

LEGAL SERVICES CORPORATION  
BOARD OF DIRECTORS

TELEPHONIC MEETING OF THE  
OPERATIONS & REGULATIONS COMMITTEE

OPEN SESSION

Monday, June 18, 2012

2:33 p.m.

Legal Services Corporation  
F. William McCalpin Conference Center  
3333 K Street, N.W.  
Washington, D.C. 20007

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson  
Harry J.F. Korrell  
Laurie I. Mikva  
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

Julie A. Reiskin

STAFF AND PUBLIC PRESENT IN THE CORPORATION'S  
OFFICES:

James J. Sandman, President  
Richard L. Sloane, Special Assistant to the  
President  
Rebecca Fertig, Special Assistant to the President  
Kathleen McNamara, Executive Assistant to the  
President  
Victor M. Fortuno, Vice President for Legal Affairs,  
General Counsel, and Corporate Secretary  
Mark Freedman, Senior Assistant General Counsel,  
Office  
of Legal Affairs  
David L. Richardson, Comptroller and Treasurer,  
Office  
of Financial and Administrative Services  
Jeffrey E. Schanz, Inspector General  
Laurie Tarantowicz, Assistant Inspector General and  
Legal Counsel, Office of the Inspector General  
Matthew Glover, Associate Counsel, Office of the  
Inspector General  
Tom Hester, Associate Counsel, Office of the  
Inspector  
General  
David Maddox, Assistant Inspector General for  
Management and Evaluation, Office of the  
Inspector General  
Ronald "Dutch" Merryman, Assistant Inspector General  
for Audit, Office of the Inspector General  
Glenn Rawdon, Program Counsel, Office of Program  
Performance  
Emily Gydesen, Intern, Executive Office  
Flor Gardoa, Intern, Office of Legal Affairs

Terry Brooks, American Bar Association Standing  
Committee on Legal Aid and Indigent Defendants  
(SCLAID)  
Chuck Greenfield, National Legal Aid and Defender  
Association (NLADA)

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

1

2

(2:33 p.m.)

3

CHAIRMAN KECKLER: We'll go ahead and get some preliminaries out of the way. I do want to note before we begin that this is the first meeting of the Operations & Regulations Committee after the departure of our long-time staff liaison, Ms. Mattie Cohan, who has gone on to another position. And I have expressed thanks and appreciation for her long period of service to the Committee.

11

The first matter to be considered is the approval of our agenda for today. May I have a motion to approve the agenda?

13

14

## M O T I O N

15

MS. REISKIN: Motion to approve.

16

MS. MIKVA: Second.

17

18

CHAIRMAN KECKLER: Thank you. Laurie, was that you?

19

MS. MIKVA: That was me.

20

CHAIRMAN KECKLER: All in favor?

21

(A chorus of ayes.)

22

CHAIRMAN KECKLER: The agenda is now

1 approved.

2 We now can move on to the approval of the  
3 minutes from our in-person board meeting on April  
4 16th, which you should all have been sent a copy of.

5 May I have a motion to approve the minutes?

6 M O T I O N

7 MS. MIKVA: So moved.

8 MR. LEVI: Second.

9 CHAIRMAN KECKLER: All in favor?

10 (A chorus of ayes.)

11 CHAIRMAN KECKLER: Without objection, the  
12 minutes are approved.

13 Our first item of substantive business is  
14 to consider and act on revisions to the Board's  
15 contributions protocol, which I think was sent to  
16 all board members about a week ago with the  
17 revision. And without further ado, I will now turn  
18 it over to Victor Fortuno. You may have to speak up  
19 or come by here since we have limited sound  
20 equipment.

21 MR. FORTUNO: Can everyone hear me clearly?

22 MS. MIKVA: Yes.

1           MR. FORTUNO: I guess those who couldn't  
2 weren't in a position to respond.

3           This actually goes back to a discussion  
4 that was had for the first time December of last  
5 year, and there was some discussion of the revised  
6 protocol that was adopted by the Board on April 17,  
7 2010.

8           What we've done is try to incorporate the  
9 thoughts that were expressed during that call and  
10 other conversations into a proposed revised  
11 protocol, and that's what was sent to you. What was  
12 sent to you should be three pages long -- two and a  
13 half pages long -- and that would replace the  
14 current protocol, which is the one-page-long  
15 protocol adopted on April 17, 2010.

16           So far we've received -- I know that we  
17 received by mail comments from Julie. I don't know  
18 that any others were received. And I think that we  
19 can go through the protocol. Well, to start with,  
20 are there any questions? And then maybe address the  
21 two that -- Julie had actually raised three, but two  
22 concerning the writing of the protocol itself, that

1 is, possible revisions to provisions in this draft  
2 revised protocol.

3           So first, are there any questions  
4 concerning the draft revised protocol? It's  
5 organized -- what it covers --

6           MR. KORRELL: Vic, this is Harry.

7           MR. FORTUNO: Harry.

8           MR. KORRELL: Vic, could you, just in  
9 literally two or three sentences, remind us why  
10 we're making changes?

11           MR. FORTUNO: I think that what happened  
12 was when we discussed it back in December of last  
13 year, it became clear that the protocol doesn't  
14 address all of the circumstances that it might. And  
15 there was also concern about things like grants.

16           The protocol didn't distinguish between  
17 grants and other contributions. What this does is  
18 it defines grants as the funding that's provided in  
19 response to a request for proposal, or some  
20 equivalent application process. And it  
21 distinguishes grants from contributions that are  
22 either solicited or not solicited.

1           And for grants, it sets forth a handful of  
2 categories which are preapproved so that while the  
3 Board is given notice, advanced notice, the  
4 preapproved categories would not require board  
5 approval in every instance.

6           And I think those are the significant  
7 changes, although there are a fair number throughout  
8 the document. But I think the three main changes,  
9 or the two, are the distinguishing grants from other  
10 contributions and setting forth the preapproved  
11 categories where the Board, while given advanced  
12 notice, isn't required to actually act on a request  
13 for approval.

14           CHAIRMAN KECKLER: I should, I think, just  
15 add one little addendum to that, which is that in  
16 terms of the changes from the last go-around, if you  
17 recall, we brought up a revised protocol from  
18 earlier and there were some suggestions about that.

19           We added in a couple of items that have  
20 arisen that have been important in the Institutional  
21 Advancement Committee and, for the Board, two other  
22 preapproved grant projects, for the advancement of



1 pro bono and for the support of private development,  
2 the idea of getting fundraising for fundraising, of  
3 bootstrapping a development operation.

4 So those are a couple of substantive  
5 additions to the list of grants from the last go-  
6 around.

7 MR. FORTUNO: And I think it was as to two  
8 of the preapproved categories that Julie had some  
9 suggestions on. If you look at page 1 of what was  
10 sent to you, it's the fourth bullet from the bottom,  
11 "Grants for programs to educate the public about the  
12 role of LSC-funded legal services in their  
13 communities and about LSC."

14 And I think that Julie's suggestion was  
15 that we should consider expanding that to include  
16 access to justice issues, matters related to access  
17 to justice, not just limiting it to educate the  
18 public about the role of LSC-funded legal services  
19 providers.

20 And then -- yes?

21 MS. REISKIN: That wasn't mine, but I think  
22 it's a great idea. I had three others. But I think

1 that's a wonderful idea, so I'll take credit.

2 MR. FORTUNO: And then someone suggested  
3 expanding the bullet beneath that, which currently  
4 reads, "Grants to support appreciation/recognition  
5 events for LSC employees." The suggestion was made  
6 to expand that to include recognition of grantees  
7 and volunteers and others that the Board determines  
8 would be appropriate to recognize.

9 And those were the two comments that I was  
10 aware of. I don't know if there were any others.

11 MS. REISKIN: Yes. This is Julie. I just  
12 thought, the second bullet, is there a reason why we  
13 can't also get grants to provide training in TA to  
14 LSC staff? It just says grant recipients.

15 And I was wondering if on the third bullet  
16 we should put a proviso there, if it's necessary to  
17 put a proviso there, that says, as long as this  
18 wouldn't compete with a grantee. And I don't know  
19 if that's necessary or not. Those are my comments.

20 MR. FORTUNO: Yes. The third bullet is the  
21 fellowships?

22 MS. REISKIN: Yes. It looks like we would

1 be getting fellowships for grantees. Right?

2 MR. FORTUNO: Yes.

3 MS. REISKIN: Would there be an issue with  
4 grantees saying, we want to get our own fellowships?  
5 I just don't know enough about this to know if  
6 that's even an issue or not.

7 MR. FORTUNO: I don't know that it is. The  
8 fellows --

9 MS. REISKIN: If it's not, then that's  
10 fine. Like I said, I don't know how law school --  
11 those things work. But --

12 MR. LEVI: But I wondered whether we didn't  
13 want to also include senior or retired lawyers in  
14 this category, too.

15 MR. FORTUNO: We can certainly do that.

16 CHAIRMAN KECKLER: Right. We can just make  
17 it simple and say, grants for fellowships.

18 MR. LEVI: Yes.

19 CHAIRMAN KECKLER: I think that's the --  
20 there could be a number of people that are in a  
21 position to do that. So that's saying recent --  
22 that just creates what's recent.

1           MR. LEVI: I agree with you because they  
2 could be mid-career. They could be somebody who had  
3 been working part-time. Can't we just broaden that  
4 out a little?

5           CHAIRMAN KECKLER: Yes. Somebody returning  
6 to work after --

7           MR. LEVI: Right.

8           CHAIRMAN KECKLER: -- leverage to raise  
9 kids. A lot of people can -- there's a lot of  
10 possibilities. So yes, I think less is more on that  
11 one.

12           Okay. Were there more suggestions?

13           MR. FORTUNO: Those are the only --

14           MS. REISKIN: Well, around less is more --  
15 this is Julie -- could we say grants for projects to  
16 provide training and technical assistance, period?

17           CHAIRMAN KECKLER: I think that in that  
18 case, your earlier suggestion of just talking about  
19 LSC staff -- training and technical assistance,  
20 that's a pretty broad thing. It could be anything.

21           I think it's true, but it could be training  
22 and technical -- training for LSC staff, is a

1 reasonable thing, to send people to training  
2 conferences, learning new skills, funded by somebody  
3 else. Not that that's fair, but it sounds like  
4 generally a good thing.

5 Yes?

6 PRESIDENT SANDMAN: This is Jim Sandman. I  
7 wanted to raise a question about the third-to-last  
8 bullet on page 1, "Grants to support appreciation/  
9 recognition events for LSC employees."

10 Two things strike me about that. One, that  
11 kind of support is unlikely to come through a grant  
12 process as it's defined in the protocol. And  
13 second, it appears to overlap or perhaps be  
14 duplicative of the third paragraph of section B,  
15 "Solicitation of Non-Grant Contributions."  
16 Solicitations for modest donations, not to exceed a  
17 total of \$3500 per event, for LSC staff events and  
18 functions.

19 So what's the difference between an  
20 appreciation/recognition event and a staff event?  
21 My suggestion would be to simply incorporate what's  
22 in the third-to-last bullet under A, Grants, into

1 the third paragraph of B.

2 MR. FORTUNO: B is solicitation of non-  
3 grant contributions, whereas A is grants.

4 CHAIRMAN KECKLER: We can do it either way.

5 MR. FORTUNO: Well, no. I think that --  
6 you're right.

7 MS. REISKIN: Foundation don't pay for  
8 staff appreciation events. Is that what your issue  
9 is?

10 CHAIRMAN KECKLER: There's unlikely to be  
11 an RFP for an application process for a recognition  
12 event.

13 MR. FORTUNO: I think we can take it out of  
14 A because, as you said, that's not likely to occur  
15 that we would submit a proposal and a response to an  
16 RFP for a grant for recognition events. It's likely  
17 to come up in the context which is discussed in B,  
18 and that would be non-grant.

19 And there's a procedure laid out in B.  
20 It's the third paragraph that you've identified for  
21 requesting and accepting those. So I think we can  
22 just delete where it appears in A and keep what

1 appears as the third paragraph of B.

2 MR. LEVI: Say that again? Because I --

3 MR. FORTUNO: Where it appears in section  
4 A, under Grants.

5 MR. LEVI: Yes.

6 MR. FORTUNO: It's the third bullet from  
7 the bottom, "Grants to support  
8 appreciation/recognition events for LSC employees."

9 MR. LEVI: Yes.

10 MR. FORTUNO: We could strike that, and  
11 what we have at B seems to meet the concern. What  
12 we have at B, the third paragraph, is that, "Exempt  
13 from the requirement but subject to the approval of  
14 the President of LSC are: 1) Solicitations for  
15 modest donations, not to exceed a total of \$3,500  
16 per event, for LSC staff events/functions, and 2)  
17 fundraising among LSC staff for charitable causes."

18 It's that clause A, solicitation of modest  
19 contributions not to exceed 3-5 per event --

20 MR. LEVI: Well, let me --

21 MR. FORTUNO: -- for LSC staff events and  
22 functions, that I think covers it.

1           MR. LEVI: Well, let me speak to that  
2 because this is the one issue that I wanted to speak  
3 to because I don't want to trip on these things.  
4 And it was my, I guess, nearly tripping that caused  
5 me to get excited about this protocol in the first  
6 place.

7           So when my law firm hosted the reception, I  
8 never asked them whether it was 3500. I have no  
9 idea what it cost. They just paid it. They hosted  
10 the LSC reception. I don't think you want to get  
11 the chairman of the board in trouble for having his  
12 law firm host a local reception, and I don't think  
13 he should have to go to the Board, or she, to get  
14 advance approval. This is really getting silly.  
15 And I think --

16           CHAIRMAN KECKLER: John, I think --

17           MR. LEVI: -- you guys need to figure that  
18 out because I really object to being put in that  
19 kind of position. I don't want to go to the firm  
20 and say, you can't spend more than 3500, and if you  
21 do, you're going to trip my protocol. I mean, come  
22 on. They may have 300 people. They might have 500



1 people.

2 MR. FORTUNO: Was that a donation, or was  
3 that -- is there a distinction between a donation  
4 and their having hosted and paid for directly?

5 CHAIRMAN KECKLER: We tried to address it,  
6 John. I take your point very seriously. But we  
7 tried to address it here by exempting in-kind  
8 contributions of goods and services.

9 MR. LEVI: Okay. Do you think that is a --  
10 okay. And as long as there -- I mean, we probably  
11 paid a caterer. I don't know what they set up. Is  
12 that in-kind? I suppose it is.

13 CHAIRMAN KECKLER: It never comes through  
14 us in the sense that we never --

15 MR. LEVI: If you take the interpretation -  
16 -

17 CHAIRMAN KECKLER: -- there's other people  
18 there besides LSC, too.

19 MR. LEVI: Yes. That's true.

20 CHAIRMAN KECKLER: So the question, really,  
21 is do we need something specific to deal with in-  
22 kind contributions of goods and services that people

1 very kindly sometimes do provide for us as we go  
2 around. I'm not sure about that.

3 MR. LEVI: Well, it says that they're not  
4 subject to the protocol at all. And if your  
5 interpretation is what I just described was an in-  
6 kind contribution, then I don't have an issue.

7 MS. REISKIN: Can't we exempt anything  
8 where an organization or a business does something  
9 for us?

10 MR. LEVI: Well, we have to -- not  
11 necessarily.

12 MS. REISKIN: No? Okay.

13 MR. LEVI: I think I could -- if you think  
14 that that kind of donating the reception is an in-  
15 kind contribution -- at least I have to say I do try  
16 to make -- when I speak, I always say, I don't want  
17 anything lavish, because I don't want to get into  
18 anything like that. So we do have to use good  
19 judgment in it, even with in-kind contributions.

20 CHAIRMAN KECKLER: Certainly. But --

21 MR. LEVI: Yes. But they're not -- yes.  
22 The protocol is the protocol.

1           CHAIRMAN KECKLER: The protocol is about  
2 funds. The protocol right now is -- there are many  
3 complications, including people's pro bono services  
4 and other things like that that have occurred, that  
5 we're not addressing here. We're just trying at the  
6 moment to deal with the issue of funds. But that's  
7 a point to be kept in mind.

8           There was one other question, Julie, that  
9 you had about the \$3500 limit, and why we've chosen  
10 the \$3500 limit.

11           MS. REISKIN: Yes. I was just curious why  
12 that number, and is that the right number, just  
13 because I know with foundations, they often look at  
14 5- or 10,000 for discretionary smaller grants. But  
15 if that's -- I don't care. It just seems like a  
16 small -- I just didn't know why that instead of a  
17 little bit higher, just to give staff more  
18 flexibility.

19           CHAIRMAN KECKLER: It's nowhere in statute,  
20 the \$3500, that I know about. The only reason that  
21 it made sense to me is that it cost about that much  
22 to actually convene the 11 members of the Board for

1 a decision. So if you had to act quickly and you  
2 had to convene a special board meeting for anything  
3 like that, it would cost at least \$3500 to do that.

4 MR. LEVI: But that seems like it should  
5 suggest that 5,000 is a better number. But I don't  
6 know.

7 MR. FORTUNO: Are we talking about C,  
8 Unsolicited Contributions?

9 MR. LEVI: Yes.

10 CHAIRMAN KECKLER: Well, we've matched B  
11 and C at the moment to put the same number in there.  
12 But it wouldn't have to be that, either.

13 MR. FORTUNO: Because I think under C, what  
14 we have is if it's less than \$3500, the President or  
15 his or her designee is authorized to accept the  
16 donation. If it's over \$3500, it doesn't require  
17 board approval, but it does require notice to the  
18 Board. So it wouldn't require the Board coming  
19 together.

20 CHAIRMAN KECKLER: Right. Well, that's a  
21 good point. Yes. So it doesn't really -- it's just  
22 notice. Yes.

1           MR. FORTUNO:   And if for whatever reason  
2   there was concern on the part of the Board about  
3   that particular contribution, the Board would have  
4   an opportunity, since what the protocol requires is  
5   at least ten days' business notice.  This would  
6   afford the Board an opportunity to schedule a  
7   meeting, if it felt the need to.  But otherwise,  
8   it's just a matter of notice.

9           MS. REISKIN:   Again, I just think that's a  
10  small amount to do that for, to say to a donor who  
11  wants to give us \$5,000 for something, well, you're  
12  going to have to wait ten days because I have to --  
13  I don't know.

14          CHAIRMAN KECKLER:  If people want to raise  
15  it to \$5,000, I'm quite indifferent about that.

16          MR. LEVI:    But I'd do it in both places.

17          CHAIRMAN KECKLER:  Then do it in both  
18  places.  All right.  That's fine.

19          MR. LEVI:    Just based on the cost of  
20  pulling everybody together, that -- yes.

21          CHAIRMAN KECKLER:  Yes.  All right.  So  
22  with these amendments, which I think you've been

1 accumulating there, I think the next step for us is  
2 to go ahead and submit this to the Board. It's  
3 ultimately a Board protocol. So what's being asked  
4 of the committee is to recommend this revised  
5 contributions protocol, with the incorporations of  
6 today, to the Board. Is that right?

7 MR. FORTUNO: I just have one question. I  
8 know we discussed the bullets under A.

9 CHAIRMAN KECKLER: Oh, okay.

10 MR. FORTUNO: We touched on expanding the  
11 third and fourth bullets from the bottom of page 1.  
12 But I don't think that there was any kind of  
13 resolution there, so I don't know whether we are  
14 leaving it as is or expanding it. I think we're  
15 taking out --

16 CHAIRMAN KECKLER: We're taking out the  
17 third one from the bottom, "Grants of Support," and  
18 then the fourth one from the bottom was, the  
19 suggestion had been to educate the public about  
20 access to justice instead of just LSC-funded legal  
21 services providers.

22 MR. LEVI: This is in addition to?

1           CHAIRMAN KECKLER: Yes. Yes, in addition  
2 to. That's part of the access to justice. But yes,  
3 to expand that. And I didn't hear any particular  
4 objection to that as a pre-approval. We're going to  
5 get notice of what we're doing. But as a general  
6 matter, that seems like something that could be part  
7 of our grants.

8           All right. So with that, I think we're  
9 ready for a motion. Or not.

10                           M O T I O N

11           MR. LEVI: Here we are, but -- I'll make  
12 it.

13           CHAIRMAN KECKLER: Okay. The motion is to  
14 recommend to the Board of Directors the adoption of  
15 the revised contributions protocol.

16           MS. MIKVA: Second.

17           CHAIRMAN KECKLER: All in favor?

18           (A chorus of ayes.)

19           CHAIRMAN KECKLER: The motion is approved,  
20 and we will take that recommendation to the next  
21 board meeting.

22           We can now move to the second item on the

1 substantive agenda, which is to consider and act on  
2 the rulemaking options paper on possible amendments  
3 to LSC's regulation on subgrants. Now, we received  
4 a number of documents from Management as well as the  
5 Office of the Inspector General on this point.

6           If people recall, and I'll turn it over in  
7 a second, this was a discussion at the previous  
8 committee meeting. We went to the Board. The Board  
9 then asked the committee to reconsider this, if  
10 there's an alternative to rulemaking. And then we  
11 immediately passed that back on to Management and  
12 the Office of the Inspector General.

13           And so there's a variety of issues that are  
14 going to come up. But I think ultimately what we as  
15 a committee have to do is to answer the question  
16 that the Board posed to us, which is, is there an  
17 alternative to rulemaking, and take that answer back  
18 to the Board.

19           So with that framing, I will now turn it  
20 over to you, Mr. Freedman.

21           MR. FREEDMAN: This is Mark Freedman of the  
22 Office of Legal Affairs. I'm no Mattie Cohan, but



1 hopefully I will serve well in this capacity.

2           You've seen there's a memo from myself, and  
3 then there's a few memos from the Office of the  
4 Inspector General. The thrust of it is that both  
5 the Inspector General and Management still recommend  
6 rulemaking as the best thing to do to address  
7 questions about the interpretation and application  
8 of the subgrants and transfer rules.

9           To summarize that, there's no clear option  
10 that would enable the Board to adopt Management's  
11 longstanding application of the rule without a risk  
12 of future findings of violations. Rulemaking is the  
13 best option here because it's the only one to truly  
14 resolve this issue with some finality.

15           And part of that is because there is -- you  
16 can see, from the variety of interpretations that  
17 have been put out before you, there is a broad range  
18 of possible interpretations and applications of this  
19 rule. Rulemaking will enable the Board to narrow  
20 that to one clear application so that there won't be  
21 a question of, well, what does it mean, and what  
22 will it mean in three years or five years?

1           And this is also an opportunity to  
2 otherwise update this rule. And with the subgrants  
3 rule having been adopted in the early '80s, and then  
4 the transfer rule adopted in the mid-'90s, there was  
5 a plan at the time, in the mid-'90s, to go back and  
6 look at the two of them, revise the subgrants rule.  
7 That never happened. So this is also an opportunity  
8 to really pick that up.

9           So all put together, there does not seem to  
10 be a viable non-rulemaking option, and there are a  
11 lot of advantages to proceeding with rulemaking.

12           CHAIRMAN KECKLER: And you've determined  
13 this, in part, in conversations with the Office of  
14 the Inspector General. Is that --

15           MR. FREEDMAN: Yes. I met with Dutch and  
16 Laurie and Matt, and we had a couple of meetings.  
17 We've had extended conversations about this,  
18 exploring the various possibilities and options,  
19 with the core question before us: Is there a way of  
20 resolving this?

21           And our real test for that: Is there a way  
22 for resolving this where, going forward, we are not

1 coming back to this question of what does it mean,  
2 and especially the question from the point of view  
3 of the recipient. The recipients want to know, what  
4 do I do? What do I really on? I don't want to get  
5 in trouble. I want to follow the rules. And  
6 rulemaking seems to be the only way to say that with  
7 certainty.

8           CHAIRMAN KECKLER: All right. So I'm going  
9 to characterize something, and you go ahead and  
10 object. And maybe someone from the Office of the  
11 Inspector General wants to object to it, so go  
12 ahead.

13           But the question was raised at the last  
14 board meeting. And it was a serious question, but  
15 is this the kind of thing that you really need  
16 notice and comment rulemaking for? Does it change  
17 the rights of the grantees?

18           And the idea of notice and commenting  
19 rulemaking -- we need a rule; if it really affects  
20 the grantees, if it's not just supporting an  
21 interpretation of a rule but changing rights,  
22 duties, immunities, of affected entities.

1           So this prompted me to think about it for  
2 some time. And then my conclusion, after your  
3 presentation, after receiving the information for  
4 this, is that it does affect the rights of the  
5 grantees because, effectively, it gives them a safe  
6 harbor, a right to follow, at minimum, the policies  
7 that have been enforced by Management as far as  
8 subgrants go without the risk of being found in  
9 violation by the Inspector General's Office pursuing  
10 its own independent, good faith interpretation of  
11 the regulation.

12           So that creation of a safe harbor is what I  
13 would say is the substantive change. Is that a fair  
14 --

15           MR. FREEDMAN: I'll provide, I guess, one  
16 thought on that; and then if anyone from the IG  
17 wants to add anything, they're here in the room. I  
18 think it is in that with the core question of what a  
19 grantee can do to know that there will not be a  
20 violation down the road.

21           And I should note here that the Inspector  
22 General has pointed out that they distinguish

1 between finding a violation, where they think  
2 something isn't meeting the rule, and then what's  
3 the recommended action to take.

4           And they recognize that there may be  
5 situations where I would characterize it as a good  
6 faith violation. It isn't that the grantee has gone  
7 out to violate the rule; they have relied on  
8 something, and the Inspector General recognizes that  
9 there are situations where it isn't the grantee's  
10 fault, as it were. There's a different issue of  
11 dispute. But nonetheless, they might find a  
12 violation.

13           So to clearly address that and change that  
14 situation, rulemaking would be necessary. And is  
15 there anything that the IG wants to add to what I've  
16 just said?

17           MR. GLOVER: This is Matthew Glover from  
18 the Office of the Inspector General. I think that  
19 your characterization is a viable one on  
20 Management's interpretation of the rule. As  
21 explained in the OIG's memos, we think that there  
22 really is a much stronger interpretation going one

1 way which creates this problem.

2           If there was a tossup question, I think the  
3 OIG would be much more amenable to interpretive  
4 guidance. But with the authority that we've seen  
5 out there, as outlined in our memo, we think that  
6 regulation is the way to provide certainty going  
7 forward.

8           CHAIRMAN KECKLER: Thank you. Okay. So  
9 with that -- and thank you also for the memo, and  
10 especially for the executive summary of the memo --  
11 with that presentation, are there further questions  
12 or thoughts from the committee or the Board?

13           (No response.)

14           CHAIRMAN KECKLER: Good. So I think the  
15 question we were posed to answer by the Board is:  
16 Is there an alternative to rulemaking that will  
17 resolve this issue? And I think the answer is no.  
18 So we had a yes/no question ultimately, and I think  
19 we have an answer to that to take back to the Board.

20           Now, is there anything more that we need to  
21 do?

22           MR. FREEDMAN: This is Mark Freedman again.

1 I think that procedurally, the Board sent it back to  
2 the committee with that question. And from the way  
3 it was couched, unless there is any change that the  
4 committee wants to consider for the original  
5 recommendation, the simplest thing is that you're in  
6 a position to say that the answer is no.

7 And so you are re-recommending to the Board  
8 or reopening your recommendation to the Board that  
9 they vote on going ahead with starting a rulemaking  
10 process for amending the rule going forward.

11 CHAIRMAN KECKLER: So what you're  
12 suggesting is that procedurally, we should move to  
13 re-recommend -- we'll just recommend.

14 (Laughter.)

15 CHAIRMAN KECKLER: Again. Re-recommend.  
16 So on advice of counsel here and -- no. As a matter  
17 of having answered this question, I think the proper  
18 next step is that this committee move to once again  
19 recommend to the Board a rulemaking begin to resolve  
20 this subgrant issue.

21 MR. FREEDMAN: And transfer.

22 CHAIRMAN KECKLER: And transfer issue.

1 MS. MIKVA: I --

2 CHAIRMAN KECKLER: I don't --

3 MS. MIKVA: Go ahead.

4 CHAIRMAN KECKLER: Go on, Laurie.

5 M O T I O N

6 MS. MIKVA: I so move.

7 CHAIRMAN KECKLER: Is there a second?

8 MR. LEVI: I'll second and ask a question.

9 Have we seen what the proposed rule would look like?

10 MR. FREEDMAN: That's really the next step,  
11 is starting to come up with some language to kick  
12 around with for a proposed rule. We have some  
13 concrete thoughts, but we haven't drafted anything  
14 yet on that.

15 CHAIRMAN KECKLER: Yes. This would just be  
16 the first step to it. And obviously, we definitely  
17 would need to see the language and so on.

18 MS. MIKVA: So we're moving that a proposed  
19 rule be developed?

20 CHAIRMAN KECKLER: Yes. That's what we're  
21 moving -- or, well, that --

22 MR. FREEDMAN: You're asking the Board to



1 direct Management to start to come up with a  
2 proposed rule. Or, actually, one of the questions  
3 is whether you want to -- a proposed rule or an  
4 advancement of a proposed rulemaking.

5 I think the recommendation of the committee  
6 from the last meeting was to go ahead with the  
7 proposed rule such that the Board could then act on  
8 that at the next full board meeting. And then  
9 Management can draft the document for the following  
10 full board meeting. We may be able to provide some  
11 concrete stuff to talk about in between, but  
12 procedurally, I think that's how we have to follow  
13 the steps.

14 CHAIRMAN KECKLER: Right. The motion on  
15 the table is to recommend to the Board once again  
16 that the Board direct Management to prepare an NPRM.  
17 So we're not necessarily issuing the NPRM, but we're  
18 asked to prepare one.

19 MS. REISKIN: This is Julie. We are going  
20 to do the kind that involves notice and comment.  
21 Right? Where people can comment if they want?

22 CHAIRMAN KECKLER: Exactly.

1 MS. REISKIN: Okay. Good.

2 MS. MIKVA: This is Laurie. I'm just  
3 confused. Why can't they go ahead and draft some  
4 sort of proposed rule that we could bring to the  
5 Board, or that we could look at in July and see if  
6 we wanted to propose it to the Board? I mean, we're  
7 not doing anything concrete at that, still.

8 MR. FREEDMAN: I think that we can easily  
9 start drafting stuff so that we can be providing  
10 some concrete materials to chew on. I think that  
11 procedurally, we wouldn't -- I can doublecheck the  
12 rulemaking protocol.

13 I think, procedurally, we need the Board to  
14 direct us to actually draft the NPRM so then we can  
15 bring it to the committee and the Board at the  
16 following meeting. But that doesn't mean we will  
17 just leave the issue hanging for a long time.

18 I think we can, amongst other things,  
19 identify the main issue, and potentially the  
20 committee can have an opportunity to discuss at the  
21 next committee meeting what are some of the things  
22 that we are likely to put into that draft rule.

1           And it will also give us a chance to have  
2 some concrete things to discuss, with feedback from  
3 the Inspector General's office, and with thoughts  
4 from the Office of Program Performance as to how  
5 that might work with the current grantmaking. I  
6 think we can move forward while we are waiting to  
7 officially start drafting an NPRM.

8           CHAIRMAN KECKLER: Right. The more you  
9 have for the Board to look at, probably, will be the  
10 better. But in the rulemaking protocol, the first  
11 step is that this committee recommends that an NPRM  
12 -- recommends to the Board that they direct the  
13 presentation of the NPRM. So since the Board hasn't  
14 yet directed Management, we need to get that first  
15 step -- get it to the Board with a recommendation.

16           MR. KORRELL: Charles, I apologize. This  
17 is Harry, just to take the risk of asking what was  
18 just answered. Can we not ask staff, in support of  
19 the committee's work, to go ahead and draft  
20 something for us to consider?

21           MR. LEVI: A little like a motion  
22 instantis, you know.

1           CHAIRMAN KECKLER: Well, in the rulemaking  
2 options paper, they can put whatever they want.  
3 They can put actual, here's an option. There's a  
4 rule, that they can describe in a revised -- so  
5 let's just say that in the revised rulemaking  
6 options paper, which could be presented to the  
7 Board, as much substantive language could be put in  
8 as possible.

9           So that would comply, I think, with the  
10 rulemaking protocol, but would also do what I think  
11 all of us like, which is to see actual regulatory  
12 language, proposed regulatory language there for us  
13 to chew on.

14           MR. FREEDMAN: This is Mark Freedman. The  
15 first rulemaking options paper was focused on why,  
16 and it sounds like the committee perhaps is asking  
17 for a supplemental options paper that's a little  
18 more of a what.

19           CHAIRMAN KECKLER: Yes.

20           All right. So the motion's on the table.  
21 We've had discussion. All in favor?

22           (A chorus of ayes.)

1           CHAIRMAN KECKLER:   Opposed?

2           (No response.)

3           CHAIRMAN KECKLER:   Without objection, we  
4 will carry that recommendation to the Board at its  
5 next meeting.  And we've also directed Management to  
6 prepare a new supplementary rulemaking options paper  
7 that is more of the what is being asked.

8           Our final item of substantive business  
9 today is with regard to the comments on our  
10 currently active rulemaking on termination,  
11 enforcement, and suspension procedures.  And you  
12 should have received a table of comments as well as  
13 Management's analysis of the comments on the notice  
14 of proposed rulemaking on alternative sanctions.

15           And I will now turn it over again to Mr.  
16 Freedman to discuss those comments and how  
17 Management is addressing the comments on that  
18 rulemaking.

19           MR. FREEDMAN:   Thank you.  I'll essentially  
20 summarize the memo.  We have 19 comments.  The  
21 Office of the Inspector General had a detailed  
22 analysis supporting the rule, had some concerns and

1 some suggestions.

2           There were 18 comments that were opposed.  
3 Primarily the comments were saying that they felt  
4 the rule was unnecessary, given our other options  
5 and the current low level of noncompliance issues.  
6 But if the rule was adopted, they pretty uniformly  
7 recommended having standards and the process in it.

8           There were 14 sets of grantees, the ABA's  
9 Standing Committee on Legal Aid, NLADA, and the New  
10 York State Bar Association all submitting comments.

11           The memo from Management here has  
12 Management's reflections on this, and generally the  
13 thrust of them is that Management recommends going  
14 forward with this rule. One of the core concerns  
15 was that about client services and how anything that  
16 takes away money from a grantee is going to affect  
17 client services.

18           That's something that was of particular  
19 importance to Management because it reflects the  
20 fundamental difficulty of compliance, when what  
21 we're talking about is LSC recipients that are  
22 delivering legal aid. And we all have the common

1 goal of getting more legal aid out there.

2           The goal is compliance, and noncompliance  
3 is fundamentally not good for clients and  
4 potentially not good for the national program. So  
5 the hope is that this is a tool that will have a  
6 deterrent effect, and that if there are situations  
7 in which funds have to be taken away as a lesser  
8 reduction of financing, then those will still be  
9 recovered into the basic field pool, and they will  
10 still be available for client services.

11           So overall, the goal here is protecting the  
12 program and ensuring long-term client services are  
13 being maintained and of a high quality and without  
14 problems that compliance concerns raise.

15           There are a number of adjustments. Some of  
16 them are minor and technical, and some of them are  
17 more substantive that Management can explore and  
18 that Management thinks would be consistent with the  
19 rule. In particular, Management is ready to  
20 recommend adding to the process in the rule an  
21 internal appeal to the President.

22           This would make the process of the rule

1 really mirror the process for 1630 disallowed costs.  
2 The process in the NPRM was modeled on the  
3 suspensions, but which does not have an appeal to  
4 the President in it.

5 I won't go into the details of all the  
6 different comments. I think that probably the best  
7 thing here is if committee members have questions,  
8 this is probably a good time to have a discussion.  
9 And I don't know if the chair wants to do anything  
10 about public comment.

11 CHAIRMAN KECKLER: Well, I'll tell you  
12 what. On the agenda, what we have is we have a  
13 public comment right as part of this item, separate  
14 from regular public comment, as part of our  
15 rulemaking.

16 I'll go ahead and have the committee and  
17 board members go ahead and ask you questions in  
18 response to your report, and then after that's been  
19 played out, we'll go ahead and open it up  
20 immediately for public comment on this issue  
21 specifically.

22 I do appreciate the work that's gone into



1 the memo. And I wanted to also say that at the last  
2 meeting, I expressed some concerns about the  
3 procedure, the process of how this is going to go on  
4 internally because it's really an accountability  
5 issue for grantees, and we need to equally be  
6 accountable -- I think I'll put it that way.

7           So I also wanted to say that I appreciate  
8 the comments that have been given in all of them,  
9 all of the work that commenters put in; but in  
10 particular, some of the comments that the ABA has  
11 made about putting in an appeal to the President and  
12 so on, which is something that makes sense to me.

13           I don't think that these things will --  
14 although it does add a certain step, time and  
15 complexity, as you point out, I don't think that  
16 these things will be that common.

17           In the couple years that I've been on the  
18 Board, I can see types of things that might -- this  
19 might apply to, might/might not have applied to but  
20 might have applied to, occurring one or two times a  
21 year, maybe, something like that. So I don't  
22 anticipate a huge burden, and there will be, it

1 seems to me, a benefit in process and  
2 accountability.

3 But with that said, I'll turn it over to  
4 the rest of the committee and the Board for their  
5 reactions.

6 MS. MIKVA: This is Laurie. I'm just a  
7 little unclear what we're being asked to do now. At  
8 this point, would we be recommending to the Board a  
9 new rule, proposed rule, to go out for comment?

10 CHAIRMAN KECKLER: Well, what we need to do  
11 today, I'm not sure about what we need to do  
12 necessarily today. Next step in the rulemaking  
13 protocol -- you can jump in any time, Vic or Mark --  
14 is the preparation of a draft final rule, which we  
15 obviously don't have.

16 After the rulemaking is over -- I'm  
17 reading the rulemaking protocol here -- "Upon the  
18 close of the comment period, OLA will draft a final  
19 rule." Now, that has not occurred at this time.  
20 That's just that would seem to normally happen as a  
21 matter of course as the comments are incorporated.

22 MS. MIKVA: Now, does --

1           MR. FORTUNO:   But -- and this is Vic again;  
2   sorry for interrupting -- but I think that based on  
3   the feedback provided by the committee today and any  
4   direction provided by the committee, a draft final  
5   rule can be prepared.  It hasn't be prepared yet  
6   because we don't know what the committee's  
7   instructions are in light of the comments that have  
8   been received.

9           So that's what we're looking for now, is  
10   guidance from the committee as to what goes into the  
11   draft final rule.  Is it the rule as published for  
12   comment, or is it some revised version of that?

13           For example, one of the suggestions has  
14   been the inclusion or insertion of this appeal step.  
15   So if the committee were to direct that that be  
16   included, then the draft final rule would reflect  
17   that, and that's what would go to the Board.

18           CHAIRMAN KECKLER:  Right.  But I would also  
19   add this, that I view OLA and Management and so on  
20   as also capable of taking comments without us  
21   necessarily blessing the comments.  But if the  
22   comments make sense and are consistent with your

1 overall regulatory goals, go ahead and incorporate  
2 them, even if we haven't blessed them.

3 MR. FREEDMAN: This is Mark --

4 MS. MIKVA: Well, here's -- here's my  
5 concern, that if there's substantial changes to the  
6 rule, to the proposed rule, which it sounds like  
7 there is, is there any more opportunity for the  
8 public to make comment?

9 MR. FREEDMAN: This is Mark, and yes, there  
10 is. The rulemaking protocol sets forth the minimum  
11 procedure, in which there would be one comment  
12 period and that would be on the notice of proposed  
13 rulemaking with the proposed rule, and then the  
14 Board would consider and adopt a final rule. That's  
15 the absolute minimum.

16 We can have additional rounds of publishing  
17 a document for comment. They can be further notices  
18 of proposed rulemaking. And we certainly have done  
19 that. As we go through the history of our various  
20 rules, some of them are adopted right away. Some of  
21 them go through a couple of rounds of comments.

22 And in some cases, especially back in 1996,

1 we would have interim rules, where we'd adopt a rule  
2 immediately because the law had just changed, but  
3 then we'd have one or two rounds of comments for  
4 tinkering it and getting it just right, even though  
5 it's in effect right away.

6 So that's one of the decisions for the  
7 committee, is whether they want to -- what they want  
8 the next stage to be.

9 MS. MIKVA: Thank you.

10 CHAIRMAN KECKLER: Right. The only  
11 distinction I would make here -- and you can add  
12 more decision points here -- there's the further  
13 notice of proposed rulemaking, which is sort of a  
14 reissue, possibly, with us focusing, asking for  
15 comments specifically on new things that we put in  
16 and that have developed out of the previous round of  
17 comment.

18 We also can produce a draft final rule that  
19 will be subject to public comment, not necessarily  
20 through the Federal Register but will be available  
21 for public comment. Is that correct?

22 MR. FREEDMAN: We can do that, since it's

1 not an absolute requirement. It's not the normal  
2 Federal Register process, but we are completely free  
3 to make documents available similar to the way we  
4 make them available now in advance of the board  
5 meeting; we can make something available for any  
6 period of time for a more informal comment. And so  
7 we certainly have options.

8           The real question would be what we wanted  
9 to do following the formal Federal Register  
10 procedures, as opposed to anything outside of that.  
11 And there are precedents in agencies where,  
12 particularly in complex rulemakings, they may have  
13 various workshops or meeting groups where there are  
14 documents that aren't published in the Federal  
15 Register and formally commented on, but that are  
16 folded together into what's going to be a final  
17 rule.

18           CHAIRMAN KECKLER: So the answer to your  
19 question, Laurie, is yes. And whatever we need to  
20 make sure that there is fully public comment on this  
21 rule, we'll do. We just have to figure out what  
22 that is.

1           MR. FORTUNO:  If I may -- this is Vic again  
2  -- I think that where we are required to republish  
3  for comment is where there are material changes to  
4  provisions that affect a grantee's rights and  
5  responsibilities.

6           If the public has not been put on notice of  
7  it -- that is, if what was published for comment did  
8  not include something which we're now thinking of  
9  changing in the rule, and it's something that  
10  materially impacts on the rights or responsibilities  
11  of the grantee, then I think we have to publish it  
12  for comment because the public did not, prior to  
13  now, have notice that that was up for grabs, so to  
14  speak.

15           If, on the other hand, it doesn't impact  
16  materially on a right or responsibility of the  
17  grantees, then it's an option but not a requirement.  
18  And that's, I think, what we were talking about  
19  here.  We could handle that differently and not go  
20  the Federal Register route if it doesn't materially  
21  impact on the rights or responsibilities of the  
22  grantee and wasn't noticed prior to now.

1           MS. MIKVA:   And is it clear what "material  
2 impact a grantee" means?

3           MR. FORTUNO:   No.

4           MS. MIKVA:   Oh, okay.   Just wondered.

5           MR. FORTUNO:   I think it's case by case.

6   But if it's something purely internal, how we  
7 process something, it would not impact the rights or  
8 responsibilities of the grantee.

9           If, on the other hand, we're talking about  
10 something that changes an obligation they have or  
11 adds a new obligation, the arguably that's the sort  
12 of thing that we would have to consider publishing  
13 for comment because the public was not on notice of  
14 it simply by the prior publication of a proposed  
15 rule.

16           I think that we can't issue a proposed  
17 rule; get comment on it; after we receive comment,  
18 change the rule substantially so that the public has  
19 not had an opportunity to comment on some of the  
20 things that we've changed.   However, it's not always  
21 easy to tell because there are some things that do  
22 flow from what was published.



1           So it requires an examination of the  
2 specific issue, what's being changed in a review,  
3 what was published, to see if that's something that  
4 is fairly within the scope of what was published, or  
5 if it really is something entirely different and  
6 therefore warranting new publication for notice.

7           And of course, as I think the chairman  
8 pointed out, the Corporation can limit comment.  
9 That is, it can make it a focused request for  
10 comment so that we can identify the specific issue  
11 on which we are soliciting comment, and make clear  
12 that it's not another round of commenting on the  
13 proposed changes generally, but simply a round for  
14 comment on the new issue.

15           MS. MIKVA: Thank you.

16           CHAIRMAN KECKLER: Right. In a way, to  
17 determine all of this, again we have to have the  
18 text of the new rule. If it substantially deviates  
19 from what could be logically anticipated -- I think  
20 sometimes we talk about logically anticipated --  
21 from our prior notice, then it's new NPRM time. If  
22 it doesn't, then basically we have a choice. We

1 could issue a new NPRM or we could do to a draft  
2 final rule.

3           So that's how I work out the decision tree.  
4 But to know where we are on the decision tree, we  
5 need to see the new language and know how much we're  
6 going to change the new version from the old noticed  
7 version.

8           MS. MIKVA: This is Laurie. I should let  
9 other people ask questions here. But does  
10 Management have a clear idea -- I mean, it seems  
11 like the -- I've read through the paper, tried to  
12 read through it carefully. But in some instances,  
13 it seemed like Management hadn't really taken a  
14 position on what changes it might want to make.

15           And I guess I'm wondering whether  
16 Management has a clear position on what changes it  
17 would make if we just said, okay, show us a new  
18 rule?

19           MR. FREEDMAN: This is Mark again.  
20 Management, in drafting this memo, our goal is to be  
21 able to provide the reflections and, hopefully, help  
22 inform the discussion of the committee so that we

1 can get a sense of where the committee would like to  
2 go.

3           So for example, using what we're already  
4 been discussing, using the appeal step is something  
5 that it seems like everyone is likely to have  
6 agreement on. On some of the other issues where  
7 we've laid out, there are some options here, here's  
8 what Management thinks, we don't have a concrete --  
9 we don't have what essentially would be, in my mind,  
10 exactly what I'm going to -- what I would write out  
11 based on instructions I've been given.

12           I think that we are ready to get input from  
13 the committee as to what direction you'd like to see  
14 us go in, and also think about what we can get  
15 drafted up for the Michigan meeting and see what we  
16 can have for you, largely get the committee's  
17 feedback on what you think and, amongst other  
18 things, whether, quite frankly, it's the committee's  
19 decision and whether there are areas in which there  
20 are directions you would like us to go that we have  
21 not identified, or ways in which you disagree.

22           CHAIRMAN KECKLER: So one way to do this, I

1     suppose, is the manner that I was sort of doing is,  
2     there's a comment out there that the ABA put out  
3     about making the internal process more like the  
4     questioned cost process.

5             I, speaking solely for myself as a director  
6     and member of the committee, thought that that made  
7     some sense. And if other people have feelings about  
8     comments or potential choices, this would be the  
9     time.

10            MS. REISKIN: This is Julie. I have a  
11     couple questions.

12            One is, I guess I'd like a response from  
13     Management. There were a couple comments about  
14     people -- a couple commenters expressed concern  
15     about people being sanctioned or punished using this  
16     reduction based on a difference in interpretation.  
17     And we just finished talking about an area where  
18     there were different interpretations of a rule.

19            And I have no worry at all. If Jim Sandman  
20     was going to be running this forever, I would have  
21     no worry that that would happen. But, as we know,  
22     that isn't going to be the case. And so I guess I'd

1 like Management's response to that.

2           Is there anything we can do in the rule to  
3 prevent that from -- there will always be different  
4 interpretations. And I think there's a difference  
5 between -- I know you put in some stuff about  
6 "willful." But I'm just still worried if that  
7 doesn't -- I guess I'm just worried about that issue  
8 still.

9           MR. LEVI: So we put that the rule expire  
10 at the time that Jim steps down?

11           MS. REISKIN: Well, that would be fine, but  
12 I don't think that'll work.

13           MR. FREEDMAN: Sort of a sunset clause.  
14 Part of addressing that is the fact that we have  
15 threshold in Part 1618 about when we go to using an  
16 option like this -- and this is also a threshold for  
17 termination of suspensions -- where we need to have  
18 a persistent or an intentional violation, and a  
19 failure to take appropriate remedial or disciplinary  
20 action, and a failure to resolve it through informal  
21 resolution.

22           So I have kind of a caveat here. I think

1 that the concerns about differing interpretations  
2 and the picture and some of the comments about there  
3 being kind of a "gotcha" or disconnect here, I don't  
4 know if those -- there have been recent concerns  
5 like that, and I do know that when this was looked  
6 at back in 2008 and that issue was raised, there  
7 were some attempts to try to flesh that out. And my  
8 understanding is there weren't really current,  
9 concrete examples.

10 But if that were to occur, I think the  
11 Corporation would be hard-pressed under the rules to  
12 sanction someone for that if, as I expect would  
13 happen, the grantee would say, look, we were told A  
14 and now you're telling us B. And we would say,  
15 okay. Well, let's take a look at it. And looking  
16 at the whole situation, we're telling you you need  
17 to do B.

18 If at that point they say, okay, you're  
19 telling us we do B, we're going to do B. We're  
20 going to fix it. We're going to make that happen.  
21 And there may be some logistics about making that  
22 happen, but that can be worked out. Then we're not

1 in a position to be able to go to a sanction because  
2 we've been able to resolve this.

3           If we say, well, you need to do B, and they  
4 say, well, no. We thought you told us A five years  
5 ago, and we're sticking to A, forget it. Well,  
6 quite frankly, that's a intention the Corporation  
7 needs to be able to say, well, this is how we  
8 interpret and apply the rule.

9           I think the Corporation would be hard-  
10 pressed to punish a grantee for legitimate reliance  
11 on what the Corporation has said in the past. But  
12 the Corporation always has to have the ability to  
13 say, well, this is the way this rule works now. And  
14 if there was a misunderstanding --

15           MS. REISKIN: Right. Right.

16           MR. FREEDMAN: -- we would verify it. And  
17 it's really going forward. And that's where this  
18 data on 1618 really comes into play. It shows that  
19 the Corporation isn't just saying, oh, in the worst-  
20 case scenario, we gotcha. Now we're going to  
21 sanction you. That's not what we intend, and I  
22 think we institutionally in the future would be very

1 hard-pressed to do it that way.

2 CHAIRMAN KECKLER: As I read this, Julie,  
3 I'm reading 1618.5(b), which I think is the relevant  
4 section. So it says -- it's sort of triggered by  
5 somebody persistently or intentionally violated the  
6 Act, and then attempts at informal resolution have  
7 been unsuccessful.

8 And so it does put in some kind of  
9 requirement for us to give notice to them about what  
10 the concerns are. I think the idea of  
11 "persistently" indicates that they --

12 MS. REISKIN: Right.

13 CHAIRMAN KECKLER: Yes.

14 MS. REISKIN: And I just know -- I mean,  
15 that could just be interpreted different ways  
16 because if it's -- I'm trying to think of an  
17 example. Like in a Medicaid fraud case, you could  
18 say -- where someone again genuinely didn't  
19 understand the rules, but they provide a service  
20 every day and bill every day, it could go on for two  
21 months, and that's persistent, you know.

22 But I think if the Corporation has to try



1 to resolve it first before doing this, that eases my  
2 concern because, I mean, yes. The Corporation could  
3 change how they interpret things. And if they do  
4 that -- and that will happen; there's no way that  
5 cannot happen -- and I just think that we have to  
6 then give people, like Mark said, time to manage the  
7 logistics of doing it differently.

8           And if something then willfully just said,  
9 forget it, I'm not changing that, and attempts were  
10 made to work with them, then something should be  
11 done. But I just -- and again, I don't have -- I'm  
12 not aware of any recent examples because since I've  
13 been around, nothing like that has happened.

14           And so it's just -- again, I've heard  
15 stories about how things change dramatically around  
16 here. And I just don't want to set up a rule based  
17 on very high ethical professional standards that we  
18 have right now that we have no control over what  
19 will change. And so we want to have rules that are  
20 as solid as possible, that's all.

21           So thank you. I think that's good. And I  
22 guess, can you -- someone, and I can't remember who,

1 said this might be one or two times a year.

2 CHAIRMAN KECKLER: That was just my own  
3 estimate. That's not a -- that's not something that  
4 we're incorporating into the rule, that we can --

5 MS. REISKIN: No. I understand. I'd be  
6 interested to know --

7 CHAIRMAN KECKLER: But similar to that.

8 MS. REISKIN: I'd be interested to know  
9 from Management if you had this in the past five  
10 years. Just off the top of your head, do you think  
11 you would have used this? How often? Because I'm  
12 still kind of hung up on the need for it, too.

13 CHAIRMAN KECKLER: We had a memo on that,  
14 that came about -- when was that issued, at the  
15 January meeting or the meeting before, maybe, even  
16 in the fall.

17 MS. REISKIN: October?

18 CHAIRMAN KECKLER: Yes. October. So we  
19 had a memo on that. I don't have it in front of me,  
20 but the upshot of it was --

21 MS. REISKIN: Well, I can look it up.

22 CHAIRMAN KECKLER: Yes. The upshot of it

1 was that it was -- that's a hypothetical, in a sense  
2 that if we had it, would we have used it? But the  
3 sense of that memo was that there are circumstances  
4 where it was thought it might well have been useful.  
5 Is that a fair characterization?

6 MR. FORTUNO: This is Vic again. I think  
7 that it's not focusing on what occurred where we  
8 would have used it if we'd had it available. I  
9 think that the situation we confronted was a little  
10 different, so without getting too specific and  
11 identifying programs, let's speak in hypotheticals.

12 Say there was a program with significant  
13 issues, and we wanted some steps taken. If the  
14 grantee was at the end of his grant term, we would  
15 have more flexibility and might not need to use  
16 something like this.

17 If, on the other hand, we were just  
18 starting a new grant term and the grantee were not  
19 cooperative, we wouldn't be in a position to wait  
20 till the end of the grant term; we would have to act  
21 more expeditiously. And in a situation like that,  
22 the flexibility would be more meaningful.

1           So it can depend on things as simple as --  
2   and we may have encountered a situation where we  
3   were able to resolve it because it occurred or was  
4   discovered at the end of a grantee's grant.  If it  
5   had been discovered earlier in the process, then we  
6   might not have had so much flexibility.  We would  
7   have been in a more difficult position, and  
8   something like this would have come in handy.

9           Does that help any or --

10           MS. MIKVA:  This is Laurie.  I've been on  
11   the discussion since the beginning, and I've read  
12   every memo, and I cannot agree that there has been  
13   any explanation, any, of when this would have been  
14   needed in the past.  I'm with Julie.

15           I just -- I don't feel like I've ever been  
16   given any evidence that it's been missing in the  
17   arsenal.  The only rationale that I think we've  
18   heard, we've gotten, is that maybe it would  
19   discourage the conduct to begin with -- not that  
20   there's been an instance where it might have been  
21   used, that anyone could come up with an instance  
22   where they could imagine it would be used.

1           MR. KORRELL: This is Harry weighing in.  
2 My impression from Management is that it is  
3 something that they want. We've seen a couple of  
4 situations where the Board got very frustrated with  
5 how long it was taking to get anything to happen at  
6 a grantee after we'd discovered significant  
7 malfeasance by an executive director and slow-to-  
8 move response by the Board.

9           And I guess if it's not been a tool they  
10 had, it may not be reasonable to expect them to  
11 identify situations where they say they would have  
12 used it if they had known about it. I guess that  
13 doesn't -- I'm not too swayed by the fact that they  
14 can't point to a specific situation that it would  
15 have been useful.

16           MS. MIKVA: Well, somebody tell me,  
17 malfeasance, when you have a rogue employee, a rogue  
18 director, is that when it would be used? I can't  
19 imagine it would.

20           MR. FORTUNO: It's fairly fact-specific.  
21 If it's something that's going on unbeknownst to  
22 everyone else versus something that's going on in a

1 manner that's open and notorious, and it's being  
2 condoned explicitly or implicitly by the board of  
3 directors, that might be a different situation.

4 I think it really depends on the specific  
5 facts. And if it were a bad apple, as I said, that  
6 might be different from if it was a barrel full of  
7 bad apples. Sorry about the illustration there, but  
8 I'm grasping to make the point that it can differ.

9 If one person is doing wrong, it would be  
10 different if others are aware of it and are doing  
11 nothing about it when, in fact, it's their  
12 responsibility to safeguard against it.

13 There may be questions of internal  
14 controls. Has somebody done something wrong because  
15 the program has just refused to implement internal  
16 controls? Not everybody may know what the one bad  
17 actor was doing, but by failing to put in place  
18 internal controls, especially if they've been  
19 informed of what is advisable and declined to  
20 implement that. That may implicate the program in a  
21 broader manner.

22 MR. FREEDMAN: This is Mark Freedman. I

1 hope this might help. It's not quite a concrete  
2 example, but it is an example of how this affects  
3 the process because this is, of course, part of a  
4 step in a multi-step process.

5           And in the current process, we are working  
6 with grant conditions. We have an ongoing  
7 relationship to get a grantee to address his  
8 compliance concerns, and grantees can range greatly  
9 on where it fits in their level of priorities, and  
10 amongst other things, how they can develop resources  
11 to whatever our compliance concern is while they're  
12 trying to serve clients with an ever-increasing --  
13 or ever-decreasing pool of funds.

14           So one effect it has is it stiffens up the  
15 spine of our entire compliance and enforcement  
16 mechanism because it gives that kind of certainty  
17 of, there is something that we could and very likely  
18 would use that will have a financial impact [brief  
19 audio drop].

20           CHAIRMAN KECKLER: And I was thinking of  
21 circumstances in which, had this rule been in place,  
22 it might have been considered. It might have

1 strengthened management's hand. It might have been  
2 implemented. Nothing necessarily would have, but I  
3 can think of a couple of instances during our board  
4 service -- and I'm not going to get into the  
5 specifics of them -- where I would have seriously  
6 considered this as a potential use or potential  
7 piece of leverage with noncompliant grantees who,  
8 ultimately, some things did happen to. But this  
9 might have been an alternative.

10           So I can think of instances where it would  
11 have been useful, as distinguishing whether or not  
12 it might have been used. It nevertheless would have  
13 been useful, I think.

14           MS. REISKIN: This is Julie. I wanted to  
15 question -- Harry had said, and I've certainly felt  
16 this, too, that there have been times when we've  
17 been really frustrated with the slowness of being  
18 able to do something.

19           And my understanding is that the slowness  
20 had to do with the process and then, to some extent,  
21 having to wait till OIG finishes before LSC can do  
22 certain things. And I never saw how not having more



1 tools made it slower.

2           So I was just wondering, Harry, if either  
3 Harry or someone could explain because maybe I'm  
4 missing something. Or did I misunderstand your  
5 question or comment?

6           MR. KORRELL: No, no. That was my comment,  
7 was that it seemed like -- and you're right. I  
8 don't think this would change the fact that if OIG  
9 is doing something and we need to wait for that  
10 process to work itself out, that -- this isn't going  
11 to change that. At least, that's my understanding.

12           But not everything that comes to  
13 Management's attention that it wants to deal with  
14 comes to it as a result of an OIG investigation. I  
15 mean, that's not the only reason things take time.

16           My impression is that one of the reasons  
17 that management is unable to move any quicker is  
18 because the sanctions that are available are so  
19 substantial that it takes so much to do it, as  
20 opposed to something less substantial like this that  
21 they may be more willing and able to use more  
22 expeditiously.

1 MS. REISKIN: Oh, okay.

2 MR. KORRELL: That's my impression.

3 MS. REISKIN: Okay. Thanks.

4 CHAIRMAN KECKLER: I was going to go ahead  
5 and open it up for public comment, and if people  
6 have -- if the board members and committee members  
7 have other comments, please join in as well. But  
8 I'm going to go ahead and invite -- I know people  
9 have been waiting very patiently on the phone. So  
10 I'll go ahead and invite you to join our discussion.

11 MR. BROOKS: This is Terry Brooks with the  
12 ABA. One of the advantages of doing this  
13 telephonically is that I can reach the stack of LSC  
14 board books on my desk and tell you that the memo  
15 that you were trying to remember was from the July  
16 2011 meeting, and it did talk about the use of  
17 various enforcement tools over a period of eight  
18 years from 2000 to 2008.

19 Termination was used twice during that  
20 period, and suspension once. There were other  
21 categories, some of which were used more frequently,  
22 like imposition of special grant conditions, used 11

1 times.

2           A lot of what I have to say is anticipated  
3 by the discussion you've already had. But one thing  
4 I should point out is that the ABA's comments were  
5 intended to be constructive, not in opposition.

6           And the written comments were very  
7 carefully tailored to try to offer a fair and  
8 balanced perspective on the proposal, and not to  
9 take a position that could be perceived as  
10 obstructionist or opposed to LSC Management's very  
11 essential function of imposing accountability on the  
12 system.

13           Some of the specific points, though, and  
14 perspectives were -- and some of these may go beyond  
15 what is contemplated here. But just to sort of  
16 throw them out there, one point is whether these  
17 kind of further patchwork changes to the sanctions  
18 scheme are really useful.

19           There have been layers and layers of  
20 changes over the years, and often those are  
21 inconsistent and have imposed new approaches that  
22 don't build on old approaches, but where one reg is

1 inconsistent with another. An example of that has  
2 already been discussed, the fact that 1630, which  
3 deals with questioned cost proceedings, a fairly  
4 minor problem, does have appeal all the way to the  
5 President, and then this new proposal did not  
6 include any kind of appeal.

7 Another thing that was unclear in the  
8 current proposal is who acts on behalf of the LSC  
9 here. In some of the other regs, it's a designated  
10 employee or someone specific. Here, the prior NPRM  
11 did not really indicate who it would be, and it did  
12 seem to contemplate that the same employee, perhaps  
13 a fairly junior, inexperienced program officer,  
14 would handle the entire matter from beginning to  
15 end, including imposition of sanctions.

16 Another point is whether there's sufficient  
17 guidance on when it's appropriate to commence a  
18 sanctions action of any type. Does the regulation  
19 provide the kind of clarity that was being discussed  
20 under the prior agenda item to the employee who has  
21 to make decisions on whether to commence a sanctions  
22 action, and to the recipients of funding so that

1 they know when they may be subject to that kind of  
2 penalty. And similarly, does the regulation assure  
3 consistency both across time and across different  
4 LSC employees who might be acting in matters such as  
5 this?

6 As was referenced by Mr. Freedman, the  
7 grounds here are a bit convoluted. I guess the  
8 first place you look is 1618 for the threshold  
9 determination of whether there's been a persistent  
10 or intentional violation. And then you jump to  
11 1606.15 to find whether there has been a substantial  
12 violation. And then you jump to 1606.3(b) to  
13 determine what a substantial violation is.

14 And none of this addresses the crux of  
15 this, which is when a recipient has acted, what is  
16 an intentional violation? And it may indeed be that  
17 a recipient intended to do exactly what it did, with  
18 full knowledge of the LSC regulation and the  
19 interpretation perform that regulation, but with a  
20 firmly held belief that there is other law that  
21 compels the recipient to act in a particular way.

22 Another question is a question of the

1 ambiguities regarding the penalties. The prior NPRM  
2 turned to the same section, 1606.3(b), for both a  
3 determination of whether a violation had occurred  
4 and for the determination of the severity of the  
5 penalty that ought to be imposed.

6           Logically, those would be separate  
7 inquiries, and that would be so because when you get  
8 to, if you will, the penalty phase, there may be  
9 many other factors that LSC would want to look at --  
10 environmental factors; mitigating actions that the  
11 recipient has taken after it realized that it had  
12 committed a violation; questions of what the impact  
13 will be on clients -- when a statewide program is to  
14 be sanctioned and there's no other provider  
15 available, perhaps the severity of the sanction  
16 should be diminished, and the point to be made is  
17 more of a point of principle rather than a point of  
18 significant punishment.

19           So I think when you get to the penalty  
20 phase, there may be some other factors that should  
21 be taken into account. And again here, at the  
22 penalty phase, there's a question of whether the reg

1 provides sufficient clarity to the employee of LSC  
2 who's imposing the sanction and/or to those who are  
3 up the appellant chain of command regarding some  
4 consistency in sanctions so that similar violations  
5 are imposed on different programs which have  
6 committed the same types of infractions, and are  
7 imposed by different employees who are utilizing  
8 this process.

9           Lastly, there are some questions that the  
10 committee might want to think about concerning just  
11 appeals generally, and at the more macro level. One  
12 of the problems here is the potential for this  
13 process, and indeed the existing processes, that are  
14 entirely internal to LSC being manipulated and used  
15 to LSC's disadvantage.

16           If LSC is the one making all of the  
17 decisions, LSC may be subject to pressures that  
18 could be brought to bear by the types of industries  
19 that clients often complain about. And if LSC has  
20 to make that final decision, it may be forced to act  
21 at its own political peril, or may be forced to act  
22 in a way that appears to cause a manifest injustice.

1           All of that is to say that the process that  
2 was sketched out in the original LSC Act may be  
3 preferable, although we may be far beyond that time.  
4 But that original process called for an independent  
5 outside hearing examiner, and in many cases it may  
6 be to LSC's advantage as well as to the valuing of a  
7 recipient to have that type of independent review.

8           The real problem here is not dealing with a  
9 recipient that is relying on an old, out-of-date  
10 interpretation of a regulation, but dealing with a  
11 recipient that has a good-faith belief that it is  
12 acting as it is compelled to act by a state law,  
13 perhaps, assuring confidentiality to clients in the  
14 fact of LSC wanting to have certain information  
15 about clients revealed, for example.

16           That type of dispute is a dispute that  
17 really does belong in a more independent forum, and  
18 it would be to LSC's advantage to make sure that  
19 that type of dispute ends up in an independent  
20 forum, not being dealt with internally. But it  
21 could very well be that with these additional  
22 sanctions at its disposal, LSC may be put in a very



1 awkward position of being pushed to move forward in  
2 a situation where it would really rather leave it to  
3 a court or other independent arbitrator.

4 Thanks for the opportunity to talk, and I  
5 don't have anything more.

6 CHAIRMAN KECKLER: Thank you. And I just  
7 wanted to reiterate that I, in fact, did very much  
8 appreciate, and I think we've talking about an  
9 element of the ABA's comments here. And I do think  
10 that they were very thoughtful and constructive.

11 And I wanted to go ahead and point out just  
12 one item that you mentioned, both today and in your  
13 written comment, about the initial decision to  
14 engage in a limited reduction of funding, being the  
15 responsibility -- I think it's appropriate -- I'm  
16 not sure what the contemplation was, whether indeed  
17 the contemplation was that it be somebody junior.

18 But I think that we perhaps should be clear  
19 in the rule, or in the preamble, or however we need  
20 to talk about it, that that's not the case and that  
21 somebody who is fairly senior, an officer of the  
22 Corporation, a director, somebody of an office,

1 somebody who has some accountability and experience  
2 and judgment, should be the one who engages in even  
3 that initial decision prior to the appeal to the  
4 President.

5 But that's certainly my view, anyway. And  
6 so I'll add in my support for that point.

7 Are there further comments?

8 MR. GREENFIELD: Yes, Charles. This is  
9 Chuck Greenfield from NLADA. Can you hear me?

10 CHAIRMAN KECKLER: Hi.

11 MR. GREENFIELD: Right. Good.

12 CHAIRMAN KECKLER: Please go ahead.

13 MR. GREENFIELD: Okay, great. I'm at the  
14 airport, and so I hope I don't get too distracted.

15 Thank you for the discussion. I think this  
16 is a very good one. The NLADA submitted comments,  
17 as you know, and a third of all LSC-funded programs  
18 submitted comments, which is a fairly significant  
19 response, I think, to what is a highly controversial  
20 proposal that has been controversial since 2008 when  
21 both NLADA, a bunch of problems, and SCLAID opposed  
22 it.

1           It continues to be controversial, as you  
2 can see from the response in the grantee community.  
3 And it is a proposal that we think is not wanted by  
4 the facts. Just the discussion today is reflective  
5 of the kind of discussion that's been going on for  
6 the last four years, frankly, which is sort of a  
7 remedy in search of a problem. Here's the remedy;  
8 now, what's the problem exactly? And the  
9 hypotheticals continue.

10           Precise examples are not provided, and we  
11 do not think the need has been demonstrated nor  
12 shown. And interestingly, as we pointed out in our  
13 comments, it's not recommendation that GAO has made.  
14 It's not a recommendation that's come out of the  
15 Fiscal Oversight Task Force. It has not been  
16 identified, really, by those that have looked  
17 carefully at LSC's operations as a weakness.

18           It clearly has been something designed by  
19 the Office of the Inspector General, and we know  
20 they have continued to push this. But others that  
21 have looked at LSC's operations, including their  
22 oversight of grantees, have not recommended this,

1 and we have not seen the kind of examples as to why  
2 it's precisely needed, as had been discussed  
3 earlier.

4           There are a variety of other remedies that  
5 LSC has to get one's attention or, as Mark put it,  
6 to stiffen a spine. I would think that it would  
7 stiffen a spine even more to have the potential loss  
8 of money, termination of money, suspension of money,  
9 and a whole variety of other things -- special grant  
10 conditions, corrective actions, short-term funding,  
11 questioned costs, and debarment, the decision not to  
12 re-fund the program that Victor Fortuno mentioned.

13           Those are significant sanctions that would  
14 get the attention or stiffen the spine, as Mark  
15 indicated, of a program. And I would sure think  
16 that if Jim Sandman calls in the chair of the board  
17 or the president -- excuse me, or the executive  
18 director of a program saying that we got this  
19 problem and we're about ready to suspend your funds,  
20 or about ready to not refund you, or to put on a  
21 special grant condition that requires you, that the  
22 attention would be pretty carefully understood, I

1 think. The issue would be pretty carefully  
2 understood by the chair of the board and the  
3 executive director.

4 I think there are a variety of ways that  
5 the message can get across. So we don't think that  
6 the evidence has been shown to this committee, nor  
7 to the past Board. As you know, the past Board  
8 refused to publish a similar regulation that was  
9 proposed as well, so that, frankly, the demonstrated  
10 need is just really not present.

11 And the concern of a number of programs, as  
12 reflected in the comments, is over the effect on the  
13 client community. And I think that it's hard to, I  
14 think, grasp that until you see the level of  
15 reductions and the amount of reductions and the  
16 level of salaries, the low level of salaries  
17 throughout the country.

18 So it does not take much for a 5 percent or  
19 less than 5 percent sanction to equal one attorney's  
20 salary, which is several hundred clients, perhaps,  
21 that would be harmed, or potential clients that  
22 would be harmed, by not having that source of

1 funding. Or in the case of the longer suspension  
2 period, or not having the use of those funds for 90  
3 days, the risk could be substantial.

4           So the concern over the effect on the  
5 client community, I think, is a substantial one.  
6 SCLAID's comments do talk about how that might be a  
7 factor in determining the severity of a sanction.  
8 And I think even -- in addition to that, I would  
9 like to add that, really it's a reason not to impose  
10 a sanction at all.

11           And I appreciate the comments made by Mark,  
12 and Jim's willingness to show some flexibility in  
13 the area of due process by having an appeal to the  
14 President. I think that's helpful. I think it  
15 doesn't resolve the reason or the lack of need for  
16 the sanctions themselves.

17           I also think it needs to be fleshed out a  
18 little more. I'm also concerned, as raised by a  
19 couple of board members, as to exactly what this  
20 committee is considering at this point because it's  
21 hard to tell what the proposal is. While showing  
22 some flexibility in a couple of areas, it's not

1 clear exactly what that flexibility means in terms  
2 of actual language. And it shows you how far that  
3 goes.

4           It is pointed out in our comments,  
5 certainly, that one way to go, if the Board insisted  
6 on proposing these -- implementing, I should say,  
7 the additional less than 5 percent sanction, up to  
8 90-day suspension, that if you could look at what  
9 other parts of the federal government does,  
10 particularly in the grants to legal services  
11 programs -- you look at Department of Justice  
12 programs, a sanctions hearing before ALJs or a DOJ  
13 official without prior involvement; offers of proof,  
14 take depositions; settlement conferences; procedural  
15 requests; recommended seizure; right to rehearing;  
16 HUD, the housing counseling and fair housing and  
17 issues programs -- these are probably the largest  
18 other sources of federal funds for legal services  
19 programs.

20           Appeals to a hearing officer, ALJ, who will  
21 issue a subpoena, rule on offers of proof, receive  
22 evidence, hold settlement conference, et cetera,

1 rule on procedural kinds of motion.

2           So it seems to me that as LSC moves into  
3 the federal world, the GAO seems to want LSC to be  
4 guided by federal provisions as to how funds are  
5 accounted for, et cetera. The OIG seems to want the  
6 same thing.

7           Well, it seems to me that then the same  
8 thing out to apply in the procedural due process  
9 area. You can't take a small bite out of the  
10 federal approach, and pick and choose. If you're  
11 going to go that direction, let's go look at some  
12 ALJ hearings for terminations or more than 5 percent  
13 suspensions, anything that have full ALJ hearings,  
14 which makes sense -- an independent review of the  
15 records. I think that you really ought to look at  
16 what other federal agencies that grant money to  
17 legal services programs do.

18           I think the other couple of points -- and  
19 I'll be brief -- is that the implementation of the  
20 rule change for imposition of special grant  
21 conditions during the grant year, which I really  
22 think applies to Victor Fortunato's point earlier made



1 today that at the end of a funding period, it's  
2 easier to have more flexibility; don't refund a  
3 problematic grantee. But at the beginning, it's  
4 more difficult.

5           But certainly, with special grant  
6 conditions being posed during the middle of a grant  
7 year and with LSC having significant flexibility  
8 with those special grant conditions, reporting, et  
9 cetera, that we don't oppose that flexibility as  
10 long as that's fairly applied, and so that it could  
11 make sense to go ahead and do that, to allow LSC to  
12 have that flexibility to impose special grant  
13 conditions during the term of a grant.

14           So I would urge this committee to do a  
15 couple things. One is not to implement these  
16 regulations as proposed. There's no showing of a  
17 demonstrated need for them. And if the committee  
18 decides to go ahead with them, then we need to have  
19 more information in front of the public so that  
20 there can be really informs responses and informed  
21 suggestions with fleshing out the language.

22           I would urge that it be sent back for

1 redrafting, and come back and try to look at the  
2 proposed language more carefully. Thank you.

3 CHAIRMAN KECKLER: Thank you, and thanks  
4 specifically to NLADA for their comments.  
5 Appreciated those coming in. And certainly the  
6 issue about the clients, we talked about that  
7 throughout and today. And one of the protections,  
8 and I know that you have concerns that go beyond  
9 that, is that -- and one of the things that I  
10 support -- is that this money that comes out return  
11 to basic field services.

12 And so any money that's going to be a  
13 subject of the limited reductions of funding, I  
14 think the rule -- and I hope that it is clear within  
15 the rule -- that it will be returned to field  
16 services and to helping clients of LSC.

17 Well, I'm not sure what the time we had  
18 scheduled -- oh, yes? Please.

19 MR. GLOVER: The OIG would also like to  
20 make some public comments.

21 CHAIRMAN KECKLER: Oh, yes. Very good.  
22 Please.

1           MR. GLOVER: We've sort of been holding off  
2 so as not to interrupt the phone people who might be  
3 speaking up.

4           CHAIRMAN KECKLER: Okay. Please go.

5           MR. GLOVER: As you know, we filed -- oh,  
6 sorry. My name. Matthew Glover, and I'm an  
7 associate counsel for the IG.

8           The IG did file some extensive comments. I  
9 don't really want to rehash them all here; the  
10 committee has them.

11          CHAIRMAN KECKLER: Thank you for them.

12          MR. GLOVER: No problem. I just want to  
13 make a couple of quick points.

14          First, we do support the rule. We think it  
15 gives LSC greater flexibility in responding to  
16 potential noncompliance. And we also think it  
17 introduces an element of proportionality to LSC's  
18 response that at least wasn't written into the rule  
19 before.

20          Now, under the proposal, LSC will have to  
21 consider a number of factors to determine the  
22 magnitude of the either limited reduction in funding

1 or a termination. We think that proportionality,  
2 the introduction of proportionality, is a big step  
3 forward.

4 We also think that the rule, with its  
5 seven-step process for imposing limited reductions  
6 in funding, introduces an important element of  
7 transparency, which will prevent a lot of the  
8 mistakes or abuses that some of the grantee  
9 community seems to fear.

10 I think it's important, as you consider the  
11 various proposals or various suggestions that are  
12 out there from the commentators, to keep in mind the  
13 statutory and regulatory context in which this  
14 rulemaking is taking place. There are a number of  
15 suggestions about outside hearing officers, ALJs,  
16 and so forth.

17 Before 1998, LSC did have in its  
18 termination rule reference to outside hearing  
19 officers. Actually, the LSC Act had reference to  
20 outside hearing officers. In 1998, Congress  
21 abrogated those requirements and instituted instead  
22 a requirement only that LSC give notice and an

1 opportunity to be heard, which the OIG believes is  
2 satisfied in the paper hearing provision set out in  
3 the rule.

4           So we think that moving back to the pre-  
5 1998 regime would be a step backwards, both in terms  
6 of flexibility and in terms of LSC's relationship  
7 with Congress.

8           There's been talk about what the standard  
9 would be for imposing a limited reduction in  
10 funding, whether we should make it intentionality,  
11 or whether the standard should be knowing and  
12 willful. Since 1976, the standard for termination  
13 in LSC has been one of intentionality.

14           In 1998, when the new termination rule was  
15 created, the issue was considered again and the  
16 decision to include a knowing and willful factor in  
17 the list of factors to consider, whether going  
18 forward with termination after you meet the  
19 intentionality threshold, was included as a factor  
20 to consider. And the Federal Register notices  
21 clearly indicate that the Corporation understood  
22 those two standards as being different.

1           The OIG thinks that the standard is  
2 basically the difference between a general intent  
3 and specific intent, and we would be concerned that  
4 if knowing and willful become the standard in every  
5 case, the question would turn out to be whether the  
6 grantee understood the rule in precisely the same  
7 way that LSC understood the rule, as opposed to  
8 whether the offending conduct was undertaken on  
9 purpose. And so we think that that would severely  
10 limit the ability to apply the rule.

11           Then there's another concern that was  
12 raised, the substantive standards that are going to  
13 be looked to in applying limited reductions in  
14 funding. Again, this is an area where I think that  
15 the regulatory history or the regulatory context in  
16 which the rulemaking is occurring is helpful because  
17 the standards that the limited reduction in funding  
18 rule anticipates using are standards that have been  
19 in place for LSC in termination since 1998.

20           They're standards that the grantee  
21 community shaped by submitting comments, and those  
22 comments were taken into account. The standards

1 changed from the time that the notice of proposed  
2 rulemaking was put out to the time the final rule  
3 was adopted.

4 I want to keep to very brief, so I would  
5 just suggest one other overarching standard that the  
6 committee might bear in mind as it evaluates  
7 proposals. And that is the goal that the NPRM set  
8 for itself.

9 There are, no doubt, as the members of the  
10 committee have pointed out, very helpful proposals  
11 out there. As you evaluate each individual  
12 proposal, we would suggest that you look and decide  
13 whether that proposal advances the goal of giving  
14 LSC more flexibility, making sure that there's the  
15 ability to respond proportionally to noncompliance  
16 so that all incidents with noncompliance aren't  
17 dealt with either through informal means or through  
18 outright termination; or, on the other hand, whether  
19 it would reduce flexibility, or restrict LSC's  
20 ability to respond to noncompliance. And we would  
21 suggest that recommendations that fall into that  
22 latter category should probably not make their way

1 into the final.

2 CHAIRMAN KECKLER: Thank you very much.

3 That was very helpful.

4 Before I take further questions, let me ask  
5 a question about -- I know board members, including  
6 some committee members and board members that are  
7 not here on the call, may have thoughts about the  
8 comments and about the proposed rule.

9 Would it be acceptable for them to send  
10 written comments in? Mr. Freedman?

11 MR. FREEDMAN: Yes. By all means, email me  
12 thoughts. I think you probably all have my email  
13 address, and I think it's on the website if you  
14 don't. It's MFreedman@lsc.gov, two E's in Freedman,  
15 no I's.

16 CHAIRMAN KECKLER: Okay. And with the  
17 thought that you can certainly continue to add to  
18 the discussion by written comments, are there any  
19 further comments for today, public comment?

20 (No response.)

21 CHAIRMAN KECKLER: I think the action is  
22 that we want them to show us some language with a



1 new rule, though. I think.

2 MR. KORRELL: Charles, this is Harry. What  
3 is our ideal timing on this? We want to get some  
4 new or some improved language. Are you suggesting  
5 that that's at a committee meeting before our July  
6 board meeting, or are you looking at that for the  
7 July board meeting?

8 I guess I'm somewhat concerned that we keep  
9 -- and this happens a lot with these processes, of  
10 course -- but that we do it and do it and do it  
11 again and again and again, and we wind up taking two  
12 years to get a proposed rule out.

13 CHAIRMAN KECKLER: Yes. You know, I just  
14 want to put this on the agenda for the July meeting.  
15 Now, exactly what we're going to do with the new  
16 language kind of depends on where we're at with  
17 that. If it shows up and it's in the shape where we  
18 can talk about as either a new NPRM or draft final  
19 rule, and there will be, presumably, a  
20 recommendation or a thought about the manner in  
21 which it'll go forward, then we'll do that.

22 But at this time, we're just going to see

1 revisions to the rule at the next meeting, and then  
2 decide what to do with them and what -- or what to  
3 recommend to the Board to do with them, more  
4 specifically, at that time, I think.

5 MS. MIKVA: This is Laurie. I certainly  
6 can't speak for the committee. My feeling is that  
7 as they redraft a proposed rule, that they put in  
8 all the stuff that they talk about that you might  
9 put in in the memo, that it's easier to look at it  
10 and take it out than for us to put something in  
11 that's not in to begin with.

12 So all the additions that they thought  
13 might answer the concerns, I would like to see those  
14 in the new proposed rule, or perhaps different  
15 versions of a new proposed rule.

16 MR. KORRELL: This is Harry speaking. That  
17 strikes me as tricky. I'm not sure how they go  
18 about incorporating significant changes like outside  
19 review and the like; if that's not the direction the  
20 committee is leaning, I'm not sure that's a useful  
21 exercise. And then in addition to making them do  
22 that work, then we need to talk about taking

1 something out.

2           And maybe I'm wrong, and Charles, I'd defer  
3 to your guys on this. But that strikes me as  
4 somewhat problematic, unless the consent is from the  
5 committee that we want to go that way.

6           MS. MIKVA: Well, I think I was talking  
7 about the stuff that they had mentioned in the memo.  
8 I wasn't talking about --

9           CHAIRMAN KECKLER: Yes. Well, let me just  
10 --e the stuff -- a lot of the comments or potential  
11 -- when you're doing this, you reject a comment.  
12 You've thought about the comment, you've considered  
13 the comment, but you're not going to do it. That's  
14 in the preamble. And certainly those kinds of  
15 things should be reflected in the preamble.

16           If there is a real choice point, you could  
17 write it to us, give it to us, in a particular  
18 paragraph with alternative A and alternative B. But  
19 it'll be super confusing to do that with all the  
20 different alternatives of the comments that have  
21 been proposed.

22           So I'm open to you if you want the

1 committee's insight on specific because A and B  
2 alternative on something. We certainly could do  
3 that. But otherwise, both things should be talked  
4 about in the preamble, I think.

5 MR. FREEDMAN: This is Mark Freedman. Let  
6 me ask a question that might help focus this.

7 Whether you're thinking you'd like to have  
8 in Michigan what would be either a draft final rule  
9 or draft further notice of proposed rulemaking,  
10 complete with preamble and draft language that's in  
11 a shape that's ready to say, okay, let me make a few  
12 changes, and then we roll it over to the Board and  
13 we publish it -- if you feel like that's what you  
14 want us to turn around in the next month.

15 Or if you feel like you want to get some  
16 concrete examples of some of these things that have  
17 been discussed for purpose discussion purposes so  
18 that then you can direct us, okay, then get us a  
19 full concrete document for either an interim meeting  
20 or the next meeting.

21 I don't have a particular -- I'm not  
22 advocating one or the other. But I'm laying out, I

1 think, that I see both threads going on here.

2 CHAIRMAN KECKLER: Well, I think, taking  
3 Harry's point about moving forward and making sure  
4 that we --

5 MR. LEVI: Well, the chair wants to say  
6 something about that.

7 CHAIRMAN KECKLER: Oh, Mr. Chairman, please  
8 go ahead.

9 MR. LEVI: I respect Harry's point and  
10 normally completely agree with it. But I don't  
11 think there's been any issue that's been in front of  
12 the Board that has generated more comment or  
13 consternation from out there than this one. I'm not  
14 aware of any.

15 And so I want to make sure this doesn't  
16 feel like it's being rushed, and that the Board  
17 itself is informed as to the extent and concern  
18 expressed in these comments. And I'm not convinced,  
19 unless you guys want to meet at 5:30 in the morning,  
20 that you're going to have another -- you certainly  
21 are not going to have a two-hour time slot in  
22 Michigan because I've seen that schedule.

1           And so I just have to caution you that you  
2 may think you want to move in a very fast way, and  
3 that is normally helpful. But there are times when  
4 organizations are confronting an issue that's been  
5 around for a very long time. There doesn't seem to  
6 be anything that's motivating an urgent decision.

7           But there seems to be a fair amount of  
8 consternation around it that you at least want  
9 people to feel that they've had an adequate time to  
10 chew on it. And I'm concerned that whatever way you  
11 pick here -- and I don't care; if you want to go  
12 with the route of -- I'm ambivalent as to what  
13 happens in terms of how you run your meeting and  
14 what you do in front of it.

15           But I want to make sure that, coming out of  
16 it, that's the way the public and those folks that  
17 have weighed in here feel we conducted ourselves  
18 because I think that's very important, too, or you  
19 won't have appropriate buy-in for anything that you  
20 do.

21           CHAIRMAN KECKLER: I 100 percent agree with  
22 that. And so the schedule is dictated by what we

1 need to get the right process to make sure that  
2 everybody understands that they have been able to  
3 comment on everything.

4           The question I guess, before, just to  
5 direct Mark in terms of what to prepare, it will be  
6 on the agenda. We know that. The question, really,  
7 is: What's the most useful document for us at the  
8 next committee meeting to have?

9           And I think it's fine to prepare the rule  
10 as Management reacts to the comments. Go ahead and  
11 find some way to talk about potential alternatives,  
12 either in the preamble or in a separate memo that  
13 says, if we took this other route, the language  
14 would look like this, you know.

15           Because I take Laurie's point as well, for  
16 us to -- we want to seek something concrete so that  
17 we can understand how to go forward and so that the  
18 public can comment on something concrete. But if  
19 we're choosing between alternatives, it's nice to  
20 have concrete alternatives as well.

21           So if there's a kind of an alternative  
22 propose on some point that's sort of fleshed out, I

1 think it's fine to have an addendum there, a memo to  
2 us, that talks about an alternative way that it  
3 would look. And then the preamble could say, yes,  
4 we didn't do that, and talk about why.

5 But I'm just thinking about what the most  
6 useful document is for the committee when it next  
7 takes this up. And whether we have enough time to  
8 do it, that's fine. We'll have the time that we  
9 have, and we will get as far as we can. I'm just  
10 trying to maximize that, all deliberate speed.

11 MR. LEVI: I just think that when it  
12 finally comes to the Board, it's going to be unfair  
13 to say to the Board, here's a number of options. You  
14 decide them. Because, boy, we've been in office for  
15 a few years, sure. But we don't have the length of  
16 understanding of how these things might have come  
17 up, and where they might have been useful.

18 And while I hear our friends in the IG's  
19 office saying those things, they are not very  
20 specific, and I don't know if there's a way to help  
21 us. Clearly there's times when we have felt, I  
22 think, as a Board, wow. We wish we had something



1 more than -- different than just all or nothing.

2           But I think we're going to need more  
3 advice. And I think you all who are in Management  
4 and in the IG, you ought to put yourself for a  
5 moment in the role of the Board and think about what  
6 you'd want to have if you were in our seats, so that  
7 we can make a comfortable and informed decision.

8           And I don't feel we're there at this point.  
9 I don't think, based on what you put in front of us,  
10 that I as a board chair feel well enough informed on  
11 this topic, or well led by Management, as to where  
12 we ought to properly land. I'm feeling uneasy.

13           And I suspect that many board members will  
14 be feeling uneasy. And ultimately, I don't want to  
15 feel uneasy. So I'm just saying that to let all of  
16 you over it, and a lot of stuff here, understand  
17 that that's how I'm viewing the world.

18           I don't know whether that was helpful or  
19 not.

20           CHAIRMAN KECKLER: It is helpful because it  
21 sets a standard up for what is going to have to be -  
22 - develop a supportive document. And, formally

1 speaking, support in the preamble for justification  
2 for the rule is going to need to be stronger, and I  
3 think that outside that, there's going to need to be  
4 some sort of continued work to talk about  
5 justifications and alternatives. And we'll keep  
6 working on it.

7 Well, with that, the next item on the  
8 agenda is public comment, which we had, but I will  
9 go ahead and formally ask for public comment, if  
10 there is a before public comment on the other topics  
11 that we considered today.

12 (No response.)

13 CHAIRMAN KECKLER: If not, then if there's  
14 other business to bring before the committee? We  
15 had plenty of business, but if there's other  
16 business to bring before the committee today, now's  
17 the time.

18 (No response.)

19 MR. LEVI: Thank you for running such a  
20 good meeting.

21 MS. MIKVA: Yes. Thank you, Charles.

22 CHAIRMAN KECKLER: Thank you. Thank you

1 all for sticking with it and participating by the  
2 phone.

3 With that, I will now consider a motion to  
4 adjourn.

5 M O T I O N

6 MS. MIKVA: So moved.

7 MR. KORRELL: Second.

8 CHAIRMAN KECKLER: All in favor?

9 (A chorus of ayes.)

10 CHAIRMAN KECKLER: Without objection, the  
11 meeting of the committee is adjourned.

12 (Whereupon, at 4:30 p.m., the committee was  
13 adjourned.)

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