

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE

Monday, September 18, 2000

9:50 a.m.

San Francisco Marriott
55 Fourth Street
San Francisco, California

COMMITTEE MEMBERS PRESENT:

John T. Broderick, Jr., Chair
Douglas S. Eakeley (ex officio)
Hulett H. Askew
Edna Fairbanks-Williams

BOARD MEMBERS PRESENT:

John N. Erlenborn
F. William McCalpin
Maria Luisa Mercado
Thomas F. Smegal, Jr.
Ernestine Watlington

STAFF AND PUBLIC PRESENT:

John McKay, President
Victor Fortuno, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary

STAFF AND PUBLIC PRESENT (con'd):

Mattie C. Condray, Senior Assistant General Counsel
Pat Hanrahan, Office of Program Performance
Michael Genz, Director of Office of Program Performance
Melville Miller, President, Legal Services of New Jersey
Linda Perle, Senior Staff Attorney, CLASP
Johnathan Ross, Chairman, SCLAID
Bertrand Thomas, Program Counsel, Office of Compliance
and Enforcement
Danilo Cardona, Director, Office of Compliance and
Enforcement
Leslie Russell, Director, Office of Information Technology
James Hogan, Vice President for Administration
John Hartingh, Special Assistant to the President
Eric Kirkland, Office of the Inspector General
Leonard Koczur, Office of the Inspector General
Laurie Tarantowicz, General Counsel, Office of the
Inspector General
Edouard Quatrevaux, Inspector General
Michael Genz, Director, Office of Program Performance
Randi Youells, Vice President for Programs
Ahn Tu, Program Counsel, Office of Program Performance
Ramon Arias, Executive Director, Bay Area Legal Services
Don Saunders, Director, NLADA
Julie Clark, Vice President for Government Relations,
NLADA

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1 P R O C E E D I N G S

2 CHAIR BRODERICK: Good morning and welcome to the
3 Operations and Regulations Committee meeting. I think our
4 meeting will be, hopefully, brief this morning. I would like
5 to start the meeting by seeking a motion to approve the
6 agenda.

7 M O T I O N

8 MS. FAIRBANKS-WILLIAMS: So moved.

9 CHAIR BRODERICK: Is there a second?

10 MR. EAKELEY: Second.

11 CHAIR BRODERICK: All those in favor?

12 (Chorus of ayes.)

13 CHAIR BRODERICK: All those opposed?

14 Agenda is approved.

15 Second item this morning is the approval of the
16 minutes of the Committee's meeting of June 25, 2000. Do I
17 have a motion to approve it?

18 M O T I O N

19 MR. McKAY: So moved.

20 CHAIR BRODERICK: Do I have a second?

21 MS. FAIRBANKS-WILLIAMS: Second.

22 CHAIR BRODERICK: All those in favor?

1 (Chorus of ayes.)

2 CHAIR BRODERICK: All those opposed?

3 Minutes are approved.

4 The next item on the agenda is consider and act on
5 a proposed rulemaking protocol for recommendations to the
6 board. A lot of time and effort has been expended on this.
7 I know it was the subject of discussion at the last meeting
8 of the board. There have been some revisions made to the
9 protocol, which I understand is now available to all of you
10 who are here. Before we discuss it in particular, we're
11 going to get some background information on rulemaking in the
12 federal system from Mattie Condray, who is senior assistant
13 general counsel here at the Corporation, and then Victor
14 Fortunato, who is our general counsel, is going to take us
15 through this in a little more detail. What I'd like to do,
16 if I could, is have Mattie and Victor come to the table. I
17 think Mattie has a PowerPoint presentation she would like to
18 make, and maybe she'd like to introduce it a little bit
19 before she does that. Good morning and welcome.

20 MS. CONDRAY: Good morning. I'm going to come over
21 to my PowerPoint presentation. If there is a problem since I
22 don't have a mike, let me know. Never in my life has anybody

1 told me that volume was a problem. What I thought I would do
2 with this PowerPoint presentation is give protocol background
3 on how rulemaking is done in the federal sector. Now if
4 we're not subject to the rules that govern federal agency
5 rulemaking, but they do supply some useful public policy
6 concerns for us. I think it'll also help set the
7 post-rulemaking protocol in a little bit of a larger context.

8 So since it's been the beginning of the last gasp
9 of summer, I think it's particularly appropriate here that my
10 presentation is entitled, "A Little R & R: A Briefing on the
11 Rulemaking and the Regulatory Process." Also, because, you
12 know, I work with banks that have got a lot of these great
13 litigation stories, I've spent my entire career as an
14 administrative lawyer and rulemaker. We don't really get
15 quite the same war stories. So I tried to let you guys know
16 that I do have some sense of humor. So I've got that
17 cartoon, you can keep this in mind as we go ahead with this
18 today on our rulemaking status.

19 The basic governing statute in the federal agencies
20 in the rulemaking is the Administrative Procedures Act. The
21 Administrative Procedures Act is actually fairly simple in
22 its requirements, but fairly complex in its rules for

1 agencies. Basically, it requires publication of proposed and
2 final rules in the Federal Register. The LSC Act contains a
3 similar sort of provision for the publication of LSC rules,
4 instruction, and guidance in the Federal Register. An agency
5 has to provide an opportunity for written comment and provide
6 at least a minimum of 30 days' notice of a proper rule
7 requiring that they in effect have an emergency situation and
8 they need to seek counsel's advice, shorten that time period,
9 but that's really an emergency situation.

10 The Administrative Procedures Act guarantees the
11 public the right to petition for rulemaking. When I use the
12 word "petition" here, it means they have a right to request,
13 normally in writing, that the agency engage in rulemaking or
14 that the agency scrap a new rule or amending a rule that
15 exists. Rulemaking can be initiated a number of ways.
16 Congressional directive is probably one that's a big
17 800-pound gorilla. Congress says, "Thou shalt do something."
18 And sometimes it's a matter of there's a congressional
19 requirement that needs to be implemented by rulemaking. Just
20 because it needs to be implemented by rulemaking makes the
21 regulation requirement work. And sometimes it's because
22 Congress has specifically instructed the agency to engage in

1 rulemaking on a particular topic. As I noted in the previous
2 slide, public petition. Any member of the public, agencies,
3 organizations, individuals have the right to request
4 rulemaking.

5 And, of course, there are a lot of rulemakings that
6 come from internal agency initiative. An agency is looking
7 at ways to improve its administration of its governing
8 tactics.

9 Notice and comment rulemaking, as I said, it's to
10 provide notice, and the public gets to comment. It's a
11 pretty much three-stage process. There's a Notice of
12 Proposed Rulemaking. This is a formal document published in
13 the Federal Register which provides notice of what an agency
14 intends to do. Occasionally, an agency, if they really don't
15 know what they want -- they know they want to do something,
16 but they're not sure what -- they can issue something that is
17 colloquially known as an "advance notice of a proposed mandate."

18 Usually this document says, "We're interested in this
19 subject, and we're looking for comments." It usually does
20 not have proposed text at that point, but it's just an
21 information-gathering stage. You don't see the phrase,
22 "advance notice of proposed rulemaking" anywhere in the

1 Administrative Procedures Act.

2 Once you have the NPRM, there's a comment period.
3 Usually, at that minimum per day, often a minimum of 60 days,
4 can be much longer depending on the complexity and
5 controversial nature, if any, of the particular rulemaking.
6 When the agency takes the comments, defines what it wants to
7 do, and issues a final rule, which then becomes effective.
8 Some agency regulations will allow people to petition for
9 reconsideration of the final rule. Again, this is not any
10 sort of thing you'll find in the APA. This is just allowing
11 people, if they're dissatisfied with the final rule, a chance
12 to bring it right back to the agency's attention. It's been
13 my experience that petitions for reconsideration are rarely
14 granted, because the agency, by the time it has issued its
15 final, has decided what it wants to do. But occasionally,
16 that mechanism is there.

17 What this means is do your notice. This kind of
18 process really sets up an arms-length relationship between
19 the parties. The result of that is that it really limits ex
20 parte communications. And in fact, if ex parte
21 communications are engaged in, that can be the basis for a
22 third party who was excluded from later challenging the rules

1 in a court. The reason for this is to encourage agencies'
2 impartiality, to increase fairness. Everybody has the same
3 chance at communicating with the agency, and no one party is
4 seen as having an "in" with getting their views heard by the
5 agency more than any other party. It's a very good system,
6 but it's not a perfect system, because what it tends to do is
7 then risk adversarial rather than collaborative interactions.

8 The way I've seen this work in practice is that the
9 agency issues a notice of proposed rulemaking. The various
10 interest groups stake out rather stark positions in their
11 written comments and in oral testimony, doing a couple of
12 things. One, speaking to their own constituency, but also in
13 the hope that if everybody stakes out this kind of wild
14 position, that the agency will come to something in between.

15 The joke that we used to have when I worked at the
16 Department of Transportation was that if by the end of
17 rulemaking we'd made everybody angry with you, you'd clearly
18 done the right thing. It's not the best system. It's got
19 its advantages and disadvantages.

20 And to meet those disadvantages we have something
21 called "negotiated rulemaking." The statutory authority for
22 it is the Rulemaking Act, Negotiated Rulemaking Act of 1990.

1 What the act does basically is allow agencies to engage in
2 certain communications that would otherwise be violative of
3 the Administrative Procedures Act, to allow "more informal
4 and collaborative effort." The administration in 1993 issued
5 Executive Order 12866, which encouraged the agencies
6 throughout the government to engage in, and in fact, ordered
7 every agency to find one topic that it could do reg-neg on,
8 and if not, have one. A little thing, even though it is, you
9 often get a shorthand phrase "reg-neg." I think that's
10 because another phrase that's not used as often is
11 "regulatory negotiations." That's where reg-neg comes from.
12 No one ever calls it neg-reg. They call it either/or.
13 Reg-neg, that's Washington, D.C.

14 A little bit about how reg-neg is done. You come
15 under a facilitator. A facilitator could be an outside party
16 or it could be an agency inside person who has been
17 specifically trained to act as facilitator. It's important
18 that that person is basically there to act as the
19 facilitator, and is not advocating or acting as a substantive
20 expert in any issue on behalf of the agency.

21 You have to have a limited group size. You
22 basically can't adopt a reg-neg with a group of 50 people at

1 the table. It just doesn't work, too many voices, not enough
2 focus. It takes too long. So the group size should be
3 limited. There's not an ideal size. I guess I've never seen
4 it done with fewer than about five people, but usually most
5 of the groups I've seen, the upper limit is about 20 to 25
6 people at the table. Now those people at the table can have
7 other people supporting them and helping them, but really the
8 people at the table have the primary responsibility.

9 Those people should all be subject matter experts
10 in whatever the subject matter of the rulemaking is; and yet,
11 you usually have some people who bring a particular expertise
12 in either economics or federal agency rulemaking there for
13 authentic analyses, as well as attorneys. The key point of
14 that is we're looking to come to consensus.

15 It's a collaborative approach, interest-based
16 negotiation. The theory is that if you get these people
17 together in a room, and they do their fact-finding, and they
18 are trying to get to a good place where everybody can live
19 with what they come up with, that they're negotiating from an
20 interest-based, not simply from an advocacy standpoint.
21 That's consensus-based decision-making, and I keep repeating
22 this point because that's really the key to reg-neg. You

1 don't necessarily get to the point where everybody is really
2 happy with everything, but you get to a place where everybody
3 can live with everything there.

4 Of course, you need to follow it with notice and
5 comment rulemaking with the government, because the
6 Negotiated Rulemaking Act allows for certain exceptions to
7 which we still have to, you know, it's the comment period.
8 And not all issues are really well suited to it. Things that
9 are not controversial at all. That there's really no point
10 in taking everybody's time and effort and money and convening
11 a rulemaking. Or, things that are really internal to the
12 agency.

13 "A Little R & R at LSC"; what does this mean for
14 us? Again, I repeat myself that we are not subject to the
15 APA. We're not subject to the Negotiated Rulemaking Act.
16 However, both of these acts embody really some sound public
17 policy principles that I think can be instructive for us, and
18 we can reflect the best of both notice and comment and
19 negotiated rulemaking. That's the end of my
20 presentation as such. But if anybody has any questions, I'll
21 be happy to entertain them at the will of the chairman.

22 CHAIR BRODERICK: No, thank you. Are there any

1 questions? Mattie, thank you very much.

2 MS. CONFRAY: Thanks.

3 CHAIR BRODERICK: Before Victor addresses the
4 revised rulemaking protocol, I wanted to point out that in
5 the board book, the draft protocol is dated September 6. The
6 one that you should be looking at if you're following along
7 is dated September 18.

8 MR. McCALPIN: Can't hear.

9 CHAIR BRODERICK: I was just saying that in the
10 board book, the draft of this protocol is dated September 6.
11 The draft you should be working off of, and hopefully we
12 have enough here, is dated September 18. There have been
13 revisions made, requested revisions, by the board at the last
14 meeting. And there have been some revisions made, obviously,
15 since the September 6 draft. If you don't have a copy,
16 Victor, do we have additional copies here? So, if you need a
17 copy they are here. Otherwise, Victor, I'm going to have you
18 take us through the September 18 draft in kind of an overview
19 fashion.

20 MR. FORTUNO: In the June 25 meeting of this
21 committee in Minneapolis, Minnesota, an earlier draft in the
22 protocol rulemaking was taken up and considered by the

1 committee. After some discussion, the committee directed the
2 five points be incorporated into the draft and then be
3 brought back to the committee. The five points which were
4 made at that time were made to make clear to the board and to
5 the committee are among those negotiated rulemaking. Two, to
6 move negotiated rulemaking up in the protocol so as to make
7 clear that it is the preferred approach, and then absent
8 circumstances will be the case, the way in which all
9 rulemakings are pursued. Three, to make clear that the board
10 has final authority on rulemaking. And four, to emphasis and
11 ensure proper comment.

12 We took this apart and we crafted a protocol, a
13 draft protocol, and discussed it with members of the public
14 and have come back with the document you have before you
15 today. One point that I just want to make is it does say in
16 the first paragraph, that it refers to the five objectives.
17 I see that there's six. I think we ought to change that five
18 to six.

19 That said, what we tried to do is start out the
20 protocol with a description of what our objective are in
21 promulgating this document and this procedure. We've done
22 that, set out the six procedures and if you want me to take

1 you through the protocol, I can. I don't know if you want to
2 go through it in summary fashion, but it has attempted to
3 incorporate the four directives given to the June 25 meeting.

4 It set out the process to which is open there, neutral and
5 it takes. Mattie and I earlier incorporated the practices.
6 Did you want for me to go through it or have any questions?

7 CHAIR BRODERICK: Well, I'm intimately familiar
8 with it at this point, but others here on the board or the
9 committee may not be. So if there are any questions, Victor,
10 I'd rather handle it, I think, in that fashion.

11 MR. McCALPIN: Well, Mr. Chairman, after
12 six-and-a-half years on this committee, I've fallen into the
13 bad habit of reading what comes before us and raising
14 questions and making comments and suggestions. I do have
15 several that I would like to make. On page 2, in the
16 paragraph headed Initiation of Rulemaking, in the 11th line,
17 "Process shall be selected." My question is by whom?

18 CHAIR BRODERICK: I'm sorry, I'm trying to find the
19 11th line here.

20 MR. McCALPIN: It says, "The appropriate rulemaking
21 process shall be selected on a case-by-case basis." My
22 question is by whom?

1 CHAIR BRODERICK: My sense would be that that
2 selection process would be made by the board on
3 recommendation of the committee.

4 MR. McCALPIN: I think if the committee is, why
5 come to the board?

6 MR. FORTUNO: The very last sentence of that
7 paragraph says, "The committee acting through its chair shall
8 consult with the president before deciding whether to proceed
9 with recommending." While that sentence is not as clear as
10 it could be, the intent is that the committee, acting through
11 its chair and in consultation with the president, would make
12 that decision.

13 CHAIR BRODERICK: Well, it depends, I think. The
14 last time we had this meeting, I participated by telephone,
15 which is looking better and better to me right now. Nancy
16 Rogers is smart. It seemed to me the concern expressed
17 around the table was that this process did not allow for
18 enough input from the board, and the board was very concerned
19 about maintaining its policy options and prerogatives and
20 responsibilities. We do not engage in rulemaking every day
21 here at the Corporation. And so, I don't think either way is
22 particularly cumbersome. If it were the sense of this group

1 that the board should have the final say in which direction
2 we're going, I don't think that's unduly cumbersome or
3 inappropriate. If, on the other hand, you're willing to say,
4 I'll let the president and chairman of the committee decide
5 it, that's fine, too. Either way, I don't think either one is
6 particularly cumbersome.

7 MS. MERCADO: Yes, Mr. Chairman, I think it seems
8 that the answer to Bill's question comes on the second full
9 sentence of that beginning paragraph, which starts, "Once the
10 board has agreed on a potential subject for rulemaking, LSC's
11 Office of Legal Affairs, in consultation with the appropriate
12 Corporation staff, will develop the rulemaking options
13 paper." And then you have the further discussion of whether
14 to select notice or the negotiated process, which needs to
15 indicate the need that it is the board that is deciding which
16 process it will select in consultation with the staff.

17 CHAIR BRODERICK: That's why I answered the
18 question as I did. It's not a model of clarity, and it's
19 really a matter of consensus here. It depends on what the
20 board wants to do.

21 MR. MCKAY: I think actually the intention here
22 with regard to the language Bill identified, that that point

1 the potential where you say, "the appropriate rulemaking
2 process shall be selected." That is a selection developed in
3 the ROP, which is a staff document. The ROP will recommend a
4 process for rulemaking, which then will be submitted to the
5 committee chair under this language. And the committee chair
6 under this language, in conjunction with the president, will
7 decide which path we will take. So, at the point when it
8 does say, "the appropriate rulemaking process," that's just
9 the beginning of the staff recommendation, which ultimately
10 then goes to the committee chair under this language.

11 CHAIR BRODERICK: On the other hand, if the board
12 wants input on that, once that path is selected we head down
13 that path. It's a little late after the fact to come back.
14 My personal view is it doesn't take a lot more time to get
15 the board's input than it would to get the chair's or the
16 president of the Corporation, but I have no strong
17 preference.

18 MR. McCALPIN: It seems to me, and I'm going to
19 make another comment later on, for a long period of time we
20 operated on the principle that the committee had substantial
21 authority and that the board got involved only at the final
22 rule adoption or rejection or whatever. I think that's

1 entirely appropriate. If you put the board in this at this
2 point, then it puts them in at three different times in the
3 process of adopting the regulation, and I think that's
4 unwieldy and unnecessary. I would certainly leave it to the
5 committee and the chair and the president at this stage of
6 the game, but because I thought that was unclear, I wanted to
7 raise the question here.

8 CHAIR BRODERICK: Well, I think it wasn't
9 absolutely clear, and I'd say it wasn't clear to me. So it
10 couldn't have been totally clear.

11 MR. FOTUNO: I think the last paragraph discusses
12 the rulemaking options paper and recommendations made in that
13 paper. At the bottom of the paragraph, it talks about the
14 committee acting towards chair in consultation with the
15 president deciding whether the procedures recommended be as
16 recommended refers you back to the rule options paper which
17 would contain the recommendations as to whether to proceed
18 somehow differently from negotiated rulemaking.

19 The second point that was made back in June 25 was
20 that negotiated rulemaking was to be a clearly preferred
21 approach or the default, if you will. This paragraph does
22 say that it's anticipated that ultimately it will be

1 negotiated. It has a footnote, footnote 4, which talks about
2 circumstances under which it might be appropriate to have, to
3 go directly to notice and comment. But I think that this
4 paragraph, read as a whole, says that it's anticipated it's
5 going to be negotiated rulemaking; however, the ROP would
6 indicate if some other approach might be appropriate under
7 the circumstances of that case. And then, that would go to
8 the committee. And the committee, acting through its chair
9 in consultation with the president, would make the call as to
10 whether to depart from the norm, which is negotiated
11 rulemaking.

12 CHAIR BRODERICK: All right, any other comment?

13 Yes, Edna.

14 MS. FAIRBANKS-WILLIAMS: What I didn't understand
15 from this is when the board would be notified that you were
16 starting to do something. I have written in my notes.

17 MS. MERCADO: It's in the very first sentence, I
18 think.

19 MS. McCALPIN: First sentence on page 3.

20 MR. FORTUNO: First paragraph, actually first
21 sentence on page 3 does say, "If after consultation with the
22 president, the committee elects to proceed with a rulemaking,

1 the president will officially so notify the board, the
2 president will also inform the Inspector General that the
3 rulemaking is being undertaken and communicate to the IG the
4 general parameters of the proposed Rule on the ROP."

5 MS. FAIRBANKS-WILLIAMS: Yes, that's the one you're
6 going to continue with, but what about the one that you
7 dropped or didn't do, or whatever. Are we going to be
8 notified that you decided that this rule isn't something that
9 we need. I'm talking as a board person now. I'm not talking
10 as a -- I would want to know what was being dropped or
11 terminated or whatever.

12 MR. FORTUNO: That's actually a good point, and I
13 don't think we have addressed the question of when the
14 decision is made to discontinue with a Rulemaking some formal
15 process of notification of the board other than, of course,
16 it's done in conjunction with the committee. And presumable
17 when the committee reports to the board on its activities, it
18 would report it had elected to discontinue a rulemaking. But
19 there is nothing here that I recall expressly addressing that
20 point. So it is a good point.

21 CHAIR BRODERICK: I agree with that. Although I do
22 think it's implicit and if the committee decides concurrently

1 with the president to terminate rulemaking, that would be
2 reported to the board in the ordinary course of the
3 committee's activities. If that were to happen, it would not
4 be unnoticed. I think we could make it explicit, but I don't
5 know that it's required. Certainly, that information would
6 get back to the board in some form or fashion.

7 MR. FORTUNO: The board is acting in this protocol,
8 through in large part, through its committee. So there is
9 board involvement through the committee, and the committee
10 presumably would keep the board fully apprised of its work.
11 And also, of course, any board member is able to attend and
12 participate in any committee meeting.

13 MR. EAKELEY: Well, the minutes of the committee
14 meeting should also reflect a decision to terminate or
15 discontinue rulemaking. So I think there are a couple of
16 different ways to cover it, that point.

17 CHAIR BRODERICK: Bill, did you have another
18 comment or two?

19 MR. McCALPIN: Not on that, no. I have some others
20 going on here.

21 CHAIR BRODERICK: I think you should feel free to
22 make them.

1 MR. McCALPIN: On page 3, the third paragraph,
2 there is an addition recently adopted to this. As I
3 understand in talking with you this morning, what the last
4 two sentences particularly contemplate, is a two-step
5 procedure that the legal services community will be asked to
6 submit names for possible inclusion on the working group. At
7 that point, committee chair and the president will decide on
8 which particular elements of the legal services community
9 will be represented on the working group. And then they will
10 be permitted to name their representative.

11 I don't think that these two sentences clearly
12 spell out the two-step nature of that. When I read it the
13 first time, I had to ask a question because I didn't
14 understand that after the board set of nominees were
15 forwarded to the president and the chair that they would then
16 make a decision as to the particular groups to be
17 represented. I would think that maybe that ought to be
18 spelled out a little bit more clearly.

19 CHAIR BRODERICK: I hear you, and I think it could
20 be. I think your point is a good one. I understand the
21 process. You've described it accurately, but I'm not sure
22 the language articulates it as specifically as you've

1 described it. So, I think probably we should amend that
2 section to make very explicit what Bill has described, which
3 I understand to be exactly the way it's going to work. So we
4 can do that.

5 MR. EAKELEY: I thought it was fairly clear.

6 MR. McCALPIN: Jim, answer the question, D-I-G.

7 MR. EAKELEY: Okay, do you want to come up to the
8 table, too?

9 MR. QUATREVAUX: Thank you. I just have a comment
10 on that paragraph, and I can hold that comment until after
11 you complete your discussion or just make it now. Your
12 choice.

13 MR. EAKELEY: We're on the paragraph. I'm sorry,
14 Jim.

15 CHAIR BRODERICK: No, no, no. Before we get there,
16 can I just interrupt you for a minute. As I read this, I was
17 reading halfway down this paragraph. It says in the first
18 sentence, "The president working in consultation with the
19 committee acting to its chair will make appointments to the
20 working group, including a facilitator." Then it goes on to
21 say as I read this, "Prior doing so, they will solicit
22 recommendations from the legal services community." So,

1 reading it that way, it seems to me to cover your concern.

2 MR. McCALPIN: As a matter of fact, the first
3 sentence is somewhat in conflict with the last sentence
4 because the first sentence says the president makes the
5 appointments and the last sentence says that the designated
6 group makes the appointment.

7 CHAIR BRODERICK: No, I think what is says is that
8 the president will appoint some individual, there may be
9 field representatives. They could be various individuals.
10 There will be groups that may well be asked to participate.
11 It could be, for example, SCLAID could be asked to
12 participate. The president will not tell SCLAID this is who
13 we want you to send to the group. SCLAID would be given the
14 opportunity, if they were asked to participate, to designate
15 a representative. But in many cases the president of the
16 Corporation would reach out and tap specific individuals. In
17 some cases, the president would reach out and tap specific
18 organizations. In the latter case, the organization would
19 have the option, and not only the option, the obligation to
20 designate a representative of that organization.

21 MR. McCALPIN: It seems to me that that's not
22 consistent with "the president will make appointments."

1 CHAIR BRODERICK: I think it's entirely consistent.

2 If the president is going to make an appointment, and he's
3 going to choose Organization A to be on the working group,
4 that's the president's choice. Organization A then says to
5 the president, you've selected our organization to be a
6 member of the working group, but under this regulation,
7 protocol, you've given us the opportunity to designate one of
8 our members from the organization back to serve. It seems to
9 me that's the intention.

10 MS. MERCADO: What about putting that last sentence
11 after the first sentence, "For the president selects"?

12 Because then it goes directly into the fact that it's the
13 groups and the organizations that select those members that
14 sit on that committee. I mean the president is selected, but
15 who of those organizations that are now recommending their
16 representative will sit there? It's more clearly in line
17 with who is selecting whom. If you put the last paragraph,
18 "All groups and organizations have to participate," put it
19 right after the "Facilitator" period in the first sentence of
20 that paragraph.

21 CHAIR BRODERICK: Any further comments? That's
22 fine. It may make it clearer. So we'll move it up. So

1 after it says, "including the facilitator," it will go on to
2 say, "all groups, organizations." All right?

3 MS. MERCADO: Mm-hmm.

4 CHAIR BRODERICK: Any objection to doing that? It
5 seems to make it clearer. Bill, does that help you a little
6 bit?

7 MR. McCALPIN: Yeah, I'm not sure. It still
8 doesn't spell out clearly the two-step process.

9 MS. MERCADO: But it's a little bit more clear.

10 MR. ASKEW: The record of this committee meeting,
11 the transcript of it, and the minutes we produce will, if
12 there's ever a question about it. How do we intend to
13 support this?

14 MR. McCALPIN: Except if the board's going to act
15 on this later today?

16 CHAIR BRODERICK: Right. We may have to do some
17 redrafting here. I think it's, it's not an absolute model of
18 clarity, and I think we can probably enhance it, though. And
19 maybe we can do that in the interim, but I think it's clear
20 that it's a two-step process. I think the change Maria
21 suggested is helpful. Ed, did you have something? Mattie?

22 MS. CONDRAY: I was just going to ask if it would

1 make it clearer to you if we said, "make appointments of
2 persons or organizations"? Because you seem to think that
3 "appointments," what I'm hearing is that "appointments" seems
4 to indicate just individuals. I think we mean it in a
5 broader sense of individuals and organizations.

6 CHAIR BRODERICK: We certainly do. I think that
7 would help Bill. I think that's a good improvement.

8 MR. SMEGAL: Mr. Chair?

9 CHAIR BRODERICK: Yes, Tom.

10 MR. SMEGAL: Would it make some sense if the now
11 third sentence starts with, "The president in consultation
12 with the committee chair will solicit other suggestions"?

13 CHAIR BRODERICK: Well, I think the intention, Tom,
14 was this president working with the chair would solicit
15 suggestions in the first instance from these various groups
16 subsequent to soliciting suggestions, the president would
17 have the option in consultation with the chair to make
18 designated appointments. It may be entirely consistent with
19 the solicited comments or they may not be. I see this
20 process working that the president, in consultation with the
21 committee acting through its chair, to solicit from the legal
22 services community prospective members of the working group.

1 The president can then decide where he goes with that.

2 MR. SMEGAL: The first two sentences aren't a
3 separate step? Because the first sentence starts out,
4 "Rulemaking appointments." The groups will decide who it is
5 they're making. And then you go on to the third sentence,
6 which sounds like another step.

7 CHAIR BRODERICK: Well, maybe what it should say,
8 "In advance of making those appointments, the president."
9 Why don't we say that?

10 MR. EAKELEY: May I? At great personal risk, may I
11 suggest a slight difference in the ordering? I would make
12 the first sentence of what is now the text, sentence two.
13 And I'd start with the next sentence and so that becomes, the
14 first sentence would be, "The president will solicit
15 suggestions." The second sentence would then be, "The
16 president will make appointments." Then, I would reverse the
17 third and fourth sentences so that the next sentence, the
18 third sentence, is "All groups or organizations asked to
19 participate." And then, the fourth sentence is "It is
20 expected, the membership." I think that does it.

21 CHAIR BRODERICK: I think it does, too. I think
22 that's very good.

1 MR. EAKELEY: I'm not going to venture into this
2 area too many times longer in my life.

3 CHAIR BRODERICK: I just want to say that our
4 chairman does not have a Rhodes scholarship for no reason.
5 And I think he's demonstrated exactly why he has it.

6 MR. EAKELEY: So people can call me "someone with a
7 great future behind him."

8 CHAIR BRODERICK: I think that he's captured it,
9 frankly. Does that solve most of the problems that have been
10 raised here?

11 MR. McCALPIN: Very careful, though I understood
12 him to say something about the paragraph.

13 CHAIR BRODERICK: Mattie's comment I don't think is
14 inconsistent with, I think we can still incorporate your
15 change. But I think by doing the sentence structure as the
16 chairman suggested solves these problems. I almost hesitate
17 to ask, but do you have any other comments, Bill?

18 MR. McCALPIN: Yes, but I understood Ed wanted to
19 discuss this paragraph.

20 CHAIR BRODERICK: Oh, I'm sorry. I didn't realize
21 that.

22 MR. QUATREVAUX: Thank you, Mr. Chairman. Let me

1 say that I just got this document and have not read past this
2 paragraph. So if I say something that's, you know, I
3 shouldn't have because I hadn't read the rest, I apologize in
4 advance. My comment deals with what were the second and
5 third sentences, wherever they are now. It really has to do
6 with the scope and the qualification.

7 My understanding is that one of the intentions of
8 this protocol was to create a level playing field and open up
9 the process to allow interested parties to participate. I
10 believe we probably would also find that in the
11 Administrative Procedures Act and certainly as a good public
12 policy principle. But as formulated here, it has the
13 opposite effect. It limits participation to those in the
14 legal services community. And as you're aware from time to
15 time, we have comments, we receive comments from other
16 interested parties who would not be captured by this
17 formulation. So, I just wanted to make that observation.

18 MR. ASKEW: I think the words "organizations and
19 organized bar" are broader than the legal services community.
20 Do you have specific groups you have in mind, or language?

21 MR. QUATREVAUX: Yes, the American Farm Bureau, for
22 one.

1 MS. MERCADO: That's under organization.

2 MR. EAKELEY: Ed is right. The way it reads now,
3 the term "regulated community" may qualify everything that
4 comes after. So only clients, advocates, organizations of
5 the regulated community are invited.

6 MS. MERCADO: But his example is exactly, because
7 the Farm Bureau believes that they are being regulated by
8 some of the legal services that we provide to some of the
9 client community. So they do fall under the category of
10 either an organization or a regulated group.

11 MR. EAKELEY: How about this slight change? Take
12 "organization" and put it at the end, and then add "and other
13 interested organizations." So it would be "regulated
14 community and its class and advocates, the organized bar, and
15 other interested organizations." That's all. I think that
16 frees it up and says what was the intent of the language.

17 CHAIR BRODERICK: I think it does, too. That's a
18 good suggestion. Does that address your concern?

19 MS. MERCADO: Well, yes.

20 MR. QUATREVAUX: I just wanted to make that
21 observation.

22 MR. EAKELEY: Other interested parties?

1 MS. MERCADO: Yes, because then what you would have
2 is, let's say that there are people in the health and human
3 services community that have some say about some particular
4 regulations in their client community that it serves. Then
5 we would have people from HHS or somebody else may want to be
6 in on the rulemaking process as well.

7 MS. CONDRAY: If I may just comment, the
8 rulemaking, the negotiated rulemaking process, generally as a
9 philosophical matter, you definitely want to include those
10 groups if they have a particular interest in a rulemaking. A
11 reg-neg, it's an investment of time and effort on a number of
12 people's parts. You don't want to do it without really
13 thinking about it, without having the right players at the
14 table because you're not going to get the results you want.
15 You'll have spent a lot of time and effort to not get where
16 you want to go. So the whole theory and philosophy of it is
17 to have the interested parties specific to any given
18 rulemaking there, and not in fact, tie yourself into a
19 specific set or not set of parties who may be interested and
20 not interested, an expert and not expert, at any given
21 rulemaking.

22 MR. FORTUNO: Unlike Mattie, I find that I do need

1 the microphone. Just one question, and that is the sentence
2 immediately following. Is the one revision that's been made
3 sufficient to address the concern or is there any need to
4 make any revision to the following sentence. That is, "It is
5 expected that membership on the working group will be diverse
6 and fully representative of the legal services community, as
7 described above."

8 MS. MERCADO: Well, if you're using "interested
9 organizations" as the "other," then you could just add "legal
10 services community and other interested groups or
11 organizations."

12 CHAIR BRODERICK: Yes, I think that's what we
13 should do.

14 MS. MERCADO: So that it's consistent with what
15 you've already put in.

16 CHAIR BRODERICK: Yes, I agree with that. Bill, any
17 other comments?

18 MR. McCALPIN: Yes, on the last line on that same
19 page, the words "substantive expertise" raise in my mind the
20 question of the criteria or the qualifications which will be
21 used in selecting members of the working group. I can
22 understand if we're going on a regulation on evictions for

1 public housing. You may want somebody with expertise, a
2 landlord/tenant, and that sort of thing. But I think equally
3 important is experience in the operation of the legal
4 services program. So that people making the regulation will
5 understand the impact of the regulation on the program. So,
6 I hope that the use of the word "substantive experience" is
7 not limited in terms of people who will be selected for the
8 working group.

9 CHAIR BRODERICK: No, I don't think it's intended
10 in any way to be limiting. And I would hope that we would
11 have a pretty diverse and varied group on these working
12 groups, and you'd have a lot of life experience and practical
13 experience and field experience so that you'd be able to
14 understand the impact of any regulation that's adopted. So,
15 we're not just trying to get too fine a point on it, I can
16 assure you.

17 MR. McCALPIN: This is not going to come from the
18 ALI?

19 CHAIR BRODERICK: No, exactly.

20 MR. EAKELEY: There you go again with those
21 acronyms.

22 MR. McCALPIN: American Law Institute?

1 MS. MERCADO: Yes.

2 CHAIR BRODERICK: I see it as a pretty diverse
3 group that will sit in, and that people will come at it from
4 a lot of different experiences.

5 MR. McCALPIN: Then, on the next page in the
6 paragraph with the bold heading, "Notice and Comment
7 Rulemaking." "The first time the Notice and Comment, LSC
8 developed" --

9 MR. FORTUNO: Bill, just one question, I'm sorry.
10 Before we leave that, would it address your concern to
11 substitute for the word "substantive," something along the
12 lines of "their areas of relevant expertise" or words to that
13 effect, so that it's broader?

14 MR. EAKELEY: I think we're satisfied.

15 MR. FORTUNO: We're satisfied? Let's move on then.

16 MR. McCALPIN: I just want to communicate a message
17 that I hope that the people put in the working group don't
18 limit themselves to technical, narrow substantive experience.

19 MR. EAKELEY: You made the point, and we're all in
20 agreement. Right?

21 CHAIR BRODERICK: It wouldn't be in the interest of
22 the Corporation to select that narrowly. It would not seem

1 to make much sense to do that.

2 MS. MERCADO: Why don't you put "substantive
3 expertise relevant to legal services"?

4 MR. McCALPIN: Why put "substantive" there?

5 CHAIR BRODERICK: I would just leave it.

6 MR. McCALPIN: Well, on the next page under that
7 paragraph, I noticed in "Notice and Comment Rulemaking. LSC
8 develops rulemaking proposal and takes comment on them in
9 writing." I don't clearly understand what goes out that
10 people could respond to in writing? I don't know that
11 there's a ROP? Is there some sort of publication?

12 MR. FORTUNO: Yes.

13 CHAIR BRODERICK: Notice and comment rulemaking.
14 There will be in fact --

15 MR. McCALPIN: Well, not at the very beginning?

16 CHAIR BRODERICK: Yes.

17 MR. McCALPIN: Is there a publication to which they
18 can respond to in writing?

19 MR. FORTUNO: There is published in the Federal
20 Register a proposed rulemaking to which comments are received
21 in writing and oral comments can be provided at publicly
22 designated meetings of the committee.

1 MR. McCALPIN: Except that, I understand that that
2 doesn't come until somewhat later in the process.

3 MS. CONDRAY: This sentence is just kind of a, it's
4 a broad structural sentence describing what Notice and
5 Comment rulemaking is generally. This sentence really just
6 an introductory sentence for all of the processes that
7 follow.

8 MR. EAKELEY: What follows below, frankly.

9 MR. McCALPIN: Okay.

10 MR. FORTUNO: And it's consistent with the LSC Act
11 where the Act provides that the Corporation shall afford
12 notice and reasonable opportunity for comment to interested
13 parties prior to issuing rules, regulations, and guidelines.

14 CHAIR BRODERICK: And the negotiated rulemaking,
15 Bill, in here really piggybacks on that Notice and Comment
16 aspect. So, there's a lot of room for public comment here in
17 writing and before our committee. It's a set-up sentence to
18 what follows.

19 MR. McCALPIN: You'll be glad to know in my last
20 substantive comment -- sorry, Tom, but I --

21 MR. SMEGAL: Well, you've gotten beyond where I
22 thought you might have had a nonsubstantive comment, that I'd

1 like to make, but go ahead.

2 MR. McCALPIN: On page 5, the second full paragraph
3 comes back to a point that I made earlier. Up to this point,
4 the committee has been given the authority and the
5 responsibility to approve a draft regulation for a
6 publication for a comment. This seems to send it to the
7 board. To give the board two bites at the apple. One,
8 should the board consider the whole thing and deciding
9 whether to publish a comment. And then, when the comment
10 comes back, it comes back to the board as a final reg. The
11 board's at it again. I think that the previous operational
12 rule that we've had which let the committee approve the
13 Publication for Comment worked satisfactorily. And I don't
14 see any particular point in involving a board decision at
15 that.

16 CHAIR BRODERICK: Victor, do you want to address
17 that?

18 MR. FORTUNO: I frankly agree with Mr. McCalpin on
19 this. I think it's worked well in the past, and I think that
20 to involve the board at too many junctures would simply slow
21 down the process. I think that so long as the board is
22 satisfied that in acting towards committee, it's discharging

1 its role. I think that would be sufficient. Then, in fact,
2 my preference would be to see the committee making this
3 decision as opposed to scheduling for action by the board
4 after the committee has already considered it.

5 MR. EAKELEY: May I comment on the comment? My
6 understanding of this was that it was put in because of other
7 expressions of concern that board remain throughout and
8 paramount. However, I think that we've made it clear, that
9 the drafts/persons have made clear, that it is ultimately the
10 board's responsibility through the committee working with
11 management. And indeed, I think that we can, if we go back
12 to the way it used to be, it'll streamline the process, and
13 we did not intend to encumber it. It seems to me that given
14 the Notice that everyone gets, interested board members not
15 on a committee can attend as committee members and provide
16 their input at that point without having to wait for a board
17 meeting to deal with this. I'm in agreement with the
18 proposed suggestion.

19 MR. FORTUNO: That being so, if we delete the
20 second sentence in that paragraph. Just delete from the word
21 "make" where it says, "make recommendations to the board for
22 action on the draft NPRM. The board." So that we have

1 instead the sentence reading "the committee will then
2 deliberate and shall decide whether to publish the NPRM or
3 return it to staff for revisions." I think it would
4 accomplish that.

5 CHAIR BRODERICK: I just want to echo what the
6 chairman said. I thought the concerns, Bill, the last time
7 were that this was happening without board input. So, I
8 think the impetus behind this was to let the board touch this
9 at various times. But if the board is of the view that it
10 doesn't need to be engaged at that level, I do think it
11 streamlines it and would be preferable.

12 MR. ASKEW: Or they could be engaged through the
13 committee as much as they want to be.

14 CHAIR BRODERICK: Sure, exactly. But it doesn't
15 have to be formal.

16 MR. McCALPIN: I have one more nonsubstantive
17 comment, then I'll shut up. The second to last paragraph on
18 page 6, the second paragraph on page 6, the second sentence,
19 "The draft of the final rule and statement of issues will be
20 provided to the committee." I think "and the board." Don't
21 keep the board in the dark until after the committee meets.
22 Let the board see it in advance of the meeting. Then if you

1 make changes then it's easy for the board to follow.

2 MS. MERCADO: Where are you at? I'm sorry.

3 CHAIR BRODERICK: He's looking, Maria, at page 6,
4 paragraph that begins "Once approved." The second sentence,
5 "The draft of the final rule and a statement of issues will
6 be provided to the committee. And Bill is suggesting it
7 should say "to the committee and the board," which I think is
8 a good point to insert the board in this process. I think
9 that's a good amendment. Thank you. As usual, Mr. McCalpin,
10 you've made good comments, and I appreciate it. Tom, did you
11 have a --

12 MR. SMEGAL: Well, I have a McCalpin comment, I'm
13 sorry I missed it. Page 4, first full paragraph. The first
14 few words are the "The OLA representative," and I can find no
15 antecedent basis for that in this document. Back on the
16 first paragraph under Negotiated Rulemaking, I see the term
17 "LSC Representatives." And it seems to be you either have to
18 get the word "representative" in somewhere else. I know
19 there are all "A's" there, but the word "representative"
20 isn't satisfied.

21 MR. ERLNBORN: Mr. Chair, on page 2, under
22 "Initiation of Rulemaking," there's a reference to the Office

1 of Legal Affairs (OLA).

2 MR. SMEGAL: Well, but it doesn't say
3 "representative." What's lacking is the word
4 "representative." It seems to me you either have to put it,
5 I think you really want it here in the first paragraph of the
6 Negotiated Rulemaking. A group composed of the OLA, who else
7 are we going to have on this rulemaking committee other than
8 the Office of Legal Affairs?

9 CHAIR BRODERICK: Right.

10 MS. CONDRAY: Is that program counsel?

11 MR. FORTUNO: It could be that someone from the
12 Office of Program Performance.

13 MR. SMEGAL: However, I think you need some
14 antecedent basis. You do not have OLA representative
15 anywhere else in this document. It just shows up there in
16 the document.

17 CHAIR BRODERICK: Your suggestion, Tom, is
18 somewhere in the previous pages we need to suggest that this
19 working group will of necessity have an OLA representative on
20 it?

21 MR. SMEGAL: That's correct.

22 CHAIR BRODERICK: Maybe we can insert that in the

1 paragraph we had so much fun with over on page 3.

2 MR. SMEGAL: Yes, such as "including the OLA
3 representative and facilitator," for example. Like that.

4 CHAIR BRODERICK: Any objection to that? That
5 seems to make sense. It's a good place to put it. So when
6 you get to page 3, you know what you're talking about when
7 you read "OLA representative on a working group."

8 MR. SMEGAL: Right.

9 CHAIR BRODERICK: Yes, good catch. Any other
10 comments, observations? Maria?

11 MS. MERCADO: On the last page, page 6, second
12 paragraph, second sentence from the bottom of that paragraph,
13 it says, "It is anticipated that the committee will accept
14 public comment as needed to assist in its deliberation." It
15 seems to indicate at that point of the deliberation on the
16 final rule, once it has been published in the Federal
17 Register, that you're not going to have public comment. That
18 may be discretionary as opposed to it being automatic. The
19 public is involved. And when you talk about Sunshine and
20 having all our committee meetings in public, and yet, the
21 most important committee meeting that we have, which is the
22 one where the final rule is going to be adopted, we have

1 public comment if we deem it necessary. Which may totally
2 mean that we work behind closed doors more of the time, if we
3 chose to. And again, thinking in perspective, not
4 necessarily us as this board, but maybe some future board
5 that this is the process you're setting in place as opposed
6 to being public.

7 CHAIR BRODERICK: Well, I don't think there's any
8 intention in that sentence to substantially curtail public
9 comment. I think we'd benefit from public comment. I think
10 -- give you an example -- I think if we've gone through final
11 rulemaking and the committee now has it back. We have all
12 the comments. We have a final draft, and someone comes to
13 the table and says, "I'd like to make a presentation for the
14 next two hours on why this rule makes no sense, and the
15 policy behind this rule really is ridiculous." I think we
16 should be able to say, "Thank you very much. We've crossed
17 that bridge sometime ago. That's not very helpful to us
18 right now because we're not there anymore. We're moving on."

19 If, on the other hand, someone comes up and says,
20 as we were doing this morning with Bill and others you know,
21 "How about this? How about that? Did you mean this? Did
22 you intend that?" That would be very helpful. But, I think,

1 at the final rulemaking deliberations of the committee, I
2 don't think we want to be sitting here having someone come
3 forward and say, "You never should have taken this path, and
4 let me talk to you about the policy implications of this for
5 the next hour." Now, if we have reservations about what
6 we've done, we're free to say, "Well, that's pretty
7 interesting. Maybe we missed it. Maybe you should talk to
8 us." But we also should be free to say at that point, "Thank
9 you very much for coming, but I don't think that's going to
10 be very helpful. That's not comment that we need. So, I
11 think, at some point you've got to kind of trust the
12 committee that we have no intention of shutting off public
13 comment. I think it would be a rare circumstance where we
14 would say, "Thank you. We don't need to hear from you." But
15 I think we ought to have the option under this sort of
16 example that I've just given. I don't think any of us on the
17 committee and on the board would expect that we would
18 willy-nilly throw public comment aside or not allow for it.

19 MS. CONDRAY: We, of course, have to be open to
20 public observation anyway. It would be really behind closed
21 doors. It's still publicly open for observation within it.

22 CHAIR BRODERICK: I think we just, you know, maybe

1 put an asterisk on that a little bit. But I think it would
2 be curtailed in very few instances, but we ought to have to
3 right to do that.

4 MR. ASKEW: Let me comment to that. I support what
5 the committee chair has said, and say that this language has
6 gone through several iterations. This is meant to be a
7 positive statement. You may have read it to be a delimiting
8 statement. It's supposed to be a positive statement. It's
9 anticipated public comment will always be accepted. But
10 there may be occasions where it's just not necessary, given
11 the stage where we are in and the various public comment
12 steps we've been through leading up to the final rule.

13 MS. MERCADO: We're assuming, I guess part of it is
14 because in looking at the other pages that deal with the
15 Notice and Comment rulemaking. It's not real clear exactly
16 at what point the public actually has time to comment on that
17 rule before you get to the point, as you say, that you've
18 worked on it X number of meetings or X number of hours or
19 whatever, and you have your final rule. And you don't want
20 to open it up again to start all over again is basically what
21 you're saying at that final session. So where in this
22 document does the public have an opportunity to participate

1 in the discussion of that proposed rule? Because I just may
2 have overlooked it.

3 CHAIR BRODERICK: Well, if you look at page 5, I
4 think it's the second full paragraph, if I've got this
5 properly. "At the committee meeting, management will present
6 the draft proposed rule, with the assistance of OLA, and
7 opportunity for public comment will be provided." So when we
8 have a draft rule, at that point it's before the committee,
9 there will be ample opportunity for public comment. We'll
10 then publish the rule. We'll get written comments and follow
11 along to that. And then, the final rule will be crafted.
12 It'll then come back before the committee, and the public, as
13 needed as necessary, which will be in the large majority of
14 cases, will have an opportunity to comment again.

15 So, they comment both at the draft phase and in the
16 final phase. I'm just suggesting to you that in the draft
17 phase, I think the scope of public comment that would be
18 helpful in some cases will be substantially broader than
19 would be helpful at the final rule phase. But I agree with
20 what Bucky said. That sentence that you've identified is to
21 be kind of a positive step forward, and I can assure those
22 who are interested as chairman of that committee, it would be

1 a rare circumstance where I would say public comment would
2 not be helpful. But there could be circumstances where that
3 would be true, and I would suggest that. It's intended to be
4 an inclusive, open process consistent with the goals that
5 we've established for this type of negotiated rulemaking. So
6 unless you feel strongly, Maria, about it, I'd like to leave
7 it as it's written. Any other comments?

8 MR. SMEGAL: Let me just say this. Just another
9 little "Mr. McCalpin" on page 3, last paragraph. "The
10 working group shall meet as necessary to develop a draft
11 notice." Then it's followed by "NPRM." It seems to me that
12 "draft" should not be at that point italicized because all
13 through the rest of the document, the word "draft" is
14 inserted before NPRM in those instances where it's intended
15 to be there.

16 MS. CONDRAY: Well, because then once it's
17 published as -- and the draft is approved and it's published
18 becomes the NPRM. We chose the word, to insert the word
19 "draft" there to distinguish the two phases. Since there's
20 two separate packages, there are two separate commentaries.
21 Isn't that right?

22 MR. SMEGAL: That's not my point. All I'm saying

1 is the first time you use "draft" at the bottom of page 3, it
2 should not be italicized because it's really not part of NPRM
3 which is used later in circumstances where it is not intended
4 to be "draft NPRM." And in every instance where you've
5 intended to be "draft," you use the word "draft."

6 MS. MERCADO: It's just a grammatical.

7 MS. CONDRAY: Okay.

8 CHAIR BRODERICK: Any other comments? All right.
9 What I'd like to do if our committee feels it is able to do
10 that, keeping in mind these various restructuring, what I'd
11 like to do with the committee is to see whether or not we can
12 vote to recommend this draft rulemaking protocol for the
13 board's consideration. I don't know whether people feel like
14 I can do that without seeing it in its revised state.

15 MS. MERCADO: I was just curious whether there were
16 any other comments other than the IG providing comment on
17 this rulemaking protocol? I mean I know we had quite a few
18 other people here. I don't know whether or not anybody,
19 before we opened and talked some more.

20 CHAIR BRODERICK: I don't know prior to the time we
21 vote, actually, if there are other interested parties here in
22 the room who would like to comment, I would like to hear

1 their comments. Thank you, Maria.

2 MR. FORTUNO: I would on the part of the staff like
3 to thank all those who suggested comments. I think they were
4 very helpful and clearly we'll be incorporating all the ones
5 that were agreed upon after this meeting.

6 CHAIR BRODERICK: Victor, thank you. We do have
7 some folks who would like to come to the table. Mr.
8 Saunders, if you could just identify yourself for the record.

9 MR. SAUNDERS: Good morning. My name is Don
10 Saunders. I'm the director of Civil Legal Services for the
11 National Legal Aid and Defenders Association. As I think
12 most of you know, NLADA is the only national membership
13 organization devoted completely to the principle of equal
14 justice for persons living in poverty. Our membership, which
15 consists of the vast majority of your grantees, obviously has
16 a great stake and concern both in this protocol and in the
17 process that you do as the number one grantor, number one
18 funder of legal services with regard to policies that you
19 develop.

20 As you know, we've had a very long history with
21 working closely with the LSC board and staff in terms of
22 making the recommendations of our membership with regard to

1 matters of important policy-making that come before the
2 board. We have enjoyed the opportunity to work very closely
3 with you in the various iterations of this policy. We have
4 been very impressed with the openness of both the members of
5 the board and your staff in working with us and hearing our
6 concerns.

7 We clearly understand the intent of this change in
8 operation. We support it. We're committed to working with
9 you very closely and carefully in making this new way of
10 operation work. We understand the leveling of the playing
11 field. We understand the arms-length relationship that
12 Mattie was referring to. We would urge you and appreciate
13 the changes you've made from earlier drafts to continue to
14 support openness and inclusiveness at every stage of the
15 process. There's many parts of this process that obviously
16 can't be reduced to writing, and we're very happy to see the
17 strong commitment of this board and your staff to continuing
18 to work with representatives of the field and other
19 interested parties in developing good policy. Obviously,
20 what we're all after is good policy to help poor people get
21 access to justice.

22 I'm just here today to, again, express the thanks

1 of the National Legal Aid and Defenders Association. The
2 chair, Ramon Arias, was here earlier. I think he's had to
3 go, but -- he always manages to show up to get his check. But
4 he and others of our board have followed this process very
5 closely and carefully, and we're all in strong agreement. We
6 look forward to developing strong working relationships under
7 this new policy and welcome any opportunity to provide you
8 with input as we go forward. As currently drafted, we're
9 comfortable with your actions this morning.

10 CHAIR BRODERICK: Mr. Saunders, thank you, and I
11 want to thank you for your constructive comments as this
12 process went forward. I think the respect that this
13 Corporation has for the NLADA is very obvious, and the
14 valuable role that your organization has played in legal
15 services is obviously clear. I hope that we will continue to
16 look to the expertise that those in your organization have
17 developed for the common interests that we all have. So I
18 appreciate your comments.

19 MR. SAUNDERS: I should add, Mr. Chairman, that I'm
20 obviously speaking for our counsel and partner in this
21 effort, the Center for Law and Social Policy.

22 CHAIR BRODERICK: And the comments that I made

1 about NLADA, I would echo for CLASP as well, and Linda Perle
2 and her contributions, which, again, have been substantial,
3 and we hope will continue for our mutual benefit. Thank you
4 very much, Mr. Saunders. Mr. Ross?

5 MR. ROSS: Mr. Chairman, my name is Johnathon Ross.
6 I am the new chairman of SCLAID and am here representing
7 that committee and the American Bar Association.

8 CHAIR BRODERICK: What state are you from, Mr.
9 Ross? You look familiar to me?

10 MR. ROSS: It has a nickname called "Granite." It
11 affects all of us eventually.

12 CHAIR BRODERICK: Are you as happy now to be there
13 today as I am?

14 MR. ROSS: I prayed to be able to come to a place
15 with a 107-degree temperature. But, I'm probably happier to
16 be going to wine country after this than you are where you're
17 going home.

18 CHAIR BRODERICK: Yes, I'm sure.

19 MR. ROSS: We have, SCLAID, has been a partner with
20 LSC and this board for a long time in the fight for access to
21 equal justice. And I hope that this goes forward that I can
22 hold a candle to my predecessors who have done so much with

1 you to effect change in that area. I've had an opportunity
2 now in my first LSC meeting as chair to work with members of
3 the board and the staff with Mr. McKay to try and move this
4 policy to a place where it does well for everybody. I'm very
5 pleased to see the organized bar mentioned in here. I
6 understand the intent, and I just wanted to thank you for the
7 process and for the result. I think it's something that we
8 can all work well with to do what we need to do for those we
9 serve. Thank you.

10 CHAIR BRODERICK: John, thank you. I just want to
11 say, I don't know if John Ross is known to all of you. I
12 know he is known to many of you. I would be remiss if I did
13 not say that his selection to chair SCLAID is an outstanding
14 one. John was president of the New Hampshire bar and during
15 his tenure there, he worked diligently to keep legal services
16 alive, not only in New Hampshire, but nationally. He didn't
17 just do it during that tenure, he's made it a commitment as
18 part of his professional life. He is one of the most
19 respected lawyers in my state and in the legal services
20 arena, he is almost without peer in New Hampshire. And I
21 think that may be true nationally. I want to welcome him. I
22 appreciate your comments, and we look forward as a board to

1 working with you and with SCLAID in the time that remains for
2 all of us.

3 MR. ROSS: Thank you very much.

4 CHAIR BRODERICK: Tom?

5 MR. SMEGAL: Mr. Chair, if I may add a personal
6 footnote to what you just said. I was here in 1986 when John
7 Ross was president of the New Hampshire bar and had the great
8 honor of meeting him and being witness to what he and two
9 other of our presidents at that time, Bill Whitehurst of
10 Texas and Mike Grecco of Massachusetts, looking at the void
11 that we had in the mid-1980s which respect to bar support.
12 The three of them as bar presidents created the Bar Leaders
13 for the Preservation of Legal Services and stood behind the
14 minority of the then Reagan board and maintaining this
15 program in a viable condition until such time as others were
16 able to come forward and do the kinds of things that this
17 board is doing. But John Ross was one of the stalwarts in
18 the mid-1980s to accomplish that. It's good to see you
19 again, John, and good to see that the American Bar
20 Association has not got an able leader such as yourself which
21 they did not have in the 1980s.

22 MR. ROSS: It's very nice of you to say that. I

1 just want to congratulate you going from just three friends
2 in 1986 to many more today.

3 CHAIR BRODERICK: Bucky?

4 MR. ASKEW: As we did in Austin, Texas, when Bill
5 Whitehurst appeared, on behalf of this board I'd like to
6 apologize to you, John, for the way you were treated in 1980
7 by the Legal Services Corporation board and hope that you'll
8 never be treated that way again.

9 MR. ROSS: It would have provided me with a lot
10 more free time if they had been nice.

11 MR. ASKEW: Excuse me, by Mr. Smegal and his board
12 members back in the mid-1980s.

13 CHAIR BRODERICK: Excuse me, the one thing that I
14 want to mention that is really amazing about John Ross, every
15 year at the midwinter meeting of the New Hampshire bar, they
16 give away an award for pro bono service, and it is named for
17 John Ross. I thought you had to die before they did that.
18 Apparently not, so it's remarkable that they do it. It's an
19 award that's prized in our state, and John's name has been
20 associated with it and rightfully so. We're delighted to
21 have you here and wish you nothing but the best at SCLAID.

22 MR. ROSS: Thank you very much.

1 CHAIR BRODERICK: Thanks, John. Thank you, Don.
2 Any other comments that would, I'd be happy to receive them,
3 but there aren't any. If there are not and if the committee
4 is willing, keep in mind what's happened here. Without seeing
5 a revised draft, perhaps we could vote to make a
6 recommendation of the full board on the draft rulemaking
7 protocol. If people are comfortable on that, I would look
8 for a motion.

9 M O T I O N

10 MR. FAIRBANKS-WILLIAMS: So moved.

11 MR. ASKEW: Second.

12 CHAIR BRODERICK: All those in favor?

13 (Chorus of ayes.)

14 CHAIR BRODERICK: All those opposed?

15 The draft rulemaking protocol is amended here, and
16 it has been adopted. And I appreciate that, and I want to
17 thank the staff, and particularly Mattie and Victor, who have
18 devoted a lot of time and energy. And I want to thank the
19 president of the Corporation, who has worked very
20 constructively with this committee in coming to this
21 consensus, and I appreciate that very much. The next item on
22 our agenda, if I can get back to it.

1 MR. ASKEW: Victor, is this the fewest comments Mr.
2 McCalpin has ever had on one of your drafts? I think it's a
3 symbol of how well this was drafted, as Mr. McCalpin only had
4 five or six comments.

5 MR. FORTUNO: Always constructive and appreciated,
6 though.

7 CHAIR BRODERICK: The next item on the agenda, and
8 I'm going to turn it over to Victor, is consider and act on a
9 revised Federal Register notice announcing and requesting
10 comment on a proposed Property Acquisition and Management
11 Manual. I understand this came before this committee
12 earlier, and the assumption was at the time based on a vote
13 that this would, in fact, be published. And subsequent to
14 that I understand that inconsistencies were discovered and
15 have allegedly apparently been resolved, but maybe Mr.
16 Fortuno you could address that issue.

17 MR. FORTUNO: That's correct. That's the reason
18 for this rule coming back to the committee. The committee
19 had once before entertained the rule and approved its
20 publication for comment. In preparing the supplementary
21 information that accompanies the rule, the proposed rule, in
22 the Federal Register, it was discovered that there, in fact,

1 were some inconsistencies. It was determined that they were
2 significant enough that it was worth resolving the
3 inconsistencies and bringing it back to the committee for
4 authorization to publish in this form. It has been shared
5 with leaders of the legal services community. After their
6 comments, and while they will have comments to the rule once
7 it's published, my understanding is and they can speak to it
8 since they have representatives here, that they agree that
9 this rule in this form should be published for comment. All
10 we ask is the committee's approval that we proceed in doing
11 so.

12 CHAIR BRODERICK: All right. First thing, are
13 there any questions, Mr. Fortunato, on this board or from this
14 committee. And if there are none, I wonder if anyone here in
15 the room wants to make any public comment before we vote on
16 this publication.

17 MS. PERLE: I just wanted to say that simply that
18 we agree that the draft that you have before you.

19 CHAIR BRODERICK: Could you just for the record
20 identify yourself?

21 MS. PERLE: I'm sorry. I'm Linda Perle, from the
22 Center for Law and Social Policy.

1 CHAIR BRODERICK: Thank you.

2 MS. PERLE: I just wanted to say that we agree with
3 what Victor said. That we will have substantive comments
4 once it's published. We don't have any now. We think that
5 this draft does reflect the agreement that was reached the
6 last time this was considered by the board. I mean by the
7 committee, and that the changes are really in the nature that
8 Victor suggested they were. That they're just to deal with
9 any sort of inconsistencies in language that appear. So we
10 don't have any objections to having this published and we
11 look forward to the comment period.

12 M O T I O N

13 CHAIR BRODERICK: All right, great. Thank you very
14 much. Any other comments? If not, I'd like to ask the
15 committee for a vote to approve this publication as presented
16 to us this morning.

17 MR. EAKELEY: So moved.

18 CHAIR BRODERICK: All those in favor? Oh, we need
19 a second.

20 MR. ASKEW: Second.

21 CHAIR BRODERICK: All those in favor?

22 (Chorus of ayes.)

1 CHAIR BRODERICK: All those opposed?

2 (Chorus of ayes.)

3 CHAIR BRODERICK: The draft rule will be published
4 as proposed. The next item is consider and act on other
5 business. I'm not aware of any. John McKay.

6 MR. MCKAY: I do, Mr. Chairman. I was going to ask
7 our general counsel to report on the status of the Fund
8 Balance Regulation, but I think I can do that
9 informationally, wanted to alert the committee Section 1628,
10 the Fund Balance Regulation has had a number of, we've
11 received a number of comments with regard to the preamble and
12 related language. Victor and his staff have worked with the
13 comments, and I believe, with Mr. McCalpin who had some
14 comments. Those are now ready and we anticipate that the
15 final language will be published in the Federal Register by
16 the end of the month. This is information and doesn't
17 require any committee action.

18 MR. McCALPIN: My feeling is that if it is
19 published in any way other than as approved by the board, it
20 would be inappropriate.

21 MR. MCKAY: I certainly would agree with that
22 statement.

1 MR. McCALPIN: I think it ought to be published
2 exactly as the board approved it at least two meetings ago.

3 MR. McKAY: Maybe I'm not being clear; Victor, can
4 you get more detail on this? It's my understanding this
5 involves the preamble language, which was not yet approved by
6 the board. I may be in error, and I'll ask Victor to clarify
7 that, Bill.

8 MR. McCALPIN: When the final rule comes before the
9 board, the commentary under preamble is a part of it.

10 MR. FORTUNO: The regulatory language itself has
11 not been changed. The draft rulemaking language has been
12 revised some. Mr. McCalpin and I had some discussions about
13 it awhile ago and some observations and very helpful
14 suggestions that Mr. McCalpin had to offer have been
15 incorporated. We've also consulted with representatives of
16 the field, and what we've sought to do is to ensure that the
17 supplementary information that's published along with the
18 regulatory language clearly reflects what was intended. And
19 we've attempted to achieve consensus within the organization,
20 that is, LSC, with the representatives of the field. In the
21 past we had worked with the committee chair. I know Ms.
22 Battle was busy and had other commitments and eventually told

1 me she was really unable to focus on this for awhile. It was
2 she who asked me to work with Mr. McCalpin on it, and we did
3 so awhile back.

4 MR. McCALPIN: Was not the commentary a part of
5 what the board approved?

6 MR. McKAY: The board approved the commentary
7 subject to revisions and approval of the committee chair.
8 Which is why when the committee chair determined that she was
9 unable to focus on it, she asked that the two of us discuss
10 it. And that's why you and I had a long discussion about
11 this awhile back.

12 MR. McCALPIN: But that's at least two months ago
13 that that happened.

14 MR. McKAY: That's true. And what we've attempted
15 to do is to take that and go back to the field, and then to
16 elements of the Corporation to make sure that everyone is in
17 agreement with what we're publishing as a final. But we are
18 about there and the rule should appear in the Federal
19 Register before the end of the month. I'd be happy to
20 circulate another copy to the board just so that you have it
21 and are able to determine for yourself that it, in fact, is.

22 MR. McCALPIN: My recollection is in the prior

1 regime when the board approved a final regulation, it was
2 with the stipulation that as amended if it were modified or
3 changed a little bit in the process, it would then be
4 circulated to the full board. Given 10 days to make any
5 objection to it, and in the absence of any such objection, it
6 would be published. We have always previously circulated a
7 board-approved final regulation with whatever microscopic
8 changes might be made to the full board. And given them 10
9 days to approve or not approve. And if there were any
10 objections, it was not published. But in the absence of
11 objections, it was published.

12 MR. FORTUNO: I think it would be appropriate to do
13 so in this case.

14 M O T I O N

15 CHAIR BRODERICK: Why don't you do that, Mr.
16 Fortuno. I think that would be helpful. Is there any other
17 business to come before this committee? I know of none, if
18 not, entertain a motion to adjourn.

19 MS. WATLINGTON: So moved.

20 CHAIR BRODERICK: Second?

21 MS. MERCADO: Second.

22 CHAIR BRODERICK: All those in favor?

1 (Chorus of ayes.)

2 CHAIR BRODERICK: All those opposed?

3 (Chorus of ayes.)

4 CHAIR BRODERICK: Thank you very much, and maybe
5 the chairman could tell us where we're heading at this point.

6 MR. EAKELEY: Into a break.

7 MR. McKAY: Because of the Sunshine Act we are not
8 able, I gather, to convene as a board until promptly 12:30
9 p.m. That means, perhaps, we don't have to rush lunch quite
10 so much. Lunch was scheduled for 12 noon at Pacific B. It
11 is now in Sierra what? Sierra B, fifth floor. That's where
12 we were before for breakfast.

13 MR. McKAY: So board members and guests should make
14 that note on their meeting agenda. It is now in Sierra B on
15 the fifth floor, where we had breakfast this morning. Lunch
16 will be at noon, so you've got a break to enjoy the, I
17 understand, hot weather outside the building. And then the
18 Board of Directors meeting will convene at 12:30 p.m. here in
19 this room.

20 MR. EAKELEY: Might lunch be available a little bit
21 in advance of noon?

22 MR. McKAY: 11:45 a.m.

1 MR. EAKELEY: Come at 11:45 a.m. We'll do our best
2 to get it served there. But we've got to work with the
3 hotel, I think. The schedule is noon. If you come a little
4 bit early, that will be fine. And we'll convene back here at
5 12:30 p.m. Thank you.

6 (Whereupon, at 11:14 a.m., the meeting was
7 adjourned.)

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