter and
17 supporting activity in their time record and it
18 requires all attorneys and paralegals to have time
19 records that are consistent with the recipient's time
20 and attendance records.

21 Now, when this committee put this proposed
22 rule out for comment, there was some discussion and a

1 specific request for comment on a certification
2 alternative and on whether the proposed changes that
3 were in the proposed regulation would achieve the
4 desired end envisioned by the inspector general. The
5 staff has now come to a recommendation that differs
6 somewhat from what was published as the proposed rule
7 and that is included in the materials with the summary
8 of comments and recommendation.

9 And we're proposing new language that does the
10 following. It would require dates on all time records.
11 It does not -- the new proposed rule does not require
12 exact time of day and consistency with payroll records.
13 It requires quarterly certification with Regulation
14 1640 penalties of any part-time attorney or paralegal
15 who also works with an entity engaged in restricted
16 activity.

17 And there is proposed language on a
18 certification requirement for those part-time attorneys
19 and there is specific language about a de minimis
20 exception. We are asking the committee to republish
21 this rule with another 60-day comment period because we
22 think that there clearly is a significance to the

1 certification requirement and the potential penalty,
2 that language was not included in the proposed rule
3 when it was first put out for publication and there's a
4 need to clearly set out what the relationship of the
5 certification is to 1640 and to request comments on the
6 effect of requiring certification on individuals in
7 programs.

8 So at this point, I think what Suzanne and
9 Linda and I will do is talk about the specific comments
10 and why these changes are being proposed.

11 MS. GLASOW: First, I took this by the issues
12 that were raised by the provision and there is some
13 need to address why we're not recommending some of the
14 provisions. The first requirement we will talk about
15 is the requirement that the time records show the exact
16 time of day and the consistency requirement that would
17 have required that timekeeping records be consistent
18 with payroll records.

19 The comments, especially on the consistency
20 requirement, almost all suggested that there would be a
21 large administrative burden on programs and that some
22 programs would need to change their systems to make

1 timekeeping and payroll records consistent. On this
2 point, one comment stated that it would force them to
3 combine two functions that are quite different and
4 there was some suggestion that part of the problem was
5 the fact that we were really trying to prove a
6 negative.

7 In light of the comments, we have conferred
8 with the OIG and so the OIG incorporation management
9 have agreed that the certification would be a better
10 option in lieu of the timekeeping provision that we put
11 into the proposed rule.

12 There is a significant sanction for making
13 false claims that would be implicated by false
14 certifications under Part 1640, our regulation that
15 subjects our programs to certain federal law about
16 false claims and so we feel that the certification
17 method would lessen the burden on programs in terms of
18 record keeping but would go a long way toward assuring
19 that part-time attorneys are not engaging in restricted
20 activities while they are being compensated by a
21 recipient.

22 We're also in agreement to delete the

1 requirement that timekeeping records be consistent with
2 the payroll records. The recommendation to include
3 this provision came as a result of earlier OIG audits
4 that were done right after the corporation received
5 many new Congressional restrictions on the activities
6 of our grantees and there was a big effort to disengage
7 from certain cases that prior to the restrictions they
8 were able to engage in but after the restrictions they
9 had to get out of these cases. And so the OIG felt
10 that there was a higher risk of non-compliance at that
11 time.

12 Currently, some time having passed, the OIG
13 feels that based on more current audits and a reduction
14 in complaints that that office is receiving, that the
15 risk is lower and so the need for more burdensome
16 record keeping is not as high as it was earlier and so
17 they've agreed that because of the alternative
18 certification alternative that has been proposed, that
19 we are in agreement now that that would be the better
20 route to take.

21 So we're not convinced that the timekeeping
22 would be an impossible burden but we feel it would be a

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1 big burden on grantees and so since we do have this
2 alternative, we're in agreement that that would be the
3 better way to go.

4 Many of the comments raise the issue that if
5 recipients had to make their timekeeping records
6 consistent with their payroll records, that it would
7 cause violations of the Fair Labor Standards Act and
8 I've given a legal rundown of that issue beginning at
9 the bottom of page 38, and I'll give you a brief
10 overview of that.

11 The Fair Labor Standards Act basically sets
12 out federal minimum wage and overtime requirements for
13 public and private sector employees. Employees that
14 are employed, however, in a bona fide executive
15 administrative or professional capacity are exempt from
16 these requirements and these are called exempt
17 employees.

18 The Department of Labor is the executive
19 agency designated to oversee the Fair Labor Standards
20 Act and has issued regulations that define what an
21 exempt employee is. One test to tell whether an
22 employee is an exempt employee is the salary test and

1 this means that an employee will not be found to be
2 exempt if the employee's pay is docked for a pay period
3 for absences for work for less than a day. Failure to
4 pay non-exempt employees a fair hourly wage and
5 overtime subjects an employer to financial sanctions.

6 The various practices employers have engaged
7 in since this law has been passed trying to deal with
8 the Fair Labor Standards Act have been reviewed by the
9 courts. There has been some disagreement among courts
10 on some of these practices. However, certain common
11 practices are permissible because of wage and hour
12 opinions issued by the Department of Labor.

13 And the Portal-to-Portal Act entitles
14 employees to rely on these opinions and some of the
15 wage and hour opinions have found that the following
16 practices are permissible. An exempt employee can be
17 required to work specific hours, fill out time cards or
18 time sheets and to obtain permission before taking time
19 off from work. There are some cases that have found
20 that these practices, before these wage and hour
21 opinions came out, that they violated the Fair Labor
22 Standards Act but now that is found to be a permissible

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1 activity.

2 Another activity that is permissible is an
3 exempt employee can be paid overtime on any basis the
4 employer wishes and the third one, which is the most
5 important for our purposes, is an exempt employee can
6 be docked leave by the hour so you can use up an
7 employee's leave time as long as there are no cash
8 deductions from the regular weekly or bi-weekly salary
9 that you give the employee.

10 And I'll give you an example there. The
11 Supreme Court in Auer v. Robbins where the Supreme
12 Court held that the DOA Secretary's interpretations of
13 Fair Labor Standards Act are controlling unless clearly
14 erroneous or inconsistent with the law and because the
15 wage and hour opinions are the interpretations of
16 Department of Labor, I give you also an example of the
17 federal court that vacated its own opinion when parties
18 brought forth wage and hour opinions that supported
19 their view and the court's opinion was inconsistent
20 with those opinions so the court vacated its own
21 opinion because of the Supreme Court case in Auer v.
22 Robbins.

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1 So basically, to sum all that up, the
2 requirement that we had in proposed rule that the
3 records be consistent, there's nothing in that
4 requirement that encouraged our recipients to dock the
5 pay of the programs or to use this consistency
6 requirement to affect the pay of their employees. And
7 if this committee for instance decided to adopt that
8 provision, we would recommend putting in the preamble a
9 full discussion of that and saying this is a compliance
10 requirement, it has nothing to do with pay and
11 recipients are not encouraged to violate the Fair Labor
12 Standards Act to use this information in any way to
13 affect the pay of their employees.

14 So unless recipients used -- started docking
15 pay in a way that was inconsistent with the Fair Labor
16 Standards Act because of these timekeeping records that
17 they were now being required to keep, we don't feel
18 there would be a violation. And if there's any concern
19 on that, we could always go and ask for a wage and hour
20 opinion based specifically on the LSC experience. But
21 I thought you should know that in case you did decide
22 to go with the timekeeping requirement.

1 CHAIR BATTLE: Well, actually, I think the
2 recommendation goes completely in the opposite
3 direction on this.

4 MS. GLASOW: That's right.

5 CHAIR BATTLE: I think we've become extremely
6 detailed in our efforts to ascertain a way to record,
7 particularly for part-time attorneys, what their
8 activities were in order to be able to evaluate whether
9 they were engaged while on LSC time in restricted
10 activities. I think that the proposal that's being
11 made is a much more reasonable one which would require
12 an attorney to certify that they are not engaged in
13 restricted activities while on LSC time because then
14 that puts in place the mechanism for being able to
15 check it when in my view, no matter how much paper you
16 put out there, it would be very difficult, it seems to
17 me, for that to be the measure that would be utilized
18 to be able to find out whether or not that action
19 occurred or not. I mean, it puts it more in line with
20 the kind of professional responsibilities that
21 attorneys must adhere to generally anyway.

22 MS. MERCADO: The sanctions are greater,

1 though.

2 CHAIR BATTLE: But the sanctions are greater;
3 that's true.

4 MS. FAIRBANKS-WILLIAMS: You said following
5 LSC time. Don't you mean during LSC time?

6 CHAIR BATTLE: While on LSC time. While being
7 paid by LSC. We don't want part-time attorneys, while
8 they're being paid by LSC, to be engaging in any kind
9 of restricted activities. Now, there is one -- I'm
10 sorry; does that --

11 MS. FAIRBANKS-WILLIAMS: That's it but you
12 said following LSC so I didn't get --

13 CHAIR BATTLE: While on LSC time.

14 One question that I have about this
15 certification, we're talking about doing a
16 certification four times a year, on a quarterly basis.
17 The certification is going to be the exact same thing;
18 I'm not engaging in restricted activities while on LSC
19 time. And I'd like to understand the wisdom of why
20 four times a year as opposed to one time a year.

21 MS. SARJEANT: My understanding of the
22 discussions we've had with the office of inspector

1 general was that they may be out at any given time
2 within a year and for one, their auditors would be able
3 to have something to look at. I think --

4 MS. FAIRBANKS-WILLIAMS: So would they have to
5 have a list of their part-time employees and the hours
6 their part-time employees worked for that quarter and
7 everything ready for that quarter to be sent in or
8 ready for anybody that wanted to look at it?

9 MS. SARJEANT: I think this is a certification
10 that they would maintain in their office and it would
11 be available to the auditors when they came to look.

12 CHAIR BATTLE: But wouldn't you -- I guess the
13 concern I'm raising, and Laurie, you may be able to
14 address it, is once you've certified, you've certified.
15 And I don't know that doing it four times a year is of
16 any more effect than doing it once a year and I'm
17 trying to ascertain why four times a year as opposed to
18 once.

19 MS. MERCADO: I guess you could always cut the
20 baby in half and do it twice a year.

21 MS. TARANTOWICZ: Hi, Laurie Tarantowicz,
22 Office of Inspector General. Our thinking was that

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1 basically that the certification should -- well, one
2 time a year is going to be meaningful but the events
3 that it would cover then would be far removed from the
4 time that you actually certified so whether or not
5 there was any intent to violate certification would be
6 more difficult to show, basically. So -- and I don't
7 think that we would be able to get -- not that we're
8 out to prosecute people, but I don't think that we
9 would ever get a prosecutor to take a case based on a
10 certification that was made eleven and a half months
11 after the activity occurred.

12 MS. MERCADO: Well, I would hate to disagree
13 with you. I mean, doing a lot of criminal years, I
14 think you can go back 10, 20 years for anything you
15 certified falsely in any government document which is
16 what a lot of the fraud cases are garnered upon. So I
17 don't necessarily see that you're not going to be able
18 to sanction someone because they certified a year ago
19 versus a quarter ago. If they are committing fraud in
20 that certification, you still have the prosecutorial
21 prerogative to go after them whether they did it 10
22 years ago or last week.

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1 MS. TARANTOWICZ: Well, I understand that.
2 This was just our thinking and the fact that we didn't
3 see that a certification was a great burden to fill
4 out.

5 MS. FAIRBANKS-WILLIAMS: Well, that's what I
6 was asking. Would it be a complete time record of each
7 person that was a part-time worker or whatever for that
8 certification? What is the certification going to be?

9 MS. GLASOW: The certification would be
10 separate from the time record. They already have to
11 keep certain time records under our timekeeping rule.
12 The certification would be a separate document that
13 basically certifies that for the preceding period of
14 time I have not engaged in restricted activities while
15 being compensated by the recipient. We took away the
16 requirement that it had to be tied to payroll records
17 and all of that.

18 MS. MERCADO: But what it does do on a
19 quarterly basis, looking at the criminal aspect of it,
20 is that if someone certifies once in a year time
21 period, and assuming they committed fraud, let's assume
22 the worst scenario, then you would have one cause of

1 action for criminal perjury as opposed to four times
2 which is four causes which under the federal sentencing
3 guidelines is a lot more jail time for doing the same
4 instrument for the period of year.

5 It is very punitive in doing it in that manner
6 when you can certify once a year. Whether you hit
7 someone in the middle of their year or the end of the
8 year, I mean, you're not going to be traveling to every
9 single program and doing them every year but you've got
10 on their record whether it's that particular attorney
11 or that particular paralegal or whomever happens to be
12 there, you have got a record of how that program is
13 spending their time. But I think that you're
14 definitely creating a chilling effect on the staff
15 people, looking at it from the perspective of the
16 criminal side, that you're trying to penalize someone
17 by creating greater causes of action, charges, criminal
18 charges that are potential in that one year period of
19 time.

20 MS. TARANTOWICZ: I don't think that that's
21 the effect. If they certify at the end of the year, it
22 covers the whole year so there would be a cause of

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1 action based upon that certification but if they
2 certified on a quarter, it would be based on the
3 activity that happened during that quarter.

4 So it wouldn't be -- it's based on the
5 activity that's in violation not on the -- I don't see
6 how the number of certifications -- because if it took
7 place -- the restricted activity -- prohibited activity
8 took place during that quarter so whether they certify
9 on a quarterly basis or a yearly basis, it --

10 MS. MERCADO: But how does that -- in the
11 quarterly scenario, if you have an ongoing case for
12 which you may have spent some time at some period in
13 time, doesn't the action follow that case that if you
14 violated your time requirements in quarter number one
15 and that case is still active and alive in the third
16 quarter, then are you saying that for each quarter
17 you're going to still hold them to be in fraud because
18 at some point in time they spent time under LSC
19 activity with non-LSC -- during their non-LSC time -- I
20 mean during their LSC time on a non-LSC activity.

21 CHAIR BATTLE: I do understand the greater
22 penalty by going certification as opposed to time

1 records. I raised the issue about once a year as
2 opposed to four times a year simply because of the
3 administrative burden of tracking down part-time
4 attorneys four times a year on some certain date to
5 fill out a form that says exactly the same thing, given
6 once it's clear that you're not to engage in restricted
7 activities during the time that you're being engaged by
8 LSC, then from that point on there's no other way, and
9 I think that's what we recognized when we tried to do
10 it by going with timekeeping records, to track that
11 other than to have that certification in place.

12 And if in fact there are facts external to
13 that which document that that's not the case, then you
14 have that as your measure. But the certification
15 itself, since it is the same certification, it seems to
16 me it can serve for a year just as well as a quarter.
17 I'm still -- I'm not understanding the need for it to
18 be four times a year as opposed to one.

19 And I understand your point about can I
20 remember what I was doing six months ago but you know
21 what your job is and what the distinctions are and the
22 requirements are. I'm not certain that that becomes a

1 major issue or that in fact simply because you're doing
2 it on a quarterly basis, that's going to make any
3 difference in the certification that you get.

4 MS. TARANTOWICZ: The other thing I guess is
5 what Karen raised is that if the certification comes
6 yearly, then it may not cover the activity that we
7 caught. In other words, if you make a certification in
8 December and we're out there in February, you don't
9 have another certification until next December, so if
10 we found current activity you would not have been
11 certified as yet.

12 MS. MERCADO: But in that scenario, you would
13 almost have to have a certification week by week
14 because, according to your scenario, if you come
15 quarterly and you come in the first month before your
16 second quarter is asked and you have now found a new
17 activity in the second quarter, they didn't do anything
18 in the first quarter but you now find an activity in
19 the second quarter but the second quarter hasn't been
20 certified yet because their second quarter hasn't
21 finished, the argument is the same, is that you're not
22 going to find a certification for that timer period

1 that you're looking at unless that period has already
2 been certified and done with.

3 So, I mean, the argument doesn't follow.

4 CHAIR BATTLE: John?

5 MR. ERLNBORN: Let me just say for my part I
6 don't see a great administrative burden with four times
7 a year. It seems to me pretty simple for the LSC
8 office to mail or when the attorney works in the office
9 hand the attorney or paralegal a document which, as far
10 as I can see, requires a signature and a date and then
11 to be filed. And if you do that four times a year,
12 once a year, I don't think either one is a great
13 administrative burden.

14 I do have a question, however, about the
15 phrase restricted activity while being compensated by
16 the recipient. I guess I have to know what the usual
17 practice is. Part-time attorneys or paralegals, are
18 they on an hourly basis where they get paid for the
19 submission of time records in 15-minute increments and
20 therefore it would seem to me it would be very obvious
21 if they submitted -- they want to be paid for 15
22 minutes while they worked on a non-LSC or restricted

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1 activity, it would be very apparent by the time record.
2 Or is it a case where they're paid X number of dollars
3 for a period, so much a week, so much a month?

4 MS. MERCADO: Salary.

5 MR. ERLBORN: In that case, how do you read
6 this, while being compensated? If you're being paid
7 for a month, if during that month they do some work
8 that's restricted, have they violated this provision?

9 MS. FAIRBANKS-WILLIAMS: We have part-timers
10 that spend two days a week and the two days they're
11 there in the office and the rest of the days they're
12 not; we can't find them.

13 MR. ERLBORN: Does while mean that increment
14 of time in the day, the 15 minutes, an hour or two
15 hours, or does it mean during the pay period?

16 MS. PERLE: That's an issue that was raised
17 with Karen earlier and I think that's something that
18 we've always had a great deal of trouble articulating
19 what they mean with respect to that. I had some
20 suggestion language, generally some suggestive language
21 changes which I'm not sure that mine does it either.

22 I think that the point is that we have to make

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1 quite clear, I don't know that we can do it in the rule
2 itself but at least in the preamble, that we're not
3 talking about -- first of all we're not talking about
4 vacation time, we're not talking about sick leave.
5 They shouldn't be working if they're sick but on
6 vacation time, certainly people are permitted to do
7 whatever they want. They're not talking about
8 weekends, they're not talking about evenings.

9 With respect to part-time workers, it varies a
10 lot from program to program depending on what the
11 arrangement is. Some people, the expectation is they
12 will work Monday, Wednesday and Friday during working
13 hours and be paid three-fifths of their full-time
14 salary. For some people, they say three days a week or
15 two days a week or two and a half days a week and they
16 can come and go as long as they more or less --

17 MR. ERLNBORN: Flex time?

18 MS. PERLE: Flex time and it really depends on
19 the circumstances of the -- the individual
20 circumstances and the arrangement that they have made
21 with their particular program. So I think that we
22 really have to look to -- it's a combination of the

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1 time that they're expected to be at the program and use
2 the program resources. So it's probably really
3 intended to be when on premises.

4 MR. ERLENBORN: Well, I think --

5 MS. PERLE: And I think we need to clarify
6 that.

7 MR. ERLENBORN: I think this language the way
8 it is is ambiguous. I would have difficulty
9 interpreting it and I think the preamble is a good
10 suggestion and probably take some space trying to
11 describe the various circumstances and how you would
12 then determine whether they're being compensated during
13 that period if time.

14 MS. SARJEANT: I think we do need to tighten
15 up the language and certainly if we're going to be in
16 the position of asking attorneys to certify to their
17 compliance with this, we have the responsibility to be
18 as clear as possible and especially considering the
19 penalties that potentially can attach to this. And
20 this is another reason that we wanted to and do
21 recommend to the committee that this go out again for
22 public comment after the language is --

1 CHAIR BATTLE: Certainly. This language is so
2 dramatically different than what we had before the
3 comments that I think you're right. Following up on
4 what John is suggesting, it seems to me because part-
5 time attorneys do work in a number of different ways,
6 that we probably need to be informed in how we handle
7 the preamble about those different ways and what we
8 mean here and also try to see if there is a way to
9 tighten the language up.

10 Because if you're working and your hours are
11 compensated, then that's one thing. If you're working
12 on specific days and if a restricted activity comes up
13 that you've got to be in court on that day, then you
14 have to take leave because you're being compensated on
15 that day for working for Legal Services and that's one
16 situation that's quite different from someone who's
17 being paid for doing 10 hours worth of work a week and
18 those 10 hours are flex given whatever that part-time
19 attorney's schedule is.

20 MR. ERLNBORN: This proposal to the preamble
21 makes me think of something I observed over the course
22 of some years. An awful lot of attorneys in my

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1 estimation or my observation read a regulation,
2 interpret it and render an opinion without ever having
3 read the preamble and I tell my students if they ever
4 do that, I think they're guilty of malpractice. An
5 awful lot is found out in the preamble to a regulation
6 and it seems just too many people, many attorneys are
7 not aware of the importance of the preamble.

8 MS. PERLE: LSC, in recent years, when it
9 sends out a compilation of LSC regs has included the
10 preambles at the urging of the field in part because --
11 for that very reason; there were old regulations and
12 there was a lot of history that was contained in the
13 preamble that people really were not aware of and even
14 the Corporation in some instances, staff had come in
15 since the rules had been implemented were not aware of
16 what the original intent in the regulatory language was
17 because they hadn't read the preamble.

18 MR. ERLENBORN: Very often, the regulations
19 will say one comment suggested that this should be
20 done, we did it or we did that to it because and very
21 often, without having written that preamble, you just
22 don't know exactly what the reg -- what it was meant to

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1 say.

2 MS. PERLE: Well, the Corporation has been
3 much better in recent years about making sure that
4 people are aware of that.

5 MS. SARJEANT: I would -- we are in the
6 process of reprinting our regulations and the booklet
7 will include the preambles and they're also available
8 on our web site because we agree that they are,
9 especially the more recent ones certainly contained a
10 lot of guidance in the preamble.

11 CHAIR BATTLE: Bill?

12 MR. McCALPIN: As long as we're on this, I'd
13 like you to consider whether you need to define or
14 explain the phrase restricted activities.

15 MS. GLASOW: I actually have a description of
16 that which would go in the preamble to the rule and I
17 think it was in the preamble to the proposed rule in a
18 little bit different form on page one of this document.
19 It's in footnote one and we have --

20 MR. McCALPIN: Which document are you talking
21 about?

22 MS. GLASOW: The timekeeping requirement,

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1 summary of comments with recommendations.

2 MS. MERCADO: Page 36.

3 MS. GLASOW: Page 36, footnote one. And this
4 is the same thing we said about this term when we just
5 recently revised Part 1610 and restricted activities is
6 an umbrella term for Section 1610.2(a) which define
7 purposes prohibited under the LSC Act and restricted
8 activities under Section 504 of the Appropriations Act.
9 And basically those two types of restrictions variously
10 affect different types of funds and so we've used that
11 umbrella term both in 1610 and we're doing it again
12 here to be consistent.

13 MR. McCALPIN: Having in mind John's comment,
14 I think you ought to consider whether it ought to be a
15 defined term instead of in the preamble because people
16 may or may not read the preamble.

17 MS. MERCADO: I would think so, and it is a
18 significant issue.

19 CHAIR BATTLE: Yeah. Okay. While we were
20 getting that information, I think Linda handed out an
21 alternative language.

22 MS. GLASOW: Okay.

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1 MS. PERLE: I don't want to go over that --

2 MS. GLASOW: I thought I should just review
3 some of the comments on the certification requirement
4 that's on page 41. Some of the comments were concern
5 that the certification requirement presumed that Legal
6 Services' attorneys routinely violated the law and we
7 want to assure in the preamble that this is not the
8 presumption but we do need to monitor the use of LSC
9 funds and this is just another reporting requirement in
10 a sense that we felt this was less burdensome than
11 actual timekeeping but it's a way that we can give some
12 documentation to auditors so that they can ensure
13 compliance and we want to make sure that we believe
14 that our attorneys out there are doing their jobs with
15 integrity and we don't presume violations of the law.

16 There was, in a couple of comments, a concern
17 that we put some sort of exception into the language
18 for de minimis situations, answering the phone, opening
19 mail, and this we'll get into more discussion on
20 because there was a concern that attorney out of fear,
21 that either by mistake or just doing something they
22 couldn't avoid, would ethically be unable to sign these

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1 certifications if we made such a strict requirement
2 that in no way would be involved in any restricted
3 activity even related to it. Because of the sanctions
4 involved and just a matter of integrity, they would be
5 unable to sign these certifications. So we have
6 included a de minimis provision in the certification
7 requirement and we'll look at the specifics of that in
8 a minute.

9 There were also some comments on the relation
10 of the certification to 1640 in terms of the
11 interrelation with that on the sanctions and also to
12 1610. 1610 as you know requires our programs to
13 certify that they maintain program integrity with
14 another organization that engages in restricted
15 activities and we see the difference there as the fact
16 that 1610 requires programs to certify. This
17 requirement will reach individual attorneys and only a
18 small number of those, it's just the part-time
19 attorneys engaged in restricted activity outside.

20 And it would also provide some documentation
21 to the board to use when they make their 1610
22 certification because they would already have some

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1 documentation that part-time attorneys are not
2 inappropriately engaged in restricted activities and
3 that would give the board of each program some
4 documentation to make those 1610 certifications.

5 And unless a false certification is made, we
6 don't believe that 1640 is implicated. If a false
7 certification is made, then it would be implicated but
8 prior to that it would not be implicated by this
9 requirement.

10 We had one more substantive requirement in the
11 timekeeping provision that we recommend keeping simply
12 because we presumed it was already part of the
13 requirement but it was not specifically so stated in
14 the rule. And that is that attorneys provide the date
15 for which they're keeping timekeeping. The current
16 rule requires that attorneys keep contemporaneous
17 records on 15-minute intervals and the preamble to the
18 current rule explains that in most cases
19 contemporaneous timekeeping means records should be
20 created no later than the end of the day.

21 In our timekeeping guide that we sent out
22 after we promulgated the rule, we have samples of

1 timekeeping forms for our programs to use as guides how
2 to do it and every one of those have a place for the
3 date. So we were presuming that recipients would keep
4 their time based on a particular date. We feel, as we
5 said in this proposed rule, that timekeeping records
6 over a period of time that are not attached to any
7 period of time become meaningless after a while.

8 If you keep the time you did on a particular
9 case that may run the gamut of several years, there's
10 no date time to put into that, then the record for the
11 client's purposes really becomes meaningless and so we
12 have also been informed by the OIG who has looked at
13 many of our programs that apparently most of our
14 programs are keeping time by date. So we don't feel
15 that it's a big problem but we would like to keep that
16 requirement or put it in in the final rule to make it
17 clear because apparently not all programs are doing
18 that. And we also suggest that the preamble to this
19 second round of proposed rulemaking ask information
20 from the programs that are not doing this by date what
21 kind of burden that would impose and how that
22 requirement would affect them.

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1 MS. FAIRBANKS-WILLIAMS: Can I ask you one
2 other question? Recently my daughter-in-law ended up
3 in the hospital and she was being dispossessed of her
4 house because her husband died and she had a part-time
5 attorney and that part-time attorney, as I said, only
6 worked two days a week and there was no way to get a
7 hold of him at the other time.

8 Since she was in the hospital and since her
9 house was being taken away when she could not be
10 present in court and wasn't there, they put a
11 substitute in. Now, does that timekeeping go on the
12 substitute or does it go on that case when he wasn't
13 there? Does he keep track of that or does somebody
14 else keep track of that?

15 MS. GLASOW: Are both of the attorneys working
16 for a recipient part-time, the one that had the case
17 and the one substituting?

18 MS. FAIRBANKS-WILLIAMS: No.

19 MS. GLASOW: Our timekeeping only requires
20 part-time attorneys to report time for which they are
21 being compensated by the recipient.

22 MS. PERLE: The answer is it's for the

1 individual who's doing the work, not by the case so
2 that the other attorney would have put the time on that
3 case on his own time sheet and not on the time sheet of
4 the part-time person.

5 MS. FAIRBANKS-WILLIAMS: And if this other
6 person was working for a completely different company
7 doing all kinds of different things, their time that
8 they spent on the case when he was absent wouldn't
9 count as anything that was spent on that case because
10 he wouldn't keep that track of that time.

11 MS. PERLE: He wouldn't be required to keep
12 track.

13 MS. FAIRBANKS-WILLIAMS: I assumed he would
14 but I'm just trying to figure out who's going to be to
15 blame for what here.

16 CHAIR BATTLE: That's understandable. The
17 language that you're proposing is at the bottom of page
18 45 under 1635.3, timekeeping requirement by date and in
19 increments not greater than one quarter-hour; is that
20 correct?

21 MS. GLASOW: Right. It basically is section
22 .3(b)(1) which starts at the bottom of 45. We had a

1 full sentence in the proposed rule and we took
2 everything else out. We decided we could make a much
3 easier fix by just saying time records must be created
4 contemporaneous and account for time by date and in
5 increments not greater than one-quarter of an hour
6 which comprise all of the efforts of the attorneys and
7 paralegals for which compensation is paid by the
8 recipient.

9 I guess now we can look at the bottom of 46,
10 paragraph (e); it's in bold. And the first sentence
11 basically sets out the certification requirement that
12 any attorney or paralegal who works part-time for the
13 recipient and part-time for an organization that
14 engages in restricted activities to certify in writing
15 that the attorney or paralegal has not engaged in
16 restricted activity while being compensated by the
17 recipient and has not used recipient resources for
18 restricted activities.

19 Any comments on that first sentence?

20 CHAIR BATTLE: Well, I think one comment that
21 John made about the while being compensated is one
22 point. Are there any others?

1 MR. McCALPIN: Let me suggest that you
2 consider turning it around, the way you do this, to
3 reflect more clearly what you have in (b)(1) so that
4 you would say something along the lines, and I haven't
5 drafted this out, recipient shall require any attorney
6 or paralegal who works part-time for the recipient and
7 part-time for an organization that engages in
8 restricted activities to certify in writing that the
9 attorney or paralegal was not compensated using LSC
10 funds for any time spent or services rendered while
11 engaging in a restricted activity.

12 In other words, talk about not compensated for
13 this instead of not engaged in the time frame. I got
14 that idea from what you have -- the way you have
15 (b)(1), the first sentence, and I'd just like you to
16 think about whether switching it around that way might
17 do it.

18 MS. GLASOW: Okay. The second sentence, the
19 certification requirement does not apply to a de
20 minimis action related to a restricted activity that is
21 unavoidable and does not involve working on the
22 restricted activity. We struggled with this language.

1 MS. ROGERS: Well, I wonder if you need it if
2 you have Bill's formulation of the previous sentence.

3 CHAIR BATTLE: I think you may still need it
4 because of the way things work. You could be in your
5 LSC office when a judge calls your other office and
6 someone tells you call the judge back on a case that
7 you've got that you work on on Fridays. That is a
8 restricted activity and you're sitting in a Legal
9 Services office when you make that telephone call back
10 to the judge about the resetting of a case or
11 something.

12 MS. ROGERS: But maybe with respect to the use
13 of the resources but as long as if you spend 15 minutes
14 answering the judge's call, you don't -- you work an
15 extra 15 minutes, you're not being compensated for
16 that.

17 CHAIR BATTLE: The de minimis -- I can imagine
18 if I were a part-time attorney and I've got to sign a
19 form that says I never did it and I'm sitting here
20 thinking, yeah, I was sitting at the LSC office when I
21 got the call about the case I've got to work on Friday.

22 MS. SARJEANT: It is very -- I mean, it's

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1 tricky because we're trying to make it very clear that
2 part-time attorneys should not be doing work while
3 they're being compensated --

4 MS. FAIRBANKS-WILLIAMS: On LSC time.

5 MS. SARJEANT: -- on LSC time but the reality
6 is for your legal practice is that there are those
7 times when you can't avoid that communication from a
8 judge or whatever and to require attorneys to sign a
9 certification that doesn't have some provision that
10 recognizes that seems to create a situation where we're
11 forcing people --

12 CHAIR BATTLE: Either not signing the
13 certification which is one problem from a record
14 keeping standpoint of view or feeling that they've got
15 to --

16 MS. SARJEANT: Right. And we've tried to use
17 language which says unavoidable and it doesn't require
18 any work on the activity so that you get the call, you
19 literally have to say, you know, I have to call you
20 back.

21 MS. GLASOW: This basically presumes that a
22 part-time attorney working for a recipient who also

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1 works for an organization engaged in recipient activity
2 is outside of this building and this office doing
3 restricted activity because the organization is
4 somewhere else.

5 I mean, we do get into our program integrity
6 situation there so it's presuming that while they're in
7 the recipient's office working for the recipient, they
8 are not supposed to be involved in restricted activity.
9 And the IG has had some problem looking at timekeeping
10 records to make sure that's happening.

11 So now we're saying let's certify that you're
12 not doing it while you're here but we're recognizing
13 that somebody might call you, you pick up the phone,
14 that person is one the phone, what do you do, they've
15 sent you an e-mail, you know, something happens and you
16 need to respond, it's a matter of professional
17 responsibility, you just can't help it.

18 We want to give just that little bit of leeway
19 to make sure that you can take care of those situations
20 but we do not want to encourage a situation where,
21 well, if you work 15, 20 minutes on restricted activity
22 while -- the time you're supposed to be in the

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1 recipient's building -- you are in the recipient's
2 building doing recipient work, that we want to start
3 encouraging that because then we run into our program
4 integrity issue.

5 Does that make sense?

6 CHAIR BATTLE: Yeah. Linda?

7 MS. PERLE: I'm -- I think I'm basically in
8 agreement with what the staff has proposed in terms of
9 the ideas behind it. I just think that when you put
10 language in the rule itself and it says (a), the work
11 was unavoidable and then you put in that basically it's
12 any activity, I think that you set up a standard that's
13 sort of impossible to -- first of all to make some
14 determination about whether what you've done is
15 appropriate or not.

16 My suggested language took the unavoidable
17 language out. I think we could put some language in
18 the preamble that says the Corporation recognizes that
19 some de minimis activity is unavoidable but it doesn't
20 set it up as a standard in the rule. And the other
21 thing is that I think that they talked about de minimis
22 action related to a restricted activity rather than the

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1 restricted activity itself. I think that's the
2 appropriate approach.

3 In other words, it's activity -- you're
4 permitted to do de minimis activity related to a
5 restricted activity but not the substantive activity
6 itself and that -- my suggestion said that it does not
7 involve substantive work on a restricted activity.
8 Those are the suggestions. If the committee is not
9 interested in changing the language that's proposed by
10 the staff, certainly comment on it. But I feel pretty
11 strongly particularly about the use of the word
12 unavoidable that just sets an impossible standard.

13 CHAIR BATTLE: John?

14 MR. ERLENBORN: There are two -- as I see it,
15 there are two things that you've done with this
16 amendment. The first I think parallels an intent, at
17 least what Bill refers to, by saying during any time
18 period, during any time period for which the attorney
19 or paralegal was compensated instead of the phrase
20 while being compensated which I found to be ambiguous.
21 So that's fine.

22 But I think the balance -- the second thing

1 you did is probably not what you intended but the
2 language says well, during the time period for which
3 the attorney or paralegal was compensated by the
4 recipient and while using recipient resources. You
5 have used the conjunctive instead of the disjunctive.
6 It would seem to me to say you can do it during the
7 time period or you can use the resources and it's not
8 prohibited unless both happen at the same time.

9 MS. PERLE: That is not what I had. I
10 originally had the disjunctive. We just had the
11 conversation a few moments ago -- but you're right;
12 it's not really what I intended and I believe you go
13 back to the oral --

14 MR. ERLENBORN: Well, I think you left out
15 part of what is currently there and I thought it read
16 pretty well, and has not used recipient resources for
17 restricted activities so that the -- you can use the --
18 if I'm reading this right, you can use the conjunctive.
19 Because you're stating something that is different; it
20 isn't tied to the time period. I don't know why you
21 dropped the restricted activities that was in the
22 original language.

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1 MS. PERLE: I'm not sure why I did either but
2 I agree that your approach is probably better.

3 CHAIR BATTLE: A hybrid really of the two, one
4 addressing the first issue that John raised about the
5 while as it was used in the original text, while being
6 compensated, and then two, in the amendment using that
7 while using recipient resources is not as clear as what
8 we've got in the original text which says and has not
9 used recipient resources for restricted activities,
10 which is a much clearer way of saying it.

11 So I think that you've heard from the
12 committee and board members the concerns that we have.
13 We do want to tighten this up. We do want it to be
14 responsive. We do know that this has to go back out
15 for comment so I think we've had enough discussion for
16 the staff to be informed as to what needs to happen on
17 the changes that have been recommended.

18 MS. PERLE: What about the use -- the part
19 about being unavoidable?

20 MS. MERCADO: Well, I think someone had
21 mentioned earlier about using that in the preamble.

22 MS. PERLE: That's my suggestion.

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1 CHAIR BATTLE: Does the staff have a concern
2 about taking it out --

3 MS. SARJEANT: The reason we had it in there
4 was to just make it very clear that there was not to be
5 any initiation of even this de minimis activity on a
6 restricted activity but just that only if something
7 happened and you can't avoid dealing with it at the
8 time.

9 MS. ROGERS: Could you think of a weaker word,
10 not quite so extraordinary --

11 MR. ERLENBORN: Back to the thesaurus.

12 CHAIR BATTLE: Some emphasis but unavoidable
13 has some other legal significance in other
14 circumstances which may be a very high bar. We want a
15 high bar but this may be too high for what we are
16 attempting to accomplish. Unavoidable; for example,
17 the phone rings and your secretary says it's the judge
18 on the phone. Do you say, oh, that's the judge; let's
19 see. He's got my restricted case; I won't answer it?
20 Or do I answer it and say, your Honor, may I get back
21 with you?

22 MS. PERLE: But even if it's opposing counsel

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1 who says well, I just wanted to see if it's okay to
2 have the hearing tomorrow at 10:00, is it unavoidable
3 to just pick up the phone and say tomorrow at 10:00 is
4 fine? I don't think so. I mean, it's not unavoidable
5 but I don't think that that should be considered
6 restricted activity.

7 CHAIR BATTLE: Nancy?

8 MS. ROGERS: It seems logical that if you get
9 a call on a case that's not -- you're not being
10 compensated for by an LSC-funded agency, that what you
11 do is you spend that 10 minutes and then you work 10
12 minutes more. I mean, that just seems like the logical
13 thing to do.

14 MS. PERLE: But you're using the phone --

15 CHAIR BATTLE: You're using resources.

16 MS. ROGERS: I see.

17 CHAIR BATTLE: So for that reason people are
18 suggesting that what you do is you say, can I get back
19 with you? If it takes a second to take fine, that's as
20 much time as it takes to say can I get back with you.
21 But anything more than that, you're getting into
22 utilizing resources which is a concern.

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1 MS. GLASOW: Laurie, did you want to say
2 anything?

3 MS. TARANTOWICZ: Well, we felt pretty
4 strongly about inclusion of the word unavoidable. I
5 know that you're talking about a potential substitute;
6 I don't think I've heard one suggested so I really
7 can't comment on it until I hear but I do know that we
8 felt pretty strongly that inclusion -- as explained to
9 us, as the de minimis exception was explained to us, it
10 was just to cover unavoidable occurrences that, you
11 know, a phone rings, you don't know who is on the other
12 end until you pick it up.

13 You get a letter, you may have to open it to
14 see what it's about, who it's from, those types of
15 things. Unavoidable was as the exception was explained
16 to us and if that was not acceptable, you know, I'm
17 sure we'd have comments on the suggested substitute.

18 CHAIR BATTLE: We'll get a chance to look at
19 that.

20 MR. ERLNBORN: It occurs to me that what is
21 going to happen in reality is the language of the
22 statute is going to be the language in the

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1 certification and if we use the word unavoidable, we
2 don't really know what it means.

3 Even if we express our intention as to what
4 that means in the preamble, I don't think all of that
5 is going to be in the certification. So you're going
6 to leave this ambiguous word in there. I don't know
7 the answer to this except I would strongly urge that we
8 spell out with particularity what we mean in the
9 statutory or the regulations language because that's
10 going to be used for the certification and we don't
11 want that to be ambiguous.

12 MS. SARJEANT: I think that's right.

13 CHAIR BATTLE: Point well taken.

14 MS. GLASOW: We're not exactly sure what
15 language you want us to go with in the proposed rule.

16 MR. McCALPIN: The unambiguous language.

17 MS. GLASOW: Thank you. That clarifies it.

18 CHAIR BATTLE: There have been some specific
19 points made by some of the members about where the
20 language in particularly (e) is clear and the problem
21 parts. For example, we have a problem with while being
22 compensated. We want it to be clear to be tied to the

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1 time. I think Bill made a suggestion about that and we
2 had the other alternative suggestion that Linda made
3 that met with some of that but I think the transcript
4 should inform you of where we are and if you've got any
5 questions, give me a call.

6 MS. GLASOW: Okay.

7 CHAIR BATTLE: Bill?

8 MR. McCALPIN: I'm going to move when you get
9 finished. Are you ready?

10 CHAIR BATTLE: Okay; we are ready for a
11 motion.

12 M O T I O N

13 MR. McCALPIN: Madame Chairman, I move that
14 the staff be requested to consider the comments made
15 today and a redraft of this regulation, was it 1635,
16 and that upon securing your assent to the redraft, that
17 it be submitted for republication for comment.

18 CHAIR BATTLE: It's been moved; do I hear a
19 second?

20 MR. ERLNBORN: Second.

21 CHAIR BATTLE: Properly seconded. All in
22 favor?

1 (Chorus of ayes.)

2 CHAIR BATTLE: All opposed? Motion carries.

3 MR. McCALPIN: Karen wants to object.

4 MS. SARJEANT: Well, no. I just want a
5 clarification. What was your direction on the
6 frequency of the certification?

7 CHAIR BATTLE: Ah. Now, my view was once a
8 year but I think John said he didn't see a problem with
9 four times a year and I don't know that we --

10 MS. MERCADO: I'm not on the committee but I
11 said once a year.

12 MR. ERLNBORN: Put it in the alternative.

13 MR. McCALPIN: I don't know. I don't think
14 four times a year is all that big a deal myself.

15 MS. MERCADO: I'm not looking at it in the
16 perspective of an administrative obstacle. I'm looking
17 at the effect if that is violated by someone during
18 that period of time and so I'm looking at the
19 ramifications of sanctions and possible criminal
20 sanctions of what that means and in that sense, four
21 times a year is a much graver situation than once a
22 year.

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1 MR. McCALPIN: That would make them a habitual
2 criminal.

3 MS. MERCADO: That's right.

4 MR. ERLNBORN: If there's a period of
5 jeopardy, if it's three months instead of a year, it
6 would seem to me.

7 MS. SARJEANT: We would recommend keeping the
8 quarterly language and then asking for --

9 MR. McCALPIN: How about semi-annual?

10 MS. MERCADO: That's what I said, we could do
11 it twice a year.

12 CHAIR BATTLE: But when you put it out for
13 comment, people have the opportunity to express their
14 concerns about it. You can leave it as is. My view,
15 again, and I understand because it's done in the
16 retrospective view, that I think Laurie's point is well
17 taken; can you remember what you did 11 months ago when
18 you filled that form out. But at the same time, I just
19 have to keep up with one employee at home and I can't
20 get my quarterly statements in for her unemployment so
21 I know what quarterly statements --

22 MR. McCALPIN: Madame Chair, I neglected in

1 making that motion to discuss the question of the
2 comment period, whether 30 or as we usually do 60 days
3 for comment but it seems to me that even if we went to
4 30, we wouldn't have it back in time for the April
5 meeting so we might just as well go to 60 and consider
6 it in June.

7 MS. SARJEANT: That's actually our
8 recommendation to do a 60-day comment period.

9 CHAIR BATTLE: That's fine. Suzanne?

10 MS. GLASOW: I'd like to ask the committee to
11 consider that if the chairman is unavailable to approve
12 the preamble, that she could designate someone in her
13 stead to do that.

14 CHAIR BATTLE: I will. I sure will. I spoke
15 with Bill about that. I recognize what my schedule
16 does to you guys.

17 Anything else? As I look at our agenda today,
18 we have dutifully, almost to the moment, made it
19 through everything. Are there any other public
20 comments that we need to consider?

21 (No response.)

22 CHAIR BATTLE: Hearing none, I will entertain

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1 a motion to adjourn.

2

M O T I O N

3

MR. ERLNBORN: So moved.

4

MR. McCALPIN: Second.

5

CHAIR BATTLE: Have a good evening.

6

(The meeting was adjourned at 4:30 p.m.)

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