

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS AND REGULATIONS COMMITTEE
OPEN SESSION

Sunday, October 4, 2015

1:08 p.m.

Hyatt Regency San Francisco
5 Embarcadero Center
San Francisco, California 94111

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:

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
Ronald S. Flagg, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary
Lynn Jennings, Vice President for Grants Management
Rebecca Fertig Cohen, Special Assistant to the
President
Mayealie Adams, Special Assistant to the President for
the Board Affairs
Stefanie Davis, Assistant General Counsel, Office
of Legal Affairs
Mark Freedman, Senior Associate General Counsel, Office
of Legal Affairs
David L. Richardson, Comptroller and Treasurer,
Office of Financial and Administrative Services
Carol A. Bergman, Director, Office of Government
Relations and Public Affairs
Carl Rauscher, Director of Media Relations, Office of
Government Relations and Public Affairs
Wendy Rhein, Chief Development Officer
Lora M. Rath, Director, Office of Compliance
and Enforcement
Janet LaBella, Director, Office of Program
Performance
Jeffrey E. Schanz, Inspector General
Laurie Tarantowicz, Assistant Inspector General and
Legal Counsel, Office of the Inspector General
John Seeba, Assistant Inspector General for Audit,
Office of the Inspector General
Daniel O'Rourke, Assistant Inspector General for
Investigations, Office of the Inspector General
David Maddox, Assistant Inspector General for
Management and Evaluation, Office of the
Inspector General
Herbert S. Garten, Non-Director Member, Institutional
Advancement Committee
Thomas Smegal, Non-Director Member, Institutional
Advancement Committee
Allan J. Tanenbaum, Non-Director Member, Finance
Committee
Don Saunders, National Legal Aid and Defenders
Association (NLADA)
Robin C. Murphy, National Legal Aid and Defender
Association (NLADA)

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

2 (1:08 p.m.)

3 CHAIRMAN KECKLER: Noting the presence of a
4 quorum, if everybody could get to their seats, I will
5 now call to order the duly noticed meeting of the
6 Operations and Regulations Committee. And since it's
7 the first meeting, I'll welcome everybody to San
8 Francisco, and thanks to our hosts, it's already very
9 nice.

10 So our first item of business -- can I ask for
11 an approval of our agenda today?

12 M O T I O N

13 MR. KORRELL: So moved.

14 CHAIRMAN KECKLER: Is there a second?

15 MS. MIKVA: Second.

16 CHAIRMAN KECKLER: All in favor?

17 (A chorus of ayes.)

18 CHAIRMAN KECKLER: The agenda is approved.

19 And the next item is to approve our minutes
20 from our meeting in July. You'll find those and the
21 rest of the materials starting at page 14 of your Board
22 book.

1 Can I have a motion to approve the minutes?

2 M O T I O N

3 MS. MIKVA: So moved.

4 MR. KORRELL: Second.

5 CHAIRMAN KECKLER: All in favor?

6 (A chorus of ayes.)

7 CHAIRMAN KECKLER: The minutes are approved.

8 We can now turn to our first item of
9 substantive business, which is an update on our
10 rulemaking on 45 CFR 1610.7 and 45 CFR 1627, otherwise
11 known as the subgrant rule. And I will turn it over to
12 Mr. Flagg to give us some information on how that's
13 going. Mr. Flagg?

14 MR. FLAGG: Thank you. We have previously
15 published, with the Committee's approval, a notice of
16 proposed rulemaking. We received a number of very
17 thought-provoking comments, indeed, from some of the
18 people in this room as well as others, and are in the
19 process of reviewing those comments. And when I say
20 "we," there's a team of offices -- IG, OPP, OCE, and
21 our Office of Legal Affairs.

22 Stefanie Davis and Mark Freedman from our

1 office are working on that, and with any luck, both are
2 on the telephone. And Stefanie, if you're there,
3 please provide further detail.

4 MS. DAVIS: Sure. Thank you, Ron. This is
5 Stefanie Davis, and I am on the line, obviously.

6 We are continuing to work through the comments
7 received during the comment period on Sections 1627 and
8 1610. Given the number of people on the team, we've
9 run into some scheduling issues, which are what have
10 gotten us to the point where we were not able to
11 present a further notice of proposed rulemaking at this
12 meeting.

13 But we are continuing to work through the
14 issues, and we hope that we will be able to provide the
15 Committee with a further notice of proposed rulemaking
16 that will reflect our discussions and the ways in which
17 LSC has decided to respond to the comments that were
18 made by the field on to the notice of proposed
19 rulemaking.

20 CHAIRMAN KECKLER: Stefanie, just to thank
21 you. I'm just going to tell you that we want you to
22 speak up, if you can, in there because we're having a

1 little trouble hearing.

2 MS. DAVIS: Sure. Sorry about that.

3 CHAIRMAN KECKLER: And maybe, if you're using
4 the speakerphone, try it without the speakerphone.

5 MS. DAVIS: Yes. I'm just on my regular
6 phone.

7 CHAIRMAN KECKLER: I can hear you all right,
8 but it's sometimes difficult.

9 So do you think -- and this is also to Mr.
10 Flagg, and I'll just ask it now -- do you think that we
11 will need to schedule an intermediate meeting of the
12 Committee to do this, or would that be helpful to you?

13 MR. FLAGG: Again, I think the standard we
14 have for that is whether or not the issues that are
15 presented pose policy alternatives or questions where
16 the path forward, in our view, is uncertain and where
17 it would be helpful to get Committee insight on those
18 issues sooner rather than later.

19 And my sense is that's probably not the case.

20 But if it is, we'll let you know. And again, even if
21 in our view the path forward seems clear, what we try
22 to do is obviously spell out what the comments were,

1 identify what we viewed as the reasonable alternative
2 so the Committee obviously has its own opportunity to
3 make a judgment about what we thought was the clear
4 path forward, what makes sense.

5 CHAIRMAN KECKLER: Thanks. Did you want to
6 expand a little bit about what you're doing? Or if
7 you --

8 MR. FLAGG: Yes. I think Stefanie
9 described -- we've gone through about half of
10 the -- well, we've reviewed all of the issues. We have
11 a working group of a half dozen or more people. And
12 they've worked through three or four of the issues, and
13 have one or two more to go.

14 And at least one of the issues, which is how
15 to define what constitutes a programmatic -- when
16 something is programmatic, how to define that in a way
17 that does not swallow a whole host of other activities
18 that have been going on for years not as subgrants and
19 don't strike us as remotely like subgrants. But that
20 needs to be dealt with in a thoughtful way.

21 Stefanie, did I capture that right, and is
22 there anything else that ought to be noted?

1 MS. DAVIS: Yes. That sounds right, Ron. I
2 would just say that we are working -- as the group is
3 working, we are developing rule text where we need to.
4 And we are simultaneously working on the further notice
5 of proposed rulemaking to explain in the preamble where
6 we have come out on the various proposals.

7 So we are in the process of working on text,
8 and we are in the process of explaining our
9 decision-making.

10 CHAIRMAN KECKLER: Okay. Are there any other
11 questions for Stefanie and Ron from the Committee?
12 Martha?

13 DEAN MINOW: I'm not on the Committee, but I
14 just wondered if you can tell from the comments if
15 there are worries that relate to particular programs as
16 opposed to across the board. One of the challenges in
17 writing a rule across so many diverse, different
18 grantees is that there are some very large grantees and
19 some very small ones, for example. I just wondered
20 about that.

21 MR. FLAGG: Stefanie, go ahead.

22 MS. DAVIS: There were not really concerns

1 about program size. To the extent that there was a
2 concern, the concern that we got or the comments that
3 we got that had to do with capacity to address some of
4 the changes were really with respect to the proposal
5 that all subgrantees comply with Section 1635 with
6 respect to timekeeping.

7 And the comments that we got basically said,
8 we're concerned that putting more requirements on
9 entities that are not directly receiving LSC funds,
10 whether they be private attorneys or very small
11 nonprofits who are not equipped with a robust
12 timekeeping system like LSC requires, that that will,
13 A, make it difficult for them to participate as
14 subgrantees, and B, possibly cause some potential
15 subgrantees to not want to participate because of the
16 additional requirements.

17 So that is one of the comments that we've been
18 spending quite a bit of time working through, and we
19 think we've come to a good resolution.

20 CHAIRMAN KECKLER: One question that occurs to
21 me from this: We've obviously been working on this
22 rule for a while, but I don't remember having ever

1 seen -- at least, it's not part of the rulemaking as
2 such -- a breakdown of how much our different grantees
3 use subgrants, which probably varies pretty
4 substantially from grantee to grantee. But if that's
5 available, I think it would just provide some useful
6 context for this.

7 Julie?

8 MS. REISKIN: And for what? We heard a lot
9 about it with TIG, but I haven't heard a lot about it
10 elsewhere. So is this mostly a TIG thing or not? That
11 would just be another piece of that. But that's a
12 really good point.

13 MS. RATH: Hi. This is Lora Rath, Director of
14 the Office of Compliance and Enforcement. We can
15 provide you all with a list of the current subgrants,
16 if you would like. There's right now currently
17 somewhere in the neighborhood of 60 to 65 active
18 subgrants at this time, and it does vary from program
19 to program.

20 Some programs obviously have none; some have
21 as many as four or five. And there are a handful that
22 do have TIGs that do have subgrants. So we can provide

1 that information to the Board, if you would like, or to
2 the Committee.

3 CHAIRMAN KECKLER: Thank you, Lora. That
4 would be useful to get a sense ultimately of how much
5 of our grant funds ultimately end up being deposited in
6 subgrants. It gives us a sense of the scale of the
7 rule.

8 MS. RATH: Yes. We can do that because they
9 do range -- there are some subgrants that are just a
10 couple to \$3,000, and some that are over \$100,000. So
11 we can provide that information with it as well.

12 CHAIRMAN KECKLER: Thank you.

13 Are there any other questions from the
14 Committee or the Board on this issue?

15 [No response.]

16 CHAIRMAN KECKLER: Thank you, Ron.

17 Let's turn then to item number 4, which is to
18 consider and act on the advanced notice of rulemaking
19 for 45 CFR Part 1630, as well as the Property
20 Acquisition and Management Manual.

21 I'll note, and I'll ask you, Ron, to confirm
22 this, that in the materials here -- that we should just

1 think about this as we're doing it; this is on page 23,
2 page 5 of the advanced notice of proposed rulemaking
3 and page 23 of the Board book -- it's going to ask us
4 to transmit this to the Board for their approval.

5 But my understanding was, from the rulemaking
6 protocol, the revised rulemaking protocol, an advanced
7 notice of proposed rulemaking wouldn't need to be
8 approved by the Board, although the Board could act on
9 it.

10 MR. FLAGG: I'll defer to Stefanie. I don't
11 recall. This is clearly something within -- there's no
12 bylaw or legal requirement.

13 Stefanie, do you recall what we said about
14 that issue in the protocol?

15 MS. DAVIS: I don't recall off the top of my
16 head, and it's entirely possible that I left in my
17 boilerplate statement from most rulemakings. But I
18 will doublecheck that before it goes out.

19 MR. FLAGG: Yes. The Board's not meeting for
20 a couple days. So Stefanie, if you could just get back
21 to us on that.

22 MS. DAVIS: Will do.

1 MR. FLAGG: And then we would ask the
2 Committee to, at this meeting, approve the advanced
3 notice of proposed rulemaking and either leave it at
4 that or make a recommendation to the Board on Tuesday.

5 Let me just make a preliminary statement and then turn
6 the microphone back over to Stefanie.

7 As you know, Part 1630 is very broad, and the
8 Property Acquisition and Management Manual is also
9 quite broad in its scope. So this is a very
10 significant rulemaking, and we have thought that if
11 we're going to be modifying portions of 1630, we ought
12 to take a look at the whole regulation now and not just
13 one narrow portion of it.

14 So this, given the breadth of these rules,
15 really does present much more of a set of policy
16 choices for the Committee and the Board than many of
17 our other rulemakings, where the path forward again
18 seems clearer because maybe Congress has changed a
19 statute and all we're trying to do is make our
20 regulations conform to the statute. This is not one of
21 those sorts of rulemakings.

22 So this is precisely the sort of rule, or

1 proposed rule -- well, it's not even a proposed rule
2 yet, but initiative -- where we think getting input
3 from our funding recipients and other members of the
4 public would be helpful. And clearly, before we have a
5 notice of proposed rulemaking, we're going to want some
6 guidance from the Committee as to the path forward.

7 So with that general background, I'll turn the
8 microphone back over to Stefanie.

9 MS. DAVIS: Great. Thank you, Ron. I did
10 just consult the --

11 CHAIRMAN KECKLER: Stefanie, we have a
12 question.

13 MS. DAVIS: Yes?

14 DEAN MINOW: I'm sorry. Before we hear from
15 Stefanie, I just wondered, what was the impetus for
16 this? I know there have been some individual instances
17 that were troubling, but what is the impetus?

18 MR. FLAGG: Yes. We, annually and on an
19 ongoing basis, look at our regulations. And I think
20 Mark Freedman, who's on the phone, is, along with
21 Stefanie, the keeper of our list of regulations that we
22 think bear further scrutiny and where we've identified

1 issues.

2 So for example, just one that comes to my head
3 quickly, and Stefanie may cover a couple of others,
4 there have been instances in the last couple years
5 where we have had questioned cost proceedings where the
6 histories were very prolonged.

7 And as a result of that prolonged
8 investigatory history and the five-year limitations
9 period we have in our regs, we basically could not seek
10 to get back costs that had been wrongly incurred, even
11 if they had been obviously wrongly incurred, because
12 they were out of time.

13 So I think the Board and the Audit Committee
14 quite properly, and Management, have thought that was
15 an issue. There's clearly an issue connected to that
16 larger issue of making sure that the limitations period
17 is triggered at a moment when we can give sufficient
18 notice to a grantee that some cost they've incurred is
19 questionable so that they are on notice. They can
20 retain documents.

21 So that was one issue that the Board and the
22 Audit Committee had spotted. And there were other

1 aspects of this rule that, in our regular review of the
2 rules, had come up. And we also get comments from the
3 field about rules that are problematical or unclear.

4 So it's a combination of those things. And
5 because of the breadth of 1630, it was not just one of
6 those. It was two or three of those. And then again
7 as we've gone through this process internally, we've
8 identified some other potential subjects of further
9 rulemaking.

10 DEAN MINOW: It's obviously too soon to have a
11 draft rule. But because it's such a broad rule, it
12 would be, I think, helpful to identify the impetus in
13 the announced proposed rulemaking so that the comments
14 are germane to the reasons for the process.

15 MR. FLAGG: Oh, yes. Yes. I think if you
16 look at this draft advanced notice of proposed
17 rulemaking, we identify with specificity the aspects of
18 the rule that we have identified as ripe for review,
19 and the reasons we think they're ripe for review, and
20 have, while we're at it, asked people if there's
21 anything else we ought to be thinking about in looking at
22 these rules.

1 DEAN MINOW: Thank you. I will just say,
2 having read it, I didn't get what you just described.
3 It just was such a level of so many different
4 questions. So now I understand better.

5 MR. FLAGG: Stefanie, I think you were going
6 to say something about the process and then talk a
7 little bit about the substance.

8 MS. DAVIS: Sure. I was going to say that I
9 had just consulted the rulemaking protocol, and we do
10 not in fact need to send this ANPRM to the Board for
11 approval for publication. So assuming that the
12 Committee approves the ANPRM for publication, I will
13 make that change to the document so that the proper
14 process is reflected in what's published.

15 CHAIRMAN KECKLER: Thank you, Stefanie.

16 MS. DAVIS: Are there any other questions, or
17 should I move on to the substance?

18 MR. FLAGG: No. I think you should move on to
19 the substance, and as you're walking through the
20 various pieces of that, try to be mindful of Dean
21 Minow's question and identify the impetus for the
22 various different issues that we have identified here.

1 MS. DAVIS: Certainly. I would say at the
2 beginning that as we were going through the rule and
3 thinking about the things that needed to be changed,
4 one of the big considerations that we discussed was the
5 fact that the federal government had recently, over the
6 past couple of years, actively engaged in consolidating
7 their rules for governing federal grants to both
8 nonprofit organizations and to states.

9 In some instances, there were provisions that
10 were very similar but we not the same. And the
11 government moved to incorporate all of the OMB
12 circulars that governed their grantmaking processes
13 into one document that incorporated changed to how they
14 did procurements, how grantees were supposed to respond
15 to certain requests for information, and how government
16 entities worked with their grantees who were also
17 giving subgrants.

18 So given that there was this very large-scale
19 change in the way that the federal government
20 administered its grantmaking processes, we considered
21 whether or not our rules which govern property
22 acquisition and how costs are justified also needed to

1 be reviewed.

2 Part 1630 has not been revised since 1997, and
3 the PAMM has not been revised since 2001. So there has
4 been a lot that has changed in grantmaking. There have
5 been, as I just said, this large effort by the
6 government to consolidate its grantmaking rules.

7 There have also been major changes in the way
8 that intellectual property is created, how its rights
9 are assigned between the developer of the intellectual
10 property or the purchaser of the intellectual property
11 and the government agency that may have funded the
12 development or purchase of that impair. So there were
13 those kinds of grantmaking and grants process questions
14 that had come up.

15 We had also received comments from our
16 grantees that some of LSC's requirements were
17 inconsistent with the requirements that they had from
18 other funders. So to the extent that we can
19 consolidate or make our requirements similar to or, at
20 the very least, not duplicative of other funders'
21 requirements, we wanted to achieve that as well.

22 So with that in mind, that forms the backdrop

1 for a lot of the questions that you will see in the
2 notice of proposed rulemaking. There are many
3 instances in which we ask, what do you recall other
4 funding sources require? What do they do?

5 Because we do want to, as much as possible,
6 write rules that make sense for us and work well for us
7 and the kind of grants that we make, the kind of
8 information that we want from our grantees. But we
9 don't want to create burdens for them. We don't want
10 to put additional administrative requirements on them
11 that are not useful to them, that are not helpful to
12 us.

13 And so with that in mind, we looked at a
14 number of issues that we had gotten comments on over
15 time from either the Inspector General or the field or
16 OPP and OCE internally.

17 Ron just touched on one of the big ones, which
18 is on pages 28 I'm sorry, 26 through 28 of the Board
19 book. And that is the five-year period in which LSC
20 can disallow costs.

21 We have proposed or are considering having
22 that period come earlier, having the notice be given

1 earlier in the process, when LSC is still conducting
2 investigations, in the interests of giving recipients
3 earlier notice that there may be a problem so that they
4 can either correct it before they have incurred
5 additional costs, so that they are able to retain more
6 of their records if they end up needing to defend a
7 questioned cost proceeding from us, and also to protect
8 LSC's ability to recover funds to the extent possible.

9 As Ron explained, sometimes our investigations
10 have gone well past the period in which all of the
11 costs can be incurred. So we made that proposal, both
12 in our interests as well as in the interests of
13 recipients.

14 I think another big one, and this is one that
15 we had received comments on from the field, is on page
16 28 of the Board book regarding the requirements for
17 using LSC funds to match federal grants.

18 This one is one that Father Pius had asked
19 about the last meeting. It has an odd history. And
20 LSC had originally, when it wrote this provision,
21 simply said that LSC funds couldn't be used for
22 matching a federal grant unless there was statutory

1 authority to do so, which is fairly standard in federal
2 programs.

3 Taxpayer dollars are not supposed to be used
4 to match taxpayer dollars. The purpose of a nonfederal
5 match is to get community buy-in to ensure that the
6 recipient has other resources to help further the
7 project that the federal government awards money to
8 carry out.

9 But when the final rule was written, the
10 provision changed a bit so that there was now an
11 affirmative statement by the federal funding agency
12 required in order for a recipient to use LSC funds to
13 match a federal grant.

14 We understand that that requirement has become
15 rather burdensome for recipients because federal
16 agencies don't usually make an affirmative statement to
17 a grantee about whether or not certain funds can be
18 used for match.

19 So we have proposed to get rid of that
20 requirement altogether and to instead think of other
21 ways that we might be able to provide recipients with
22 assurance that they can use LSC funds as match, if

1 necessary. We've proposed a program letter. There may
2 be other ways that excipients think would be useful to
3 helping them apply for federal grants using LSC funds
4 as a match.

5 CHAIRMAN KECKLER: Stefanie, this is Charles.

6 MS. DAVIS: We received comments from the
7 IG --

8 CHAIRMAN KECKLER: Stefanie, can you hear me?

9 MR. FLAGG: Stefanie?

10 CHAIRMAN KECKLER: Stefanie? I don't know
11 if --

12 MS. DAVIS: -- about the IG's office --

13 MR. FLAGG: Stefanie?

14 MS. DAVIS: Yes?

15 MR. FLAGG: You've got to listen. Charles has
16 a question.

17 CHAIRMAN KECKLER: Okay. I don't know about
18 the sound here.

19 A quick question about that issue. Reading
20 here, my first question is, has OLA produced an
21 opinion, internal or external opinion, on this?

22 MR. FLAGG: Yes. The underlying issue is not

1 controversial. Federal government agencies, by and
2 large, are quite willing to permit their grants to be
3 matched with LSC funds, which are not viewed as federal
4 funds.

5 We have opinions on that, but the difficulty
6 is this requirement currently in our regulations that
7 would, in each instance, require a federal agency to
8 give us a letter saying, we're fine with this. And as
9 a practical matter, that's a little bit like when you
10 try to download software from Microsoft, getting their
11 agreement popping up, and you want to take issue with
12 it. You're not going to make much progress in
13 negotiating over that.

14 CHAIRMAN KECKLER: No. I understand that,
15 Ron.

16 MR. FLAGG: So there are OLA opinions on this.

17 CHAIRMAN KECKLER: Okay. I might take a look
18 at one. But there at the end of the description, it
19 says, "LSC recipients could then provide that program
20 letter to awarding agencies that question the
21 nonfederal character of LSC funds."

22 So then I'm thinking they might be wrong. But

1 I don't want to get our grantees or us crosswise with
2 these other agencies. And I'm wondering if there's a
3 way to not have that happen.

4 I'm not sure what the way would be, but it
5 seems like even if we're correct and we feel
6 comfortable with it and the legal position, it seems
7 it's implicit that there can be elements of the
8 government that might hold a contrary view.

9 MR. FLAGG: Yes. So far, I believe it's the
10 case that there have not been. That is, as far as I
11 recall, people have not declined. The issue has been
12 to get an affirmative statement by them that they're in
13 agreement.

14 But you're right. We can take action, but it
15 doesn't bind the federal government. So that is a
16 challenge.

17 CHAIRMAN KECKLER: This would be -- I'm just
18 throwing it out there. Right? We could ask for an
19 opinion which would bind them.

20 MR. FREEDMAN: This is Mark --

21 MS. DAVIS: I was just going to say -- this is
22 Stefanie -- two things. One is that we do have

1 opinions from -- and Mark can jump in here -- we do
2 have opinions from I don't remember if it's the
3 Comptroller of the Treasury or who it is. But we do
4 have opinions that say that LSC funds are not federal
5 funds for matching purposes.

6 The other thing that I would say is in my
7 experience as a government agency attorney, agencies
8 aren't generally looking behind the source of the match
9 unless there's something really questionable, which is
10 why we offered the option of having a program letter
11 out there.

12 That seemed to be a way to give recipients
13 some comfort if they felt like they needed to -- if
14 they did get a question from the government agency, but
15 without having to go through this very burdensome
16 process of actually getting the agency to say, oh, yes.

17 That's completely fine to use LSC funds as the match.

18 CHAIRMAN KECKLER: Okay, Stefanie.

19 MR. FREEDMAN: This is Mark. If I can just
20 add to that, usually our problem is the opposite, that
21 the agency is bewildered by our requirement.

22 MR. FLAGG: Mark, you've got to speak up. We

1 can't hear you.

2 MR. FREEDMAN: Sorry. Hold on. Hopefully you
3 can hear me better right now.

4 Usually we have the opposite problem. The
5 agency is bewildered by our requirement. And for
6 example, when the IRS contacted us regarding matching
7 for the low-income taxpayer clinic program, their
8 primary question to us was, why do you have this
9 requirement, and how can we get it out of the way?

10 They, Americorps, the precursor to HHS back in
11 the '70s, have all said for matching purposes, LSC
12 funds are not federal funds. And then the Comptroller
13 of the Currency, as Stefanie mentioned, they determined
14 in a slightly different context but for a context of
15 banking laws, our funds are not federal funds.

16 And while there are some occasions where we
17 might be -- for example, the litigation regarding the
18 restrictions in the First Amendment had federal
19 government character issues -- here, if we're balancing
20 which is the bigger concern, our experience is that
21 clearly the bigger concern is that this is getting in
22 the way and it's frustrating the agencies that our

1 grantees has an unnecessary bureaucracy, moreso than
2 any concern that any agencies are feeling like, oh,
3 wait. We didn't realize that LSC funds were actually
4 coming from the federal coffers.

5 CHAIRMAN KECKLER: That certainly provides a
6 helpful context, and it makes me more confident in our
7 position, though I've still got a lingering worry that
8 something might pop up some time one thing or another.

9 But hopefully --

10 MR. FLAGG: Yes. Look. On the issue of
11 whether the funds -- once our appropriated funds are
12 within our coffers, whether they're federal funds, is
13 settled law. They are not, full stop.

14 OMB agrees with that. Comptroller of the
15 Currency agrees with that. I've not heard a contrary
16 view on that by anybody. And that conclusion drives
17 many things that we do within the organization. And
18 that issue has been the subject of many opinions within
19 LSC and within the federal government, and the
20 Congressional Budget Office likewise.

21 So that core piece is undisputed and lies at
22 the core of this particular issue as well. So that's

1 why I don't think at the end of the day the legal issue
2 is controversial. The issue is to produce a document
3 or something that people can hold up and say, this
4 resolves this issue and we can match with LSC funds.

5 CHAIRMAN KECKLER: Okay. I think, unless
6 there are other questions on this, we can move on to
7 some other issues.

8 Father Pius?

9 FATHER PIUS: A couple of things, just very
10 briefly. I think we should bring the threshold number
11 that comes up on this. I think it's nice that we're
12 doing it. Was there ever any thought to doing a
13 bifurcated or at least leveled one, so, for example,
14 different amounts that you require approval for based
15 on the size of the entity, or different amounts based
16 on what you're spending money on, whether it's a
17 refurbishment or whether it's a new acquisition?

18 But that's one thing to think about. I've
19 seen it in other contexts.

20 MR. FREEDMAN: I can't hear you. Are you
21 there?

22 FATHER PIUS: Yes. We can hear you.

1 MS. DAVIS: I'm here.

2 FATHER PIUS: The other --

3 MR. FREEDMAN: Did I lose them entirely?

4 MS. DAVIS: It kind of sounds that way.

5 FATHER PIUS: The phone system's not working
6 well today, is it?

7 MR. FLAGG: Mark, we can hear you.

8 FATHER PIUS: Apparently they can't hear us.
9 Somehow there's not a connection between this sound
10 system and the phone system.

11 CHAIRMAN KECKLER: Okay. That's a problem
12 because if people are dialing in on the phone from the
13 public, that would be --

14 FATHER PIUS: They're having a problem here
15 us.

16 CHAIRMAN KECKLER: That would be also --

17 FATHER PIUS: Okay. I'll just do my other
18 part. One of the other things that I noticed or wasn't
19 sure about was there's this issue of making sure we get
20 the five-year issue. But what is it that triggers or
21 stops the triggering?

22 The question is, is it whether we -- so we're

1 going to change this so that we can do not a questioned
2 cost thing but sort of a note: We're worried. Right?

3 MR. FLAGG: Yes.

4 FATHER PIUS: But that's not a questioned cost
5 procedure. So it sounds to me a little like we're
6 still in the five-year issue because -- or are we going
7 to use the "we're worried" notice as what -- as long as
8 that's within the five years, that's going to make us
9 okay?

10 MR. FLAGG: Yes. Look. We are --

11 FATHER PIUS: And I just want to make sure
12 that's well-defined because I didn't think it was
13 well-defined in this.

14 MR. FLAGG: No, no, no. We're posing a
15 question here. We're not -- look.

16 FATHER PIUS: No, no, no, no. I understand
17 that. I understand that.

18 MR. FLAGG: Let me tell you, the idea here is
19 now, under the current -- so we just need to state
20 clearly --

21 FATHER PIUS: Oh, no, no.

22 MR. FLAGG: Let me just finish. The situation

1 now is the five-year period is not triggered until
2 we've completed our investigation, we've gathered all
3 of the documentation, and everybody has signed off that
4 we are going to bring a questioned cost proceeding.

5 So from the time we hear from the IG to the
6 moment we arrive at the point I just described can
7 often take months, even a year. And what we want is to
8 identify a moment when we can give notice, specific
9 notice, to a grantee that here is a specific set of
10 costs that we have identified as possibly subject to
11 question.

12 Here's the time period of them, here's what we
13 know about them, please retain all records regarding
14 those costs -- that sort of specific notice, and in
15 this rule, we would identify the elements that would
16 have to be identified and notice provided for that
17 would trigger the five years.

18 The difference is, we won't have to have
19 reached a firm resolution as to whether or not we're
20 going to see questioned costs.

21 FATHER PIUS: Right. My only point --

22 CHAIRMAN KECKLER: Hold on, Father Pius.

1 We're going to break for a couple minutes and try to
2 sort out this phone thing. Two-minute break. If
3 people on the phone can hear me, two-minute break.

4 (A brief recess was taken.)

5 CHAIRMAN KECKLER: I will resume today's
6 meeting of the Operations and Regulations Committee
7 from the world center of high technology.

8 (Laughter.)

9 CHAIRMAN KECKLER: Father Pius?

10 FATHER PIUS: No. I just wanted to thank Ron
11 for that explanation, which I understand. My only
12 point is the regulations provide at least some thought
13 of what the new triggering would be, and it's just my
14 thought that it's not clear and it could be a little
15 bit clearer about what that triggering would be.

16 MR. FLAGG: Yes.

17 FATHER PIUS: That's fine. And I understand
18 we're working to our final one, so that's fine. But I
19 just wanted to raise at least that concern.

20 The other question I had is, what we talk
21 about is people who engage in these questioned cost
22 activities, some of them that might be deliberately

1 fraudulent. In lots of cases you waive a time limit
2 when there is evidence of malice, and whether or not we
3 should think about having a waiver of the time limit
4 when there is deliberate intent to defraud.

5 So those are just my suggestions. And there's
6 a typo, and I will send it to you, Stefanie.

7 CHAIRMAN KECKLER: Thank you. So given the
8 technical difficulties, for which I apologize to any
9 members of the public who were calling in, let's move
10 swiftly through the rest of this advanced notice unless
11 Board and Committee members have particular questions
12 about it.

13 MR. FLAGG: I think Julie had a pending
14 question.

15 CHAIRMAN KECKLER: Julie, please.

16 MS. REISKIN: I had two. One is, I agree with
17 what Father Pius said about waiving something when
18 there's malice. But when there isn't, I think it's
19 really important that we not leave things open too
20 long. But I think there has to be a really defined
21 time that we either question the costs or don't. And
22 whatever that is, it just needs to be very, very clear.

1 If we do a new rule, it needs to be something
2 that isn't retroactive, so if -- do you understand what
3 I'm saying?

4 MR. FLAGG: Yes. No, look. There's going to
5 be five years of retroactivity, just as there's always
6 been. The question is --

7 MS. REISKIN: That isn't new?

8 MR. FLAGG: No. That's not new. The question
9 is, when does that five-year period get triggered?
10 Does it have to be triggered by being ready for trial,
11 or the LSC having made a decision? Or can it be
12 triggered when we have sufficient information from the
13 IG and other sources that we can give complete notice
14 to the grantee that we've seen something that causes us
15 concern and they need to retain records?

16 There shouldn't be a right or any interest in
17 a grantee being able, where there's been a clear
18 violation of a regulation, to not have to pay back
19 costs just because our investigation took a little
20 longer.

21 So I think there's a way forward here that
22 will make sure people are on notice on one hand, but

1 two, not have us needlessly forfeit our right and
2 obligation to recover funds that have been improperly
3 spent.

4 But again, we are at a stage here where we
5 haven't even issued a notice for comment. We're asking
6 for comments about how we ought to be thinking about
7 these issues. So we're at a much more preliminary
8 stage here than we typically are in rulemakings.

9 CHAIRMAN KECKLER: Right. I think the one
10 thing is, do we see issues where the Board or the
11 Committee is going to need some information as we
12 engage, as Ron put it at the outset, with this complex
13 rule? And are there other issues here that we think
14 ought to be added to this list of questions? Those are
15 what I --

16 MS. REISKIN: I had one other --

17 CHAIRMAN KECKLER: Julie, and then Gloria.

18 MS. REISKIN: Yes. I just had one other
19 question. There were a couple places where you asked,
20 what do other funders do? And I didn't know were you
21 asking anyone, or was that a more targeted question?
22 And that was throughout the rule. I thought it was

1 great that you're asking.

2 MR. FLAGG: Yes. Again, and I think Jim and
3 the Board have been very good about this, we have to
4 recognize that for all of our grantees, we are not
5 their sole funding source. And for many of our
6 grantees, they have multiple funding sources which
7 cumulatively are much greater than we are. We're a 20
8 percent funder for some of our grantees.

9 So where we have various reporting and other
10 obligations under these rules, we're just trying to
11 make them consonant with requirements they may face
12 from others so that they don't have a crazy quilt of
13 regulatory requirements from us and others.

14 MR. LEVI: Now, can I just say something? If
15 I understand what's happened here with our sound
16 system, this is addressing all of us. That is the
17 public. Is that correct?

18 CHAIRMAN KECKLER: I believe that's right.

19 MR. LEVI: Am I correct as to that? Because
20 the question that I want to know is, are the people on
21 the phone hearing us through this or that?

22 CHAIRMAN KECKLER: They should be hearing us

1 through that because that's the conference call.

2 MR. LEVI: And I want to just test that they
3 are in fact hearing us.

4 MR. FLAGG: Stefanie, can you hear what's
5 going on in the conference room?

6 MS. DAVIS: Yes. Rather inconveniently, my
7 hearing quality has gotten worse as yours has gotten
8 better.

9 MR. FREEDMAN: This is Mark. I can hear you
10 guys as well. It's not quite as loud as before, but I
11 can still hear you perfectly well.

12 MR. LEVI: So what we need to do is make sure
13 we're projecting into the center.

14 CHAIRMAN KECKLER: Yes. It's a good point,
15 John. Everybody speak up.

16 (Pause)

17 PROFESSOR VALENCIA-WEBER: This is Gloria. On
18 the material that we got, I understand what Ron is
19 saying about where we're at because we're seeking
20 information.

21 Basically, what you're seeking on the
22 five-year problem is to move to what we would call a

1 good faith rule -- that is, that the good faith
2 analysis by LSC, and as it says on page 27, that
3 there's a reasonable basis for questioned cost
4 proceedings; a good faith notice that LSC has enough
5 evidence to have a reasonable belief that unallowable
6 have occurred.

7 The administrative law area is full of places
8 where good faith rules, good faith practices, can cause
9 problems because what's good faith to the regulator or
10 administrator is not good faith in the eyes of those
11 who it's being used.

12 So we want to really perhaps ask for comments
13 about, to those who would be regulated by this good
14 faith notice, what is sufficient evidence? What kind
15 of whatever will be adequate from their side that we
16 are not being capricious about how we do this?

17 I know that that's what you'll be asking for.

18 But perhaps it might be more expressly --

19 MR. FLAGG: Yes. No, that's what we've asked
20 for. We have specifically said we need to identify the
21 elements that we need to give notice about. And both
22 to you, Gloria, and you, Julie, we're asking our

1 grantees for their views on that. What notice is
2 sufficient for them to understand that their costs are
3 being challenged?

4 CHAIRMAN KECKLER: Thank you.

5 If there aren't any further questions on here,
6 we have been asked to approve this advanced notice of
7 proposed rulemaking to begin the process of
8 information-gathering from the public about this. May
9 I have a motion to approve the advanced notice of
10 proposed rulemaking?

11 M O T I O N

12 MS. MIKVA: So moved.

13 MR. KORRELL: Second.

14 CHAIRMAN KECKLER: All in favor?

15 (A chorus of ayes.)

16 CHAIRMAN KECKLER: The advanced notice of
17 proposed rulemaking is approved for publication by the
18 Committee.

19 Let's now turn to the next item of business,
20 which is a rulemaking timeline. I feel, Ron, that this
21 is fairly self-explanatory unless members of the Board
22 or the Committee have questions about it. Do you have

1 any particular comments you wanted to make about that?

2 MR. FLAGG: No. I agree. The Committee
3 approved an agenda at the July meeting. This merely
4 takes the agenda and attaches our proposed dates for
5 implementing the agenda, and it does not require any
6 action on the Committee's part. It's there, and if you
7 have questions, we'll be pleased to answer them.

8 Otherwise, obviously, this is a dynamic
9 document. We'll continue to work away on the schedule,
10 and we'll keep you apprised of our progress.

11 CHAIRMAN KECKLER: Thank you, Ron.

12 The next item on record management, I would
13 like you to go ahead and make some brief remarks on
14 that. This is a matter often considered to be not that
15 exciting, but as we've all come to realize over a
16 recent period, it is of considerable importance. So
17 thank you for doing the policy, and please bring it up
18 to us.

19 MR. FLAGG: Okay. This actually is a newly
20 drafted policy, a newly enacted policy. This is not a
21 policy that requires Committee approval. We're
22 reporting on it. Charles asked us to report on it

1 because record management is in this Committee's
2 purview, and indeed is on our risk matrix as an issue
3 that does present some risk to the Corporation. So
4 this is a report on this area.

5 The new policy represents a change from the
6 old in a couple of ways. One, the old policy had a
7 committee within LSC jointly responsible for taking
8 action and, as is often the case where committees are
9 tasked with taking action, that was not a model for
10 execution.

11 So the new policy creates a more centralized
12 approach with responsibility for records management
13 with the General Counsel and with the Office of Legal
14 Affairs, obviously working with other offices directly
15 to implement the policy since our records
16 reside -- there are central records within each office.

17 We have offsite materials for each office. We
18 obviously have corporate records. And so there will be
19 a continuous need to work with ours.

20 But our office has been tasked, and I pledge
21 to you will carry out, the implementation of this
22 policy so that the record retention periods that are

1 reflected in the policy -- which are largely similar to
2 the old retention periods but which had often been not
3 necessarily followed; we had not been losing documents,
4 they've just been retained or sent offsite.

5 We have about 2,000 boxes offsite, which I
6 don't know how that strikes you; probably for Harry and
7 John and other people who are in private practice,
8 there are individual cases that have 2,000 boxes. So
9 to have 40 years of the organization's history in 2,000
10 boxes is not bad.

11 That number has actually not grown in recent
12 years because so much of our material now is digitized.

13 And our effort over the course of implementing this
14 policy will be to look at those 2,000 boxes, discard
15 those that really don't need to be retained, digitize
16 those which it might make sense because they're going
17 to be recalled from time to time, and probably retain
18 some number of those in box form if it's more
19 economical to do it that way. But we'll just have to
20 make a judgment based on how many boxes are held.

21 I would note, as I'm sure you did, that our
22 Board members are covered by the policy. I don't want

1 you to be concerned about that. Most of the documents
2 that you would have are also held by LSC and are under
3 the auspices of the Office of Secretary. And we have
4 on pages 76 and 77 of the Board book a listing of those
5 documents, and to the extent you just have copies of
6 those documents, you don't need to worry about
7 retention.

8 We will think about any other issues that
9 relate directly to the Board and will separately give
10 you some sort of guidance as to whether you need to do
11 anything else beyond what you've been doing already
12 with your records. But this should be --

13 MR. LEVI: What about the server you have in
14 your garage?

15 (Laughter.)

16 MR. FLAGG: I have not now or ever been
17 technically inclined.

18 FATHER PIUS: But it does raise a point on
19 whether there should be LSC email, in the future
20 whether there should be LSC emails for the Board.

21 MR. FLAGG: Oh, no. I think --

22 FATHER PIUS: We don't need an answer, but it

1 is something to think about, whether we should be doing
2 that.

3 MR. FLAGG: We actually have been thinking
4 about it. We have a separate email policy, and there
5 would be a fuller statement on what to do with emails.
6 To the extent that emails constitute records, they're
7 covered by this policy. But we have a separate policy
8 dealing with retention of emails, and we'll share that
9 with you as well.

10 MR. LEVI: Well, I do think that raises a
11 question because we do email as a Board, and we email
12 on behalf of the Corporation. And to the extent that
13 policy applies to those emails, I suppose we wouldn't
14 like to inadvertently violate it.

15 MR. FLAGG: No. But I think, again, the
16 lion's share of communications among and between Board
17 members also involve -- not all of them; I understand
18 you could have a two-way email between two Board
19 members or three Board members that don't come to me or
20 don't come to Jim.

21 But to the extent there are emails coming in
22 to LSC, we have copies of those. To the extent there

1 are Board books, notices -- I mean, you've all
2 accumulated an enormous amount of material. And what
3 I'm saying is everything that was generated by us or
4 that you sent to us, to the extent it's an LSC record,
5 we have custody of it.

6 Just because you have one of these Board books
7 sitting in your basement somewhere, unless it's --

8 MR. LEVI: We don't need to return them?

9 MR. FLAGG: Correct.

10 MR. LEVI: But, for example, what about a
11 letter that I write to a firm on behalf of the
12 campaign? And maybe we forget to copy Wendy,

13 MR. FLAGG: Right. We'll --

14 MR. LEVI: For example, is that something we
15 should be preserving?

16 MR. FLAGG: I would for the moment preserve
17 it.

18 MR. LEVI: I would prefer we do. And I'm sure
19 it is saved in our system somewhere. But it's the
20 Sidley system, not the LSC system.

21 MR. FLAGG: Right. Rather than answer
22 individual questions on the fly, I would like to take a

1 more studied approach to it. But if there is LSC
2 business where you have the only copy of a record, we
3 should try to retain in.

4 CHAIRMAN KECKLER: Thank you, Ron. I had many
5 of these same concerns. And so we look forward to
6 looking more about our own responsibilities from a note
7 to the directors as well as our emails.

8 MR. FLAGG: Yes. What we are doing is, office
9 by office, the people in OLA who are working on this
10 issue are meeting one at a time with each office to
11 come up with an implementation plan. And we're going
12 to do the same thing with the Board.

13 So we're aware that this is not a
14 self-executing policy. And we need to work with
15 people, and that's what we're doing.

16 CHAIRMAN KECKLER: Thank you.

17 MR. LEVI: As to that -- I'm sorry.

18 CHAIRMAN KECKLER: Go ahead.

19 MR. LEVI: For example, Katherine Ward asks us
20 to report on our hours quarterly. So it strikes me
21 that if you were to send out a notice, "Is there any
22 email that you believe that you have the only copy of

1 that's germane to LSC business that ought to be
2 preserved," that would be a reminder.

3 And then we can send it to you, and then it
4 won't get lost in somebody else's -- think about that.

5 I'm not saying that's the answer, but --

6 MR. FLAGG: No, no. Again, today's briefing
7 is not -- right. No, no. And we will provide you
8 guidance so that you will feel comfortable. And if you
9 have any questions, we will answer them.

10 CHAIRMAN KECKLER: Thank you, Ron.

11 With that, let me open it up -- oh, I had one
12 question just to close that off. Are you standing at
13 the records management officer at the current time, or
14 who is that person?

15 MR. FLAGG: It's me.

16 (Laughter.)

17 CHAIRMAN KECKLER: Okay. Thank you, Ron. You
18 need a closet for all those hats.

19 MR. FLAGG: Well, in fairness, with every hat
20 I wear, there's at least one person who's actually
21 wearing the hat. And in this instance, Helen Guyton of
22 our office has been working away on this. And Helen

1 and I will be working with you to the extent that this
2 policy imposes any obligations on you.

3 CHAIRMAN KECKLER: Thank you, Ron.

4 So at this time let me open it up for public
5 comment, including to any brave souls who might be on
6 the phone. Please introduce yourself.

7 MS. MURPHY: Robin Murphy, chief counsel for
8 the National Legal Aid and Defender Association. Can
9 they hear me on the phone?

10 MR. LEVI: You'll have to speak clearly.

11 MS. MURPHY: Stephanie?

12 MR. FREEDMAN: We can hear you.

13 MS. MURPHY: Wonderful. Thank you.

14 Just very briefly, I just want to thank very
15 much the Committee, the Board, and the Office of Legal
16 Affairs for giving us a 60-day comment period and for
17 doing an anticipated notice of rulemaking.

18 It gives the field, NLADA, and other
19 stakeholders a much more meaningful opportunity to
20 provide hopefully even better comments than we've
21 provided up to now. So we really appreciate that, and
22 appreciate the questions from the Office of Legal

1 Affairs. We certainly do want to comment. These are
2 very significant. They are very broad. So we
3 appreciate that.

4 As to the subgrantee notice of proposed
5 rulemaking, I would ask that that period, even though
6 it is a final rule and we have looked at that for some
7 extent, I would ask that there be a 60-day comment
8 period on that also.

9 There's a number of stakeholders, particularly
10 the American Bar Association, state and local bar
11 associations, who really have a process that they have
12 to go through and several layers of approval before
13 they can put comments in. And a 30-day time period is
14 very tight for them. I don't have a specific example,
15 but I've talked to them about this.

16 So I would ask the Committee and the Office of
17 Legal Affairs, when there's a rule that may affect the
18 bar, and the subgrantees rule does affect possibly bar
19 associations, IOLTA associations, that you consider a
20 60-day time period for them. Excuse me. I have a cold
21 today.

22 Based on those comments also, there's the

1 fee-generating rule. So I don't have to hold up the
2 meeting and come up again, that will once again involve
3 the private bar, and also the ABA association. So I
4 would ask also that that be a 60-day comment period as
5 well to give them a meaningful opportunity to go
6 through their approval process.

7 The other thing I would point out, and I know
8 it doesn't have to be approved by the Board, I noticed
9 in several areas of the records keeping, there's a
10 six-year limit on some of the records that I think
11 would be helpful to grantees in dealing with a
12 questioned cost proceeding.

13 So if you're talking about extending that, and
14 notwithstanding any comments that the field or NLADA
15 will have on that, if you're talking about extending
16 that to six years -- possibly an investigation could
17 even take longer -- to deprive the grantees of
18 information they may need would be a problem.

19 So I ask LSC, particularly Office of Legal
20 Affairs, to consider making that a seven-year time
21 period or even longer so grantees would not be without
22 that information they need. And I won't hold the

1 meeting up with particulars. I can certainly talk with
2 Ron and Stefanie and Mark about that.

3 Thank you very much.

4 CHAIRMAN KECKLER: Thank you, Robin.

5 Is there any other comment?

6 (No response.)

7 CHAIRMAN KECKLER: Seeing and hearing none, is
8 there any other business to bring before the Committee
9 today?

10 (No response.)

11 CHAIRMAN KECKLER: Seeing none, we can
12 consider and act upon an adjournment of the Committee
13 meeting. Is there such a motion?

14 M O T I O N

15 MR. LEVI: So move.

16 CHAIRMAN KECKLER: Is there a second?

17 MR. GREY: Second.

18 CHAIRMAN KECKLER: All in favor?

19 (A chorus of ayes.)

20 CHAIRMAN KECKLER: The Committee stands
21 adjourned.

22 (Whereupon, at 2:29 p.m., Committee adjourned.)