





OFFICE OF LEGAL AFFAIRS

To: Operations and Regulations Committee

Through: Victor M. Fortuno, Vice President and General Counsel 

From: Mark Freedman, Senior Assistant General Counsel 

Re: Non-Rulemaking Options for Third-Party Contracting ROP

Date: June 12, 2012

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At the April Board meeting, the Committee recommended that the Board commence rulemaking regarding LSC's subgrant and transfer regulations. That action was based on concerns raised in the Office of Inspector General's (OIG) audit AU-11-01 of the LSC Technology Initiative Grants (TIG) program. Management discussed those issues in the attached April 4, 2012, rulemaking options paper (ROP). Management recommended rulemaking, and the OIG agreed that rulemaking would be one way to address those concerns.

The Board asked the Committee to determine whether there was a non-rulemaking option for resolving those issues. Thereafter, staff from OLA and the OIG met to discuss whether there were any options other than rulemaking for the Board to adopt Management's interpretation of the subgrant and transfer rules. The OIG has drafted two memos to the Committee regarding the applicability of Part 1627, which are in the materials provided for the meeting on June 18. The OIG and Management continue to disagree on the interpretation of the rules.

Management agrees with the OIG that rulemaking is the best way of addressing these issues. The OIG has stated that, were the Board to adopt Management's interpretation of the rules, it cannot preclude the possibility that the OIG could find a violation of the rules in a situation in which the recipient follows the interpretation that Management and the Board have set forth, although in that situation the OIG would refer the issue to Management rather than require action by the recipient. The OIG stated to Management that, "It is the OIG's position that rulemaking would be required to adopt Management's interpretation because (a) the text and regulatory history of the existing rule do not support Management's interpretation, and (b) as written, the rule might not lend itself to easy administration in the context of the TIG program."

Management believes that, for compliance and enforcement purposes, recipients should have a definitive, uniform interpretation of the rules that is followed by both Management and the OIG. There appears to be no option other than rulemaking that would provide that level of certainty. Rulemaking would provide an opportunity to clearly address the situations identified in AU-11-01, and it would also provide an opportunity to otherwise update the rules consistent with current LSC grantmaking, requirements, and restrictions.