




OFFICE OF LEGAL AFFAIRS

RULEMAKING OPTIONS PAPER

TO: **Operations & Regulations Committee**
Board of Directors

FROM: **Victor M. Fortuno** 
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SUBJ: Rulemaking to Develop "Lesser Sanctions"

Introduction

This Rulemaking Options Paper ("ROP") has been prepared by the Office of Legal Affairs ("OLA") and LSC's senior management.¹ The ROP is structured as follows: a summary of Management's recommendation; a "Background" section to provide some legal and programmatic context for the issue(s) at hand; a "Scope of Potential Rulemaking" section, which sets forth a variety of policy options; a "Rulemaking Process" section, which sets forth a discussion of the various rulemaking process options available; and, finally, there is a "Management Recommendation" section which sets forth Management's recommendations with respect to the rulemaking scope and process options. This ROP is intended to aid the Committee and the Board in the deliberation and decision-making process.

Summary of Management's Recommendation

For the reasons set forth below, Management recommends that LSC initiate a rulemaking providing LSC with the authority to impose, and setting forth the standards for the imposition of, two additional enforcement tools, colloquially known as "lesser sanctions." These tools are an extension of the maximum suspension period from 30 days to six months and procedures for the imposition of a limited (less than five percent) reduction of a grantee's funding. Adding to LSC's enforcement "toolbox" will be useful to assist LSC in securing compliance. Not all enforcement tools need to be applied to be effective. Rather the potential for a sanction may have a deterrent effect. Management

¹ This ROP differs from the one dated July 12, 2007, but reflects further consideration by and the current thinking of LSC senior management.

further recommends that such rulemaking be undertaken through Notice and Comment Rulemaking, with the convening of a limited scope Rulemaking Workshop to address the process for imposing limited reductions in funding.

Background

LSC's Enforcement Authority & Tools

LSC takes seriously its responsibilities to ensure compliance. The LSC Act provides general enforcement authority to the Corporation.² LSC's main regulation discussing general enforcement authority and procedures is the Enforcement Procedures regulation at 45 C.F.R. Part 1618. In accordance with the requirements of Part 1618, Management uses a variety of enforcement tools, formal and informal, to ensure compliance. By and large, these tools are very effective as the vast majority of LSC grantees are in compliance with LSC requirements most of the time. Grantees want to be in full compliance and, where instances of non-compliance occur, grantees almost always work diligently and cooperatively with LSC staff to promptly come into compliance.

Among the enforcement tools currently available to LSC are: the imposition of Corrective Action Plans ("CAPs"), temporary suspension of funding, questioned cost proceedings, and termination (in whole or part) of a recipient's grant -- any of which may be imposed during a grant year; placing recipients on month-to-month funding, which may be done only at the outset of a grant term; and imposing special grant conditions, which may be done at the outset of a grant term or between grant years of a multi-year grant term. These tools, along with on site Case Service Report/Case Management System reviews, informal consultations and compliance training, generally suffice to ensure that recipients remain in compliance with applicable requirements and come back into compliance when violations occur.

Several additional enforcement tools are provided for in LSC adopted regulations. These tools are generally intended and available to the Corporation to address those rare instances of significant non-compliance by a grantee. In particular, LSC has adopted suspension procedures at 45 C.F.R. Part 1623 and questioned cost procedures at 45 C.F.R. Part 1630. LSC has also adopted grant "termination" procedures at 45 C.F.R. Part 1606 which contains procedures for the termination (in whole or part) of funding in cases of substantial noncompliance by a recipient with LSC statutory or regulatory requirements and other policies, instructions or grant terms and conditions. Under this regulation, any contemplated reduction of 5% or more of a recipient's funding is considered a termination and triggers the termination procedures.³ Reductions of funding of less than 5% are not considered terminations. However, unless the termination procedures set out in Part 1606 are used, LSC may not reduce a grantee's funding by less than 5% absent a formal rulemaking to establish standards and procedures.⁴ LSC has never adopted regulations

² LSC Act, §2996e(b)(1)(A); 42 U.S.C. §1006(b)(1)(A).

³ 45 C.F.R. § 1606.2(d).

⁴ 45 C.F.R. § 1606.2(d)(2)(v).

establishing such standards and procedures.

The instances in which LSC encounters a grantee that is not diligently working toward compliance are few and far between. However, the proposed tools may well have a deterrent effect and increase LSC's flexibility in addressing compliance issues.

Previous Consideration of the Development of a "Lesser Sanctions" Regulation

Although the 1998 revision to Part 1606 contemplated further rulemaking to adopt procedures for limited reductions in funding, no further action was taken at the time, or subsequently, to develop such a rule. In 2002 the Regulations Review Task Force undertook a review of LSC regulations. The Report of the Task Force recommended the consideration of a "lesser sanctions" rulemaking in the context of a comprehensive consolidation of Parts 1606, 1618 and 1623 into one regulation setting forth the Corporation's enforcement and sanction standards. This recommendation was adopted by LSC management at the time of the issuance of the Task Force Report (January 2002) and was accepted by the LSC's Board of Directors, but no rulemaking was initiated prior to the end of the tenure of the then-existing LSC leadership.⁵

Enforcement and Sanctions in Federal Grant Programs

Federal grant-making agencies have, by regulation, adopted what is colloquially known as the "common grant rule." This is a uniform rule issued by the Office of Management and Budget as Circulars A-102 (Grants and Cooperative Agreements with State and Local Governments) and A-110 (Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations). Each Federal agency has adopted the common grant rule in its own regulations. Circular A-110 (and the various agency regulations implementing A-110) is what governs grants which LSC's recipients receive from Federal agencies such as the Department of Justice, and the Department of Housing and Urban Development.

Under this general authority, Federal agencies are authorized to: temporarily withhold cash payments pending correction of the deficiency by the recipient; disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance; wholly or partly suspend or terminate the current award; withhold further awards for the project or program; or take other remedies that may be legally available. Examples of other tools used by other agencies include converting the grantee to a reimbursement method for payment and withholding of awards of other discretionary grants. Comparing LSC's enforcement tools with those of Federal agencies which provide grants other than on a cost-reimbursement basis (similar to LSC), it appears that LSC has and uses most of the same tools employed by those Federal agencies.

⁵ Subsequently, the Board deferred all action on rulemaking pending the appointment of a new Board of Directors.

Scope of Potential Rulemaking

The following section addresses two options involving the imposition of monetary-based penalties. Although Management believes that monetary-based enforcement tools should be enforcement tools of last resort, they can be useful options for their deterrent effect and as a meaningful sanction in the infrequent instances in which they would be needed. Although either of these tools could be adopted individually without the other, Management believes that pursuing both would be preferable. Such an approach would provide LSC with a more complete set of enforcement tools, enabling LSC to choose the most effective and appropriate sanction in any given situation.

Amending Part 1623 to Provide for Suspension of Funding Pending Corrective Action

One monetary-based sanction which Management believes would be useful to have at its disposal would be the extension of the maximum suspension period from 30 days to six months, with the suspended funding fully restored at the end of that suspension period. There is no legal impediment to extending the maximum suspension period, although LSC would have to amend Part 1623 by rulemaking to accomplish this.⁶

As with limited reductions in funding, Management believes that a longer maximum suspension period can be a useful option for its deterrent effect (thereby also enhancing the efficacy of non-monetary sanctions) and as a meaningful sanction in itself in the infrequent instances in which required. Moreover, the reasons as discussed below justifying the regulation's current 30-day maximum suspension period are no longer as compelling as they were when the rule was adopted. Rather the current operating environment for many grantees suggests that a longer maximum suspension period may now be merited.

The preamble to the current version of Part 1606 explains that the 30-day limit was chosen to:

reflect[] the presumption that a suspension of too long a duration would likely endanger a recipient's ability to continue service to its clients. A suspension is intended to be used for extraordinary circumstances when prompt intervention is likely to bring about immediate corrective action. The Corporation, therefore, should act quickly to determine that the problem is solved and is unlikely to reoccur, the appropriate corrective action has been taken, or initiate a termination process under part 1606.

⁶ Although §1011(2) of the LSC Act provides that "a suspension of financial assistance shall not be continued for longer than thirty days, unless [the grantee] has been afforded reasonable notice and opportunity for a timely, full, and fair hearing, and, when requested, such hearing shall be conducted by an independent hearing examiner," §501(b) of LSC's FY 1998 appropriation legislation (which has been carried forth in each subsequent appropriation) renders that provision inoperative. Specifically, that section states that "[s]ections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 2996j) shall not apply to the provision, denial, suspension, or termination of any financial assistance using funds appropriated in this Act."

63 Fed. Reg. 64646 at 64648 (Nov. 23, 1998). In the nearly nine years since this rule was adopted, many grantees have significantly increased the variety of sources of their funding. While there are some grantees with little or no non-LSC funding, many grantees now receive significant amounts of funding from other, non-LSC sources. As such, a 30-day suspension in funding for these grantees might represent nothing more than a short-term cash flow challenge, if that, given that the LSC funds are restored at the end of the suspension period. A longer potential maximum suspension period may, therefore, now be necessary to achieve the same level of grantee response that a 30-day suspension period was expected to engender in 1998. Moreover, because of the short duration of the current maximum suspension period, LSC has rarely gone to the trouble of actually imposing a suspension.⁷ Having the option of a longer suspension term would make suspension a more practical option. For example, a more practical suspension option would have been useful in a few situations in which grantees refused to provide LSC access to certain records. Management believes that having a more creditable threat of a suspension may have provided additional incentive to those grantees to be more cooperative in producing these records.

Management anticipates that the maximum six month suspension would be warranted only in rare cases, and would only seek to apply the minimum suspension period it believes would be necessary to result in the required corrective action being taken. Of course, as is currently the case, the full funding would be restored upon conclusion of the suspension period. However, the flexibility to apply up to a maximum six month suspension would be helpful. Management is of the opinion, however, that if a suspension of longer than six months would be needed or appropriate, other sanctions (such as permanent reductions in funding or complete termination) would likely be more appropriate.

Amending Part 1606 to Include Standards and Procedures on Limited Reductions in Funding

The adoption of standards for the imposition of a reduction of funding of less than 5% would also provide LSC with additional flexibility in enforcement tools. On those rare occasions in which such a penalty would have to be imposed, Management believes that having a limited reduction of funding option utilizing a less cumbersome and involved process than the existing termination process would be an appropriate way of sanctioning a grantee. For example, there have been a few cases in which grantee's have knowingly violated restrictions (such as the attorneys' fees and the solicitation restrictions). In these cases, a 1606 termination was not appropriate. The amount of LSC funds expended in the commission of the violations was relatively small and a questioned cost proceeding was neither sufficient to deter these grantees from their courses of action nor provided a punishment commensurate with the nature of the violation. A lesser reduction would also minimize the risk that a grantee's ability to implement corrective action or, more importantly, client service would suffer due to a significant lack of resources. Management acknowledges that it may be difficult to develop a simplified process for the imposition of

⁷ The exception to this is in cases involving a grantee's failure to provide the IG with an acceptable audit. However, in these cases, the suspension term runs, as required by statute, until an audit is completed.

limited reductions in funding, but is of the opinion that such a process can be developed and that the effort would be worth undertaking.

Rulemaking Process - Options

Under the LSC Rulemaking Protocol, LSC may pursue rulemaking by Notice and Comment Rulemaking only, or through the use of Negotiated Rulemaking (followed by a brief notice and comment process). If LSC pursues a Notice and Comment rulemaking only, LSC has the option of conducting a public Regulatory Workshop to engage in a discussion with interested parties about the subject of the rulemaking prior to the development of a Notice of Proposed Rulemaking.

With respect to the proposed rulemaking on the extension of the maximum suspension period (Part 1623), although the rulemaking is likely to be of significant interest to the grantee community, the issues do not appear to be of such a nature as to require the convening of a Regulatory Workshop. The LSC Rulemaking Protocol calls for the use of Regulatory Workshops to elicit information through open discussion about problems or concerns with a particular issue and to provide an opportunity for sharing ideas on how to address that issue. However, since the contemplated rulemaking would involve largely procedural matters, a public discussion (beyond that which may occur at the Board meeting in which this issue is raised) does not seem likely to raise issues or create novel approaches to problem-solving which will be of significant assistance to LSC in the drafting of a Notice of Proposed Rulemaking. In this instance, the normal exchange of ideas through the written notice and comment process will likely be adequate.

On the other hand, Management believes that the convening of a limited scope Regulatory Workshop on the development of a process for the imposition of limited reductions in funding (Part 1606) could prove beneficial. The give-and-take dialog of a Regulatory Workshop might help elicit ideas on a process which would be streamlined (in comparison to the existing termination procedure) while affording grantees sufficient due process.

As the contemplated rulemakings do not call for discussion of issues relating to the provision of legal services, it does not appear that a prolonged face-to-face dialog with grantees would be necessary in these instances. In our view, the time and expense of a Negotiated Rulemaking would not appear to be warranted. Rather, the rulemaking would focus on process issues and procedures LSC must follow in taking enforcement action. A Notice and Comment rulemaking would appear to suffice.

Management's Recommendation for Action

Management recommends the initiation of a rulemaking amending Part 1623 to extend the maximum suspension period from 30 days to six months and amending Part 1606 to provide for limited (less than five percent) reduction of a grantee's funding. Management further recommends that such rulemaking be undertaken through Notice and Comment Rulemaking only. Management is of the opinion that Negotiated Rulemaking is neither appropriate nor necessary in this instance. Management believes that convening a Regulatory Workshop on the

extension of the maximum suspension period would not represent an effective or efficient use of resources. Rather, Notice and Comment Rulemaking by itself would provide sufficient opportunity for all interested parties to comment on LSC's proposed course of action. However, Management recommends the convening a limited scope Regulatory Workshop on the development of a process for the imposition of limited reductions in funding.

Approved:



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