
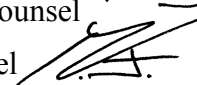


## OFFICE OF LEGAL AFFAIRS

To: Operations and Regulations Committee  
Through: Victor M. Fortuno, Vice President and General Counsel   
From: Mark Freedman, Senior Assistant General Counsel   
Re: Summary of Comments on the August 8, 2012, Further Notice of Proposed Rulemaking Regarding Enforcement Mechanisms  
Date: September 18, 2012

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## INTRODUCTION

The Operations and Regulations Committee (Committee) is considering proposed rules for adoption of additional enforcement mechanisms. The proposed mechanisms are 1) limited reductions in funding (under five percent), 2) suspension of funding for up to ninety days, and 3) immediate special grant conditions. LSC published for comment proposed rules through a Notice of Proposed Rulemaking (NPRM) on January 31, 2012. Based in part on comments to the NPRM, LSC published revisions to the proposed rules in an August 8, 2012, Further Notice of Proposed Rulemaking (FNPRM). LSC received seven comments on the FNPRM, all of which arrived on, or before, the September 6 deadline. The comments have been posted on the LSC website at <http://www.lsc.gov/about/regulations-rules/open-rulemaking>. This memo provides a brief summary and guide to the comments. As a general matter, the comments provided a number of useful suggestions. Management has concerns about the suggestions for increasing the standards and procedures beyond what is already in the existing rules or the proposed rules. The proposals for enhanced standards and procedures could lead to the kinds of delay and uncertainty that would interfere with the effective use of these new enforcement tools. The primary goal of this rulemaking is to provide LSC with tools for measured and immediate responses to substantial, but manageable, compliance concerns.

## COMMENTS SUBMITTED

LSC received comments from the following entities:

- The LSC Office of Inspector General (OIG) (nine pages)
- American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID) (ten pages)
- National Legal Aid & Defender Association (NLADA) (eight pages)
- New York State Bar Association Committee on Legal Aid (CoLA) (five pages)
- Legal Services Association of Michigan (thirteen legal aid programs) (one page)
- Midwest Project Directors Group (twenty-one legal aid programs) (two pages)
- All six LSC recipients in New York State outside of New York City (two pages)
- Northwest Justice Project (NJP) (Washington State) (five pages)

None of the comments opposed the FNPRM changes to the original proposed rule. The OIG supported the FNPRM, subject to their prior comments on the NPRM. The other six comments proposed adding more standards and procedures, many of which would alter the existing standards and procedures for terminations, debarments, and suspensions. SCLAID continued to support the goal of the rulemaking, subject to suggestions for improvement in these areas. NLADA and three other comments opposed the rulemaking, and, in the alternative, strongly recommended improvements to standards and procedures. NJP opposed new or additional sanctions without the same due process protections provided in the existing rules for terminations and debarment. Many comments provided technical suggestions that Management agrees with or that raised concerns about ambiguities that Management will consider addressing. For example, some comments noted that the FNPRM used both the terms “lesser reductions in funding” and “limited reductions of funding.” Management agrees that one term should be used, and suggests “limited reductions of funding.”

Only NLADA submitted comments formatted to respond to the six questions posed in the FNPRM. All of the comments submitted will be addressed, notwithstanding the failure to follow the format requested. Many comments provided very useful suggestions of alternative language in redline format.

#### OIG Comments

The OIG reiterated its support for the proposed regulations, with the caveats provided in its earlier comments. The OIG provided the following analysis.

- The reordering of the limited reductions language improved the structure of Part 1606.
- The existing five-factor standard for terminations in Part 1606 is sufficient for limited reductions; there is no need to make the “knowing and willful” factor mandatory.
- The proposed rules provide for more proportionate responses to violations than the current rules.
- Additional procedures are unlikely to deter hypothetical future abuses of these rules by LSC, but they would make the rules more cumbersome and would not further the purpose of adopting more flexible enforcement tools.
- The final appeal to the President for limited reductions provides a process that appears to be sufficiently streamlined to provide meaningful review while not unduly slowing down enforcement.
- The updates to Part 1618 are consistent with actual practice and the other regulations.
- As specified in Part 1618, it is appropriate to consider imposing sanctions when there is a substantial violation and the recipient does not agree to informal sanctions.
- The proposed rules would continue the current distinction in the rules between the higher “knowing and willful” standard, which is a factor in Part 1606 determinations, and the lower Part 1618 “intentionally violated” threshold for proceeding to enforcement options.

- A requirement could be added to Part 1606 for publication of final decisions regarding terminations, debarment, or limited reductions.

The OIG noted a concern that the example regarding Part 1618 in the FNPRM might indicate a misreading of the current rule. The example used a persistent *and* intentional violation, while the rule only requires a persistent *or* intentional violation.

The example was meant to provide an extreme case in which both elements are present. It does not indicate any intent to read the current rule, or the FNPRM, to require both.

### SCLAID Comments

SCLAID provided detailed comments with redline suggestions for revisions. These suggestions reiterated points from SCLAID's comments on the January NPRM. SCLAID recommended adding a "knowing and willful" threshold to Part 1606 for terminations, debarments, and limited reductions; increased procedural protections; and applying those enhancements to the Part 1623 suspension rule if that rule is expanded to ninety-day suspensions.

- *Knowing and Willful Threshold for Sanctions.* SCLAID proposed moving the "knowing and willful" factor out of the five factors for consideration in the current Part 1606 rule to make it a required, threshold factor for terminations, debarments, and limited reductions. Additionally, SCLAID proposed adding a requirement that "a recipient will not be considered to have acted in a knowing and willful manner when it has relied in good faith on a reasonable interpretation of state or federal law as a basis for its action or failure to act." SCLAID's proposal does not directly address the question of a difference of interpretation between LSC and the recipient.
- *Consideration of the Amount of Funds Misused.* SCLAID proposed adding a new factor for consideration of "the amount of funding that was inappropriately used."
- *Guidance on the Magnitude of the Reduction in Funding for Terminations or Lesser Reductions.* Part 1606 uses a set of five factors for determining whether to take enforcement action and how much to reduce funding (in a termination or limited reduction). SCLAID proposed separating those inquiries into two stages for the questions of 1) whether LSC would impose a termination or limited reduction and 2) the magnitude of the termination or limited reduction. For the second question, SCLAID proposed a new, separate set of factors. Those factors would include the four factors in the current rule (excluding the fifth factor for "knowing and willful" because SCLAID would promote it to a threshold factor). SCLAID would add the factor regarding the amount of funding misused, mentioned above, and another three factors regarding the availability of other funds and the impact of the reduction in funding on the recipient and on client services.
- *Appeals.* The proposed Part 1606 uses the Part 1630 appeal procedure for limited reductions. The President would hear the appeal, unless he or she had involvement in the prior decision, in which case the President would appoint a senior LSC staff person to hear the appeal. SCLAID observed that the President has supervisory control over all LSC staff, and as such there is a question if an appeal would be meaningful if the

President had been involved in the initial decision. SCLAID proposed that appeals should go to the President only if he or she had no prior involvement in the matter. Otherwise, the appeal should be heard by an external independent hearing examiner. This would be the only situation in which the LSC regulations explicitly contemplate a non-LSC employee making the final decision regarding a change in recipient funding.

- *Suspensions—Standards, Impact, and Appeals.* SCLAID proposed adding to Part 1623 the same enhancements discussed above for Part 1606.

## NLADA

NLADA submitted comments with similar recommendations as SCLAID, including redlined suggestions, but NLADA also continued to oppose the rulemaking entirely. NLADA reiterated its reasons why the rulemaking should not proceed: 1) a lack of actual need, 2) sufficiency of existing tools, 3) harm to clients and potential clients, 4) lack of due process, 5) insufficient standards, and 6) no recommendation for new enforcement tools by the GAO or LSC's Fiscal Oversight Task Force. NLADA organized its comments to correspond to the six questions posed in the FNPRM; it was the only commenter to follow those instructions.

- *Q1: Changes to the NPRM.* NLADA supported the direction of the changes to the NPRM as improvements, but also urged LSC to add additional due process protections.
- *Q2: Changes to the lesser reductions procedures.*
  - NLADA proposed the same additions to the standards regarding knowing and willful violations and good faith reliance on reasonable interpretations as SCLAID recommended.
  - NLADA also proposed a new procedural threshold of \$10,000. Any limited reductions in funding that exceed \$10,000 would trigger the same process as terminations (of between five and one-hundred percent) or debarments. That process includes a hearing before an impartial hearing officer, who makes a recommendation to the President for a final decision. The President may have been involved in the prior consideration of the matter, and the President is not bound by the hearing officer's recommendation.
  - NLADA also proposed a change to the existing hearing officer requirements, which provide that the President appoints the impartial hearing officer, who may be an LSC employee. NLADA proposed changing the rule to prohibit the appointment of an LSC employee as the hearing officer.
  - These changes would also apply to NLADA's proposed appeal procedures for Part 1623 suspensions of over \$10,000, as discussed below.
- *Q3: Whether the proposed structural changes to the rule would result in substantive changes to terminations or debarments.* NLADA did not find any structural changes that produced substantive changes to terminations or debarments, although NLADA recommended its own substantive changes to terminations and debarments as discussed above.

- *Q4: New definitions.* NLADA made recommendations regarding changes to the definitions, as discussed in response to Question 3.
- *Q5: New proposed final appeal process for limited reductions.* NLADA recommended adding more process for limited reductions over \$10,000 as discussed in response to Question 2.
- *Q6: New proposed language for Part 1618.* NLADA did not comment on the proposed language for Part 1618. NLADA recommended changing the existing “persistently or intentionally” threshold in Part 1618 (unchanged in the FNPRM) to a “knowing and willful” threshold consistent with NLADA’s proposal to use that language as a threshold in Part 1606, as discussed in response to Question 2.
- *Suspensions.* NLADA also provided comments on the existing suspension procedures. The NPRM proposed extending non-audit suspensions from a maximum of thirty days to a maximum of ninety days, after which the suspended funds would be provided to the recipient. The FNPRM did not change this proposal. NLADA observed that suspensions of up to ninety days can carry far greater financial consequences than thirty-day suspensions for recipients that may already be suffering from severe funding losses. NLADA provided the example of a full suspension of funding on a one million dollar grant, which could amount to \$250,000. If the suspension lasted for ninety days, then the recipient would operate without \$83,333 during the first month, which would increase to \$166,666 in the second month, and then increase to \$250,000 in the third month. As anticipated in the NPRM, extending suspensions to ninety days could have a powerful impact on recipients if imposed on one hundred percent of a recipient’s funding. NLADA noted that any resulting disruption in client services might not be immediately remedied upon resumption of funding. NLADA suggested the following enhancements to Part 1623:
  - The “knowing and willful” definition would be enhanced with the same “reasonable interpretation” language proposed by NLADA and SCLAID for Part 1606.
  - As with NLADA and SCLAID’s suggestions for Part 1606, the “knowing and willful” factor could be elevated to a threshold requirement for determining whether a violation is substantial instead of as one of the five factors for consideration.
  - A new “substantial violation” definition could be added and cross referenced with the same definition provided in the FNPRM for Part 1606. This appears to be a technical clarification without any substantive changes.
  - The requirement in Part 1606 that LSC act through someone at the level of deputy director or above, as proposed in the FNPRM, could also be added to Part 1623 suspensions.
  - Part 1623 currently does not provide for an appeal after the informal meeting with LSC to review the proposed suspension. NLADA recommends adding a right to an appeal to an impartial, non-LSC, hearing officer and then to the President for suspensions of over \$10,000. Part 1623 would use the same procedures recommended in response to Question 2 for limited reductions of over \$10,000.

New York State Bar Association Committee on Legal Aid (CoLA)

CoLA continued to oppose the rulemaking for the same reasons as NLADA, reiterated its original comments on the NPRM, and joined in the comments of NLADA, which opposed the rulemaking, and suggested changes to the standards and procedures if rulemaking proceeds. CoLA emphasized the recommendation that the definition of a Part 1606.2 violation should require a “knowing and willful” threshold with an exception for good-faith reliance on reasonable interpretation of federal or state laws or regulations.

Legal Services Association of Michigan

The Legal Services Association of Michigan, representing thirteen legal aid programs, endorsed the NLADA comments, which opposed the rulemaking, and suggested changes to the standards and procedures if rulemaking proceeds.

Midwest Project Directors Group

The Midwest Project Directors Group, representing twenty-one legal aid programs, endorsed the NLADA comments, which opposed the rulemaking, and suggested changes to the standards and procedures if rulemaking proceeds.

New York State LSC Recipients Outside of New York City

These six LSC recipients submitted two pages of comments that opposed the rulemaking for the same six reasons identified by NLADA. These comments also made the following proposals, if the rulemaking were to proceed, which appear identical to the NLADA proposals:

- LSC should add due process procedures and protections for limited reductions of less than five percent.
- For Part 1606 substantial violations, LSC should require that the violations are “knowing and willful,” that the recipient had “actual knowledge” that it was violating the rules, and that it was not relying in good faith on a reasonable interpretation of state or federal law.
- LSC should provide a right of appeal to an independent, impartial hearing office. It appears that the addition of “independent” to the impartial hearing officers’ qualifications is meant to exclude LSC employees, as per the change recommended by NLADA.

Northwest Justice Project (NJP)

NJP is the statewide LSC recipient in Washington State. NJP continued to oppose the rulemaking unless the new or additional sanctions are afforded the same degree of due process provided in Part 1606 for terminations or debarments. NJP also provided a number of helpful technical suggestions for the language of the rules. NJP proposed the following enhancements for the proposed rules, which are similar to many of the suggestions of NLADA and SCLAID:

- The Part 1606 termination and debarment due process procedures should be available for appeals of limited reductions in funding of over \$10,000.
- The definitions of “knowing and willful” and “substantial violation” should exclude legitimate disagreements or good faith misinterpretations of the rules.
- The new Part 1606 appeals for limited reductions should always go to the LSC President, who should not be involved in the prior decisions (as stated in NJP’s follow up e-mail to their comments). NJP questioned the value of an appeal if the President was involved in the preliminary decisions to impose a reduction in funding.
- The FNPRM proposal to only permit senior LSC staff to make decisions on limited reductions should be modified to exclude deputy directors.
- The FNPRM adds to the preliminary determination for terminations, debarments, or limited reductions the option for LSC to specify “what, if any, corrective actions the recipient can take to avoid the proposed action.” This option currently appears in Part 1623—Suspensions and was included in the original NPRM, but only for limited reductions. NJP suggests making explicit that, as an alternative to an appeal, a recipient could respond to a proposed Part 1606 enforcement action by implementing the proposed corrective action.
- The FNPRM continues the provisions of the current rules that informal conferences, as the first level of review for all Part 1606 preliminary determinations, are conducted by the same LSC employee who issued the preliminary determination. NJP questioned the value of a conference in which the recipient would functionally be asking the LSC employee to reverse his or her own preliminary decision. NJP suggested that the informal conference should be conducted by a more neutral third party such as a different senior staff person at LSC (other than the President) or a non-LSC professional mediator.

## CONCLUSION

The comments to the August FNPRM continue the themes set in the comments to the January NPRM. The comments generally welcomed the restructuring of the rules and a number of the enhancements. The comments also offered many helpful suggestions for technical improvements to the rules. Nonetheless, NLADA and the majority of the commenters continue to oppose the adoption of any new enforcement mechanisms. All of the commenters, other than the OIG, have pushed for standards and procedures that would change the current rules and might render the new enforcement mechanisms difficult to apply as quickly and decisively as Management has proposed.