

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

TELEPHONIC MEETING OF THE
OPERATIONS & REGULATIONS COMMITTEE

OPEN SESSION

Thursday, September 20, 2012

3:01 p.m.

Legal Services Corporation
3333 K Street, N.W.
Washington, D.C. 20007

COMMITTEE MEMBERS PRESENT:

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

OTHER BOARD MEMBERS PRESENT:

Julie A. Reiskin

STAFF AND PUBLIC PRESENT IN THE CORPORATION'S OFFICES:

James J. Sandman, President

Richard L. Sloane, Special Assistant to the President

Rebecca Fertig, Special Assistant to the President

Kathleen McNamara, Executive Assistant to the
President

Lynn Jennings, Vice President for Grants Management

Victor M. Fortuno, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary

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

Jeffrey E. Schanz, Inspector General

Laurie Tarantowicz, Assistant Inspector General and
Legal Counsel, Office of the Inspector General

Matthew Glover, Associate Counsel, Office of the
Inspector General

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

Janet LaBella, Director, Office of Program Performance

John C. Meyer, Director, Office of Information
Management

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

Don Saunders, National Legal Aid and Defenders
Association (NLADA)

C O N T E N T S

OPEN SESSION	PAGE
1. Approval of agenda	4
2. Approval of minutes of the Committee's meetings of July 27, 2012	4
3. Briefing on Further Notice of Proposed Rulemaking on termination procedures, enforcement, and suspension procedures	5
Staff Report by Mark Freedman, Senior Assistant General Counsel Public Comment on the Further Notice of Proposed Rulemaking	
4. Public comment	33
5. Consider and act on other business	47
6. Consider and act on adjournment of meeting	48

Motions: 4, 4, 47

P R O C E E D I N G S

1

2

(3:01 p.m.)

3

CHAIRMAN KECKLER: Perhaps we can take care of the initial matters here, and hopefully others will be able to join who have an interest.

6

So being as there's a quorum, I will now call to order the duly noticed teleconferenced meeting of the Operations & Regulations Committee. And the first item of business is the approval of the agenda for today.

10

M O T I O N

11

MR. GREY: Move it.

12

MS. MIKVA: Second.

13

CHAIRMAN KECKLER: All in favor?

14

(A chorus of ayes.)

15

CHAIRMAN KECKLER: Hearing no opposition, I will deem the agenda approved, and move on to the minutes of our July 27th meeting. The minutes should have been attached to the email that you received. Yes?

19

M O T I O N

20

MS. MIKVA: Move to approve.

21

MR. GREY: Second.

22

CHAIRMAN KECKLER: Okay. All in favor?

1 (A chorus of ayes.)

2 CHAIRMAN KECKLER: Hearing no opposition, I
3 will deem the minutes of our last meeting approved and
4 turn to our first substantive item of business, which is
5 a briefing that has been prepared by Management on our
6 further notice of proposed rulemaking, and which is set
7 up by a memo you should have received in that email, as
8 well as a timeline analysis of our current enforcement
9 mechanisms.

10 So without any further commentary on my part,
11 I'll now turn the teleconference over to Mr. Freedman for
12 a briefing.

13 MR. FREEDMAN: Thank you, Mr. Chairman. This
14 is Mark Freedman, Senior Assistant General Counsel in the
15 Office of Legal Affairs. For reference of the committee,
16 we have here on the phone at LSC the President and the
17 IG.

18 We also have our new Vice President for Grants
19 Management, Lynn Jennings. We have Lora Rath, the
20 Director of the Office of Compliance and Enforcement;
21 Janet LaBella, the Director of the Office of Program
22 Performance; also, Laurie Tarantowicz, Counsel for the

1 Inspector General, and Matt Glover, Associate Counsel for
2 the Inspector General.

3 We also have Becky Fertig, who has organized
4 all this for us. And we also have Chuck Greenfield, who
5 is here for NLADA. Oh, and of course, Kathleen, who I
6 didn't see because she was sitting right behind us, and
7 who also is responsible for getting everything together
8 for us. Apologies to Kathleen.

9 I'm going to give a hopefully ten minutes or
10 less just overview. Then we'll get to what I expect will
11 be questions you all already have. Today we'll have a
12 discussion about the basis for Management's
13 recommendation regarding these enforcement mechanisms.

14 On the 30th, when we get together in person,
15 we'll be prepared to have a discussion on the comments on
16 the FNPRM, the modified rulemaking. And Victor Fortuno,
17 the General Counsel, has just joined us as well.

18 First I'd like to give a quick reference to the
19 timeline. The last meeting, the Committee asked about
20 having some timelines to be able to better understand
21 what we currently have. I believe at the time I
22 mentioned we had a law clerk that I thought would be all

1 over it, and I'd like to say that Flora Soleno did a
2 great job. She was in my office first thing when I was
3 back from the board meeting saying, "What do you want?"
4 And I said, "I don't know. Surprise me. Just make it
5 good." I think she did.

6 As you can see from these timelines, there are
7 certain presumptions in there because not all the
8 testimony periods are definite, and I made certain
9 presumptions about maximizing the time periods, the
10 allowances. These are probably pretty good guesses, but
11 I would expect that in reality, most of these timelines
12 would go a little longer because nothing tends to go
13 quite on time. But they give us a good ballpark.

14 It's important to note that these timelines
15 start with the decision to take action. Usually that has
16 been preceded by weeks or months of investigation, trying
17 to get to the point of knowing we want to do something.
18 The practice is to work carefully with the recipients to
19 make sure that we have the facts right, we understand
20 what happened, how it happened, and what is being done to
21 address it.

22 So the timelines start with, we have all the

1 facts gathered and we have reason to believe that we need
2 to take some sort of action. And usually at that point
3 there are a lot of people asking, well, what are we going
4 to do about it?

5 MS. REISKIN: Excuse me. This is Julie. Does
6 that assume that you've already talked to them informally
7 about, this is a problem; we really need you to get on
8 it, without anything formal?

9 MR. FREEDMAN: Exactly. Thank you. Full
10 disclosure: There isn't anything in here that explicitly
11 says exactly that. But quite simply, that's the way this
12 type of stuff operates, that we need to have gathered the
13 information to be able to form a basis for the initial
14 notice that this all involves. And gathering that
15 information is something that I can't imagine being done
16 without the involvement of the grantee. So that is the
17 expectation of how these would always be done.

18 Also, there's a certain sense of, if we want to
19 take an action that we can defend, we need to be able to
20 do something that we can say, we really have the facts
21 right, and we made sure that we understood what the
22 grantee was doing and why they thought they were doing

1 it.

2 Otherwise, we're in danger of doing something
3 that would potentially appear to be arbitrary and an
4 abuse of our power, and it would, quite frankly, look
5 bad, and potentially would give them a basis for
6 challenging our action.

7 CHAIRMAN KECKLER: Mark, can I pause you just
8 for a second there? This is a little bit to one side of
9 it, but it has to do with the issue of debarment and
10 termination and debarment procedures. We talk quite a
11 bit about an independent hearing examiner.

12 Who are these people, and do we know who they
13 are ahead of time? How does that work and get slotted
14 into the timeline?

15 MR. FREEDMAN: The way the rules are set up
16 right now, if it is a termination of debarment, so that
17 would be a termination of 5 percent or greater, there is
18 an opportunity for an appeal to a hearing examiner. The
19 hearing examiner then makes the recommendation -- we'll
20 have a recommended decision that then goes for a final
21 decision of the President.

22 On the 1606 timeline, we have that in there as

1 -- it's between days 85 and 115, and day 115 is when the
2 hearing would occur. And I've spotted this in here as a
3 one-day hearing, although it easily could be a multi-day
4 hearing.

5 The President appoints that person, and under
6 the current reg, that could be an LSC employee who has
7 not been involved with the termination to date. It could
8 be someone from outside LSC. That's a decision the
9 President gets to make.

10 We have a time frame of ten days, from day 75
11 to 85, for the recipient to request -- after the
12 recipient has requested a hearing for LSC to notify the
13 recipient of the date and time of the hearing. That's
14 the primary window for the President to decide who the
15 hearing officer is going to be, although I would expect
16 that, as a practical matter, as we started one of these,
17 we would anticipate the likelihood of a hearing, and the
18 President would probably already have in mind who to have
19 prepared to conduct the hearing to meet the requirements
20 of the rule.

21 CHAIRMAN KECKLER: You've said, interestingly,
22 that it can't be an LSC employee or it may be somebody

1 from outside LSC. In the past, how was that -- has it
2 normally been one or the other?

3 MR. FREEDMAN: Well, quite frankly -- I'm
4 looking at Vic to see if I'm wrong about this -- I think
5 we have not done any terminations since the rule was
6 revised in 1998.

7 Prior to that, when we had the requirement of
8 an independent hearing officer for terminations or for
9 denials of refunding, when we had a right to refunding, I
10 believe that the requirement was that it be someone
11 outside of LSC. Partially that was because of the
12 statutory requirements regarding due process that were in
13 the LSC Act.

14 Those statutory requirements were lifted by
15 Congress in 1996 as part of the appropriations riders.
16 So in 1998, as the rule was revised, part of it was also
17 making revisions to reflect the fact that Congress had
18 quite clearly sent the message that they thought that we
19 had procedural requirements that were too onerous in this
20 context.

21 So, as a practical matter, we simply haven't
22 made a call for how to handle the independent hearing

1 examiner and whether there are circumstances under which
2 that really would be an LSC employee or not. We haven't
3 had one of these proceedings.

4 CHAIRMAN KECKLER: Thank you. That's just
5 something I've always wondered about. But it is somewhat
6 relevant to crafting our procedures in these limited
7 reduction matters.

8 Thank you. Please go ahead.

9 MR. FREEDMAN: Okay. As I think the comparison
10 table, the first document, kind of lays out, there is
11 this gap, a time gap. Suspensions we can implement
12 fairly quickly, but suspensions only last for 30 days,
13 and even if there is no change in circumstances, no
14 actions are taken.

15 So we have an option for doing something
16 immediately but then releasing the funds a month later.
17 The limited reductions, as proposed, that would give us
18 something that could be done in 80 days, in about three
19 months. And that might dovetail nicely with the proposal
20 to expand suspensions for up to three months.

21 Absent those, the next options are disallowed
22 costs under 1630 or a termination of 5 percent or greater

1 under 1606. As you can see, both of those take five or
2 six months to complete. So we've got about half a year
3 before we can actually take an action. And in the case
4 of disallowed costs, the amount in question depends on
5 the money involved, which may or may not relate to the
6 severity of the violation.

7 So we have, under the current rules, a pretty
8 big time gap of up to six months before getting to the
9 point where we can actually do something. And this is,
10 again, after we have determined that we think there's
11 really a problem and that we think there's enough of a
12 problem that we need to take some kind of remedial
13 action.

14 That's of a concern, and I think that then
15 relates to -- that's a natural point to go into the
16 general analysis and justifications, that there are, in
17 one sense, two gaps here. One is that time gap. The
18 other gap is the below 5 percent. The termination reg
19 has functionally always provided that it goes down to 5
20 percent, and below 5 percent there's this acknowledgment
21 some different rules may apply.

22 In the revisions in 1998, it was made explicit

1 that the rules and procedural requirements for
2 terminations of 5 percent or greater do not apply for
3 below 5 percent, but that LSC couldn't impose any
4 reductions below 5 percent unless it came up with
5 specific regulations about how it would do so.

6 And that's what this proposal amounts to, is
7 filling in that gap, saying, here's how we will address
8 zero to 5 percent, and how to address them with
9 procedures that are tailored to the smaller amounts in
10 question and not the procedures that we have had
11 longstanding for amounts of 5 percent or greater.

12 The goal, of course, is to get the best system
13 of compliance to minimize the risk of the loss of client
14 services, loss of funding to an individual program, and
15 also there's the risk of loss of congressional confidence
16 in our oversight. Those all play together with our
17 overall compliance mechanisms.

18 The other tools that we have have limitations
19 for dealing with problems that are significant but that
20 don't call for a 5 percent or greater termination and the
21 accompanying procedures that those require.

22 For example, we may have corrective actions and

1 special grant conditions in which we've told the grantee,
2 you need to do A, B, or C. But fundamentally, those rely
3 on our enforcement of saying, if you don't, there will be
4 consequences in your next competition cycle, which may be
5 next month and it may be in two years.

6 And the consequences in competition are,
7 really, how long of a grant do they get, or do we not
8 give them a grant at all? We do not currently have an
9 option for giving someone a partial grant of 90 percent
10 of their funding because we think they're not doing a
11 perfect job.

12 And when we give someone funding, we are giving
13 them 100 percent funding; and if we feel like we can't
14 give someone funding, then we have the threat of the loss
15 of client services if we don't have someone who's ready
16 to take on that entire services area. And that can be a
17 substantial challenge.

18 Our experiences are that, of course, generally
19 recipients are either in compliance or they are eager to
20 sit down and address compliance concerns. They don't
21 like having corrective actions hanging over them any more
22 than we like having to try to get them to take those

1 actions.

2 There have been significant exceptions. As
3 discussed in the memo, there have been some major
4 violations of the regulations. There have been grantees
5 that have significant failures to address compliance
6 concerns or timely implement corrective actions.

7 LSC staff has generally been able to make it
8 work with the tools we have, but not without difficulty.
9 And I think that might be one of the most important
10 points here. We have what feel like many near misses.
11 We have circumstances that enable us to make our existing
12 tools work. Sometimes it's timing. Sometimes it's the
13 cooperation of the board members of the grantee, or some
14 of the senior staff of the grantee.

15 It's still a very difficult question we face
16 when we find ourselves with a significant program and the
17 question is, what are we going to do, and how do we know
18 it's going to work, and what tools do we have? And
19 that's when we find ourselves looking at our toolbox and
20 saying, well, there are some pretty big gaps. We're
21 going to try to find a way to make this work, but we know
22 that it might be easier and more effective if we fill

1 those gaps.

2 That's my summary, and I expect you probably
3 have some more questions.

4 MR. LEVI: I'm not sure. This is John Levi.
5 What's the process from here on out or that you're
6 recommending?

7 MR. FREEDMAN: Charles, would you like to
8 address that, or would you like me to?

9 CHAIRMAN KECKLER: Well, why don't I just say
10 what I have had in mind, given where we're at, and then
11 Management can comment further, if that seems sensible
12 and agreeable, as well as other members of the Committee
13 or the Board.

14 Right now it's September 20th. The Board and
15 the Committee will meet on this issue, and we still have
16 to discuss the comments. There were substantial
17 meaningful comments to the further notice of proposed
18 rulemaking.

19 The Committee ultimately needs to do -- and the
20 Board -- needs to do one more thing, which is, they need
21 to get a final product, which is a rule with a preamble
22 that reflects all of our work and all of the comments and

1 work of people outside, and get the final document, and
2 have us as a Committee, and then the Board, look that
3 over.

4 And in the rulemaking protocol, it specifies
5 that the Board, not just the Committee, receive that
6 substantially before they're required to vote on it. So
7 I would say before the Board would be asked to vote on a
8 final rule, a draft final rule with preamble, we need it
9 a couple of weeks, at least, in your hand well before the
10 time when we sometimes get board books.

11 So we can't vote on a draft final rule at the
12 next meeting because there is no draft final rule. But
13 eventually, the expectation is that we would see what
14 management comes up with for a draft final rule, and then
15 consider it.

16 Now, prior to that, beyond our discussion here
17 and our discussion in North Carolina, I would expect
18 there to be some more information coming from Management
19 before we get the draft final rule, somewhat open for
20 discussion and suggestion of the Committee and the Board
21 -- what more you need before you want to get the draft
22 final rule.

1 PRESIDENT SANDMAN: Charles, this is Jim
2 Sandman. I would propose that Management prepare a memo
3 to the Committee analyzing the comments that we've
4 received, providing Management's response and
5 Management's recommendation in light of the analysis and
6 the comments, with an explanation for our recommendation.

7 We haven't yet had an opportunity to do that;
8 the comment period just closed at the beginning of last
9 week, I believe. We have provided a summary of the
10 comments, but not an analysis of the type that I think
11 the Committee should have.

12 We won't be able to have that in time to be
13 distributed prior to the September meeting, but that's
14 what I would suggest Management provide to the Committee
15 as the next step.

16 CHAIRMAN KECKLER: That sounds sensible. I
17 guess I think that since we may want to deliberate and
18 discuss the comments -- all the comments have been
19 received, and so those would be available for the
20 Committee to read. And would Management be prepared to
21 offer some discussion of the comments at the September
22 meeting, or to facilitate a discussion by the Committee?

1 PRESIDENT SANDMAN: Yes.

2 CHAIRMAN KECKLER: Okay. I think that's what
3 we'll -- that's the next step, then, after today.

4 MR. LEVI: So the marked-up draft that we have
5 is not reflective of those comments yet?

6 MR. FREEDMAN: That is correct, Mr. Chairman.
7 The markup you have is the markup showing all the changes
8 that are suggested in the current proposed rulemaking
9 that we published in the beginning of August. So the
10 comments are on those proposed changes, and the
11 discussion on the 30th will be able to discuss that
12 proposal and the comments on them. We have not come up
13 with further revisions, a new markup with any additional
14 changes.

15 MR. LEVI: Fine. I just wanted to make sure.

16 MS. REISKIN: This is Julie. I have a
17 question, and maybe I'm really missing something. But
18 your memo, and even the examples, identify a lot of
19 different areas where the regs are getting in your way,
20 or maybe some different areas where the regs are getting
21 in your way.

22 But I'm not seeing resolution to those kinds of

1 things in the proposed rule, like the fact that it takes
2 so long or -- there are a few other areas. And I'm
3 wondering -- it seems like it's focusing on just the
4 suspension issue and the reducing limited funding issue.

5 And I'm wondering, if you're doing this, why
6 aren't you looking at a broader variety of tools, like
7 being able to suspend, and not un-suspending it until the
8 problem is fixed, or something like that?

9 MR. FREEDMAN: That's an excellent question.
10 In coming up with these proposals, we were trying to come
11 up with what we thought were reasonable tools to address
12 the gaps without going too far overboard.

13 And one of the things we did look at was the
14 question of indefinite suspensions. The regs currently
15 provide that if there's a suspension because of a failure
16 to submit an acceptable audit, the suspension will
17 continue indefinitely until an acceptable audit is
18 submitted. That was a provision in the 1996
19 appropriations riders that we implemented by the
20 regulation.

21 We strongly considered that as a proposal, it
22 certainly is something that could be put into this

1 rulemaking. The -- excuse me. In 1998, when we revised
2 the suspension and termination regs, there was the
3 question of whether suspensions would still be limited to
4 30 days.

5 At the time, the Corporation decided that if we
6 couldn't address something in 30 days, that suspending
7 further wasn't what we wanted to do; we should go right
8 to looking at termination. Our experience has been that
9 that doesn't really -- it leaves too big of a gap because
10 30 days really isn't, in many cases, enough time to
11 intelligently address it, and then we have this big gap
12 of potentially six months before we could actually engage
13 in a 5 percent or greater reduction, or termination.

14 So three months, 90 days, seemed to be a period
15 of time that was still true to the original concerns of
16 not having an indefinite suspension and giving the
17 Corporation incentive to roll forward to taking the next
18 action, while also providing a long enough period of time
19 that the suspension would be genuinely meaningful.

20 Now, I think we go through in the memo,
21 depending on the circumstances of a grantee, a 30-day
22 suspension may not be something that is a huge problem

1 for a grantee, depending on their cash flow. For some
2 grantees, it could be crippling; for some grantees, it
3 might not, whereas that same suspension that could go on
4 for three months will be more noticeable.

5 The one suspension that we had done -- I want
6 to say recently, but it was a number of years ago --
7 involving audit was with a grantee that had great trouble
8 getting their audit in. And after months and months and
9 months, we suspended their funding.

10 As a practical matter, depending on how you
11 count it, it was a month, month and a half suspension,
12 and they got their audit in. And it was a partial
13 suspension; it was only 20 percent of their funding. But
14 they also knew that that suspension would go on until
15 they got that audit in.

16 Does that answer your question?

17 MS. REISKIN: Kind of. I need to think about
18 it a little. But yes, kind of, thanks.

19 (Pause)

20 MR. FREEDMAN: Any other --

21 CHAIRMAN KECKLER: If there's --

22 MR. FREEDMAN: Oh, sorry. Go ahead.

1 CHAIRMAN KECKLER: Could you discuss a little
2 bit more, and I know that we have talked about this
3 before, about the issue of -- because when you talk about
4 gaps, on the one hand there's this timing issue to have
5 things -- that you can act before six months.

6 And as we just heard, there's really not really
7 been a termination, and now -- termination procedure in
8 15 years or thereabouts, 14 or 15 years. I mean, it
9 means it's sort of a bigger gap, in a sense.

10 And then there's just the placeholder within
11 the regulatory structure itself. But there's this other
12 gap that you talk about in your memo about the issue that
13 you alluded to, questioned costs and program impact, and
14 having something that addresses that.

15 Could you just talk a bit about that, and the
16 example that you have in there about that?

17 MR. FREEDMAN: I can. I think I want to
18 understand your question a little bit better. Are you
19 thinking of the issue of when we have questioned costs,
20 whether or not they are proportionate to the severity of a
21 violation? Is that what you're referring to?

22 CHAIRMAN KECKLER: Yes. Yes, exactly. Yes.

1 MR. FREEDMAN: Okay. Questioned costs or
2 disallowed costs are -- they're an interesting part of
3 this because, on the one hand, they are something that,
4 in fact, can be used as an enforcement tool because
5 they're available. We can say, we're taking back a
6 certain amount of money.

7 But they are not designed as a tool in that
8 measure. They're designed to say, money was charged to
9 the LSC account that should not have been charged, and as
10 an accounting matter, we're taking that back because LSC
11 funds shouldn't have been used for that, or there were
12 mistakes made. And it comes out of the accounting rules,
13 not out of program management rules.

14 We can always reduce a disallowed cost or a
15 questioned cost that will become a disallowed cost. We
16 can always reduce that for equitable reasons. We can
17 say, you made a mistake. There was \$60,000 worth of
18 funds.

19 But it was an honest mistake. You're working
20 to correct it. We think it would be bad for client
21 services to disallow the whole 60,000, so we're going to
22 reduce it to a lower number, or even make a discretionary

1 decision not to engage in disallowed costs at all.

2 What we can't do is the opposite. We can't
3 say, you did something really bad. There were only
4 \$5,000 of LSC funds spent on it, but it was really bad.
5 And we can't inflate the disallowed costs to the severity
6 of the action, which I think highlights the limitation of
7 using them as the tool in that way.

8 And even with the equitable reduction, because
9 of circumstances, that also highlights the fact that the
10 costs are about accounting issues. They're not about --
11 for lack of a better word, they're not about culpability
12 issues.

13 Does that get at what --

14 CHAIRMAN KECKLER: Right. I think --

15 MR. FREEDMAN: -- or are there a few more
16 you're thinking of?

17 CHAIRMAN KECKLER: No. I think that's it. But
18 it's also -- in the sense of culpability, it's also, from
19 a regulatory standpoint, about deterrence, that is, that
20 somebody can -- what my concern is, and I think this only
21 -- and I don't know if it plays into what people are
22 thinking, consciously or unconsciously, when they're

1 considering a violation.

2 But I think it's a reasonable concern, that
3 yes, there are things that people can do that cost a lot
4 of money. But they really want to do them. They really
5 don't like a particular restriction in a certain
6 instance, and they don't have to spend very much money to
7 do it. So that's the concern, is that there's not a lot
8 of enforcement if circumstances like that arise.

9 MR. FREEDMAN: I think that's an important
10 point. And if I can add to that, I think there are --
11 well, our regulations aren't always clear-cut as to what
12 should be done in every single circumstance. That's just
13 the nature of a regulatory regime.

14 What we want grantees to do, and a lot of
15 grantees, in fact, do, is call us up and say, we're
16 thinking about this. Is it a concern? They can call
17 someone in OPP, someone in OCE, someone in OLA, and we
18 generally -- once one of us gets one of those calls, we
19 call the other ones to touch base and see if we're all on
20 the same page, especially if it's something we haven't
21 seen before.

22 We want to encourage that. There are

1 situations where we've found compliance concerns where
2 one of our first questions is, well, why didn't you call
3 and ask? The tighter our enforcement regime is, the more
4 we stiffen the spine of what we can do, hopefully the
5 tighter the sense is throughout the grantees to call and
6 ask when they're not sure or when there are new
7 questions.

8 I know that there are some grantees who I hear
9 from frequently, and there are others who I never hear
10 from. And I have no sense of whether that correlates to
11 their concerns about compliance or not.

12 CHAIRMAN KECKLER: So you think that one
13 beneficial side effect is that you may get more calls?

14 MR. FREEDMAN: Yes. As long as "beneficial" is
15 your term.

16 (Laughter.)

17 CHAIRMAN KECKLER: Yes. Yes, that's right.

18 MR. FREEDMAN: But I'll be deferring them to
19 Janet and Lora, who are conveniently sitting on my right
20 and left.

21 CHAIRMAN KECKLER: Are there any other
22 questions?

1 MS. MIKVA: This is Laurie Mikva. I don't
2 really think this is to Mark. This is to perhaps you,
3 Charles, to the Committee as a whole.

4 I think I previously raised the issue of why we
5 couldn't separate these. And certainly at some point,
6 when I'm asked to vote, I would like limited reductions
7 to be separate from the others. It seems to me the
8 further we go down this road considering them together,
9 the harder it will be to separate them. So I'm just
10 raising that again, why it's all or nothing at this
11 point.

12 CHAIRMAN KECKLER: To what extent are the rules
13 integrated? Do we think of them as integrated responses?

14 MR. FREEDMAN: This is Mark again. We try to
15 make sure that we're looking at the enforcement structure
16 as a whole. And, as a matter of fact, as we were looking
17 at it this year, one of the things we realized about 1618
18 -- which is really written as the threshold regulation
19 that one looks to before going to 1606 and 1623 -- we
20 realized that 1606 and 1623 had been revised in a number
21 of major ways. And in that process, no one had ever gone
22 back and updated 1618, so 1618 still had language that

1 was 20 or 30 years out of date.

2 So here we have -- the current proposal has
3 1623, the change in suspensions, where we're just
4 expanding them to potentially 90 days, the lesser
5 reductions as an addition to 1606, and then a group of
6 updates, of housekeeping, in the language of 1606 and the
7 language of 1618.

8 My pure regulatory hat says that in part to
9 keep everything coordinated, it's important to do that
10 all at once. And procedurally, I suppose there are
11 questions about whether what we come up with as a final
12 rule, if it has every aspect of that, or how things might
13 be separated out, if necessary.

14 But I think that it serves the rulemaking best
15 to look at it as a total package, at least at the end of
16 the day, so that we make sure that we have everything
17 properly coordinated. And I'll add to that, looking at
18 the timelines, we make sure that if we're trying to fill
19 gaps, we haven't either created new ones or left gaps
20 unfilled that we originally thought we were going to
21 address.

22 MS. MIKVA: I understand that, Mark. But my

1 question is, if by some -- whatever, if a majority of the
2 Board thought that two of the three tools in your arsenal
3 were good and one was not good, would we have to go
4 through proposed rulemaking all over again, separating
5 them out?

6 MR. FREEDMAN: This is Mark again. I think
7 it's somewhat of a parliamentary question for how the
8 Committee wants to consider it. It's currently proposed
9 as the total package. But as with anything before the
10 Committee, it can be functionally amended. It can be
11 handled differently. So I think it's up to the Committee
12 how it wants to procedurally handle it.

13 If there was a vote on the entire package to
14 simply not adopt those rules, we probably would need to
15 restart rulemaking. But if there was a vote to adopt
16 some but not all of the package, that probably could be
17 done.

18 MS. MIKVA: Thank you.

19 MR. FREEDMAN: Oh, and I'll add to that, to
20 some extent it's easier to revise things going forward to
21 reduce scope than to expand the scope.

22 MS. MIKVA: I'm sorry. I'm not sure I

1 understand that.

2 MR. FREEDMAN: Merely that if we're trying --
3 if there's a proposal to do something greater than we had
4 originally proposed, then there's an important question
5 of whether or not that's been noticed and published --

6 MS. MIKVA: Right.

7 MR. FREEDMAN: -- which gives us an incentive
8 to notice more in case we want to restrict the scope and
9 say, well, okay. We got a lot of comments on that, maybe
10 we won't do it, as opposed to being in a situation where
11 it looks as if we want to do something more than we
12 noticed. That usually triggers a requirement to re-
13 notice if it's a substantial --

14 MS. MIKVA: All right. I understand now.
15 Thanks.

16 CHAIRMAN KECKLER: Yes. I think that let's not
17 decide any -- the questions here right now. But I think
18 an example of that might be the idea of indefinite
19 suspension, or at least I would be concerned if we
20 expanded up to indefinite suspension.

21 MR. FREEDMAN: That's a good example. If we
22 did that, we'd want to -- if we seriously considered

1 that, there's a process by which we could issue a notice
2 for comment on that one addition. It would introduce
3 some additional time or, potentially, we could -- taking
4 this as a hypothetical, we could adopt the rule as is and
5 then notice an abbreviated rulemaking for that one issue,
6 possibly doing a second revision to this revision to go
7 from 90 days to indefinite.

8 CHAIRMAN KECKLER: Okay. Are there further
9 questions about the examples or the memo?

10 (No response.)

11 CHAIRMAN KECKLER: If not, then we actually
12 have a bullet point for public comment on this item as
13 well as the regular public comment for our meeting. I'm
14 not sure they're easily distinguishable, but I'll now
15 turn it over to public comment.

16 MR. GREENFIELD: This is Chuck Greenfield from
17 NLADA. Charles, may I go ahead?

18 CHAIRMAN KECKLER: Yes. Please go ahead.

19 MS. MIKVA: Can you move closer to the phone?

20 MR. GREENFIELD: Okay. They just moved the
21 microphone closer Can you hear me now?

22 MS. MIKVA: Now I can hear you, yes. Thank

1 you.

2 MR. GREENFIELD: Thank you. I was reviewing,
3 the last day or so, the September 18th memo that Mark
4 Freedman and Vic wrote to this Committee about the
5 examples of additional -- as to the need for additional
6 sanctions. And I just would like to thank LSC for doing
7 this, for a number of reasons.

8 One is, several times during the memo they
9 mention that this is actually an example, unusual
10 examples, being presented, that most all programs do
11 comply, and comply with requirements appropriately. And
12 so these are unusual examples being provided, and not the
13 normal course.

14 The problem is, when we focus on sanctions, you
15 start thinking that all programs are acting improperly
16 and they're all violating the requirements of LSC and the
17 desires of LSC management. And that's simply not the
18 case. So I'd like to thank management for recognizing
19 that in the memo.

20 This is an issue, as we pointed out in previous
21 comments from LSC grantees and our members, of importance
22 to the LSC grantees for a number of reasons. And one is

1 that there's really a significant reliance on LSC funds,
2 as many of you know.

3 The last fact book, I think, was 43.3 percent
4 of all funding for LSC-funded programs is from LSC; that
5 I suspect, given the decrease -- and I hope that the
6 decrease is not going to dramatically be reduced -- so
7 it's a significant portion of their funds that are at
8 risk if there is a sanction imposed of either less than 5
9 percent or a suspension of up to 90 days.

10 And I'd also like to thank Mark and Jim and
11 Management for giving concrete, real examples of why or
12 what the driver is behind these proposed additional
13 sanctions. This is the first time in the now-9-month-old
14 process now and previous process that lasted some time in
15 2008 in which there have been these precise examples
16 given of actual cases or actual -- other times,
17 hypothetical examples were given which were helpful but
18 not particularly illustrative, allowing us to really
19 evaluate how they would operate.

20 But I think the examples provided appear to be
21 very egregious examples of conduct on the part of a
22 couple of grantees. They also appear to be examples

1 where eventually, LSC was able to get what was necessary
2 done; that is, either to change grantees through either
3 the grantee voluntarily withdrawing their request for
4 funding, through LSC not refunding an applicant at the
5 end of the competition period, and/or an executive
6 director leaving during the process.

7 And so, in fact, the examples seem to show that
8 there was action on the part of the -- perhaps not quick
9 action, I'll agree with that, but there was action on the
10 part of LSC and on the part of the grantees to get where
11 LSC was trying to get to.

12 Examples provided are not examples of the
13 unsuccessful nature of existing enforcement mechanisms.
14 For example, there's no 30-day sanction, if we want to
15 just talk about the suspension period, 30-day suspension
16 in any of the examples provided, and where that was not
17 successful, where that would be fairly decent evidence as
18 to, well, we need more than 30 days because the 30 days
19 didn't work.

20 There are some statements made that we don't
21 think 30 days would have worked. So we don't have
22 examples. Whether there are examples given, I don't

1 know. Excuse me -- whether there are examples that exist
2 but not provided, I don't know.

3 So we don't really have a good example of 30
4 days not working. I understand 90 days is more
5 significant to a program; of course it is. It's more
6 money. And also, the examples appear to be examples of
7 programs that had longstanding problems, management
8 problems, that were actually well-known by LSC for some
9 period of time.

10 And query whether -- we don't know; we're
11 speculating -- but query whether, with those types of
12 problems, the extent to which the problems have been
13 shown in the memo or alleged in the memo, query whether a
14 less than a 5 percent sanction or even a 90-day
15 suspension would have had an effect on that conduct,
16 given the period of conduct.

17 There are a variety of mechanisms, as we have
18 pointed out before, that LSC does have and they have used
19 in some of these examples, provided that is not refunding
20 at either the competition period or at the renewal
21 period. So there's a yearly opportunity to do that as
22 well.

1 There's the ability to, at that point, put on
2 an LSC hat, then, as in other times. I don't know how
3 many, but I know of some, where they put programs on a
4 month-to-month or a quarter-by-quarter funding, with
5 significant reporting requirements that get the attention
6 of programs; and special grant conditions, as we know,
7 which we have responded that we thought that a fair
8 application of special grant conditions during the course
9 of the grant year, as proposed in these proposed
10 regulations, is agreeable with NLADA and our members. We
11 thought that was a reasonable approach, so that special
12 grant conditions could be imposed during the year.

13 And there are a number of examples of informal
14 resolution of problem programs -- I'm looking at people
15 around the table that have been involved in those -- in
16 which the then-President or General Counsel or others
17 have had discussions with executive directors, with
18 chairs of board of directors of a program, and during
19 those discussions have been able to achieve what is
20 necessary, that is, either ensure that compliance of the
21 problem is resolved or, as LSC sees it, have some sort of
22 agreement that the program will pay a fine.

1 There are a number of examples where a fine has
2 been paid as part of voluntary agreements for programs,
3 not through this sanction, this purely sanction approach.
4 And as I think I said one other time to the Committee, if
5 I was the chair of the board, having Jim Sandman call me
6 saying that your funds are -- 43 percent or more of your
7 funds are at risk here; you need to do something quickly
8 or we're going to pull your funds, is a pretty
9 significant and forceful informal way to resolve. And I
10 think those efforts have been successful in the past.

11 If the Committee is absolutely convinced that
12 they need to go ahead with additional sanctions, less
13 than 5 percent sanctions or the 90-day suspension period,
14 the responses I've received from a number of different
15 directors and litigation directors throughout the country
16 from both LSC and non-LSC programs that are concerned
17 about this issue, some of whom have responded in writing
18 with comments, have really been to the fair application
19 for any new sanctions imposed or suspensions imposed,
20 that that is critical, that has a lot of history involved
21 in that.

22 I think there was some discussion at the LSC

1 board meeting in Ann Arbor about that programs -- not all
2 programs, of course, but some programs -- had a history
3 of some battles in the past with LSC, where LSC was less
4 friendly to the field. I'm not suggesting "friendly"
5 means "not oversight." I'm suggesting less friendly
6 meaning antagonistic towards field programs -- in the
7 past, not now -- in the past sometimes with political
8 agendas against certain programs, driven by certain
9 complaints by opposing parties.

10 That in the fair application, as we've
11 suggested, and I know, as Mark said, we're not talking
12 today about the comments submitted on the further notice
13 of proposed rulemaking, but the comments that we've
14 submitted and others have requested some additional due
15 process in any new provisions for sanctions, and that
16 would include a requirement that an action by a program
17 be willful.

18 "Knowing and intentional" is one provision
19 already in the 1618 provision, but we think "willful" is
20 a better term to use, and that willful not include --
21 when there's a good faith dispute based on existing state
22 or federal law as between a program and between LSC, that

1 there are mechanisms to resolve that, and that that not
2 be considered "willful" conduct during the mechanism to
3 resolve that, period, and that there be independent
4 hearing examiners that would make the decisions on
5 appeal.

6 We know now that there's no appeal,
7 essentially, within a suspension, a proposed suspension
8 that changes from 30 to 90 days. But this would not only
9 bring what is an independent hearing examiner currently
10 present in the more than 5 percent and up to termination
11 sanctions, make it similar but eliminate the LSC employee
12 part of that -- I think the ABA has mentioned some
13 concern about that, too, in their comments -- but also
14 have that apply to less than 5 percent but more than
15 \$10,000, for example, sanctions and also for suspensions
16 as well.

17 And so I wanted to make those points because if
18 the Committee desires to go in that direction, the
19 programs are very concerned about the fair application
20 and notice and the opportunity to appeal to an
21 independent hearing examiner. Thank you.

22 CHAIRMAN KECKLER: Thank you very much, Chuck.

1 And we do appreciate your comments today, as well as
2 NLADA's comments that were received on the further notice
3 of proposed rulemaking. And if anybody is listening in -
4 - and I'll say it again in North Carolina -- but thank
5 you very much for your comments on the rule.

6 You know, one thing that Chuck mentioned, and
7 I'll just add a brief question, is about the issue of
8 fines. Fines aren't really mentioned in our enforcement
9 mechanism, but this has come up occasionally. And if
10 Management would be able to comment on the issue of fines
11 in comparison with limited reduction of funding?

12 MR. FREEDMAN: Here's a little context on what
13 I think we tend to refer to as fines. We, of course,
14 don't have a provision for fines. That would be a
15 limited reduction in funding. And really, that part of
16 this rulemaking is about adopting clear procedures for
17 fines, saying, there are circumstances that we have had
18 that we reasonably anticipate will probably come up in
19 the future where we want to impose a fine.

20 A grantee may even be in a position of feeling
21 that a fine is the appropriate response, that a
22 disallowed cost or a termination of 5 percent or greater

1 are not what they want and not really the tool that's
2 appropriate for the situation.

3 Lacking an explicit procedure for fines, we
4 have the threat of disallowed costs, depending on how
5 much money is in question, and we have the threat of not
6 renewing someone's grant during competition or, depending
7 on where they're at in competition, maybe not awarding a
8 grant to them.

9 Given those parameters, when there's been -- in
10 some circumstances we've been able to sit down with the
11 grantee and say, we all want resolution. We don't have a
12 clear process for resolution. Let's sit down at the
13 table and work this out. We've got good people, and they
14 can make a lot of things work.

15 I think there's a very strong argument that it
16 is better for the grantees and for LSC for us to have a
17 clear process by which that is done rather than to rely
18 on us all sitting down around the table. I think it's
19 better procedurally, it's better as a regulatory matter,
20 and quite frankly, it eliminates a lot of the uncertainty
21 of the process that I think is probably not healthy for
22 LSC or for the grantees, going in and trying to figure

1 out, how do we do this?

2 I know that when those situations come up,
3 usually a number of people look around the virtual table,
4 as it were, and say, don't we have some way of just doing
5 this? And that's where somebody, often Vic, raises his
6 hand and says, "Well, you see," and then he starts to
7 explain why there is no provision in 1606 for anything
8 below 5 percent.

9 Quite frankly, that's part of how we've gotten
10 here, is by feeling that fines are something we can do if
11 we all manage to get everyone on the same page. But we
12 don't have a real proper process for doing it.

13 CHAIRMAN KECKLER: Thank you. I think that's
14 helpful to know. That's something that --

15 MS. REISKIN: May I ask a -- sorry.

16 CHAIRMAN KECKLER: Please go ahead.

17 MS. REISKIN: This is Julie. I just wanted to
18 ask Mr. Greenfield a question, if that's okay.

19 MR. GREENFIELD: Yes, Julie?

20 MS. REISKIN: Okay. You mentioned additional
21 due process protections, and I'm wondering if you feel
22 that that is incompatible with shortening -- well, two

1 questions. One is, is there a way to do that without
2 lengthening the timeline? And two, better yet, is there
3 a way to have adequate, robust due process and possibly
4 even shorten the timeline?

5 MR. GREENFIELD: I don't know. I think we
6 could look at that, Julie, and see. I think the
7 important part is that there be a process for fair
8 application, and that also -- as I said earlier, also
9 that programs have the ability to appeal to an
10 independent hearing examiner.

11 So, I mean, of course a one-day notice or
12 something like that would be ridiculous, and I don't
13 think LSC's proposing that. So I know that built into
14 the termination procedure are these longer notice
15 periods. And I think those are the periods that Mark
16 used, or his assistant used, in developing the timelines.

17 So those are currently existing in the
18 termination guidelines. So I don't know whether those
19 should be looked at or not, and I think that the proposal
20 that NLADA has put in for the further notice doesn't
21 really address that, doesn't incorporate those timelines
22 with the termination.

1 So our comments wouldn't prohibit something
2 less than those 30-day notice periods that are currently
3 in the termination. We just didn't address that issue.
4 I'm trying to think it through in my response to you so
5 it's probably a little bit garbled. But we're not
6 proposing that those time limits have to be applied in
7 less than 5 percent sanctions or suspensions.

8 MS. REISKIN: Thank you.

9 CHAIRMAN KECKLER: Okay. If there's no other
10 public comment, I'll move to consider and act on any
11 other business before the Committee.

12 MS. MIKVA: Charles, this is Laurie Mikva.

13 CHAIRMAN KECKLER: Hi, Laurie.

14 MS. MIKVA: I don't know that this matters.
15 But after moving that we approve the minutes, I actually
16 looked at them, and it says that I moved to approve the
17 further proposed rulemaking, and then I abstained from
18 voting on it. And I just don't think I did move. But I
19 don't know who did, and I don't know that it matters.

20 CHAIRMAN KECKLER: Okay. I saw that, and I was
21 wracking my brains, but I think -- you know, that doesn't
22 necessarily indicate your -- it indicates a procedural --

1 MS. MIKVA: No, it doesn't. But I don't think
2 I did. But that's okay. As I said, that's okay.

3 CHAIRMAN KECKLER: All right.

4 MR. FREEDMAN: Julie, this is Mark. We can go
5 back and check the transcript on that, and perhaps the
6 Committee simply wants to vote on -- the minutes prior
7 approved are approved subject to that correction that we
8 can verify in the transcript.

9 CHAIRMAN KECKLER: Yes. Thank you. Please
10 correct the minutes, if necessary.

11 MS. MIKVA: Thank you. Thank you, Mr.
12 Freedman.

13 CHAIRMAN KECKLER: So if there's no other
14 business before the Committee, I will now consider a
15 motion to adjourn.

16 M O T I O N

17 MS. MIKVA: I move. I do move this.

18 (Laughter.)

19 CHAIRMAN KECKLER: Thank you.

20 MR. GREY: Second.

21 CHAIRMAN KECKLER: Is there -- okay. All in
22 favor?

1 (A chorus of ayes.)

2 CHAIRMAN KECKLER: All right. Thank you,
3 everybody, very much. The meeting is adjourned.

4 (Whereupon, at 3:58 p.m., the meeting was
5 adjourned.)

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