

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS AND REGULATIONS COMMITTEE

OPEN SESSION

Monday, October 17, 2011

1:26 p.m.

American Bar Association Offices
321 N. Clark Street
Chicago, Illinois 60601

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairman
Robert J. Grey, Jr.
Harry J.F. Korrell, III
Laurie I. 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
 Kathleen Connors, 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
 Atitaya Pratoomtong, Staff Attorney, Office of Legal
 Affairs
 Katherine Ward, Executive Assistant, Office of
 Legal Affairs
 David L. Richardson, Comptroller and Treasurer, Office
 of Financial and Administrative Services
 John Constance, Director, Office of Government
 Relations and Public Affairs
 Jeffrey E. Schanz, Inspector General
 Joel Gallay, Special Counsel to the Inspector General,
 Office of the Inspector General
 Laurie Tarantowicz, Assistant Inspector General and
 Legal Counsel, Office of the Inspector General
 (by telephone)
 Ronald "Dutch" Merryman, Assistant Inspector General
 for Audit, Office of the Inspector General
 Thomas Coogan, Assistant Inspector General for
 Investigations, Office of the Inspector General
 David Maddox, Assistant Inspector General for
 Management and Evaluation, Office of the
 Inspector General
 Janet LaBella, Director, Office of Program Performance
 Robert E. Henley, Jr., Non-Director Member, LSC
 Finance Committee

Linda Perle, Center for Law and Social Policy (CLASP)
 Don Saunders, National Legal Aid and Defenders
 Association (NLADA)
 Terry Brooks, American Bar Association Standing
 Committee on Legal Aid and Indigent Defendants
 (SCLAID)
 Robert E. Stein, American Bar Association SCLAID
 Bev Groudine, American Bar Association Commission
 on IOLTA/SCLAID

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P R O C E E D I N G S

(1:26 p.m.)

CHAIRMAN KECKLER: I note the presence of the members of the Operations & Regulations Committee here, constituting a quorum. And I now call to order the duly noticed meeting of the Operations & Regulations Committee.

Our first item of business is an approval of the agenda, which is printed in your board books.

M O T I O N

MR. KORRELL: Move to approve.

CHAIRMAN KECKLER: Is there a second?

MR. LEVI: Second.

CHAIRMAN KECKLER: All in favor?

(A chorus of ayes.)

CHAIRMAN KECKLER: Without opposition, the agenda is approved.

The next two items involve the minutes of the committee's prior meetings of July 20, 2011 and September 16, 2011, which are also included in your board books.

May I have a motion to approve those minutes, if you've had a chance to review them?

M O T I O N

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MS. MIKVA: So move.

MR. KORRELL: Second.

CHAIRMAN KECKLER: All in favor?

(A chorus of ayes.)

CHAIRMAN KECKLER: All right. Both sets of minutes, then, are deemed approved.

Our first substantive and main item of business for the committee today is to consider and act on the potential initiation of rulemaking on enforcement mechanisms and sanctions. That's an item of business which we discussed at the prior committee meeting in July. And a rulemaking options paper has been prepared by the Office of Legal Affairs and provided to board members to aid in our deliberations today.

I will now hear from Ms. Mattie Cohan of the Office of Legal Affairs, and also representatives of the Office of the Inspector General. I note, for the people on the line, that the Inspector General is here with us, and on the phone is Ms. Laurie Tarantowicz of the Office of the Inspector General.

So I will then hear further discussion on this

1 topic.

2 MS. COHAN: Great. For the record, my name is
3 Mattie Cohan. I am Senior Assistant General Counsel in
4 the Office of Legal Affairs.

5 As the committee chair has noted, we were asked
6 to provide a rulemaking options paper, and that was
7 provided to you to stimulate your discussion, picking up
8 from the last committee meeting.

9 So I want to leave as much time for your
10 discussion so I don't want to go through a long
11 recitation of anything. But there are enforcement
12 mechanisms that we do have. There are ones that we don't
13 have. There's a natural tension about monetary
14 mechanisms versus non-monetary mechanisms.

15 I think at this point I would tend to turn it
16 back over. If anybody has any questions, I'm more than
17 happy to answer them, help people flesh stuff out. But
18 at this point, I think that's the best use of my and your
19 time.

20 CHAIRMAN KECKLER: Before we move on to that,
21 could you just explain something that we talked a bit
22 about at the last meeting, but I'm not sure everybody

1 recalls that from some months ago, which is that this is
2 a matter which has come before the committee and the
3 Board at least twice in substantial form before. And the
4 last time seems to have been a few years ago with the
5 prior board in 2008.

6 This resulted in a draft notice of proposed
7 rulemaking after a public process, is my understanding of
8 it.

9 MS. COHAN: That's correct.

10 CHAIRMAN KECKLER: And remind us, then, what
11 the status of that draft rule is.

12 MS. COHAN: I would say that rulemaking --
13 formally, a rulemaking was initiated pursuant to the
14 rulemaking protocol, and a draft notice of proposed
15 rulemaking was developed. It was discussed more than
16 once. But at the time, the committee chose not to
17 recommend to the Board formal publication of that notice
18 for comment.

19 But that rulemaking never got officially
20 closed, so it's essentially moribund. But it's
21 technically open because we haven't closed it, but
22 nothing has happened.

1 CHAIRMAN KECKLER: Formally speaking, did they
2 table it, or do you recall what was done with the --

3 MS. COHAN: I don't recall that there was a
4 formal motion to table. Rather, the discussion at the
5 time ended and the item was never put back on the
6 committee's agenda.

7 CHAIRMAN KECKLER: Okay. So I don't know
8 whether a lot of the committee members or the rest of the
9 Board have had a chance to do that. That draft notice of
10 proposed rulemaking is available on the website as well
11 as some of the background materials that have been
12 available for that.

13 MS. COHAN: That's correct.

14 CHAIRMAN KECKLER: So if you want to review
15 that some time, that's available.

16 All right. Now I'll turn it over to the
17 Inspector General and the Inspector General's Office for
18 comments on this topic, and, if you wish, on the
19 rulemaking options paper.

20 MS. REISKIN: May I just ask a quick
21 preliminary question?

22 CHAIRMAN KECKLER: Yes. Go ahead.

1 MS. REISKIN: And I'm sure this is a stupid
2 question. But I know what negotiated rulemaking is and I
3 know what the regular is. What is a regulatory workshop?

4 MS. COHAN: Oh, sure. A regulatory workshop is
5 basically -- it's more than -- it's not a public hearing
6 that generally happens in front of the full Board. It's
7 a less formal gathering of the grantees that's not
8 intended to develop any sort of regulatory proposal, but
9 is intended to provide a factual background, essentially,
10 to create a factual record.

11 I'll give you an example. The last time that
12 we used it was when we revised our regulations on the
13 client grievance procedure. We conducted a regulatory
14 workshop. We had a variety, a representative sample, of
15 recipients in and just kind of talked to them about what
16 is happening.

17 How do you do your client grievance procedures?
18 How has that changed over the years as your service area
19 has consolidated or your client base has changed? What
20 about the rule is hindering you? And so we just
21 developed a factual record so that when we went back to
22 do the rulemaking, we had a much better factual base.

1 MS. REISKIN: Thank you.

2 CHAIRMAN KECKLER: Okay. Mr. Inspector
3 General?

4 MR. SCHANZ: Thank you. I would like to bring
5 this to the Board's attention if this is something that
6 you can use. And I think the leading example of the
7 frustration that we didn't have more options was the
8 Baton Rouge program. We talked about that when that was
9 spiraling out of control, and the Board felt at that
10 time, if my recollection is correct, that there was not
11 enough options for what to do with a program that was
12 spiraling out of control.

13 Now, from an IG perspective, we were very
14 content or within our jurisdiction to do an audit of that
15 program and a subsequent investigation based on some of
16 the audit findings that we had.

17 So with that discussion -- and I know Laurie,
18 who is my general counsel, is on the line. She's been
19 involved in this discussion for well before my tenure,
20 and that's been three and a half years now. So having
21 additional arrows in the Board's quiver, as it were, or
22 tools in the toolbox, I think is good management.

1 And that would be my introduction to it. And
2 Laurie and Mattie worked together on this draft, and they
3 can discuss it probably in a lot more detail than I can.
4 But I do want to indicate that this was something that
5 the Board indicated that might be ripe for publication.

6 CHAIRMAN KECKLER: Thank you.

7 I recognize Ms. Mikva.

8 MS. MIKVA: May I ask a question? With the
9 Baton Rouge program, could you help me recollect? I
10 thought that when they went to the Board and the Board
11 took immediate action, it would have been satisfied. Am
12 I not remembering that right?

13 CHAIRMAN KECKLER: No. That was part of it.
14 And we drilled down a lot further than their board did.
15 Their board was 32 individuals, so they didn't actually -
16 - well, based on our work and the review of the board
17 minutes, they didn't actually govern that program very
18 well, where an executive director was able to use limited
19 taxpayer funds for personal benefit.

20 So the Board did take action. But they took
21 action based a lot on what the IG found out later because
22 you just can't do it on innuendo. You have to do it on

1 basic facts and details of some of the abuses that were
2 facts.

3 Yes?

4 MS. MIKVA: Are you suggesting that this would
5 have been an appropriate sanction, given all that
6 occurred later?

7 MR. SCHANZ: This would have given LSC
8 management another option. And that's why -- a
9 rulemaking option for limiting funding to programs and
10 some of the things that are particularly laid out in this
11 memo.

12 CHAIRMAN KECKLER: Thank you.

13 Ms. Tarantowicz? Did you want to add some more
14 comments on the rulemaking options paper and on the value
15 of these items or the possible petition benefits of these
16 options?

17 MS. TARANTOWICZ: Thank you. For the record,
18 this is Laurie Tarantowicz, Assistant Inspector General
19 and legal counsel. I guess, just to reiterate Jeff's
20 statement about the OIG's support for a rulemaking in
21 this area, I'd be happy to talk about a couple of
22 comments on the specific proposals, if you would wish.

1 Or if you want to wait to get into a discussion --

2 CHAIRMAN KECKLER: Please go ahead and

3 elaborate. Elaborate the views you have.

4 MS. TARANTOWICZ: Okay. Thank you. I guess I

5 really wanted to make two main points about the

6 rulemaking options paper, and one would be in terms of if

7 the Board decides to go forward with alternative

8 enforcement mechanisms, I guess one of our main concerns

9 is that we put in place a sort of streamlined process in

10 order to reach the concerns that we have with the options

11 that are currently available. So if the Board would keep

12 that in mind as we go forward, we could certainly talk

13 more fully about that when we get into the particulars of

14 the notice of proposed rulemaking.

15 The other thing that I wanted to mention is

16 you'll notice in the rulemaking options paper there's

17 discussion of an OIG proposal to require grantees to

18 remove and replace executive team members who are

19 contributing to an atmosphere of noncompliance. And I

20 just wanted to clarify that a little bit.

21 We are not right now suggesting that the Board

22 go forward definitively with that option, but merely

1 suggesting that that would be something to consider. And
2 I think the suggestion on our part arises because of the
3 difficulties that LSC has had in the rare instances when
4 we find a grantee that is very troubled, and it can
5 potentially come from an atmosphere created by the
6 executive level at the grantee. And this option is
7 suggesting to eliminate the possibility of a disruption
8 of services to the client community that would arise when
9 LSC has to find an alternative provider in that area.

10 We understand that recognize that there's a
11 potential murkiness with regard to LSC's legal authority
12 to promulgate a rule in this area, but thought that it
13 was important that the Board look to alternatives that
14 would keep an organizational structure in place in the
15 area so as not to disrupt client services, but have an
16 option that is saying to the grantee, look, we want to
17 fund you. We just don't believe we can fund a grantee
18 that has this executive team in place. And we can
19 certainly talk more about that if the Board is
20 interested.

21 CHAIRMAN KECKLER: Right. I think that's
22 obviously a sensitive issue, and I'm sure with the

1 grantees as well as with some of the discussions that we
2 have within the advice that's been given.

3 I'm going to go ahead and then open it up for
4 committee members' and other members of the Board's
5 thoughts on the rulemaking options paper. And then,
6 after we collect our thoughts, we'll circle back around
7 and consider what we wish to do on this matter.

8 So I'm going to open the floor. Laurie?

9 MS. MIKVA: I would ask if our President has
10 any information or advice to give us on this.

11 PRESIDENT SANDMAN: I don't at this point. I
12 will.

13 CHAIRMAN KECKLER: Julie?

14 MS. REISKIN: Yes. One of the frustrations
15 that I remember from that incident that you were talking
16 about is the amount of time that seemed to go by, that it
17 seemed like that it was known that there was a problem,
18 and then it just took a very long time. And then all of
19 a sudden there was like a flurry of action.

20 Is there anything here that would speed up --
21 when we know there's a problem, speed up very decisive
22 action? Maybe I'm remembering it wrong, but that was

1 what I remember, is it seemed like when we were told of -
2 - it just seemed like there was way too much time that
3 had gone by, and then it was going to take a lot more
4 time to do anything.

5 MR. FORTUNO: What happened was the timing
6 there, because we were approaching the end of the grant
7 term, it was decided that to take other action would have
8 taken longer and been more expensive, and that the timing
9 was such that it worked best to, one, meet with their
10 board of directors, outline what the problems were, and
11 look to see what they were going to do and put in place
12 in order to correct the problem; but leave ourselves the
13 option that if they didn't do that to our satisfaction
14 that we could, at the end of the year when the grant
15 expired, deny the application for refunding.

16 We would have to provide interim funding for
17 the grantee unless we could find an interim, and we would
18 recompete the service area, which is what we did there.
19 And in fact, we have a new grantee for that service area.

20 But I think what happened was because of the
21 timing, it was decided that the most appropriate way was,
22 rather than take some action that would take, actually,

1 longer than it would take to do what we did, just to put
2 it in the hands of the grantee board of directors, make
3 sure they understood the concerns and the problems, and
4 give them an opportunity to remedy them, and in the
5 meantime to prepare so that if they didn't do so to our
6 satisfaction, we had the option of denying the
7 application for refunding -- denying the grant
8 application and initiating recompetition, which is what
9 we did.

10 MS. COHAN: I just want to point out that --
11 and this is true of our current -- the tools that we
12 currently have, our current mechanisms, as well as any
13 other potential ones without getting into the merits,
14 specific merits, of additional ones in particular, is
15 that not every mechanism is going to work in every
16 situation.

17 There are mechanisms we have now that are
18 particularly well-suited for certain situations, and
19 sometimes other situations, those same mechanisms that
20 can be very effective in some circumstances aren't in
21 others. So that's just part of that mix to keep in mind
22 with any --

1 CHAIRMAN KECKLER: Maybe to clarify -- I don't
2 know if you're thinking along these lines -- in that
3 particular circumstance, the grantee that was having
4 troubles was coming to the end of its grant term. Right?

5 MR. FORTUNO: Yes.

6 CHAIRMAN KECKLER: So if it had not been coming
7 to the end of its grant term and its grant was to extend
8 another couple of years, there would have been a
9 different situation. Is that your point?

10 MR. FORTUNO: Yes. And we're not here to --
11 the options paper is simply laying out what the different
12 alternatives could be procedurally, and also some of the
13 issues that might be addressed. But there are no
14 recommendations here.

15 But one thing that's been discussed over time,
16 for example, is that if the regulation on termination
17 provided some abbreviated process for a small reduction
18 in funding, small meaning less than 5 percent, that that
19 might be some leverage in order to get the attention of a
20 governing body to focus on what the problem was.

21 I think that because it was late in the grant
22 term, that served to get their attention, of course,

1 because they recognized -- and when we met with them, I
2 was very direct about it and told them that I need to
3 make a decision and this is what I'm going to factor into
4 it.

5 So I think that that worked for us. I think
6 that if it had been two months into a grant, we would
7 have had a different situation, and the ability to
8 essentially have the leverage of, we can do a less than 5
9 percent reduction more quickly and more inexpensively
10 than it would be right now under the current rule,
11 certainly that would have been a consideration.

12 But as I said, we're not here recommending one
13 over another. We're simply just discussing options for
14 how to proceed with whether to do a rulemaking.

15 MR. LEVI: Well, but whether to do a
16 rulemaking, it seems to me, comes second to what is the
17 rulemaking designed to accomplish. And so the first
18 question which I'm still trying to understand is did
19 management have a recommendation of a certain number of
20 things it wanted us to try to accomplish through this
21 rulemaking based on its experience?

22 I know you were the interim head and

1 experienced some of this, and I hear some of that theme.
2 But in the way that this ought to come up, it seems to me
3 the rulemaking ought to be after a discussion with the
4 committee about, well, there are these things that we've
5 observed. This has been happened in the field. We've
6 felt a little bit hamstrung with our options, and here's
7 some options we would like to recommend.

8 Then we say, well, that sounds good. Now let's
9 go to some rulemaking options. Is that what's happened
10 here? I don't think so.

11 MR. FORTUNO: Well, Jim hasn't had an
12 opportunity to reflect on this yet. He just recently saw
13 the paper. So Jim's not in a position to make
14 recommendations. And I think that while we've maybe
15 given it some thought ourselves over time and the IG's
16 office has, I think that we need to engage in a
17 discussion with Jim, make sure he understands what the
18 concerns are and what the competing policy concerns are.

19 Then we have a recommendation from management
20 now that we have a new President. I don't think we are
21 at that stage yet. I think that the rulemaking options
22 paper says that management recommendations will be

1 forthcoming. I think, once you get those, then you'll
2 know whether management is recommending that we proceed.

3 But at least you have some idea as to what the
4 parameters are -- some of the issues, some of the things
5 that may be discussed for a potential rulemaking, and
6 some of the options as to how it could be accomplished if
7 you choose to go that route.

8 CHAIRMAN KECKLER: Well, in light of that --
9 oh, Laurie, just go ahead and ask.

10 MS. MIKVA: I was going to move to table it.

11 CHAIRMAN KECKLER: Well, let me ask a question
12 before you do that. Okay? Because I think there's
13 another alternative here, potentially, which is that I
14 think it would be useful beyond, obviously, getting
15 management's view of -- this is a tool for management.
16 This is a tool for management to accomplish something for
17 grantees.

18 So if it's a tool that management can't use or
19 doesn't want, doesn't need, then there's no point in
20 proceeding. Okay? Because we're looking to try to give
21 management the right tools that it needs to provide true
22 accountability for the grantees, and so on. So a

1 management recommendation seems like it's something that
2 we would like to have before we go out full-bore and do
3 any kind of rulemaking.

4 Beyond that, I think the other thing that I
5 think would be useful for me, possibly for the committee
6 -- if we can agree or disagree -- would be to be a little
7 bit more concrete about what we're doing, about what kind
8 of rule -- here are some things that people have thought
9 about in the past and things that you can do in the
10 rulemaking options paper, and it's interesting.

11 But I'd like to be more concrete about it and
12 get into, this is the regulation we're changing. Here's
13 some language that we could put in this particular
14 regulation. I guess it would be 1606 or possibly some
15 other ones.

16 So I think another idea that I've had is, don't
17 reinvent the wheel. Get that old document out and change
18 it, and do it, and involve management in that draft
19 notice of proposed rulemaking, and give us something
20 concrete building off that. Things that didn't work,
21 people didn't like, reject those things. Just change it
22 around. Keep some things, bring others, and then bring

1 that before us.

2 MR. FORTUNO: We could possibly prepare a draft
3 notice of proposed rulemaking that would incorporate
4 management's recommendations so that what you would see
5 is a document that essentially says, this is what
6 management would recommend and this is what it would look
7 like if you were to proceed with it. That draft could
8 then be discussed by the committee, and you could comment
9 on it. Of course, even at that point if you proceed with
10 a notice of proposed rulemaking, that doesn't mean --

11 CHAIRMAN KECKLER: After that.

12 MR. FORTUNO: That's right. If you proceed
13 after that with a notice of proposed rulemaking, you
14 still have -- if we go to notice and comment, you still
15 have the notice and comment that follows it. So we're a
16 long way from having revision to our regulation or some
17 change in the rulemaking scheme.

18 CHAIRMAN KECKLER: Yes. So the idea would be,
19 redraft the old thing. Redraft with management's best
20 advice and the involvement of the Inspector General, as
21 has been involved before with this, presumably. And
22 bring that before us. That's my proposal.

1 Is there a --

2 M O T I O N

3 MR. KORRELL: So moved.

4 MR. LEVI: Do we need a motion?

5 CHAIRMAN KECKLER: I'm not sure that we need a
6 motion. If there's no objection to having that be part
7 of the --

8 MR. KORRELL: Withdrawn before a second.

9 CHAIRMAN KECKLER: -- before the January
10 agenda.

11 MR. KORRELL: I guess I -- Charles, if you
12 don't mind --

13 CHAIRMAN KECKLER: Yes.

14 MR. KORRELL: I got the impression at maybe it
15 was the last meeting or the meeting before -- I
16 understand President Sandman hasn't had a chance to
17 review this and formulate a position -- but my general
18 impression from some of the folks at the table is that
19 this is a tool that at least some folks in management
20 would like to have.

21 And with that, I guess, my preference is to do
22 something like you've suggested, Charles, and at least

1 move the process forward to get something concrete rather
2 than waiting another cycle of board meetings before we
3 see something.

4 CHAIRMAN KECKLER: Show us the tool that you
5 want. This is a rulemaking options paper. This is not
6 the tool. And so --

7 MS. COHAN: No. No.

8 DEAN MINOW: That seems like a perfectly
9 sensible thing to do. But could I say that in the
10 future, it would be really good to involve the President
11 before we have a board meeting so that this is a
12 coordinated process?

13 MR. FORTUNO: Absolutely.

14 PRESIDENT SANDMAN: Thank you.

15 CHAIRMAN KECKLER: Yes?

16 MS. REISKIN: I just have a question. When
17 you're looking at -- it seems like that you want a
18 toolbox. There's a toolbox of enforcement. And you feel
19 like -- or there may be a feeling that there's additional
20 tools that you might need. I also noticed that there's
21 one that has never been used and others that are very
22 rarely used.

1 Would you consider removing other tools, or do
2 you not know that yet?

3 MS. COHAN: That would be a policy
4 recommendation that --

5 MS. REISKIN: That would be something you'd
6 talk to the President about?

7 MS. COHAN: Yes.

8 MR. LEVI: Well, the other thing is that once
9 we publish a rulemaking, there's a public comment period.
10 How long is that, typically?

11 MR. FORTUNO: That would be -- rules are
12 published for comment -- we normally give at least 30
13 days. We sometimes give 60 or 90 days, depending on the
14 importance, complexity, other circumstances. But, at a
15 minimum, we provide 30 days for public comment.

16 CHAIRMAN KECKLER: And remind me, also, in the
17 rulemaking options protocol, that a draft rule can be --
18 once we were to approve it, a draft rule can itself be
19 put up on the web for comment prior to being turned into
20 a NPRM.

21 MR. FORTUNO: The straightforward notice and
22 comment approach.

1 MS. COHAN: Yes. Under the LSC rulemaking
2 protocol, draft notices are put up on the website prior
3 to the board meeting at which they are discussed. So it
4 is essentially -- unlike a federal agency, the draft
5 notice is put out for comment, public perusal, and then
6 whatever is actually proposed is put out for formal
7 public comment. So there's essentially a second round of
8 public comment before you get to the final rule stage,
9 pursuant to our protocol.

10 CHAIRMAN KECKLER: Okay. But the draft notice
11 from 2008 had already gone out on the website and been --

12 MS. COHAN: Oh, yes. That's been out there
13 since 2008.

14 CHAIRMAN KECKLER: That's right. Yes, that's
15 right. Yes. Okay.

16 MR. SCHANZ: I would just like to add that the
17 IG's interest in this is given the backdrop of three GAO
18 reports that talked about governance and accountability
19 and transparency and having more tools for management to
20 deal with, for lack of a better term, problem or putative
21 problems with grantees. So our interest is from a
22 governance and accountability standpoint.

1 CHAIRMAN KECKLER: Thank you. I'm very aware
2 of that. Many of us share those goals.

3 MR. FORTUNO: I should add --

4 CHAIRMAN KECKLER: Yes?

5 MR. FORTUNO: -- just to round it out that
6 prior management -- there was, as you know, some
7 discussion with the Board and there was discussion in-
8 house. And prior management, after having a fairly
9 robust discussion, decided that there didn't seem to be a
10 need at the time for any change in the toolbox, if you
11 will. And so the ultimate decision was not to pursue it.

12 So I don't want to suggest that there is a view
13 that's shared by all and that is longstanding. In fact,
14 there's been some difference of opinion over time. So I
15 think what you'll be hearing now is you'll be hearing
16 what new management, now on the job for a while and in a
17 position to make some recommendations, would like to
18 recommend.

19 Also, the timing is not inopportune because we
20 have the Fiscal Oversight Task Force and consideration of
21 what that may entail. So there may be some linkage
22 between the two.

1 CHAIRMAN KECKLER: Right. And I would add also
2 that there are implications potentially with regard to
3 the strategic planning as well with that.

4 Anyway, I very much appreciate that and I very
5 much look forward to the product of management's own
6 deliberations about this, as well as the Inspector
7 General, for our next meeting.

8 MR. FORTUNO: Okay.

9 CHAIRMAN KECKLER: The next topic that we have
10 today is a staff report -- and it can be brief -- on a
11 topic we -- there's nothing to consider and act upon
12 today with this -- on the relationship between LSC laws
13 and regulations and LSC guidance.

14 This is a topic that has been important in
15 federal agencies over the last several years. And I
16 myself have noticed during my time here a slight tension
17 having to do with the work of this committee, what
18 documents are brought before this committee.

19 I'm certainly not recommending that all of them
20 be brought before us, but that sometimes things can be
21 accomplished by what are called guidances. Other things
22 can be accomplished by regulations, which obviously go

1 through the rulemaking options protocol and the committee
2 and so on.

3 So I wanted to learn a little bit more about
4 how LSC -- and have all of us learn a little bit more
5 about how LSC decides whether to make something a
6 regulation or to make it a guidance; and if it's a
7 guidance document, whether that guidance document is to
8 be brought before this committee, as some of them have
9 been -- I think the accounting was; it's not a
10 regulation, but it's an important guidance document --
11 and whether those guidance documents are brought before
12 us or not.

13 So Ms. Mattie Cohan, please tell us a little
14 bit more about that kind of process within outsource.

15 MS. COHAN: Sure. One thing that I'll state at
16 the outset that's a backdrop for this is that the LSC Act
17 requires that rules, regulations, instructions, and
18 guidelines -- is there another one in that list, Vic?

19 MR. FORTUNO: Rules, regulations, guidelines,
20 and instructions.

21 MS. COHAN: Instructions, thank you -- have to
22 be published for notice. Rules and regulations need to

1 be published for comment; other things need to be
2 published for notice.

3 Back in the '80s, the Corporation issued a
4 number of instructions, formal instructions. In fact,
5 the private attorney involvement rules started out as an
6 instruction and then turned into a rule at some point.
7 So that's a backdrop that we have as part of our
8 statutory obligation.

9 Generally, regulations are required to be
10 published for comment. A lot of our guidance that falls
11 into interpretive guidance -- program letters, Office of
12 Legal Affairs advisory opinions -- those aren't changing
13 or adding additional requirements; those are interpretive
14 guidelines, interpretive documents.

15 Those generally don't -- they have been on
16 occasion published. They're certainly put up on our
17 website and distributed widely. But they're generally
18 not published in the Federal Register. We have on
19 occasion chosen to do that. And those are not things
20 that come up for comment.

21 We have then also had a few things like the
22 property acquisition and management manual, which started

1 out its life as a rulemaking, and then during the course
2 of the rulemaking was taken out of the rulemaking thing
3 -- so it's not part of 45 CFR -- but we went through the
4 whole public notice and comment period and published it
5 anyway, and it came before the committee and the Board.

6 So I don't know that there's a single hard and
7 fast rule that we have. There have been some guidance
8 documents over the years about what needs to be published
9 and what doesn't need to be published. One of my back
10 burner projects since I arrived in 2000 has been to
11 update that document, but in the crush of business,
12 that's not the thing that comes to the fore.

13 So I would say things that add new substantive
14 requirements -- like the PAMM; even though it didn't end
15 up in the regulations, it had a variety of substantive
16 requirements on grantees. And so that did go through a
17 public comment process.

18 CHAIRMAN KECKLER: Right. And I think that
19 that's -- you described it that basically there's
20 regulations and then there's guidances that could be
21 regulations. And there possibly are regulations that
22 could be guidances.

1 MS. COHAN: Possibly.

2 CHAIRMAN KECKLER: And so I'm less concerned
3 about any particular situation than that there's a
4 mindful open process that makes the best choice between
5 those different options within the organization. I guess
6 that's my concern.

7 I guess my other question is -- I'll let other
8 people ask questions in a second, but -- is how also are
9 things brought before this committee? What's the
10 decision process that takes a document and says, we're
11 bringing this to Ops & Regs, or we don't?

12 MS. COHAN: I don't know that there's a single
13 decision-making process on that as opposed to just
14 knowing certain things that are going to go out for
15 public comment. Generally, items of broad applicability
16 are generally going to be brought in front of the
17 committee, but I think that there's not a hard and fast
18 policy anywhere about it.

19 I think different times, individual items have
20 been discussed about what sort of level they want to come
21 to. So I feel bad that I don't have a particularly good
22 answer to your question.

1 CHAIRMAN KECKLER: Well, that's okay. And I
2 think that it's something that certainly -- my experience
3 in the federal government was that that's a situation
4 that was not uncommon. But what the Office of Management
5 and Budget had worked out, then, over the past several
6 years was to take certain guidances and call them
7 significant guidance. And that created its own sorts of
8 confusions.

9 But in effect, it was -- it's something about
10 what you describe. Things of broad applicability, things
11 of importance, things that are going to go out and be
12 noticed, you know, both formally noticed and noticed in
13 the community require separate process and policy
14 considerations.

15 Anyway, that's somebody that -- obviously,
16 we're not subject to that. I don't think federal
17 agencies are necessarily subject to that any more,
18 either, so many changes. But I think that kind of
19 thought was something that other regulatory entities went
20 through, went through that sort of thoughtful process
21 about thinking about certain guidances as more
22 significant than others and perhaps requiring a different

1 process than others.

2 So anyway, I just wanted to get a heads up
3 about how LSC's doing it and maybe make a suggestion to
4 think through those processes yourselves.

5 MS. COHAN: Sure.

6 CHAIRMAN KECKLER: And especially since it does
7 impact the idea of the committee, too, that certain
8 things come to the committee and certain things don't, I
9 myself would look to know a little bit more about that
10 particular piece of it and understand that, what should.

11 Certainly other committee members and members
12 of the Board can also think and make suggestions about
13 what things they think should come before us and what
14 things they think don't need to. And maybe we can work
15 our way up towards a -- we can craft a rule by gradually
16 discovering yes, that document, no, that document, and
17 saying I don't know.

18 But anyway, that's the background to the issue.
19 And I'll let other members of the committee or the Board
20 ask any questions. Yes?

21 MS. BROWNE: This is probably a very basic
22 question. But I understand that LSC is not required to

1 follow the APA, or is it?

2 MS. COHAN: That's correct. LSC is not subject
3 to the Administrative Procedure Act.

4 MS. BROWNE: But are we borrowing some of the
5 concepts from the APA on when to have notice and comment
6 periods published in Federal Register? Because for
7 guidances, if you have a substantive guidance versus an
8 interpretive guidance versus a permissive guidance, it
9 seems to me -- it starts getting really kind of --

10 MS. COHAN: As we often do on a lot of things,
11 we look towards federal practice. We look towards the
12 common law of administrative procedure that predated the
13 Administrative Procedure Act. We look towards the
14 Administrative Procedure Act, even if it doesn't apply to
15 us.

16 That was some of what was going on with the
17 development and the adoption of the rulemaking protocol.
18 The rulemaking protocol sets forth LSC's little mini APA
19 for LSC's regulations. We're also not subject to the
20 Advisory Committee Act. We're not subject to the
21 Negotiated Rulemaking Act. But we looked at -- without
22 being subject to the Negotiated Rulemaking Act, we could

1 use negotiated rulemaking, and have adopted some
2 procedures for that.

3 MR. FORTUNO: If I may, we're not subject to
4 the APA because we're not a government agency and the
5 APA, by its own terms, applies just to government
6 agencies.

7 What we have in its place appears at Title --
8 I'm sorry, at Section 1008(e) of the LSC Act. And what
9 it provides is that the Corporation shall afford notice
10 and reasonable opportunity for comment to interested
11 parties prior to issuing rules, regulations, and
12 guidelines. That's the notice and comment.

13 And it shall publish in the Federal Register,
14 at least 30 days prior to their effective date, all of
15 its rules, regulations, guidelines, and instructions. So
16 instructions is a category that doesn't require
17 publication for comment but does have to be published for
18 notice before becoming final, 30 days before final.

19 That doesn't give us as much guidance we would
20 like. And, for example, one of the questions that may
21 arise is, well, what's a rule? What's a regulation?
22 What's a guideline? And so for that, we look to some of

1 the body of law out there, and there's much persuasive
2 authority that we can rely on.

3 So that's why we look at some of the case law.
4 And in fact, there is a fair amount of case law, mostly
5 from back in the early to mid '80s, talking about
6 rulemaking by the Corporation.

7 So we have some case law to rely on. We have
8 some persuasive authority out there that we can look to.
9 And we've been developing it as we go along, and I think,
10 as the committee chair pointed out, in some ways it's
11 data points.

12 In time, we have sufficient data points to
13 chart a process here and have a better sense for what is
14 and isn't within the scope of this. I think our general
15 approach is that if it's of wide application and it's
16 prescriptive, it requires something on the part of
17 grantees. It's not an internal process, but something
18 that we're imposing on our grantees. Then that sort of
19 thing gets published for comment and is issued as either
20 a rule or regulation or a guideline.

21 CHAIRMAN KECKLER: Thank you. That helps.

22 If there aren't any further questions on this,

1 there's no action that's required. This is something for
2 the committee to think about, and possibly also the
3 Corporation.

4 I will now turn to item 6, which is public
5 comment. Is there any public comment here or on the
6 phone?

7 (No response.)

8 CHAIRMAN KECKLER: Seeing none, I will move to
9 consider and act on other business. Is there anybody who
10 has other business to bring before the committee today?

11 (No response.)

12 CHAIRMAN KECKLER: Seeing none, I will now
13 entertain a motion for the adjournment of the committee
14 meeting.

15 M O T I O N

16 MS. MIKVA: So move.

17 MR. LEVI: Second.

18 CHAIRMAN KECKLER: All in favor?

19 (A chorus of ayes.)

20 CHAIRMAN KECKLER: The committee is adjourned.

21 Thank you.

22 (Whereupon, at 2:11 p.m., the committee was adjourned.)