

LEGAL SERVICES CORPORATION  
BOARD OF DIRECTORS

MEETING OF THE  
OPERATIONS AND REGULATIONS COMMITTEE  
OPEN SESSION

Monday, April 16, 2012

10:56 a.m.

Legal Services Corporation  
3333 K Street, N.W.  
F. McCalpin Conference Center, 3rd Floor  
Washington, D.C. 20007

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson  
Robert J. Grey, Jr.  
Harry J.F. Korrell, III (by telephone)  
Laurie Mikva  
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

Sharon L. Browne  
Victor B. Maddox  
Martha L. Minow  
Father Pius Pietrzyk, O.P.  
Julie A. Reiskin  
Gloria Valencia-Weber

## STAFF AND PUBLIC PRESENT:

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

Mattie Cohan, Senior Assistant General Counsel,  
Office of Legal Affairs

Mark Freedman, Senior Assistant General Counsel, Office  
of Legal Affairs

Atitaya Rok, Staff Attorney, 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

Ronald "Dutch" Merryman, Assistant Inspector General  
for Audit, Office of the Inspector General

David Maddox, Assistant Inspector General for  
Management and Evaluation, Office of the  
Inspector General

Daniel Sheahan, Program Evaluation Analyst, Office of  
the Inspector General

Magali Khalkho, Resource Management Specialist, Office  
of the Inspector General

Carl Rauscher, Director of Media Relations, Office of  
Government Relations and Public Affairs

## STAFF AND PUBLIC PRESENT (Continued):

Elizabeth Arledge, Communications Manager, Office of

Government Relations and Public Affairs

Treefa Aziz, Government Affairs Representative, Office of Government Relations and Public Affairs

Jean Edwards, Administrative Assistant, Office of Information Management

Eric R. Jones, Network/System Engineer, Office of Information Technology

LaVon Smith, Network/System Engineer, Office of Information Technology

Lora M. Rath, Deputy Director, Office of Compliance and Enforcement

Janet LaBella, Director, Office of Program Performance

Glenn Rawdon, Program Counsel, Office of Program Performance

Jane Ribadeneyra, Program Analyst III, Office of Program Performance

John Constance, former Director, GRPA

Tom Smegal, Non-Director Member of Institutional Advancement Committee

Robert E. Henley, Jr., Non-Director Member of Audit Committee

Hannah Lieberman, Executive Director, Neighborhood Legal Services

Chuck Greenfield, National Legal Aid and Defender Association (NLADA)

Don Saunders, NLADA

Terry Brooks, American Bar Association

Linda Perle, Center for Law and Social Policy (CLASP)

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

2 (10:56 a.m.)

3 CHAIRMAN KECKLER: I now note the presence of a  
4 quorum of the Operations and Regulations Committee, and  
5 ask for an approval of the agenda for today.

## 6 M O T I O N

7 MR. GREY: So moved.

8 CHAIRMAN KECKLER: Is there a second?

9 MS. MIKVA: Second.

10 CHAIRMAN KECKLER: All in favor?

11 (A chorus of ayes.)

12 CHAIRMAN KECKLER: The agenda is approved.

13 Our next item of business is approval of the  
14 minutes of our telephonic meeting of February 29, 2012.

## 15 M O T I O N

16 MR. GREY: So moved.

17 MS. MIKVA: Second.

18 CHAIRMAN KECKLER: All in favor?

19 (A chorus of ayes.)

20 CHAIRMAN KECKLER: With that approved, we can  
21 now turn to our first item of substantive business,  
22 which is a staff report on our current open rulemaking

1 on enforcement mechanisms. And I recognize Ms. Cohan.

2 MS. COHAN: Thank you. For the record, I'm  
3 Mattie Cohan, senior assistant general counsel with the  
4 Office of Legal Affairs for LSC. Right now, I'm just  
5 doing a brief staff report. We are not asking the  
6 Committee to deliberate or take any action at this  
7 time.

8 As you know, the Notice of Proposed Rulemaking  
9 was published on January 31st to propose amendments to  
10 our regulations at 45 CFR Part 1606, the termination  
11 rule, 1618, the enforcement rule, and 1623, the  
12 suspension rule.

13 The comment period only closed just a couple  
14 of weeks ago, on April 2nd. We received 17 timely and  
15 two slightly late comments. All of the comments are  
16 now on the LSC website on the open rulemakings page.

17 The report that you were given provides a  
18 very, very brief summary of the comments. Perhaps it's  
19 not surprising that all of the comments received from  
20 folks out in the field opposed the various proposals.  
21 The OIG also submitted comments. They submitted  
22 comments generally in favor of the proposals.

1           I know there's a lot else on the Committee's  
2 agenda, so I don't think I'll go into any more detail  
3 unless anybody wants me to or has questions.

4           CHAIRMAN KECKLER: I have one very brief  
5 question, which is something about our scheduling. And  
6 given that you've seen the volume of comments and are  
7 busy incorporating them and so on into a revised  
8 document, what sort of schedule are you looking at?

9           MS. COHAN: Well, partially that's up to the  
10 Committee. Certainly we will take these in and analyze  
11 them and then go back, and the standard procedure would  
12 be to draft up a final rule responding to the comments  
13 or whatever other management recommendations there are.

14           Currently we would be set to bring this to you  
15 in July. If the Committee would like to meet earlier,  
16 by phone or something, I'm sure we could accommodate  
17 that.

18           CHAIRMAN KECKLER: My own opinion would be  
19 that July would be fine, and give you plenty of time.

20           Yes?

21           MR. GREY: Charles, not to be a contrarian,  
22 but --

1           CHAIRMAN KECKLER: Please be a contrarian.

2           MR. GREY: I think it might be helpful for the  
3 Committee to have a once-over once everything has been  
4 compiled and analyzed, and give us a chance just to --

5           CHAIRMAN KECKLER: That's a very sensible  
6 suggestion. And I was sort of moving there, but I was  
7 wondering when you would be done with the document. I  
8 don't think we necessarily need to meet about it, but  
9 we don't necessarily -- it would be nice to have it for  
10 some time period ahead of time before the normal board  
11 books are delivered --

12          MS. COHAN: Sure.

13          CHAIRMAN KECKLER: -- for the July meeting if  
14 you have that document available.

15          MR. GREY: Yes. And just maybe if you could  
16 convene just a discussion meeting for the purposes of  
17 discussing, just so we could quiz staff about some of  
18 the ways in which they may have reconfigured the rules  
19 and that kind of thing.

20          CHAIRMAN KECKLER: That's a very sensible  
21 suggestion. We'll get the document and we'll schedule  
22 that meeting. Okay.



1                   Yes?

2                   MS. REISKIN: On the staff memo, you talked  
3 about, "In situations where recipient does not  
4 voluntarily take corrective actions in a timely  
5 manner." Are you planning to have the rules say that  
6 these other sanctions can only be used in those  
7 circumstances?

8                   MS. COHAN: I don't think we have a plan for  
9 what the draft final rule will say yet because we have  
10 not analyzed and dealt with the comments.

11                   MS. REISKIN: Does the current rule say that,  
12 the one that went out for comment, that you can't use  
13 any of these other ones unless someone does not  
14 voluntarily do other things?

15                   MS. COHAN: It does not. No, there's no  
16 absolutes in the rules. It's a case-by-case analysis  
17 depending on what the facts of the situation are.

18                   MR. GREY: Discretion is left to the staff,  
19 not based on a trigger that you've got to do something  
20 or not do something?

21                   MS. COHAN: That's correct. I will point out  
22 that 1618, the enforcement rule, tells the Corporation

1 that the Corporation shall try to do informal voluntary  
2 compliance first. But beyond that, it's a matter of  
3 discretion within the constraints of what the  
4 regulation provides. And the factors that have to be  
5 considered are set forth in the regulation.

6 CHAIRMAN KECKLER: All right.

7 MS. MIKVA: Just a quick question. So we  
8 should expect a management recommendation with some  
9 analysis? Is that right? Or just a rule that is the  
10 management's recommendation?

11 MS. COHAN: The way I understood what the  
12 Committee wanted to see was the analysis of the  
13 comments and some indication of the management  
14 recommendation prior to the drafting of a final rule.  
15 Is that what you were getting, Jim?

16 PRESIDENT SANDMAN: Yes. But we'd be happy to  
17 have committee discussion at any point along the line  
18 that you think appropriate.

19 MS. COHAN: Yes. Absolutely.

20 CHAIRMAN KECKLER: When you've analyzed the  
21 comments, I think that we would be looking for the  
22 suggested edits to the rule, management's suggested

1 edits to the rule in light of the comments. And then  
2 when we look at those suggested -- we'll have a  
3 discussion about them.

4 MR. LEVI: I am assuming, even then, including  
5 the possibility for further comment. Because this has  
6 certainly generated a lot of comment.

7 MS. REISKIN: Did you accept those two  
8 slightly late comments?

9 MS. COHAN: Yes.

10 MS. REISKIN: Does it have coverage of --

11 MS. COHAN: No. Here, my approach for the  
12 last 12 years, as when I worked at an agency, is late  
13 submitted comments are considered to the extent  
14 feasible. They came in two days late; we haven't  
15 analyzed them. I think it's perfectly feasible.

16 But most agencies reserve the right that if  
17 you get a comment that comes in on the eve of the  
18 publication of the final rule, yes, they're a little  
19 late.

20 MS. REISKIN: Right.

21 CHAIRMAN KECKLER: Okay, then. Everybody will  
22 be thinking about this for our discussion, telephonic

1 discussion.

2           So we'll move to the next item of business,  
3 which is to consider and act, if we are ready to act,  
4 on board policy on LSC promulgations.

5           MS. COHAN: Thank you. This was a topic that  
6 came up at the February 29th meeting. And what we have  
7 written here and provided for you, there's a little  
8 summary memo and then there's a resolution setting  
9 forth the policy in the form of a draft resolution for  
10 you, summarizing as we believed was the Committee's  
11 decisions and promulgations and leanings at the last  
12 meeting.

13           CHAIRMAN KECKLER: Let me pause it. And so  
14 our potential action here as a Committee is to  
15 recommend this policy to the Board? Is that what's  
16 needed?

17           MS. COHAN: Yes. That's correct. And then  
18 the Board would take an action to adopt the resolution.

19           CHAIRMAN KECKLER: Okay. Okay.

20           MS. COHAN: So the policy, as set forth here,  
21 covers LSC's various external promulgations, whether  
22 they are rules or program letters or the budget request

1 or whatever other documents that the Corporation puts  
2 forth out into the world for others. And it kind of  
3 follows, essentially, the way our statute is, Section  
4 108(e) of the LSC Act regarding public notice and  
5 comment on various promulgations.

6           So any promulgation requiring notice and  
7 comment under Section 108(e) of the Legal Services  
8 Corporation Act would have to be presented to the Board  
9 of Directors for prior review and approval. The  
10 current rulemaking is one perfect example of that.

11           Any promulgation at LSC is required by Section  
12 108(e) of the LSC Act to publish in the Federal  
13 Register 30 days prior to its effective date, and must  
14 be distributed to the Board prior to publication for  
15 notice to the Board of management's intent to issue the  
16 document, but is not subject to formal board approval  
17 prior to promulgation.

18           And then there are promulgations that aren't  
19 subject to Section 108(e) of the Act at all, but  
20 sometimes the Corporation chooses to issue those either  
21 for comment or for prior notice and publication. An  
22 example is I believe we recently published one of our

1 program letters for comment before issuing it.

2           And those types of documents, if they are  
3 voluntarily subject to comment, would come before the  
4 Board for prior notice but not necessarily prior  
5 approval, so that there would be an opportunity, if  
6 anybody on the Board had a problem, to let management  
7 know that sooner rather than later.

8           Then finally, anything else that's not  
9 otherwise covered by the other items, which would be  
10 something that's not required to be published under  
11 Section 108(e) and is not being published or subject to  
12 comment on a voluntary basis, would not be subject to  
13 board approval or prior notice as a matter of course.

14           So that's a quick run-through. If anybody has  
15 any questions?

16           MR. LEVI: I don't understand the  
17 third -- what you just said. Go over that one more  
18 time, the last item.

19           MS. COHAN: Oh, sure. The very last, things  
20 that aren't necessarily as a matter of course? No. 4  
21 or No. 3?

22           MR. LEVI: Well, what kinds of things are we

1 talking about here?

2 MS. COHAN: Not all --

3 MR. LEVI: We aren't supposed to be littering  
4 the Federal Register with -- okay.

5 MS. COHAN: No. Not all program letters, for  
6 example, or Office of Legal Affairs external advisory  
7 opinions. Those generally are not subject to  
8 publication in the Federal Register or comment, and if  
9 the Corporation is not choosing to seek comment on  
10 them, that would fall into that last category.

11 MR. LEVI: Now I understand.

12 PRESIDENT SANDMAN: Could I explain the  
13 proposed resolution here?

14 CHAIRMAN KECKLER: Yes.

15 PRESIDENT SANDMAN: This is an effort just to  
16 adopt good management practice as a matter of  
17 governance policy here. If a matter is of sufficient  
18 significance that LSC is going to be publishing about  
19 it in the Federal Register, I don't think the Board  
20 should learn about it for the first time by reading the  
21 Federal Register, if that's what you do in your leisure  
22 time or otherwise.

1 (Laughter.)

2 PRESIDENT SANDMAN: I think the Board should  
3 find out about it before it appears in the Federal  
4 Register, whatever it is.

5 CHAIRMAN KECKLER: Yes. We all agree with  
6 that. I was just going to -- I don't think this needs  
7 to be even in the resolution or amended. But I was  
8 wondering how feasible it would be for these types of  
9 things to also be put on a board wiki as these things  
10 accumulate for us, and they can come back. And it's  
11 convenient if they're on a board wiki that's just  
12 accessible to the Board.

13 PRESIDENT SANDMAN: Are you talking about this  
14 resolution?

15 CHAIRMAN KECKLER: No. Not the resolution. I  
16 mean --

17 PRESIDENT SANDMAN: Or the things that we --

18 CHAIRMAN KECKLER: -- the things that are sent  
19 out to us for notice, the various promulgations.

20 MS. REISKIN: So we'd have them all in one  
21 place.

22 CHAIRMAN KECKLER: Yes.



1 MS. COHAN: Oh, I'm sure that's -- yes.

2 PRESIDENT SANDMAN: Yes. We can do that.

3 CHAIRMAN KECKLER: Okay. Yes. Thank you.

4 MS. REISKIN: This may be because I'm spending  
5 too much time hanging around lawyers, but I was just  
6 wondering about a word in here. In the resolution, the  
7 second "Whereas," when I was reading it, it got me hung  
8 up on it. It said, "The Board does not have a  
9 comprehensive policy," and then goes on to talk about  
10 the policy.

11 And I'm wondering if it should say, "The Board  
12 has not had" or "did not have." It just hung me up  
13 reading it. Maybe it doesn't matter to anyone else.

14 CHAIRMAN KECKLER: "Does not currently have."  
15 Yes. "Does not currently have" is certainly a little  
16 bit clearer, and so that's fine.

17 All right. Are there further discussion or  
18 questions regarding this policy? This has come up over  
19 a few sessions. We've talked about this area of LSC  
20 guidance and the Board's role in it.

21 In my view, this is a partial answer. It  
22 answers part of the discussion. There's another

1 underlying discussion about which things should be  
2 considered guidance, in effect, which things should be  
3 published and which things should not be published.

4           We've had sort of a discussion about that. I  
5 think that in the future, we may have further  
6 discussions about that. But this answers an important  
7 section of it, I think, which is, however, whether we  
8 ultimately clarify what needs to be published and what  
9 doesn't need to be published and so on, if something's  
10 going to be published, this tells us how the Board gets  
11 it. And I think that it's a valuable step forward,  
12 although maybe not the complete answer on guidance  
13 issues.

14           Is there anything else? Yes, Father Pius?

15           FATHER PIUS: Obviously, with the first one,  
16 they couldn't even submit it to the Federal Register  
17 without approval so that time periods aren't essential.

18           But for the other two, is there a thought that you  
19 would say, before submitting it for publication in the  
20 Federal Register, you have to submit it to the Board  
21 five or ten days -- was there any thought of putting a  
22 time period to give the Board notice before it was even

1 sent to the Federal Register for the pre-30-day  
2 publication?

3 CHAIRMAN KECKLER: Yes. There's not a time  
4 period in here.

5 FATHER PIUS: In other words, do we want to  
6 give the Board a time period to react if it's ever  
7 necessary?

8 CHAIRMAN KECKLER: I'm trusting in the  
9 judgment that -- on the one hand, I want -- it's an  
10 issue of flexibility versus notice. I think that my  
11 own sense is that with management's commitment to do  
12 this, they will use their discretion, as we discussed  
13 at the last meeting, to normally give us enough time to  
14 react because otherwise, what good can we do? But in a  
15 jam, we might learn about it only a little bit before.

16 FATHER PIUS: And I suppose if it's  
17 insufficient in the future, we could amend this to --

18 CHAIRMAN KECKLER: We can always amend it and  
19 ask for something.

20 Yes? Oh, okay.

21 M O T I O N

22 MR. LEVI: I'm moving that you pass it.

1           CHAIRMAN KECKLER: Is there a second?

2           MS. MIKVA: I'm moving that the  
3 Committee -- right. I'll second it.

4           MR. GREY: Just a comment to Father Pius's  
5 observation, and that is, I think the safety net is you  
6 object. You just say, I don't like it, and so it stops  
7 at that point and it's got to be reviewed. So I think  
8 that sort of covers it.

9           CHAIRMAN KECKLER: Yes.

10          MR. LEVI: I guess I should have made clear,  
11 as amended with the currently.

12          CHAIRMAN KECKLER: As amended. All right.  
13 Any further discussion?

14          (No response.)

15          CHAIRMAN KECKLER: All in favor?

16          (A chorus of ayes.)

17          CHAIRMAN KECKLER: The motion carries the  
18 Committee, and we will present this as a recommendation  
19 to the Board this afternoon.

20          Very well. Let's move on to our next item of  
21 business, which is to consider and act on the  
22 rulemaking options paper, which we've all received and

1 read, a possible amendment to LSC's regulation on  
2 subgrants. This is something that has come up a little  
3 bit before. But I will turn it over to Mr. Freedman to  
4 explicate the memo that you received on this and our  
5 various options as far as rulemaking goes.

6 Mr. Freedman?

7 MR. FREEDMAN: Thank you, Mr. Chairman. My  
8 name is Mark Freedman, senior assistant general counsel  
9 in the Office of Legal Affairs. To my right is Glenn  
10 Rawdon, program counsel from the Office of Program  
11 Performance, and as I think you know, he's the man  
12 who's largely responsible for the great TIG program we  
13 have. And I'm going to digress for a moment.

14 Glenn and I both started here in 1999, within  
15 a few months of each other. So I've been working with  
16 him on TIG stuff since 1999, and over the last year  
17 I've particularly been working closely with him and  
18 Jane and David Bonebrake on TIG matters relating to the  
19 audit.

20 And I have always thoroughly enjoyed working  
21 with Glenn. You've seen the work that TIG has done and  
22 the work that he and the others have done. But I like

1 working with him. It's not just the output; it's also  
2 he and the others are great to work with.

3 MR. RAWDON: Thank you, Mark.

4 MR. FREEDMAN: You're welcome. So what  
5 brought us here today -- I'm going to give you a short  
6 overview. I'll keep it to less than ten minutes;  
7 that's my goal.

8 You have before you the rulemaking options  
9 paper and management's recommendation. To cut to the  
10 chase here, management has two recommendations, and  
11 I've spoken with Laurie Tarantowicz from the counsel's  
12 office in the Office of the Inspector General.

13 She's informed me that the Inspector General  
14 considers both of management's recommendations to be  
15 sufficient to address their concerns in the TIG audit  
16 regarding Recommendation 29. They noted that the Board  
17 has a number of options to address these kinds of  
18 concerns. These are just one set of options, but  
19 these, as far as they're concerned, do address their  
20 concerns.

21 So this all started with the TIG audit. When  
22 the Inspector General performed the TIG audit, they had

1 concerns about third party contracting involving TIG  
2 grants. Recommendation 29 addresses two of those.

3           They had concerns about financial oversight of  
4 third party contracting generally, and that's addressed  
5 in a couple of different recommendations; and they also  
6 had concerned about how well we clearly distinguish  
7 between subgrants and the related transfers, which have  
8 a whole set of their own requirements, and let's call  
9 them procurements, non-subgrants, which are subject to  
10 ordinary financial requirements.

11           So in Recommendation 29, they recommended that  
12 we specifically make sure that in the TIG program for  
13 non-subgrants, there is sufficient financial oversight  
14 requirements. And they recommended that management  
15 recommend to the Board rulemaking to address the  
16 question of the scope of the subgrant rule so we're  
17 clear when it applies and when it doesn't.

18           To that end, what management has done is, for  
19 financial oversight on this and a few of the other  
20 recommendations, management has implemented new grant  
21 assurances for the TIG program for all third party  
22 contracting involving competition, financial oversight.

1 Those are recommendations that, for Recommendations 5  
2 and 34, the other two that involve this, the IG has  
3 accepted as sufficient to implement the  
4 recommendations. And it's my understanding from the IG  
5 that that concern in Recommendation 29 is also  
6 addressed here.

7 Management is not requesting the Board to  
8 engage in rulemaking on that issue because management  
9 is able to address it in its discretionary authority  
10 under Part 1632 standards.

11 Also, by management continuing to have this in  
12 their discretionary authority, there is some  
13 flexibility so we can easily adapt it. If it looks  
14 like the current rules that we've adopted don't work as  
15 well as we want them to, we can adapt them for the next  
16 year and the next year. We don't have them quite so  
17 set in stone.

18 CHAIRMAN KECKLER: Let me pause you right  
19 there and ask, so with regard to the rulemaking options  
20 paper, there are two main discussions of two potential  
21 rules in there. One has to do with subgrants and one  
22 has to do with non-subgrant third party contracting.



1 All right?

2 MR. FREEDMAN: Correct.

3 CHAIRMAN KECKLER: And so what you've just  
4 said is that -- and the non-subgrant third party  
5 contracting starts on page 9. Is that the case?

6 MR. FREEDMAN: Let's see. Let me take a look.  
7 (Examining.) Yes. Oversight of non-subgrant third  
8 party contracting.

9 CHAIRMAN KECKLER: Page 65 of the board book.  
10 So with regard to that section, there's a set of  
11 rulemaking options in there for new rules about third  
12 party contracting. But it is management's  
13 recommendation that we do not need to engage in  
14 rulemaking on that because you have other -- you  
15 engaged in other actions which have been responsive to  
16 the Inspector General's concerns.

17 MR. FREEDMAN: That's exactly right.

18 CHAIRMAN KECKLER: Thank you. Please  
19 continue.

20 MR. FREEDMAN: Okay. With regards to the  
21 other question, which is how to decide whether  
22 something is a subgrant or not, this is an area where

1 the IG thought there was some ambiguity in the rule,  
2 which is why they recommended that management recommend  
3 rulemaking.

4 The big picture question there, of course, is  
5 when is it something we want to regulate as a subgrant  
6 when it's a third party contract. And of course, our  
7 grantees, they get our funds, and they often use those  
8 to hire somebody to do something. And in that world,  
9 the way we've broken it down is we have subgrants where  
10 they're hiring somebody to do something that is really  
11 the legal services work, what we want them to do.

12 And so we want to make sure we regulate it, so  
13 we have to approve the contract. And we do full fiscal  
14 auditing, just like a primary grantee. Plus, when we  
15 adopted the transfer rule, which applies the  
16 substantive legal services restrictions to transfers of  
17 LSC funds to another third party, we use the same  
18 definition functionally as the subgrant rule.

19 Basically, what we say there is if an LSC  
20 grantee takes LSC funds and pays somebody else to do  
21 some kind of work, and we think of it as legal services  
22 work, that other entity is now going to be an LSC

1 grantee, subject to all their substantive restrictions,  
2 subject to the fiscal restrictions, subject to full  
3 auditing.

4           But if it's not, if it's a procurement, then  
5 it's going to be done as an ordinary procurement and  
6 we're not worried about applying the legal services  
7 restriction or about us being able to audit that third  
8 party contractor who's a vendor of goods or services.

9           The IG raised the concern that in the TIG  
10 program, we will have grants that are specifically for  
11 work that isn't necessarily legal services work. It's  
12 for technology work. And so the contractor may be  
13 doing most or all of the TIG work for that particular  
14 grant. And they raised the question, well, what does  
15 that mean for our subgrants rule?

16           Our longstanding approach at LSC, both OLA's  
17 of our rules and the way management has applied them,  
18 is that we look to the programmatic purpose of the  
19 third party contract to decide, is this a subgrant or  
20 is it a procurement?

21           In order to address the possible ambiguity in  
22 the reg that the IG has flagged, management has

1 recommended rulemaking to make that more explicit in  
2 both the subgrant rule and the transfer rule to say  
3 clearly, when we try to make that determination, we're  
4 going to look at, is the third party contract for some  
5 kind of legal services activity?

6           That enables us to apply the rule consistently  
7 across all the different grant programs, be it the  
8 basic field grant, a TIG grant, an emergency or special  
9 needs grant, so that we can say, if a grantee is using  
10 LSC funds to hire a software programmer, that's not  
11 going to be a subgrant, and the software programmer is  
12 not going to be subject to our panoply of restrictions,  
13 regardless of what LSC grant it's pulled from.

14           Part of that also comes from the fact that TIG  
15 grants are often for a portion of a larger project. So  
16 it isn't that a TIG grant is necessarily for an entire  
17 project; grantees will often come to us -- we encourage  
18 them to come to us -- and say, we've got a \$100,000  
19 project. We're bringing \$60,000 of funds from other  
20 sources. We need \$40,000 to do A. And sometimes doing  
21 A is hiring someone to install video equipment, or  
22 hiring someone to write the software.

1           So it works with the operation of the TIG  
2 program as well as the consistency across the different  
3 grant programs for us to have a rule that's based on  
4 what is the third party contracting. And that's the  
5 distinction of whether it's going to be a subgrant and  
6 a transfer or if it's going to be a procurement subject  
7 to the procurement rules.

8           As you can tell from the rulemaking options  
9 paper, there are many nuances here. There are also a  
10 variety of other options that could be pursued,  
11 including looking at financial oversight in the  
12 subgrant rule and separating that from the substantive  
13 restrictions in the transfer rule.

14           So if you have questions on how any of those  
15 would pan out, I can answer those. And both Glenn and  
16 I can answer questions about the nuances or the  
17 subgrant rule, and also how it plays out in practice in  
18 TIG or in any of the other types of programs we fund.

19           CHAIRMAN KECKLER: I have one question. One  
20 of the things that you talk about in there is you talk  
21 about, as a potential model, the way that we deal with  
22 PAI funds, and basically that, as I read it,

1 people -- some entities from our grantees receive our  
2 PAI funds and handle their PAI, but those are not  
3 subject to LSC restrictions because those would be like  
4 a private law firm or a profit bar foundation, and we  
5 don't want to restrict their non-LSC funds.

6 MR. FREEDMAN: What we've done there is we've  
7 said that the restrictions only flow to the funds  
8 transferred when it's a PAI program. So it creates the  
9 scenario where our grantees, if they provide a subgrant  
10 to handle private attorney involvement  
11 work -- sometimes to the bar association, sometimes  
12 it's a fee specifically to a law firm -- that the  
13 restrictions will go with the LSC funds, but they will  
14 not spread to the rest of the entity. And that was a  
15 discretionary decision we made with the rule.

16 There is the possibility of calling something  
17 a subgrant and then having the transfer rule apply to  
18 it, but in a more limited capacity like that. Of  
19 course, in that situation, we are starting with the  
20 presumption that it's a PAI grant so it's for legal  
21 services activities to begin with.

22 So we have this fundamental trigger that we

1 want the additional oversight, both in the subgrant  
2 rule, and we want the restrictions to apply to some  
3 extent in the transfer rule.

4 CHAIRMAN KECKLER: So I guess my next question  
5 was, when that movement of money occurs for PAI, we do  
6 call that, though, a subgrant?

7 MR. FREEDMAN: Right. Exactly. And I'll note  
8 here that the subgrant rule and the transfer rule have  
9 two different provisions involving private attorneys.  
10 And part of it just reflects the fact that the subgrant  
11 rule was written in 1983 and the transfer rule was  
12 written in 1996.

13 So in the transfer rule, there's a limitation  
14 on transfers for PAI activities, which are also going  
15 to be PAI subgrants. In the subgrant rule, there is a  
16 provision that says, subgrants don't include individual  
17 payments, essentially, to private attorneys for  
18 handling cases. Those are the like reduced fee  
19 payments, Judicare payments.

20 So we have the scenario where we have a PAI  
21 subgrant that's subject to the limited transfer rules.

22 There may be other situations -- there can be

1 situations -- where the subgrant definition and the  
2 transfer definition don't quite mesh for a PAI  
3 activity, and I'd note that just to flag that they're  
4 not identical. And sometimes that can trip one up when  
5 one's looking at one definition and trying to figure  
6 out how it works with the other definition.

7           CHAIRMAN KECKLER: Okay. Well, I'm going to  
8 open it up for other people to be able to ask Mark and  
9 Glenn questions. Let me ask one more question, maybe  
10 involved with Glenn as well, which is, as a percentage  
11 of TIG grants, what, roughly, percentage would this  
12 affect such that such a percentage of TIG grants would  
13 be recharacterized as subgrants?

14           MR. RAWDON: Well, as Mark said, the  
15 difficulty comes with how you characterize  
16 "programmatic." Is it the main activities of the  
17 grantee, meaning the provision of legal services that's  
18 programmatic, or is programmatic the programmatic  
19 purposes of a specific grant?

20           Because if it's the programmatic purposes of  
21 the specific grant, then that would encompass easily 30  
22 to 50 percent of the grants, where the bulk of the



1 grant is going to perhaps a single contractor to  
2 install a telephone system, to put in a video system,  
3 where the purpose of the grant is to get the new phone  
4 system.

5           So you can argue that the programmatic  
6 purposes of that grant is the installation of the phone  
7 system, which is like what Mark pointed out in the  
8 option paper. If they bought that from the field  
9 grant, then clearly it would not be a subgrant; but  
10 under the TIG, it could be.

11           And so it would affect a large percentage of  
12 them if you took the programmatic to mean the purpose  
13 of the grant as opposed to the primary function of the  
14 grantee.

15           CHAIRMAN KECKLER: So if it's the primary  
16 function of the grantee in this -- I'm not sure how  
17 many TIGs would this apply to, but something like the  
18 development of, I don't know, self-help kiosks? That's  
19 a technical thing, but it's also, in effect, the  
20 provision of legal services as well if you do that.

21           And you can't answer this because it would  
22 depend on the wording. But let me put it this way:

1 Are there some TIG grants which, in a fairly generous  
2 interpretation of what amounts to legal services, might  
3 be subgrants?

4 MR. RAWDON: Well, the direct assistance is  
5 one of the things that we struggle with because that's  
6 part of the definition. And so what we've tried to  
7 look to is the degree of autonomy that's given to the  
8 third party contractor. And the more autonomy that  
9 they give to them, the more likely it is to be a  
10 subgrant.

11 If our grantee is keeping complete  
12 control -- in the kiosk example that you gave, they say  
13 to the contractor, okay, we want this size kiosk, we  
14 want this computer, we want this monitor, and we want  
15 this, and we want you to go out and set it up and hook  
16 it up to the internet, then that wouldn't be a subgrant  
17 under what we've been saying even though they're  
18 actually doing the setup of that because our grantee's  
19 maintaining complete control and complete supervision  
20 over it. They've not delegated any of that  
21 decision-making authority.

22 If, however, they said, we don't really know

1 what these should look like. You've a lot of these;  
2 would you put all these in for us and we'll just accept  
3 what you give us, then that's going to look more like a  
4 subgrant.

5 MR. FREEDMAN: If I may add, There are a  
6 number of TIGs where if the grantee hired someone else  
7 to do the main TIG activity, it would clearly be a  
8 subgrant because it is -- like in the case of the  
9 kiosks, there's the aspect of, okay, what do we want  
10 these things to do? What are the client needs? What's  
11 the legal development?

12 There are a number that would be. Generally,  
13 grantees do those themselves, in part because other  
14 than an existing grantee in a fairly blunt matter,  
15 other than an existing grantee, nobody wants to have to  
16 figure out how to comply with all of the LSC  
17 restrictions.

18 So if it's going to be work involving the real  
19 programmatic legal services work, our grantees are the  
20 ones who are going to keep it. And that's one of the  
21 reasons why there aren't a lot of subgrants in the TIG  
22 program.

1           There are some, and in the cases where there  
2 are some, it's underlie because one grantee is hiring  
3 staff at another grantee to help them with a part of  
4 the TIG development of the project. For example, we  
5 have some of that with one of the veterans' TIGs, where  
6 one of the grantees is running the grant, and they're  
7 hiring some staff at another grantee with expertise in  
8 veterans' issues.

9           I also wanted to add that procedurally, the  
10 management recommendation is to go ahead with  
11 rulemaking for amending the transfer rule and the  
12 subgrant rules. That can be done one of two ways.

13           We could go directly to a notice of proposed  
14 rulemaking, where staff would draft up proposed  
15 language and then present it to the Committee for  
16 consideration and whether or not the Committee wants to  
17 then recommend that for publication.

18           We also could do an advanced notice of  
19 proposed rulemaking, where we identify issues, and then  
20 the publication in the Federal Register would be,  
21 here's the things we're thinking about and soliciting  
22 general feedback on that.

1           Given that there's agreement between  
2 management and the IG on this being an approach that  
3 addresses the IG's recommendations, it's likely that  
4 going right to a notice of proposed rulemaking with  
5 draft language for the Committee to look at will be the  
6 most effective way to do it, and possibly we could do  
7 that and have a final rule by the end of the year if  
8 we're diligent about our schedule.

9           CHAIRMAN KECKLER: Okay. Let me open it up  
10 for further questions. I'll have a further thought on  
11 that.

12           Go ahead, Julie.

13           MS. REISKIN: Yes. I have -- I guess it's a  
14 concern. This is a wonderful program, and again, there  
15 are probably some deep legal issues I'm not  
16 understanding. But it seems, again, there's some where  
17 you might have both, like develop of a HotDocs or  
18 something.

19           But legal work is legal services work, and if  
20 you're going to buy something from Microsoft, Microsoft  
21 isn't going to follow our restrictions. But you're  
22 buying something else.

1           So it seems like this is getting really  
2 super-complicated. And I'm wondering if there's a  
3 way -- like with the IRS, they have a little checklist  
4 that anyone can use, that anyone can understand: Is  
5 this an employee or a contractor? Can we not do  
6 something like that for our grantees?

7           And part of why I ask is I was just part of a  
8 TIG, not as a board member but as my job. The Colorado  
9 Legal Services got a TIG to do some disability-related  
10 stuff, and so I was part of their community advisory  
11 committee.

12           And I liked the product, and so when I said to  
13 our director, "Oh, here's some great ideas for another  
14 TIG we can apply for," he said, "We're not applying for  
15 more TIGs." And I said, "Why?" And he said because  
16 it's just gotten so complex that they just can't afford  
17 it because of the amount of administration. And then  
18 when I saw some of the documents, it really made sense  
19 to me.

20           And I asked at the last meeting, and I'm  
21 hoping that I'll get a report on that some time during  
22 this meeting: How many other people are not applying?

1 I heard that the conference number was a little down.

2 I don't want to turn away grantees. So it  
3 just seems like this is getting really complicated, and  
4 does it need to be so complicated?

5 MR. FREEDMAN: And I'll answer part of that,  
6 and then I think Glenn will probably have something  
7 he'll add.

8 On this particular issue, it's an excellent  
9 point because part of what we're doing is trying to  
10 adopt the most straightforward rule so that the  
11 distinction between subgrant and no-subgrant, and being  
12 able to say when does it apply and when doesn't it  
13 apply, is easier to make because it won't be dependent  
14 on what kind of grant you're pulling it from.

15 As a part of implementing the recommendations  
16 from the Inspector General's audit, we also  
17 have -- we've increased the procedures we have in-house  
18 for reviewing questions, especially as people have  
19 ideas about TIGs and, seeing whether or not there's  
20 going to be a subgrant issue.

21 We've always taken the approach that if  
22 somebody has a project they're thinking of and they

1 want to figure out whether or not they can hire  
2 somebody else as a part of it, they can always call us  
3 up, Legal Affairs or calling up the TIG staff.

4           And so our goal here is, at least as to this  
5 issue, to the subgrant transfer issue, to address the  
6 accountability concerns that the Inspector General  
7 raised while trying to keep the process and the  
8 distinctions as straightforward as we can to minimize  
9 the difficulties it might produce in administration.

10           MR. RAWDON: And you're absolutely right. It  
11 has gotten more complicated. Now, we haven't really  
12 seen that translate to fewer people applying. They're  
13 still very interested in getting the TIG grants.

14           But it does add to a lot of the confusion  
15 sometimes because -- well, you can see this options  
16 paper, how complicated this particular area is. And  
17 that's one of the reasons we'd like to see the Board  
18 address this so that it's more clear for the  
19 recipients.

20           One of the problems we get into -- it's really  
21 clear if it's a Microsoft type of situation. You can  
22 say, okay, there's no legal expertise involved in this



1    whatsoever.  But it gets more difficult, like you said,  
2    when you've got a Mark Lawrenson or some of the other  
3    contractors that do the work on the automated  
4    documents.

5                    These are attorneys with lots of years of  
6    experience, and if a form that one of our people sends  
7    in to them is not arranged well, or the interview  
8    doesn't flow well and they think, well, gee, maybe if  
9    you change the questions this way, people would  
10   understand it better, or this is a better organization,  
11   are they using their legal knowledge or are they using  
12   their document automation knowledge?

13                   So that can get to be very fuzzy areas and  
14   cause people some concern as to whether or not this is  
15   a subgrant or whether or not it's a third party  
16   contract.  And so clarification that we can give them  
17   in the rule itself on this is going to be very  
18   important, particularly in clarifying what "direct  
19   support" means, so it's very clear to them that just  
20   because they're a lawyer doing the work, that doesn't  
21   mean that this is programmatic activity.

22                   CHAIRMAN KECKLER:  Yes.  I think there's some

1 principles here that were talked about before, which is  
2 that the label of subgrant versus procurement, or  
3 indeed whether somebody keeps it in-house or moves it  
4 outside, shouldn't really alter, number one, the  
5 alignment of the money with congressional intent,  
6 whoever has it and however it's labeled. And it also  
7 shouldn't ultimately change our capacity for oversight,  
8 our legal capacity, our technical capacity to go and  
9 get documents.

10           So we should be able to retain that, however  
11 it's labeled. And that's partly for our own oversight  
12 responsibilities, but in my own mind, it's also to take  
13 off the table the business of dealing with  
14 restrictions, of dealing with oversight  
15 responsibilities, from the choice of whether to  
16 outsource something or not.

17           That decision should be based on efficiency  
18 and competence and who is best at using this. And so  
19 if you're crafting a rule, those are some principles  
20 that I think are useful to keep in mind. And I know  
21 that you're thinking along the same lines in many ways.

22           So are there further comments on this?

1           MR. LEVI: I also want to make sure that  
2 you're thinking about future type -- not just the TIG  
3 world. We make a research grant. That doesn't put  
4 those folks under the restrictions. And so I want to  
5 make sure we don't go further in that direction.

6           MR. FREEDMAN: And that's exactly what this  
7 proposal is aimed at, is by making clear that the  
8 distinction is about whether or not it's legal services  
9 activities that are being contracted for. We have a  
10 consistent rule across all different grant types, and  
11 it avoids having the question come up when we have  
12 different types of contracting activities or different  
13 types of grant-making activities.

14           It may be that as we engage in other types of  
15 grant-making activities, we'll want to evaluate the  
16 question of how do we make sure that we have the  
17 adequate oversight that's appropriate for that type of  
18 grant. But that's exactly how we want to address it.

19           MR. RAWDON: Financial oversight is different  
20 from the restrictions as well. No one wants to give up  
21 financial oversight, and being able to look and make  
22 sure that the money is well-spent. But if the only way

1 to do that is to make all of the money that this person  
2 would ever bring in subject to the restrictions, that's  
3 going to have a chilling effect.

4 CHAIRMAN KECKLER: Right. And I think, as you  
5 go forward, it's very useful to think about this  
6 separation that you talk about in there that we have  
7 with PAI about the issue of the transfer rule, and the  
8 LSC restrictions can follow the money; they might not  
9 affect all the other money that this other party, the  
10 sub-grantee/third party contractor, has.

11 One thought that I had which I'm just going to  
12 throw out there for discussion, your reaction, is that  
13 if you could prepare a rule -- the conceptual division  
14 that I'm hearing, in reading the memo and hearing here,  
15 is there's probably lots of general agreement, but  
16 there's still a conceptual division about what a  
17 subgrant is, whether the subgrant is from the original  
18 subgrant rule and occurs with legal services only.

19 Now, our restrictions, obviously, those flow  
20 to legal services. Right? But the idea of a subgrant,  
21 the question is, is that conceptually distinct or not?

22 If it's conceptually distinct, then whatever the TIG

1 is for, if you hand it over to somebody else, then  
2 that's a sub-grantee. If it's not conceptually  
3 distinct, then it's a subgrant only if that entity is  
4 doing legal services.

5           And what I was wondering is whether it would  
6 be possible to do a little alternative when you prepare  
7 a rule for us because I could see the language of what  
8 it looks like, and also the thoughts about whatever  
9 problems might occur with that.

10           MR. FREEDMAN: I think that you flagged the  
11 conceptual issue, which is, when we have a scenario  
12 where we say -- we give a grant to do something, and  
13 then the grantee's going to give almost the entire  
14 grant to somebody else to do it, is there special  
15 accountability we want for that, different from an  
16 ordinary procurement?

17           And part of the answer there is that we've  
18 been taking the approach of looking at the question of  
19 how this would be treated in any grant program. So if  
20 we're giving a special grant to do a particular  
21 activity, that would not be a subgrant if it was out of  
22 the basic field grant. Under the approach that we've

1 been taking, we say that's not a subgrant because the  
2 activity involved is not the kind of activity we make  
3 that distinction on.

4           We also have the flexibility, as a management  
5 matter, whenever we make a grant to add specific  
6 requirements that are tailored to those scenarios. And  
7 so I think that it may be that the best way to address  
8 that is to consider starting, probably, with the TIG  
9 program if we want to have specific grant assurances  
10 that involve when the TIG is going to almost entirely  
11 be paid to a third party, grant assurances that provide  
12 whatever additional accountability we would want out of  
13 the subgrant rule.

14           And part of the reason I mention that is that  
15 the subgrant rule includes a preapproval process. The  
16 idea behind the subgrant rule is we don't want the  
17 grantee to go out there and just start subgranting to  
18 folks on substantive stuff, and we don't know who the  
19 ultimate provider of legal services is.

20           In the TIG program, because of the size and  
21 the nature of the TIGs, we know going in when we grant  
22 the TIG whether or not they're planning on awarding

1 some or all of it to a third party. And if they make a  
2 big change like that, they've got to tell us or else,  
3 quite frankly, they're not going to get paid.

4           And so one of the big steps in the subgrant  
5 rule, the preapproval, has already been subsumed by the  
6 TIG process. And this is a little thinking out loud.  
7 I think that the concerns you've addressed are ones  
8 that it might be best for us to essentially play around  
9 a little bit with things like grant assurances as a  
10 discretionary matter, and then see whether it makes  
11 sense to have another avenue within the rule for  
12 subgrants that aren't legal services subgrants, but are  
13 the primary purpose of some particular grant.

14           And I think one concern is whether or not  
15 something like that would trip up things like emergency  
16 and special needs grants, where what we want to do is  
17 get a grant out fast to someone. And it may be, here's  
18 \$50,000 to go rent a new office and telephone system.

19           Right now, we don't stop and say, well, is  
20 this a subgrant? And I'm a little worried about  
21 whether we put in the reg additional issues that might  
22 slow down that process.

1           CHAIRMAN KECKLER: Let me define the question  
2 here rather narrowly, okay, for us and the Committee,  
3 which is, we had the memo. We've had the discussion.  
4 We've seen a recommendation.

5           I interpret the recommendation in this way,  
6 which is, management has recommended that we engage in  
7 rulemaking on the subgrant rule. And we'll leave it  
8 open exactly what the form and nature of that subgrant  
9 rule would be; but that we don't at this time engage in  
10 rulemaking, separate rulemaking, on third party  
11 contracting.

12                           M O T I O N

13           CHAIRMAN KECKLER: And I propose that as a  
14 recommendation, to accept management's recommendation,  
15 so characterized, to the Board.

16           MR. GREY: Second.

17           CHAIRMAN KECKLER: Is there discussion?

18           (No response.)

19           CHAIRMAN KECKLER: All in favor?

20           (A chorus of ayes.)

21           CHAIRMAN KECKLER: Okay. That recommendation  
22 will be presented this afternoon to the Board.



1           All right. We have a staff report on policies  
2 and protocols. If we can be very brief with that, we  
3 will do that.

4           MS. COHAN: Hi. This is Mattie Cohan again.  
5 I'll try to be really brief.

6           You have a summary of protocols, policies, and  
7 procedures. We tried to do a really quick compendium  
8 of the things that would apply to you above and beyond  
9 all of the statute stuff that would apply to you that  
10 you wouldn't know about.

11           The only thing I will point out is that there  
12 are a couple of items in here, particularly the  
13 communications policy. The policy was adopted, but it  
14 hasn't really been followed. So it's kind of moribund,  
15 but it's never been rescinded, which I think is -- what  
16 section is it? It is --

17           CHAIRMAN KECKLER: It would be 85, yes.

18           MS. COHAN: -- yes, 3(c). So I'd just point  
19 that out, that it's there but it's not actively being  
20 followed.

21           And then, as noted earlier with the external  
22 promulgations, there hasn't been a comprehensive

1 policy. There was a short motion in 1990 that was  
2 never then followed after that particular board  
3 management.

4 So to the extent that the Board may wish to  
5 take a look at some of these things and come back and  
6 ask for more information on them or wish to review any  
7 of them in detail with an eye to changing or deleting  
8 or adding something, we stand ready to help you with  
9 that.

10 CHAIRMAN KECKLER: Could this stuff be on the  
11 board wiki as well, perhaps?

12 MS. COHAN: I'm sure it can, yes.

13 CHAIRMAN KECKLER: Yes. Thanks.

14 MS. COHAN: I think the compendium of all of  
15 these items was being put together to be put on the  
16 board wiki. I don't know if that's happened or not.

17 CHAIRMAN KECKLER: Okay.

18 MR. LEVI: I was just going to say that to the  
19 extent that management thinks that any of them need to  
20 be modified, I assume you'll tell us. But otherwise,  
21 with all of the things we have on our agenda, I'm not  
22 sure whether we wear ties on Sunday or not should

1 necessarily have to come before us.

2 (Laughter.)

3 MS. COHAN: Absolutely.

4 MR. LEVI: But seriously, people should take a  
5 look at this. But I would not want to burden us with  
6 too much of this.

7 MS. COHAN: But it's also there is a reference  
8 to remind you of things you need to kind of keep in  
9 mind as you meet.

10 MS. REISKIN: If there are questions and  
11 comments on this, where should they go? To you?

12 CHAIRMAN KECKLER: Well, if there are  
13 questions about what they mean, they should go to  
14 Mattie. If you want to change them, talk to me,  
15 because some of this stuff will be reexamined. We're  
16 reexamining a couple of these today, just as it goes  
17 along.

18 And the other one that I just wanted to note,  
19 which is the continuity of operations plan --

20 MS. COHAN: Right. Right.

21 CHAIRMAN KECKLER: -- is something that we had  
22 talked about. And this is something that -- we don't

1 have time to deal with it today because we do have a  
2 very full agenda. But, over time, it's something that  
3 I'm going to keep seized of and will hopefully move  
4 forward with. Anything else, any of these others,  
5 after you've had a chance to review them, if you have a  
6 reform, please talk to me.

7           Okay. Well, without further comment on that,  
8 I will then move to one of these protocols in  
9 particular, segue onto the contributions protocol,  
10 which we've been asked to examine and which you all  
11 should have had a chance to look at.

12           In there, there's a draft protocol, which is  
13 on page 90; an associated resolution; and also, after  
14 that, you might have seen a current protocol, which is  
15 on page 93. So I'll go ahead and turn it back over to  
16 introduce the topic, and then we can have some  
17 discussion.

18           MS. COHAN: Sure. I will just very briefly  
19 highlight the changes that are in the draft protocol to  
20 the existing one.

21           The draft now makes it clear that it applies  
22 to cash contributions, not contributions of goods and

1 services, and that it explicitly includes grants that  
2 are applied for as well as other cash contributions  
3 that come in.

4           Then I think the biggest change is where the  
5 previous one required the -- or the existing one  
6 requires the approval of the board of directors, that  
7 is generally maintained.

8           But the draft has one, two, three, four, five  
9 categories of contributions that, if it's passed,  
10 constitute the prior approval of the Board now; so that  
11 if there would be solicitations for contributions,  
12 these things would not need additional board approval,  
13 but would be subject to at least ten days' prior  
14 working notice to the Board of the specific  
15 solicitation for the contribution.

16           Then anything else that's not in one of those  
17 categories, it makes clear that the prior approval to  
18 the Board would be presented within ten working days in  
19 advance of the proposed solicitation; and it clarifies  
20 the exemption from the requirement of solicitations of  
21 cash directed to local merchants, from modest  
22 donations, for in-house staff events, and fundraising

1 among the LSC staff for charitable causes. Those would  
2 be subject to the approval of the LSC president.

3 I think those are the major changes proposed  
4 to the existing one.

5 MR. LEVI: Well, I think there's a lot of  
6 issues in the drafting here. The word "solicitation"  
7 has many, many interpretations. So if a donor, a  
8 prospective donor, comes to you and says, "We'd like to  
9 give you a million dollars for research," when they're  
10 at a meeting with us or with Jim or whatever and they  
11 walk up to us and they say, "And now we want to engage  
12 in that conversation -- are we soliciting in violation  
13 of this because we didn't have ten days' prior  
14 approval?"

15 I don't think we ever want to put any of us in  
16 that position. And I wouldn't like your drafting to  
17 embarrass any board member or staff person here in that  
18 circumstance. And I really think it could be  
19 interpreted in such a way as to say, "Oops, I can't  
20 talk to you without ten days' prior written approval."

21 That is just not realistic, folks, in the  
22 development world.

1           MS. COHAN: Oh, sure. And unless Jim wants to  
2 jump in, I don't think that's what this was aimed at.  
3 To the extent that the existing policy talks about  
4 solicitation of contributions, my recollection of when  
5 it was adopted, it was really aimed at when the  
6 Corporation would go out and ask people for money, not  
7 people coming to us.

8           MR. LEVI: Yes. But you see, here's what  
9 happens. When your donor comes up to you and offers a  
10 million, that means they can give you two.

11           (Laughter.)

12           MR. LEVI: And so what you want to do is  
13 immediately say, "How about two?"

14           MS. COHAN: Two. That's right.

15           MR. LEVI: And so now, did we solicit, you  
16 see? I think that we ought to consider the  
17 implications of that.

18           MS. REISKIN: Is there a reason that we're  
19 asking -- I've never heard of this in a nonprofit. Is  
20 there a reason that we're asking management to come ask  
21 us? Generally there's a gift acceptance policy that's  
22 kind of broad that says, for example, if you're doing

1 lung cancer stuff, maybe you're not going to accept  
2 money from tobacco companies. I mean, it's really  
3 broad. And this just seems like micromanagement.

4 MR. LEVI: Well, that's another question,  
5 then, that the draft begs, which is, could the prior  
6 approval be a broad grant of prior approval?

7 MS. COHAN: And I think that's what was  
8 intended, was that this would be a broad grant of prior  
9 approval for things within these categories, over the  
10 current policy, which is, there is no broad grant of  
11 prior approval for anything.

12 The current policy is, any solicitation has to  
13 be brought for specific approval by the Board. That's  
14 the current policy. And so the changes proposed we  
15 trying to --

16 MR. LEVI: We do need to make changes here. I  
17 know that.

18 MS. COHAN: Trying to help that, yes.

19 CHAIRMAN KECKLER: I think it's useful to have  
20 a discussion. There's some other aspects here. Your  
21 comment pointed out -- I think there's a distinction  
22 here between grants and gifts and solicitation. Okay?



1 I think however we work the policies, the policies  
2 need to be different.

3           Somebody who has a grant is, hey, come here,  
4 get my money, you know? Compete for my money. I'm  
5 offering. I want somebody to take my money. And  
6 that's fine. If that's within our purview as LSC, we  
7 should be competing for these grants.

8           On the other hand, the issue of trying to get  
9 people soliciting money, that's a different matter, who  
10 haven't said they want to give, but you try to convince  
11 them to give. That kind of fundraising is a different  
12 nature, I think, and has different implications for us  
13 as an organization, and for the public acceptance of us  
14 and our relationship with Congress and all of those  
15 things.

16           So I think that there's some distinctions that  
17 need to be made in the policy as it's revised. But  
18 I'll let others go ahead and comment.

19           MS. COHAN: I'll just also remark that on your  
20 point about -- there's also kind of a line where it  
21 starts to get kind of fuzzy and grey between grants and  
22 individual contributions.

1           If I happen to have won the Mega-Millions and  
2   so I was sitting on a big pot of money, and you came  
3   and asked me for money, that's, I think, pretty much  
4   clearly asking me for a cash contribution.  If you go  
5   to an organization that has published a request for  
6   proposals, that they have grants, that's clearly a  
7   grant.

8           If I am the charitable arm of a corporation, I  
9   am in the foundation of a corporation and I give out  
10  money, you have to apply for it, but maybe I'm not  
11  publishing a request for proposals.  Is that a grant or  
12  is that a cash contribution?

13          If I come say, "Here's the letter; please give  
14  Legal Services some money," and then I'm the foundation  
15  and I come back and I say, "Well, explain to me a  
16  little better how you're going to use it in accordance  
17  with our charitable foundation rules," I'm not sure  
18  where that line is between a grant and a -- as a legal  
19  matter, anyway.

20          CHAIRMAN KECKLER:  That's an example.  So, for  
21  instance, and others can comment, the example here is a  
22  good one in terms of the Board's going to remain

1 apprised of things, and particularly in circumstances  
2 that aren't clear. On the other hand, grants that are  
3 available, sometimes we have time for notice for them  
4 anyway, but it just seems that's something that, to  
5 some extent, we could expect to do as a matter of  
6 course.

7           Gifts that if somebody -- I don't know how  
8 often this happens; it doesn't seem to happen nearly as  
9 often as we'd hope, that people would come up the  
10 street with million-dollar checks. It seems like, if  
11 they did, we would be glad -- our policy should  
12 indicate that we're happy to receive it if they're  
13 properly told about the restrictions and so on.

14           (Music on telephone.)

15           CHAIRMAN KECKLER: Somebody's actually  
16 celebrating my comment. They find it such a joyous  
17 prospect. If people can mute the telephone. They're  
18 putting us on hold? Okay.

19           MS. COHAN: Nice.

20           CHAIRMAN KECKLER: You were going to comment  
21 about something, Vic?

22           MR. FORTUNO: If this doesn't clear up, we may

1 have to --

2 MR. LEVI: They probably didn't want to be  
3 solicited.

4 MR. FORTUNO: -- ask everyone to dial back in  
5 and then cut them off so that the person who's got us  
6 on hold is cut off. Everyone else will come back in.  
7 It sounds like it may have stopped.

8 CHAIRMAN KECKLER: No, it hasn't stopped. So  
9 I'm afraid we'll just have to have people dial back in,  
10 if we can have that happen.

11 MR. FORTUNO: Anyone who's on the phone,  
12 please dial back in because we're going to cut you off  
13 now in order to cut off the party that has us on --

14 (Pause.)

15 MR. FORTUNO: All I was going to say was I  
16 think that -- for the record, Victor Fortuno in the  
17 Office of Legal Affairs. And I think Julie was right.  
18 This is somewhat unusual. This in some ways is akin  
19 to bad facts making for bad law. There was a set of  
20 circumstances that drew a little criticism, and then in  
21 response to the criticism, this policy was generated.

22 I think that it's taken on a life of its own,

1 and what we're doing now is we're working with this  
2 policy that took on a life of its own and trying to  
3 modify it in ways that make it a little more  
4 user-friendly. But I think that it can be revamped  
5 very radically. It can be largely eliminated. It's  
6 entirely up to you.

7           But the circumstances were that there was a  
8 reception up on the Hill. The Corporation was  
9 anticipating some private contributions. The private  
10 contributions didn't come through.

11           The Corporation funded the reception with, in  
12 mind, a promise of some money that was made, and in  
13 fact was received after the event itself. There was  
14 some criticism about using LSC funds, that is,  
15 appropriated funds, for the reception. And in order to  
16 address the criticism, this policy was drafted.

17           But I think that, if you understand the  
18 background, you understand why it was. But I think the  
19 questions are entirely appropriate, which is, is this a  
20 bit excessive? Is it micromanaging? And obviously,  
21 you want to encourage bringing in fresh money, not  
22 discourage it or make it any more difficult than

1 necessary.

2 CHAIRMAN KECKLER: Right. And I think that we  
3 need to have a policy for grants that encourages us to  
4 compete for grants properly. We need to have a policy  
5 that, if someone does offer us, just straight-up offer  
6 us money, what we can do with it.

7 Maybe we have to say, "That is fantastic. I  
8 can't just take the check, but it's fantastic. Here's  
9 who you need to talk to. You need to call Office of  
10 Legal Affairs. You need to call Jim, whoever that is,  
11 and this is a wonderful gift," but pass it off to  
12 somebody who can see whether it's properly receivable.

13 Then, for other things, yes. We probably do  
14 need continued board involvement and notice for some  
15 things.

16 One question I had, which was a question I  
17 promised --

18 MR. FORTUNO: Herb Garten?

19 CHAIRMAN KECKLER: -- Mr. Garten to talk  
20 about, is that on the resolution, it seems to imply  
21 that the revised protocol would involve us using our  
22 same bank account for this, but simply accounting for

1 it.

2 MR. FORTUNO: Yes. I think that Herb was  
3 involved in the crafting of the original resolution,  
4 and it provided for not just separate accounting of the  
5 funds received, the contributed funds, but for those  
6 funds to be maintained in an entirely separate checking  
7 account.

8 I think the comptroller at one point reported  
9 that doing so resulted in the payment of additional  
10 fees, that he didn't think it was necessary to have it  
11 in a separate account so long as it was separately  
12 accounted for. And so I think that when the resolution  
13 was amended the first time, it was amended to allow for  
14 the funds to be maintained in the LSC main account, but  
15 that it would be accounted for separately.

16 I don't know if David's in the room, but he --

17 PRESIDENT SANDMAN: Yes.

18 MR. FORTUNO: -- may be able to speak to that.

19 But I think that, in a nutshell, it had been a  
20 requirement that it be maintained, not just accounted  
21 for separately but maintained in a separate checking  
22 account. And David can explain what the expenses were

1 related to that and why that was changed.

2 CHAIRMAN KECKLER: You can weigh in on this.  
3 I guess I understand that it costs more, and I  
4 understand that, as an accounting matter, it ultimately  
5 purely be segregated. I think there's a reason, for  
6 appearance's sake, to consider maintaining separate  
7 bank accounts despite a slight economic inefficiency  
8 there. But anyway, I'll let you go ahead and explain.

9 MR. RICHARDSON: For the record, my name is  
10 David Richardson. Yes. When we set up the account,  
11 interest was very minimal. As a matter of fact, the  
12 year that we put the money in the bank, we received on  
13 the funds like \$18 worth of interest, and they charged  
14 us \$35 for a confirmation letter to our auditors to  
15 verify that we had the money in the bank and it was not  
16 encumbered. So it was costing us more money to have  
17 the money in a separate account.

18 MR. FORTUNO: We are talking about relatively  
19 small dollar amounts.

20 PRESIDENT SANDMAN: I have a question. I  
21 don't see in the existing protocol any requirement that  
22 the money be maintained in a separate account. I see a



1 requirement that it be accounted for separately, which  
2 appears to be --

3 MR. FORTUNO: That's because what you're  
4 looking at is the amended protocol, 2010.

5 PRESIDENT SANDMAN: No. I'm looking at page  
6 93.

7 MR. FORTUNO: Yes. That's the --

8 PRESIDENT SANDMAN: It says, "Current  
9 Protocol."

10 MR. FORTUNO: If you look at the bottom of the  
11 page, it says, "Revised and adopted on April 17, 2010."

12 That took out the requirement that it be in a separate  
13 account. If you look at the original protocol from  
14 2008, that had it in there.

15 It was changed in 2010, and what you're  
16 looking at here is the resolution currently in effect,  
17 which is what we ended up with after the revisions in  
18 2010.

19 PRESIDENT SANDMAN: Then why would any further  
20 change be necessary?

21 MR. FORTUNO: There is no elimination of that  
22 requirement because it's not in the current policy.

1 When Herb was thinking, gee, didn't we have a  
2 requirement that it be maintained in a separate  
3 account, it's because he was thinking of the policy he  
4 drafted back in '08.

5 So there would be a change now if you wanted  
6 to go back to the requirement that it be in a separate  
7 checking account. If you don't want to go back to  
8 that, then there's no change on that point necessary.

9 CHAIRMAN KECKLER: I think the issue arose  
10 because of looking at the resolution, because there's a  
11 "Whereas" clause in the resolution. And so I'm not  
12 sure whether the "Whereas" clause -- it doesn't really  
13 connect up with either the current protocol or the  
14 draft protocol. It's, "the fees being charged by the  
15 bank for maintaining a separate bank account." I don't  
16 know that we need that "Whereas" clause.

17 MR. FORTUNO: No.

18 CHAIRMAN KECKLER: We don't? Okay. So in any  
19 event, I think that we can get rid of that. But I  
20 think that we've given some suggestions for -- we  
21 definitely want a revised protocol. We want a new  
22 protocol. We want further revisions to the draft

1 protocol before presenting that to the Board for  
2 recommendation.

3           We've given some suggestions here, and I  
4 encourage all other board members to contact Mattie and  
5 Vic regarding their suggestions for principles that  
6 would govern it and/or, of course, helpful language or  
7 whatever would have it. And we will move forward with  
8 that.

9           Hopefully, since we know that we're going to  
10 have an interim meeting to discuss changes to the  
11 rulemaking on enforcement mechanisms, if there's a  
12 revised contributions protocol by that point, we may be  
13 able to consider that in the telephonic meeting as well  
14 because I do want to move forward with it as soon as we  
15 can. As you've seen from the development meeting and  
16 so on, we continue to be looking for possibilities for  
17 private sources and different sources for the  
18 Corporation.

19           So I think the official thing is to table this  
20 momentarily with instructions to management, and  
21 revisit this in the near future.

22           Without objection on that point, I will then

1 turn to our next item of business, which is public  
2 comment on the many activities we've considered today.

3 MR. BROOKS: Hi. I am Terry Brooks, the  
4 counsel to the ABA Standing Committee on Legal Aid and  
5 Indigent Defendants. I'm very aware that I am what  
6 stands between you and lunch, or perhaps my friend  
7 Chuck is. But I would like to make a few additional  
8 comments on the question of the enforcement mechanisms  
9 that the Committee took up early in its agenda.

10 The ABA did submit comments, and I will not  
11 reiterate those, nor will I seek to reiterate the many  
12 points that are made in the 17 comments you did  
13 receive. But I just wanted to provide a sort of  
14 high-level overview of a couple of issues that I hope  
15 you'll consider as you delve into this in more detail.

16 The ABA commends LSC for examining  
17 improvements in its accountability, and recognizes how  
18 vitally important it is that LSC be a responsible  
19 steward of the federal funds that it administers. The  
20 ABA comments were carefully crafted so that they do not  
21 urge LSC to avoid consideration of improving  
22 accountability, but only attempt to promote a fair and

1 objective process.

2           The comments also urge that LSC has an equally  
3 important obligation to preserve the provider  
4 infrastructure that exists out there. As you all know,  
5 it's an infrastructure that right now is under  
6 incredible pressure in these economic times.

7           I think you also all know that the funding  
8 system that exists out there is very complex, fragile,  
9 and interdependent. Something that happens to one  
10 stream of funding can have an impact on other streams  
11 that are often provided as matching funds.

12           The funding streams that are out there also  
13 support and leverage a substantial amount of pro bono  
14 activity, so a reduction in funding can have ripple and  
15 magnified effects. So against that backdrop, there's  
16 just three things I'd like to talk about real briefly.

17           One is the question of due process, which is  
18 raised over and over in the comments, and I won't go  
19 over all of that. But I think it would be helpful to  
20 look back at where the due process provisions have come  
21 from and gone to as we trace them through the various  
22 regulatory changes that have occurred.

1           The original LSC Act, in Section 1011, said  
2   that: "Financial assistance shall not be suspended  
3   unless the grantee has been given reasonable notice and  
4   opportunity to show cause why such actions should not  
5   be taken," and that: "Financial assistance shall not  
6   be terminated and a suspension of financial assistance  
7   shall not be continued for longer than 30 days unless  
8   the grantee has been afforded reasonable notice and  
9   opportunity for a timely, full, and fair hearing, and  
10  when requested, such hearing shall be conducted by an  
11  independent hearing examiner."

12           In 1996, Congress in the Appropriations Act  
13  made some substantial changes to the regulatory  
14  structure for the Corporation to address certain types  
15  of grantee activities that it saw as problematic. But  
16  it left this balanced system of dealing with compliance  
17  infractions in place, the requirement of a possibility  
18  of an outside, independent hearing examiner.

19           In 1998, with no finding of frequent or  
20  significant compliance violations, the Appropriations  
21  Act suddenly changed this. It just simply did away  
22  with Section 1011. I tried to find legislative history

1 on why that was done; I was unable to find any.

2           So at that point, in 1998, Part 1606 was  
3 amended to create the current procedure that applies to  
4 reductions in funding of greater than 5 percent. And  
5 that change moved all consideration of compliance  
6 issues inside of LSC. No longer is it provided for any  
7 possibility of an independent outside hearing. Under  
8 the existing Part 1606, it's an entirely internal  
9 process, with no external review.

10           With that change, it's surprising that that  
11 procedure is found to be burdensome and difficult. It  
12 does require two levels of review within LSC, but it's  
13 all within LSC and within LSC's control.

14           The current proposal now goes a great step  
15 further. It eliminates any possibility or any need for  
16 review whatsoever. The same program offer within LSC  
17 that encounters what is viewed as a compliance problem  
18 is empowered to then impose a sanction. That person is  
19 police, prosecutor, judge, and jury. And that's a  
20 substantial change from where this all came.

21           The second point I'd like to make is something  
22 that you might think of as more in the nature of

1 substantive due process. The termination and  
2 suspension procedures are pretty much a punitive type  
3 of effort to try and encourage compliance.

4           If you look at other types of systems of that  
5 nature -- for example, if you analogize it to criminal  
6 law -- there is usually a requirement of an essential  
7 element of intent. Did the alleged wrongdoing  
8 understand, or reasonably should have understood, that  
9 what they were doing was wrong and do it anyway?

10           The current 1606 and the proposal to amend it  
11 do not have any intent requirement at all as an  
12 essential element. It's there as a consideration in a  
13 list of considerations, but there's no requirement that  
14 there be an initial finding of willful and knowing  
15 misconduct here. And the ABA comments suggested that  
16 you have an opportunity to make an improvement and to  
17 incorporate within the regulation that type of intent  
18 provision.

19           I guess the last thing I wanted to suggest is  
20 that there are some substantial drafting issues in the  
21 proposal, particularly if you look at the Definitions  
22 section in the proposal, to changes to the Definitions



1 section.

2           The proposal creates some confusing  
3 duplication, and it seems to eliminate an important  
4 definition. And so for that reason, there will be a  
5 need for some redrafting.

6           But more seriously, the proposal in the  
7 Definitions section also, in a sort of circular and  
8 contradictory way, states that termination does not  
9 include a limited reduction in funding. But throughout  
10 the rest of the reg -- for example, in the Grounds  
11 section of the reg -- the term "termination" is used.

12           So the limited reduction in funding is not a  
13 termination; therefore, the Grounds section doesn't  
14 apply; therefore, you have no section that deals with  
15 grounds for limited reductions in funding, as I read  
16 it.

17           Therefore, it would seem that the next draft  
18 will need to be a very different draft than the one we  
19 have seen. And for that reason, I want to suggest that  
20 it may be appropriate to circulate that next draft for  
21 public comment again so that we can see how those  
22 difficulties, and some of the other suggestions that

1 ABA and others have made, are worked out, and have an  
2 opportunity to comment on those again.

3 Thank you for your time and attention, and  
4 I'll stand down and we'll let Chuck stand between you  
5 and lunch.

6 CHAIRMAN KECKLER: Great. Thank you very  
7 much, Mr. Brooks, and thank you also to the ABA for its  
8 thoughtful comments, and I will add, to all the people  
9 and organizations that took time to comment on the  
10 rule. Thank you.

11 Mr. Greenfield?

12 MR. GREENFIELD: Thank you, Charles. Chuck  
13 Greenfield, NLADA, on behalf of NLADA.

14 What happened is what I suspected would  
15 happen. This proposal is very controversial. When you  
16 review the comments, if you haven't already, over  
17 60 -- I think 64 -- different programs commented, 43 of  
18 them LSC programs. So a third of all grantees  
19 commented on this, plus 21 other programs.

20 Major partners of LSC see problems with this,  
21 and we have submitted comments on behalf of NLADA, as a  
22 number of individual programs, as I said, have

1 submitted comments.

2 In the spirit of this Committee's discussion  
3 last January in San Diego about making sure that the  
4 comments are carefully considered before LSC moves  
5 forward, I just ask that that be continued, that spirit  
6 be continued, and that this Board as well as management  
7 consider these comments when it decides whether to  
8 proceed on this regulatory path, or decides to withdraw  
9 this approach. So thank you very much.

10 CHAIRMAN KECKLER: Thank you.

11 If there are no further public comments, we'll  
12 consider and act on any or business that anybody has  
13 before the Committee.

14 (No response.)

15 CHAIRMAN KECKLER: Seeing none, I will now  
16 consider a motion to adjourn, if anyone will offer such  
17 a motion.

18 M O T I O N

19 MR. GREY: Moved.

20 MS. MIKVA: Second.

21 CHAIRMAN KECKLER: All in favor?

22 (A chorus of ayes.)

1                   CHAIRMAN KECKLER:  The business of the  
2 Committee is now concluded.  Thank you.

3                   (Whereupon, at 12:23 p.m., the Committee was  
4 adjourned.)

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