

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS AND REGULATIONS COMMITTEE
OPEN SESSION

Sunday, April 12, 2015

2:33 p.m.

Legal Services Corporation
3333 K Street, N.W.
Third Floor
F. William McCalpin Conference Center
Washington, D.C. 20007

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson
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

Lynn Jennings, Vice President for Grants Management

Rebecca Fertig Cohen, Special Assistant to the
President

Patrick Malloy, Grants Management/Legislative Fellow,
Executive Office

Wendy Rhein, Chief Development Officer

Ronald S. Flagg, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary

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

Stefanie Davis, Assistant General Counsel, Office
of Legal Affairs

Sarah Anderson, Graduate Law Fellow, 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 Long, Executive Assistant, Office of Government
Relations and Public Affairs

Jeffrey E. Schanz, Inspector General

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

STAFF AND PUBLIC PRESENT (Cont'd):

John Seeba, Assistant Inspector General for Audit,
Office of the Inspector General

David Maddox, Assistant Inspector General for
Management and Evaluation, Office of the
Inspector General

Daniel O'Rourke, Assistant Inspector General for
Investigations, Office of the Inspector General

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

Megan Lacchini, Deputy Director, Office of Compliance
and Enforcement

Janet LaBella, Director, Office of Program
Performance

Bristow Hardin, Program Analyst, Office of Program
Performance

Traci Higgins, Director, Office of Human Resources

Eric Jones, Network Engineer, Office of Information
Technology

Atein Riggins, Office of Information Technology

Herbert S. Garten, Non-Director Member, Institutional
Advancement Committee

Frank B. Strickland, Non-Director Member,
Institutional Advancement Committee

Robin C. Murphy, National Legal Aid and Defender
Association (NLADA)

Dominique Martin, Law99.com

John C. Meyer, Retired, LSC

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

2 (2:33 p.m.)

3 CHAIRMAN KECKLER: I'm going to call to order
4 at this time, noting the presence of a quorum, the
5 announced meeting of the Operations and Regulations
6 Committee. And we'll begin, beginning a little later,
7 and I'll begin with asking for an approval of today'
8 agenda.

9 M O T I O N

10 MS. MIKVA: So moved.

11 MR. KORRELL: Second.

12 CHAIRMAN KECKLER: All in favor?

13 (A chorus of ayes.)

14 CHAIRMAN KECKLER: The motion is approved.

15 I'd also ask for approval of the minutes of
16 our last quarterly meeting from January 22nd. Is there
17 a motion to approve?

18 M O T I O N

19 MS. MIKVA: So moved.

20 CHAIRMAN KECKLER: Is there a second?

21 MR. KORRELL: Second.

22 CHAIRMAN KECKLER: All in favor?

1 (A chorus of ayes.)

2 CHAIRMAN KECKLER: All right. The minutes are
3 thereby approved.

4 And we can turn to our first item of
5 substantive business, which is to consider and act on a
6 notice of proposed rulemaking for transfers of LSC
7 funds and subgrants, sometimes called our subgrant
8 rule. And so we're planning on putting out for comment
9 a revision of that rule.

10 And I will turn that over to the Office of
11 Legal Affairs.

12 MR. FLAGG: Thank you. This was, as all of
13 our efforts are, a team effort. And Stefanie Davis and
14 Mark Freedman were the heart of the team, and Stefanie
15 will speak for us.

16 MS. DAVIS: Good afternoon. So we are, as
17 Charles noted, here to talk about -- and you'll see
18 there's a little addition to the header -- to a notice
19 of proposed rulemaking on Parts 1610, 1627, and 1630.
20 And I'll get to why that is toward the end.

21 So as you probably recall, this is an item
22 that has long lain dormant. This rulemaking was

1 approved in 2012, before I even started at LSC. And it
2 kind of got overtaken by events, but now we've come
3 back to it. And among the highest priority issues on
4 the rulemaking was to clarify which transactions the
5 subgrant rule applies to.

6 This rulemaking was prompted by differing
7 interpretations from the IG and Management, and so
8 rulemaking was approved to clarify which of those
9 interpretations we wanted the rule to have.

10 So you will notice through the rule that we
11 propose adopting Management's interpretation, which is
12 that subgrants apply to awards to third parties from
13 our recipients to carry out the programmatic work of
14 their Legal Services grant. So we are clarifying that
15 this about doing Legal Services work.

16 The issue came up because the Office of
17 Inspector General did an audit of the TIG program and
18 found that some recipients had been making awards for
19 more technical things, such as software development or
20 purchase of hardware.

21 And because the TIG awards are technology
22 awards, they believed that those were subgrants because

1 purchasing hardware or doing technical work was the
2 purpose of the grant. And that was difference, was
3 does a subgrant cover all of these types of grants or
4 does it only cover one type of grant?

5 And so what we propose, through a couple of
6 changes to the rule, is making clear that the term
7 "subgrant" applies only to recipient awards to third
8 parties to carry out programmatic legal assistance
9 work.

10 That doesn't mean that the TIG awards and TIG
11 subcontracts aren't being accounted for. There are now
12 special contracting rules in the TIG program, and we
13 imagine that we will also be looking at contracting
14 rules again when we take up -- in fact, we will be
15 looking at those again when we take up the revisions to
16 Part 1630 and the PAM.

17 So the first major change that we've made to
18 reflect Management's interpretation is visible on the
19 preamble discussion on page 26 of your Board book and
20 in the rule text on page 41, and that is to use and
21 define the term "programmatic" to mean activities or
22 functions carried out to provide legal assistance as

1 defined in Section 1002 of the LSC Act. We did that
2 again to make it clear that we are tying these to the
3 legal assistance activities of our recipients.

4 You'll also see that reflected in the preamble
5 discussion on page 2 and 28 of your Board book and the
6 rule text on pages 42 and 43 where we discuss the
7 definition of subgrant and the characteristics of
8 subgrants.

9 We decided that part of what the issue was, in
10 looking at the types of agreements we were talking
11 about, that some of the activities that are covered by
12 TIG awards, some of the subrecipient subgrants, some of
13 the third party awards, were very technical things that
14 more resembled contracts and procurements or goods or
15 services than actual carrying out of services. And so
16 we looked to the Federal Government's construct of how
17 grants work and how contracts work, and that was
18 essentially the line that we took.

19 We have substantially adopted the definition
20 of subgrant from the Uniform Grants guidance and made a
21 few tweaks to make it particular to LSC. But that is
22 seen in the definition of subgrant, which is an award

1 of LSC funds provided by a recipient to a subrecipient
2 for the subrecipient -- that's a lot of words in saying
3 subrecipient -- to carry out part of the recipient's
4 programmatic activities.

5 And you can also see that reflected in the
6 characteristics of the subgrant that they're all really
7 tied to. Is the subrecipient carrying out activities
8 that essentially supplements or supplants the
9 recipient's work in that area? So is the subrecipient
10 doing something for which they have to determine
11 whether or not a client is eligible?

12 Is what they are doing measured in relation to
13 the performance standards that the grantee itself has
14 to live up to? Does the subrecipient have
15 responsibility for making program decisions about which
16 cases to take or who to refer people to? Are they
17 responsible for complying with our statutes and
18 regulations?

19 And are they using the funds to carry out a
20 purpose specified in our statutes and regs rather than
21 procuring goods or services for the recipient's
22 benefit? So that's where you really see that we've

1 made this change to reflect Management's interpretation
2 of where the subgrant rule applies.

3 You'll see in the definition of subgrant that
4 we have not changed the \$25,000 limit. The reason we
5 are talking about this, Northwest Justice Project
6 raised a comment during the PAI rulemaking suggesting
7 that we change the \$25,000 threshold for PAI subgrants
8 because that was the threshold that we set in 1983 when
9 we passed the PAI rule. And inflation, of course, has
10 raised the prices of everything. They recommended a
11 threshold of \$60,000.

12 As we were discussing what we thought we
13 should do here, we realized that we were talking about
14 trying to balance reasonable contracts amount for
15 grantees to be seeking approval for with our interest
16 in ensuring accountability for the funds. And so we
17 wanted to be able to say that we had thought about what
18 number best harmonized those needs because we're a
19 little bit concerned that if we raise the threshold too
20 high, we will lose our ability to oversee or to approve
21 PAI subgrants.

22 CHAIRMAN KECKLER: Stefanie, let me pause you

1 for a second --

2 MS. DAVIS: Yes. That would be --

3 CHAIRMAN KECKLER: -- and ask on that point.

4 But isn't it the case that these contracts -- so
5 normally, under the PAI rule, if we're contracting out,
6 so Judicare or some kind of situation like that, any
7 kind of expenditure like that, the receiving attorney
8 providing the services, there's a requirement for them
9 to account for their -- they have to record their time
10 and the use of the funds. Right? Under the PAI rule?

11 MS. DAVIS: Correct. So it's not that there
12 is no accounting for those funds prior to the
13 threshold. It's just the question of whether or not
14 the recipient has to seek prior approval of that
15 agreement. So there is still accountability, but maybe
16 not the same level of accountability as you would get
17 if you were seeking a subgrant.

18 Does that answer your question?

19 CHAIRMAN KECKLER: Yes. The other question I
20 had about that is, do we have a sense of -- partly this
21 is driven by the regulation itself. Do we have a sense
22 of how many of these types of contracts there are out

1 there or that maybe would be induced? I'm not putting
2 you on the spot, but that's something that we might
3 want to accumulate and think about, how many of these
4 things there are.

5 MS. DAVIS: Right. Lora Rath is telling me
6 somewhere between four and five. So it's a fairly
7 small number that we're talking about.

8 FATHER PIUS: Between four and five ever year?

9 MS. DAVIS: Sorry. Every year.

10 So we basically propose not changing the
11 threshold at this point, but seeking specific comment
12 from the field on, one, whether we should change it;
13 two, if so, what it should be changed to; and three,
14 what the justification for the change that's proposed
15 is.

16 Yes?

17 PROFESSOR VALENCIA-WEBER: On those four or
18 five, have you just had discretionary decisions made
19 about how you would treat the amount that the grantee
20 is requesting permission for?

21 MS. DAVIS: I'm not sure I --

22 PROFESSOR VALENCIA-WEBER: You have four or

1 five a year --

2 MS. DAVIS: Right.

3 PROFESSOR VALENCIA-WEBER: -- that have 25,000
4 or more?

5 MS. DAVIS: Right.

6 PROFESSOR VALENCIA-WEBER: And of those,
7 you're making discretionary decisions on what makes
8 sense in the situation and what those funds are?

9 MS. DAVIS: I think Lora would be in a better
10 position to answer that. But I think the answer is we
11 look at whether it's a reasonable use of the funds and
12 approve the subgrant if it is. Or if it's not --

13 MS. RATH: Hi. It's Lora. Yes. Stefanie is
14 exactly right. It's presented to us as a contract. We
15 look to make sure that it has all the basic tenets that
16 every other subgrant needs to have, and we look at
17 whether it seems reasonable. So we use the same
18 criteria that we do for other subgrants.

19 CHAIRMAN KECKLER: Right. But the essence of
20 it, one of the important points, is that under this
21 rule under various interpretations, if it's a subgrant,
22 then the receiving attorneys would be under a variety

1 of restrictions.

2 MS. RATH: There's an exception for the
3 restrictions when it's to a private attorney or a
4 Judicare program, that they are subject to the
5 restrictions just for that money that is being
6 transferred to them so that they can do other work.

7 CHAIRMAN KECKLER: So that still would be the
8 case even if we raised the threshold?

9 MS. RATH: Yes. Right. That's the intention.

10 MS. DAVIS: Right. And that exception is only
11 for PAI subgrants. That doesn't apply to any others.

12 CHAIRMAN KECKLER: All right.

13 Julie?

14 MS. REISKIN: If you choose to raise the
15 threshold, would it make sense to look at putting
16 something in the rule, if it's based on inflation, that
17 just says, this is how it happens, so that every time
18 there's inflation you don't have to change the number?

19 I don't really have a feeling one way or
20 another about that or about changing it. But I've seen
21 that, and I've seen other rulemaking things go towards
22 that to avoid having to go through a whole rulemaking

1 process for something like that. But there may be
2 reasons not to. I just wanted to bring it up as a
3 question.

4 MS. DAVIS: We can certainly think about that.

5 I think we had not quite decided where essentially we
6 would go when we were looking at that. But indexing
7 it, or indexing it if it raises above a certain amount,
8 I think is something we could certainly consider.

9 CHAIRMAN KECKLER: All right. So do we have
10 any further things on the subgrant rule?

11 MS. DAVIS: There are a few other things.
12 They're not nearly as major. We've made some revisions
13 to the section discussing subgrant approval to make the
14 subgrant approval process a bit simpler and combined
15 more with the basic field grant and special grant
16 application processes. Those didn't exist when this
17 rule was passed, and so we've just tried to modernize
18 things.

19 We have revised the timekeeping requirements.

20 So we've proposed moving the transfer rule into Part
21 1627 because they were basically the same thing, and it
22 seemed kind of odd to have these requirements in

1 different places. So rather than harmonizing them, we
2 just brought them together.

3 We're proposing to have the timekeeping
4 requirement be 1635, Compliant Timekeeping, because we
5 don't see why subrecipients should not be maintaining a
6 high standard of timekeeping. And we also thought that
7 having three different levels of timekeeping for three
8 different kinds of programs made no sense.

9 CHAIRMAN KECKLER: Yes. I think that's a good
10 idea. Let me pause to endorse that. But there's
11 another question I had, and maybe this is irrelevant,
12 but maybe it comes up as well, is that if you're going
13 to do that, shouldn't they record their time in, I
14 don't know, electronically accessible form? I'm just
15 concerned about updating that idea so that they record
16 their time in a way that the grantees can use and that
17 we can review relatively easily.

18 MS. DAVIS: So you're talking about putting a
19 recordation requirement on in addition to --

20 CHAIRMAN KECKLER: It's a thought.

21 MS. DAVIS: They are required to provide us
22 with the same access to their records that we have to

1 recipient records under the subgrant rule. So we can
2 still see them even if they're not in the same form,
3 but that is something we can consider doing.

4 Let's see. Right. We're moving the transfer
5 rule. We've also proposed, just for ease of reference,
6 there were some provisions -- this provision, Part
7 1627, used to be about subgrants and fees because we
8 were focusing so much on the subgrant rule and trying
9 to make it cohesive and coherent.

10 We decided to propose transferring the fees
11 contributions and payments to tax-sheltered annuities
12 out of Part 1627 and into Part 1630, which has to do
13 with our cost standards. That's where we look at
14 everything else regarding the use of our funds.

15 CHAIRMAN KECKLER: But there have been no
16 substantive changes to these items?

17 MS. DAVIS: Not at this point. I think we
18 would look at those when we are doing the 1630 and PAM
19 rulemaking, if we're going to make any changes. But
20 for ease at this point, we're just preparing to use, as
21 I'm told by the Federal Register, the rarely used
22 transfer option to transfer them out of Part 1627.

1 The one last thing that I wanted to touch on
2 was that we had mentioned in one of our earlier
3 presentations on the rulemaking agenda that we were
4 considering adding exchanges of goods and services
5 rather than simply funds as a way to conduct subgrant
6 arrangements.

7 We ultimately decided not to do that because
8 we thought that subgrants truly should be paid for with
9 cash because it's easier to track that way. But we
10 imagine we will be looking at goods and services and
11 transactions involving the exchange of goods and
12 services when we do the 1630 and PAM rulemakings.

13 CHAIRMAN KECKLER: Are there questions from
14 the Board or Committee? Julie?

15 MS. REISKIN: I may not be understanding
16 something. But you talk about the orderly termination
17 of subgrants on the bottom of page 35 of the Board
18 book, and it says that the terminate if you're no
19 longer an LSC recipient. And then there's some other
20 reasons.

21 But I don't see anything about if the
22 subgrantee is not performing properly. I assume that

1 there's a way -- am I just not understanding this? I
2 assume that they can terminate?

3 MS. DAVIS: Right. So the language that
4 you're talking about here is really about what happens
5 when the grantee itself ceases to function as an LSC
6 recipient --

7 MS. REISKIN: Oh, okay.

8 MS. DAVIS: -- rather than the subgrantee
9 itself failing to perform correctly. We don't actually
10 have a provision in regulation that tells the grantees
11 what they have to do, but I certainly hope they would
12 terminate a recipient.

13 MS. REISKIN: But they're not prohibited
14 from --

15 MS. DAVIS: They are not, no.

16 CHAIRMAN KECKLER: As a little bit of a
17 followup to that, one point that Jim mentioned,
18 Stefanie, is this business of having the subgrants be
19 one year long except for special grants; there's an
20 exception in there.

21 So I wondered a little bit. I'm more
22 interested in the exception than -- the one year makes

1 more intuitive sense to me, that we have that and keep
2 some control over it, and they have some control over
3 it.

4 So could you talk briefly, at least, about why
5 we don't extend this one-year policy generally to
6 subgrants, and that we have this exception built into
7 the regulation, as proposed?

8 MS. DAVIS: Sure. So as we were discussing
9 this rule, we had a really great committee that had
10 team members from the Office of Compliance and
11 Enforcement and the Office of Program Performance,
12 including Glenn Rawdon, who basically runs the TIG
13 program, and Mytrang Nguyen, who's program counsel for
14 the Pro Bono Innovation Fund, as members.

15 And one of the things that they said is that
16 in the special grant programs, because they tend to be
17 fairly discrete programs where you have a particular
18 project for a certain period of time, often
19 subrecipients would want a guarantee of a somewhat
20 longer award period than one year.

21 So in order to make it possible and still
22 attractive for our recipients who did need those kinds

1 of awards and who did need to make those kinds of
2 arrangements to get the partners that they wanted to
3 carry out their special grants, we wanted to have that
4 option available to them.

5 MR. FLAGG: I would also point out that in the
6 general field program, the grants, while they're up to
7 three years, are reviewed every year. So it makes
8 sense in that context to review subgrants in the same
9 time period.

10 Where you have these Pro Bono Innovation Fund
11 grants and TIG grants, sometimes they run 18 months,
12 and it would be sort of odd to give an 18-month grant
13 but say we're going to look at the subgrant 12 months
14 in. So that was another piece of the rationale.

15 CHAIRMAN KECKLER: Yes. I think I understand
16 it. It's something to think about, anyway, to keep in
17 mind just because it says in there, well, one of the
18 rationales that's in the preamble talks about the idea
19 in special grants that those are reviewed regularly.
20 We have progress reports, in a way, but of course we do
21 that in certain ways through the basic field.

22 But if you have a one-year rule, then there's

1 teeth to that. You can say, okay, as the grantee
2 reviews the performance of the subgrantee they can say,
3 well, we'll renew you or we won't renew you. And so I
4 don't know.

5 You might actually be -- I can see your point,
6 Stefanie, about how you're giving an option and giving
7 strength to the grantee by allowing them to guarantee
8 longer. At the same time, I think they might adapt to
9 a one-year rule and it might give them a little -- it's
10 giving them actually a little power, in a way.

11 MR. FREEDMAN: If I may, I think the key
12 difference that's relevant to your point is that in the
13 special grants programs, the money is only released as
14 they reach their milestones. So if they fail to reach
15 a particular milestone, the prime grantee will not get
16 their next check, and hence the subgrantee as well will
17 not get their check.

18 In the basic field program, they're issued
19 their checks regularly. So in the basic field program,
20 we are maintaining a more proactive approach to the
21 subgrants of saying, they are only going to be for a
22 year, and you can resubmit when you're resubmitting

1 your renewal or thereabouts, so that we make sure that
2 we're looking at everything.

3 Whereas in the special grants programs, if
4 there's a problem, and it's a problem significant
5 enough that they're not able to meet their milestones,
6 then they're likely to not get their next check. And
7 our experience, if I can characterize it generally, has
8 been that that's awfully motivating.

9 CHAIRMAN KECKLER: That's a good point.

10 Are there any other questions on this notice?

11 Yes, Father Pius?

12 FATHER PIUS: We wouldn't expect, given the
13 new status, that many of the special grants would be
14 subject to the subgrant rule any more. Certainly not
15 the TIG grants any more. Or am I misreading this?

16 MR. FREEDMAN: They still are. The
17 emphasis --

18 FATHER PIUS: I'm just trying to think of a
19 scenario in which a TIG grant would follow under the
20 new -- I thought that was part of the point, that they
21 wouldn't fall necessarily under the same rule because
22 they're not programmatic any more.

1 MR. FREEDMAN: Where there isn't a
2 programmatic aspect to the subgrant -- so, for example,
3 some of our TIGs involve, let's say, development of
4 systems to provide legal information, including
5 developing some of that legal information, developing
6 the forms, identifying the client needs, kind of an
7 overall project where the big picture of the TIG
8 project has programmatic aspects.

9 And one of the things we have in a number of
10 situations right now is where we give it to one of our
11 grantees, existing grantees, and they're giving some of
12 the money to another LSC grantee. And they are all
13 doing some of the programmatic work, the conceptual and
14 the real legal services-related work.

15 Now, there may also be a part of it that is
16 hiring software developers, contractors, where it
17 clearly will not be a subgrant. It'll be procurement.

18 One of the areas where this gets particularly
19 fuzzy is in developing pro se forms and
20 materials -- for example, the access to justice road
21 map. On one end there is the real legal work. You've
22 got to understand it. You've got to understand the

1 clients. You've got to understand the client needs.
2 And that's programmatic. On the other end, there's the
3 real software development work.

4 And in between, we often have software
5 developers who themselves are former legal aid
6 attorneys, or even current legal aid attorneys, because
7 they have the vocabulary to really be able to make it
8 work. And that's where some of our tougher calls come
9 in of when does it cross the line to trigger the
10 subgrant requirements?

11 And I think the same is true in, let's say,
12 the Pro Bono Innovation Fund -- actually, moreso.
13 There's more programmatic-type examples there. The
14 disaster grants. So depending on the nature of the
15 grant, there may be subgrants. There may be
16 procurement contracts. And there may even be hard
17 calls. This will make a lot of that easier and more
18 manageable.

19 CHAIRMAN KECKLER: I think some of the
20 examples that you have in there are helpful. But I
21 think that that's another thing that, as we move
22 towards the extent of the rule, that we could talk some

1 more about, is to use this as an opportunity to clarify
2 that as much as possible.

3 Because I think from all of our experiences
4 over time, we know that technology-aided delivery of
5 legal services is just going to become the model. And
6 so when we're talking about technological things where
7 service is provided, whether it's provided through the
8 web or with a robot assistant or whatever you want to
9 call it, it's still going to be our -- that's our
10 program.

11 But that's something that we can work out.
12 But I think the examples were helpful, but they can be
13 extended and we can keep working along those.

14 MS. DAVIS: Right. And as you say, that's an
15 area where we can issue guidance if we need to. I
16 think the structure that we've set up in the rule has
17 given enough flexibility, or at least enough
18 guideposts, to look at what we're talking about in
19 terms of programmatic services to hopefully be able to
20 make those calls when we need to.

21 CHAIRMAN KECKLER: Martha?

22 DEAN MINOW: I'm glad you said that because I

1 do agree with you, and I think change is coming faster
2 than we can imagine. So keeping a channel to have
3 updated examples I think is important.

4 I also wonder, in a similar spirit, is there a
5 way to have a very simple description here of the
6 process for grant, subgrant, not subgrant but -- which
7 requirements apply, a chart or something that's just
8 very clear? Because it's not the easiest, most
9 user-friendly kind of activity.

10 Especially as we start to have new players in
11 this space who are not lawyers who are providing
12 technology or artificial intelligence or other kinds
13 of -- I think it would be very helpful.

14 MS. DAVIS: I certainly think that's something
15 that we can put out, either as part of the preamble, as
16 part of the guidance to carrying out the rule. But I
17 think that's a great suggestion.

18 CHAIRMAN KECKLER: Father Pius?

19 FATHER PIUS: Yes. I just wanted to thank the
20 Office of Legal Counsel for just the work that they've
21 put into this, although I will admit I'm still of the
22 view that this is based on a misinterpretation of the

1 law from the OIG.

2 I don't think that this is necessary. I think
3 that it would be much better, because of the issues
4 that we've just been talking about, to have a more
5 flexible approach which would not require a very long,
6 complicated rule.

7 I understand some of the cleanup that goes
8 along with this that's very good. I'm not going to
9 oppose the rule, but I'm still not entirely convinced.

10 I understand the work and I appreciate the work, but I
11 simply disagree with the OIG's analysis. I don't think
12 it has a basis in the law, and I am still not entirely
13 convinced that this is the way we should be going.

14 CHAIRMAN KECKLER: Well, if there's anything
15 further, I think the Committee can be prepared to act
16 on this notice of proposed rulemaking. And we're open
17 for comment on this, to put it out there. Hopefully
18 we'll get some good comments on that. There has to be
19 a motion to --

20 DEAN MINOW: Recommend it.

21 CHAIRMAN KECKLER: A motion to recommend the
22 notice of proposed rulemaking to the Board for

1 publication.

2 DEAN MINOW: Right.

3 M O T I O N

4 MR. KORRELL: So move.

5 MS. MIKVA: Second.

6 CHAIRMAN KECKLER: All in favor?

7 (A chorus of ayes.)

8 CHAIRMAN KECKLER: Opposed?

9 (No response.)

10 CHAIRMAN KECKLER: The motion carries, and
11 this notice of proposed rulemaking will be recommended
12 to the Board at the Board meeting.

13 We can now move to our next item, which is a
14 notice of proposed rulemaking accompanying a rulemaking
15 options paper for 45 CFR Part 1628, which we talked
16 about at the last Board meeting and brought up, which
17 are recipient fund balances.

18 I'm going to turn that over to Mr. Flagg.

19 MR. FLAGG: When you're going well, you should
20 keep the same player going. So Stefanie is back up to
21 the plate.

22 MS. DAVIS: I would just like to point out

1 that I did in fact run ten miles this morning. So
2 thank you.

3 (Laughter.)

4 MS. DAVIS: Yes. So we have Part 1628,
5 Recipient Fund Balances, which we are presenting a
6 notice of proposed rulemaking and rulemaking options
7 paper. This is largely the good work of one of our
8 graduate law fellows, Peter Karalis, who could not be
9 with us today. He's Greek Orthodox and today is
10 Orthodox Easter, so he is celebrating with his family.
11 So I'm standing in for him.

12 So the brief history behind this rule: The
13 current rule, as it's drafted, restricts LSC's
14 authority to grant waivers of fund balances exceeding
15 25 percent of a recipient's annual LSC support to three
16 very specific circumstances.

17 And over time, recipients have had very
18 compelling reasons that are not among those three
19 circumstances that have caused them to have LSC fund
20 balances exceeding 25 percent. They have been things
21 like large attorney's fees awards, or the infusion of a
22 use-or-lose disaster relief grant from another non-LSC

1 source.

2 CHAIRMAN KECKLER: Stefanie, I'm sorry to
3 interrupt you.

4 MS. DAVIS: Yes?

5 CHAIRMAN KECKLER: So do we have a sense that
6 there's somebody, a recipient or grantee, who may be
7 under this burden this year? Yes?

8 MR. FLAGG: It's happened. It's come up at
9 least twice this year. And in one instance, which was
10 particularly compelling to us, there was an attorney's
11 fee award received by the program as a party, I
12 believe. Right? I mean, as attorney's fees.

13 And they received the award late in the year,
14 and because of this regulation, as it exists, we're
15 faced with the alternative of trying to spend down
16 their carryover to get under 25 percent and to do it
17 quickly, which is never a great idea, or face the
18 prospect of losing the money through no fault of their
19 own.

20 And so that was just one example of a
21 situation where the regulation encouraged the
22 possibility of imprudent spending. So I think when

1 these circumstances have come up in the past, and
2 they've come up a couple times in the last year, the
3 Board members we've talked to have all been of the view
4 that this is a situation that should be addressed; that
5 there obviously could be circumstances that are not
6 encompassed within the three examples that are
7 currently, really through historical accident, in the
8 reg; and that it makes much more sense to use those
9 three types of circumstances as examples and not the
10 finite universe of events that would trigger relief.

11 CHAIRMAN KECKLER: And also, we talk in the
12 rule, in the preamble and the paper, about these being
13 extraordinary. Right? That's a semi-statistical sort
14 of claim. I'm curious how often we know that this
15 might occur.

16 You're speculating because people did this
17 spend-down or whatever, but a sense of how often we
18 think in the future these situations might happen if
19 you loosen the rule.

20 MS. DAVIS: The Office of Compliance and
21 Enforcement was kind enough to provide us with the
22 information on waiver requests that they've received

1 for the years 2009 to 2014. And based on all
2 waivers -- so waivers including those over 10 percent
3 because that's the point at which you have to start
4 requesting a waiver -- during that time, they received
5 93 requests for waivers.

6 Four of those were waiver requests for fund
7 balances above 25 percent. So one of those was the
8 situation that Ron was describing. Another one was the
9 Hurricane Sandy disaster relief use-or-lose award. One
10 was where two grantees merged and ended up having a
11 combined fund balance of more than 25 percent. And I
12 don't know the details on the fourth one.

13 But they truly are things that don't happen
14 regularly. They're not expected. They're not
15 anticipated. And we are not proposing to change the
16 standard at all. We are leaving it at "extraordinary
17 and compelling," and think that that is what we will
18 continue to measure any requests for waivers above 25
19 percent of the fund balance against. So I don't think
20 it would increase much, if at all.

21 CHAIRMAN KECKLER: So about one per year,
22 maybe? There's four over the five --

1 MS. DAVIS: Right. Right.

2 CHAIRMAN KECKLER: So about one. Maybe a
3 little less.

4 MS. DAVIS: Right.

5 CHAIRMAN KECKLER: So continue. We're behind
6 schedule, so we're condensing.

7 MS. DAVIS: Sure. so there are two basic
8 points that we wanted to raise here. One is, of
9 course, that we propose eliminating the limitation to
10 those three circumstances, having them stand as
11 examples rather than the three circumstances.

12 And we have also put into the regulation the
13 language that's currently in the preamble regarding
14 requesting advance or expected approval of a request to
15 maintain a fund balance above 25 percent earlier in the
16 year than the requests are currently made.

17 Right now, fund balance waiver requests are
18 submitted after the recipient submits its audited
19 financial statement, so well after the end of their
20 fiscal year. So we proposed allowing recipients who
21 expect that they're going to be in this situation where
22 they have above 25 percent of a fund balance to seek

1 approval ahead of time, and then just to confirm how
2 much they are in fact carrying over once they actually
3 get their audited financial statements.

4 We had discussed at the last Board meeting
5 giving the Board notice before any of these waivers
6 were awarded. We opted not to include that proposal.
7 Julie is shaking her head, so that was a good call. So
8 we opted not to do that, so you will not see that in
9 the rule. And those are the big points on Part 1628.

10 CHAIRMAN KECKLER: Are there questions from
11 the Committee or the Board regarding this notice we're
12 going to put out for comment?

13 I have one question, and I raised it last
14 time. It seems to be -- I may be a little persnickety
15 about it, and the statistics that you brought up are
16 helpful -- but I still have this concern that either in
17 the rule or somewhere, that we shouldn't have something
18 where it recurs.

19 To me, the idea of an extraordinary or
20 compelling standard is something that is good for this
21 year, but you can't say, well, we got a bunch of
22 disaster money at the end of 2013. Here it is. That's

1 a good explanation for 2013, but it's not a good
2 explanation for 2015, that you haven't been able to
3 effectively spend down the influx of funds that's more
4 than 12 months old.

5 So I think there's also an argument about that
6 at the 10 percent level, too. But I don't know how
7 often that problem might happen, and maybe I'm just
8 anticipating a problem that's unlikely.

9 MS. DAVIS: Right. And in response to that, I
10 would say that there is a provision in existing 1628
11 that says that a recipient, as part of their waiver
12 request, must provide a plan for how they're going to
13 spend the excess during the course of that year. So it
14 is anticipated, in fact, that the recipient will not be
15 carrying funds over.

16 CHAIRMAN KECKLER: I guess you'll tell them
17 that and then they'll know that. It might be wise to
18 say somewhere that it's not going to work two years in
19 a row.

20 MR. FLAGG: Look. We don't want to get
21 ourselves in the same bind we're already in today. If
22 somebody got an extraordinary award of millions of

1 dollars, we don't want to say, under no circumstances
2 could you possibly carry any of that over for two
3 years.

4 And so we take your point. It's covered in
5 the reg. Probably never, but we are best not to say
6 never because then we could end up in the same soup we
7 are today.

8 So I think they can come to us pursuant to
9 this provision and say, we've got these millions and
10 millions of dollars of unexpected funding, and here's
11 how we propose to spend it down over the next year or
12 two years. And if they do that, we're in a position to
13 say, no, you need to spend it down faster than that.

14 But I think to put a blanket prohibition,
15 that's basically saying to Management, we don't trust
16 you guys -- and I know that's not your intent -- we
17 don't trust you to hold these folks to responsible
18 limitations. But clearly, the intent is absent numbers
19 that would make it impossible that it gets spent down
20 in the next year.

21 CHAIRMAN KECKLER: No. That's not my
22 intention at all. My intention, as always in

1 regulation, is fair warning. Fair warning -- even if
2 you got something extraordinary, it's generally
3 designed to be corrected. But I take your point. It's
4 something for thought and comment as we move forward.

5 Harry?

6 MR. KORRELL: If there is a significant
7 carryover, or I suppose in the unlikely event of a
8 multi-year carryover, is that something that's
9 considered in the grant consideration? If somebody's
10 gotten millions of dollars from a fee award, do we
11 consider that as part of --

12 MR. FLAGG: No. I believe the grants are
13 based on a formula. And if the formula says, you have
14 X number of people in poverty, you get so much in your
15 grant. So the way to deal with the carryover is not by
16 limiting the grant but by restricting -- to deal with
17 the carryover as such.

18 CHAIRMAN KECKLER: Are there any other
19 questions regarding this notice?

20 [No response.]

21 CHAIRMAN KECKLER: If not, I think we can
22 entertain a motion to recommend this notice. Is there

1 such a motion?

2 M O T I O N

3 MS. MIKVA: So move.

4 MR. KORRELL: Second.

5 CHAIRMAN KECKLER: All in favor?

6 (A chorus of ayes.)

7 CHAIRMAN KECKLER: Opposed?

8 (No response.)

9 CHAIRMAN KECKLER: The motion is approved, and
10 this notice of proposed rulemaking will be recommended
11 to the Board at the next Board meeting.

12 We can now turn to the next item of
13 substantive business, which is to act on a Final Rule
14 for 45 CFR Part 1640, which is the application of
15 federal law to LSC recipients. And I will turn it
16 again back to Mr. Flagg.

17 MR. FLAGG: Thank you. Again, another team
18 effort, this time speaking for our team Sarah Anderson,
19 who I'd like to introduce to the Committee and the
20 Board. Sarah is one of our graduate fellows. She's
21 been with us almost a year and has done substantial
22 work in the 1640 notice of proposed rulemaking and now

1 the Final Rule.

2 MS. ANDERSON: Good afternoon. The NPRM for
3 this rule was published on February 3rd, and it went
4 out for a 30-day comment period. At the close of
5 comments, we got two comments, one from NLADA, and
6 Colorado Legal Services. They were generally very
7 supportive of our proposed changes.

8 The two specific comments were, first, both
9 were concerned about a stakeholder's ability to comment
10 on any proposed modifications before the list was
11 changed because we were moving the list from the reg,
12 where it sits now, to a website.

13 The regulation does not require us to post
14 notice and comment, an opportunity to comment, before
15 we submit these modifications to the Board for
16 approval. But we remain committed to providing
17 recipients with notice of any proposed modifications
18 before a Board meeting, and they will be given an
19 opportunity to comment before those modifications are
20 presented to the Board for a vote.

21 The second comment was specifically from
22 NLADA, and they were concerned that the proposed

1 regulation did not clearly state that the list of laws
2 would be an exhaustive list, although it was stated in
3 the NPRM. So we do intend to make this an exhaustive
4 list.

5 So what we are doing is changing the wording
6 within the proposed rule. So 1620.2(a) (sic) will say,
7 "LSC will maintain an exhaustive list of applicable
8 laws relating to the proper use of federal funds on its
9 website."

10 CHAIRMAN KECKLER: Pardon me. Where is that
11 in our Board book?

12 FATHER PIUS: Page 77.

13 MS. ANDERSON: Comment 2 is on page 77.

14 CHAIRMAN KECKLER: Is that 1620.2 or 1640.2?

15 MS. ANDERSON: Oh, that's a typo in there.
16 I'm sorry. 1640.2.

17 CHAIRMAN KECKLER: Yes.

18 MR. FLAGG: And we'll amend that.

19 CHAIRMAN KECKLER: Right. Thank you. Very
20 good. And on page 78, we see that change has been made
21 to the Final Rule, to have an exhaustive list.

22 Julie?

1 MS. REISKIN: I'm not totally sure I
2 understand the response to the first comment about the
3 giving notice to comment. The list is a list of every
4 federal law that affects LSC. Right?

5 MR. FLAGG: No. The list is a list of federal
6 laws that basically are related to fraud and that sort
7 of thing that is directly applicable to our grantees.
8 And we have an exhaustive list. It's going to be
9 published on our website. And every time it's changed
10 or every time we propose to change it, we will provide
11 a notice to our grantees.

12 As a practical matter, the change would have
13 to be approved by the Board, not with a rulemaking like
14 this, but we would at the Ops and Regs Committee say,
15 there's been a new federal law that has been passed
16 that prohibits fraud in the use of federal funds.

17 This is exactly the kind of law we believe
18 that Congress intended to be applicable to our
19 grantees, and we propose that it be added to our
20 relatively short list of statutes falling in that
21 category.

22 We're subject to the Sunshine Act, so any time

1 we make a proposal like that, the public will be aware
2 of it. The public will get notice of it. And they
3 can, in the context of a meeting like this, say, gee.
4 We don't think that's a good idea.

5 My belief is 99 times out of 100, nobody will
6 say anything about those sorts of circumstances. In
7 the hundredth case, where there's a federal law that is
8 perhaps not as clearly related to fraud, somebody could
9 raise that with the Committee and the Committee could
10 say, okay. You've raised a point. We're willing to
11 create a formal comment period.

12 But the point is not to have this sort of
13 elaborate notice and comment proceeding for the other
14 99 cases in which there's really no controversy about
15 it.

16 MS. REISKIN: But it sounds like there will be
17 a notice. And really, the debate would be at the
18 Congress level. Right? If Congress passes a rule, the
19 question or the argument might be, does this apply or
20 not? Right?

21 MR. FLAGG: Well, typically the federal laws
22 are with respect to use of federal money. They're not

1 going to have LSC in mind or LSC grantees.

2 MS. REISKIN: Right.

3 MR. FLAGG: And the only question is whether
4 or not we should include that law that Congress has
5 passed on this relatively short list. And if the law
6 is -- what's the magic language?

7 MS. DAVIS: Related to the proper use of
8 federal funds?

9 MR. FLAGG: No, no. And federal laws which
10 address issues of waste, fraud, and abuse of federal
11 funds, again I think in 99 cases out of 100, a law is
12 going to clearly fall in that category or not.

13 If it's a close case and we say, let's include
14 it on the list, somebody can come to this Committee
15 meeting and say, we don't agree with that, and you
16 would have the option of hearing that comment at the
17 time it's raised or taking a step back and say, okay.
18 Let's put this out for public comment.

19 But what you won't have to do is, in the other
20 99 cases where there's no controversy about that, go
21 through an elaborate notice of proposed rulemaking to
22 deal with it.

1 MS. REISKIN: It sounds like the concern is
2 addressed.

3 MR. FLAGG: We believe it is addressed. To
4 the extent the concern is, we won't get notice, we
5 won't have an opportunity to comment, we've addressed
6 that concern. There will be notice and there will be
7 an opportunity to comment.

8 CHAIRMAN KECKLER: And so, Ron, and again, I
9 don't want this to be taken the wrong way, but what if
10 you want to remove a law from the list? How will that
11 process occur?

12 MS. DAVIS: It's the same process. I would
13 imagine it would be the same process. We don't
14 envision revising the list unless Congress takes action
15 to either pass a statute regarding fraud, waste, and
16 abuse that applies to us, or repeal a statute, or amend
17 an existing statute in such a way that it no longer
18 would apply to the use of our funds.

19 And the rule states that if we propose to make
20 any change to the list, we would provide notice to you
21 and present it to you before that change gets made.

22 MR. KORRELL: The rule says "modified," not

1 "added."

2 CHAIRMAN KECKLER: All right.

3 DEAN MINOW: Yes. It's covered.

4 CHAIRMAN KECKLER: Martha?

5 DEAN MINOW: I take it that there are two
6 possible reasons for the comment. One is concern about
7 whether people know that there has been an addition or
8 a subtraction of a law that's relevant. The second is
9 whether people want to object.

10 Since it's Congress making the decision, I
11 guess it's only in these instances where there's some
12 ambiguity because the language isn't clearly using
13 these magic words -- I guess I would think that the
14 notice issue is more important than the opportunity to
15 comment, for that reason.

16 MR. FLAGG: And what is contemplated
17 is -- let's say it's a routine case, which I think most
18 of these cases will be. There's a new law in Congress
19 that has to do with waste, fraud, and abuse in the use
20 of federal funds. And we tell the Committee, there's a
21 new law in Congress that has been enacted and signed by
22 the President. It should be added to the list.

1 We will provide public notice. And in
2 addition, we would tell all of our grantees. We would
3 send them a notice, as we do any time we send out a
4 public notice, say, take a look at our website at this
5 link, that this law has been added.

6 CHAIRMAN KECKLER: Ron, another element of
7 this that I had a question about -- and it actually
8 relates to the document that we're going to be looking
9 at, or briefly, about summarizing enforcement
10 mechanisms that we'll look at later -- so there's a
11 provision in this rule, violation of the agreement,
12 that is, that LSC determines that there's been a
13 violation of federal law applicable to waste, fraud,
14 and abuse.

15 How is that related to the enforcement
16 mechanisms? Does that qualify as a substantial
17 violation? How do we categorize this rule in
18 relationship to that other document, the process of
19 finding a violation can lead to termination and so on?

20 MS. DAVIS: I'll also ask for Mark's input on
21 how and whether it relates to the enforcement
22 mechanisms. But because this is so specific about what

1 laws are being violated, and the sanction is
2 essentially termination of the grant when we find that
3 a recipient has violated one of these laws -- it's what
4 Congress tells us happens if one of these laws is
5 violated, that the grant award becomes null and
6 void -- so I'm not sure that there is much overlap when
7 Congress is telling us that the grant is terminated.
8 But I'd also appreciate Mark's input on this.

9 MR. FREEDMAN: Thank you. Stefanie's correct
10 that where there's a violation that is determined to be
11 a violation by the grantee, in the sense of it's not
12 just some employee did something, but the grantee is
13 culpable in it, then the way we read the congressional
14 statute, which says that the funding will be
15 terminated, we will terminate the funding. There will
16 be summary proceedings for termination. So in that
17 case, the other enforcement mechanisms are moot.

18 What is more likely to happen is --

19 MS. MIKVA: So that would not be the normal
20 termination?

21 MR. FREEDMAN: Precisely.

22 MS. MIKVA: It would be a special summary?

1 MR. FREEDMAN: Precisely. Do not pass Go. Do
2 not get your hearing before a hearing examiner. And
3 that has never happened, and hopefully never will.

4 What does happen is there's an individual, a
5 chief financial officer -- we all can think of examples
6 over the last few years -- where they have violated one
7 of these laws and a whole bunch of other laws. That
8 issue is something that might be relevant in another
9 enforcement proceeding.

10 For example, if we felt that the management
11 and board of a grantee was so lax as to allow their CFO
12 over a long period of time to yada yada yada, that
13 might be a reason that we would consider a limited
14 reduction of funding.

15 Or if we see that this has happened and
16 there's another person being prosecuted, we might think
17 about a suspension of funds, or 20 percent of the
18 funds, until they give us sufficient assurances that
19 they are stopping whatever is going on. So I think
20 that's where this would play into the other enforcement
21 mechanisms.

22 CHAIRMAN KECKLER: I'm not going to get into

1 it. I think of one sense where this might have been
2 applied, at which the entire organization might have
3 been conceived of as in violation of this. So
4 hopefully, knock on wood, it won't happen.

5 But I think not so much the rule itself, but
6 if you're thinking about this enforcement mechanisms
7 memo as comprehensive, I wondered whether in some
8 future iteration of it or in this one you might want to
9 include this.

10 Because I view this as an enforcement
11 mechanism. It's an enforcement mechanism given to us
12 by Congress for these laws and for our stewardship of
13 federal funds, and it's a powerful one that's held
14 over. So that's a thought.

15 Are there other comments or questions from the
16 Committee or the Board on this rule?

17 (No response.)

18 CHAIRMAN KECKLER: In that case, I will open
19 it up for public comment on this rule, which is
20 scheduled as part of the agenda. If there's any public
21 comment before we consider a recommendation on this
22 Final Rule.

1 Please state your name and introduce yourself
2 for the record.

3 MS. MURPHY: Yes. Thank you. I'm Robin
4 Murphy from National Legal Aid and Defender
5 Association, chief counsel for civil programs. Good
6 afternoon. Thank you for the opportunity to comment on
7 this regulation.

8 We greatly appreciate LSC adopting one of our
9 suggestions, which was to make the list exhaustive, and
10 also appreciate the serious consideration that LSC
11 gives to our comments and the comments of the other
12 recipients.

13 I would note, and LSC did indicate in their
14 comments, that they are committed to providing -- and
15 I'm talking about the notice and prior opportunity to
16 comment provision being left out of this particular
17 list. While it may seem picky, it could possibly be
18 important.

19 As the Board has noted, the sanctions are
20 extremely serious, summary revocation, possible summary
21 revocation of funding. And also, it is part of the
22 grant conditions, and grantees, in order to get their

1 grant, have to agree to abide by this list. So they
2 really don't have a choice in the matter if they want
3 to obtain their grant.

4 We appreciate and we're confident that the
5 current LSC administration, even in a preamble
6 commitment, would definitely honor this commitment.
7 This Board and LSC, at the helm of Jim Sandman as
8 president, has demonstrated repeatedly their
9 willingness to engage in an open process, to be fair in
10 terms of regulatory modifications, particularly, I
11 would note, when we did the PAI modifications.

12 However, this Board and this administration
13 will not necessarily always be here, and this
14 regulatory revision will be, and that is our concern.
15 We are not in the least concerned with the commitment
16 that LSC programs will get notice.

17 But in the future, there may be
18 administrations and there may be boards that would not
19 necessarily either be concerned with this, remember
20 this, or want to provide this notice. And I think the
21 Sunshine Act is a little -- it might be something chief
22 counsel, as long as there's a position there at NLADA,

1 would be cognizant of. But I'm not sure a busy LSC
2 program is going to be particularly able to keep up on
3 the Sunshine Act laws.

4 So for that reason, we request that the notice
5 and 30-day comment period be put back in the rule if
6 there's a modification before change would be given to
7 the Board. We would of course prefer that it be in the
8 Federal Register.

9 However, this could be considered as a
10 different way, where there's simply notice; just as the
11 list is being put on LSC's website, that the notice
12 will go out to the recipients. We're not necessarily
13 asking for public comment because this is really
14 something that would be of concern to the recipients
15 primarily or to interested persons like NLADA. But
16 instead of doing public, you could do a notice to the
17 recipients.

18 And I know that there's regular communication
19 of rules and whatnot with the recipients. So I don't
20 think it would be that onerous to put a requirement in
21 the regulation that would be followed for an
22 alternative notice if you don't see fit to do the

1 Federal Register procedure.

2 So that's our only concern. Otherwise, we
3 think it's a very positive development, are not
4 concerned with, as I said, this administration.

5 And just in the other regulatory developments,
6 we do look forward to commenting, and see the vast
7 majority of those regulatory revisions that will
8 probably be coming out, since voted by this Committee,
9 as positive also. So thank you very much.

10 MS. MIKVA: I just have a question. The
11 30-day notice, is there something comparable? Has this
12 be done before, or this would be unique to this
13 provision? The 30-day, I'm just wondering if it's been
14 done in other contexts, something similar to that.

15 MS. MURPHY: Well, the 30 days is generally
16 what's followed by the APA, and that's generally what
17 has been done by the Board and by LSC for some time.
18 So that's why I suggest 30 days. It is also a
19 time -- it gives people a chance to know what's going
20 on, confer with each other, and make a comment.

21 MS. MIKVA: Right. I'm just wondering whether
22 this lesser step you're suggesting has been done in any

1 other context.

2 MS. MURPHY: Not that I'm aware of.

3 MS. DAVIS: No. I'm not aware that it's been
4 done, either. That's not to say that it couldn't be
5 done appropriately, but I'm not aware that we have used
6 it.

7 CHAIRMAN KECKLER: Currently the notice
8 provision is in 1640.2(a). And it says, "The list may
9 be modified with the approval of the Corporation's
10 Board of Directors." Now, it's implicit in there that
11 that will be at a public meeting, but we could --

12 MR. FLAGG: No. That rule doesn't say that,
13 but the Sunshine Act does not permit this Committee or
14 the Board to act absent a public meeting. The Sunshine
15 Act also requires that we give I believe it's a week's
16 notice of any public meeting with an agenda.

17 So there clearly would always be an
18 opportunity for the public to know about it in advance
19 and to appear before the Committee in that rare
20 circumstance where there's a law dealing with fraud,
21 waste, or abuse that somebody has a quibble as to
22 whether it really does have to do with fraud, waste,

1 and abuse.

2 The other thing I would say is the regulation
3 explicitly requires that after the fact, LSC will
4 provide recipients with notice when the list is
5 modified. If somebody thought, that doesn't make any
6 sense; the new statute that they've added has nothing
7 to do with fraud, waste, and abuse, they could petition
8 LSC to change the rule back or change the list back.

9 So there will be, both before the action and
10 after the action, opportunities for people to comment.

11 CHAIRMAN KECKLER: Right. How burdensome,
12 from a management standpoint, would it be to say -- it
13 says, "LSC will provide recipients with notice when the
14 list is modified." Is there a way to rephrase that,
15 saying prior to the list being modified, or would that
16 be burdensome from a Management standpoint?

17 MR. FLAGG: No. I think we'd be willing to
18 modify it to say, "LSC will provide recipients with 14
19 days' notice prior to the list being modified by the
20 Board," something along those lines.

21 MR. KORRELL: Mr. Chairman?

22 CHAIRMAN KECKLER: Yes.

1 MR. KORRELL: I'm going to counsel against
2 doing that. I just think having different deadlines is
3 a bad idea. Some are 30 days, some are a week, some 14
4 days. As counsel has pointed out, we have the Sunshine
5 Act. The Sunshine Act requires advance notice.

6 The merit of this rule, in my view, is that
7 it's now flexible. And if it's rare that it's going to
8 happen, that there's going to be a law that gets passed
9 that adds to the list, it's going to be exceedingly
10 rare that there's a question about it. And if we do
11 get it wrong, it's easy to fix it.

12 Because it's not in the Federal Register,
13 because it does not require advance notice of the
14 comment, if we somehow screw it up, it's just easy to
15 fix. And I think it's exceedingly unlikely that we're
16 going to add something to a list and that the field
17 isn't going to know about it before. And if somehow
18 that happens, it's impossible they're not going to know
19 it afterwards.

20 I would counsel against adding another
21 deadline that we are likely to -- it increases the
22 likelihood that somebody makes a mistake and we have a

1 problem on our hands. So I would counsel against
2 making that change.

3 CHAIRMAN KECKLER: Thank you, Harry.
4 Martha?

5 DEAN MINOW: I think that's sensible advice.
6 I do think that there's just a background question
7 about it. Is this organization playing "gotcha" with
8 grantees? And I don't think we are, and I think we
9 just want to make it clear: This is not some way to do
10 an end run around the usual length of time for
11 procedures.

12 And also, should Congress enact a law that is
13 in this unclear area of whether or not it applies, I
14 assume it'll get some attention. If it doesn't get
15 some attention, there's a way to correct its
16 application.

17 So I do wonder if there's a context in which,
18 either in our own records or other way, we could say,
19 this is not intended to be a way to play "gotcha" with
20 grantees.

21 MR. FLAGG: I think the answer to that is it's
22 never been invoked, ever.

1 (Laughter.)

2 DEAN MINOW: I understand that. I understand
3 that. So it shouldn't be a problem to say that. It
4 shouldn't be a problem to say, this is not a
5 way -- because I take Laurie's concern to be something
6 in that direction.

7 CHAIRMAN KECKLER: Julie?

8 MS. REISKIN: Could we just say "prior"
9 without days, without 30 days or 14 days or whatever?
10 Could we just say "prior"?

11 MR. FLAGG: No.

12 MS. REISKIN: No? All right.

13 MS. MURPHY: If I could just make one point.

14 CHAIRMAN KECKLER: Go ahead and add.

15 MS. MURPHY: I would just point out that if
16 the Board votes, the opportunity to correct this is
17 going to be probably not until the next Board meeting,
18 which would be approximately four months, if that's the
19 schedule that they're meeting on; as opposed to giving
20 prior notice, where if there's a problem, it can be
21 discussed really expeditiously.

22 And I know the chance of their being

1 disagreement. I've looked at what has been listed
2 here. No, we don't have a problem with that. But yes,
3 it can be corrected with a lot more trouble, I think,
4 and a lot more burden than having notice go out to
5 people in advance and have an opportunity for them to
6 take a quick look. We don't have a problem. We're not
7 commenting.

8 MR. FLAGG: Again, just to be clear here,
9 there will be public notice. There will be public
10 notice that the Board of Directors and this Committee
11 will be meeting, and on its agenda is a proposal to add
12 a particular law to this list.

13 It will be published in the Federal Register,
14 that notice that I just described. It will be
15 published in advance of the meeting. And at that
16 point, if people aren't reading the Federal Register,
17 there's not much we can do.

18 But that does give the public and recipients
19 the opportunity prior to action being taken, as has
20 happened in the last year on more than one occasion,
21 when the NLADA has come to a meeting like this and
22 said, you know, I know this is late in the day, but

1 there's been a proposal here, and you may not have
2 thought of XYZ.

3 And every time that's happened, the Board has
4 said, we hear you, and has modified time schedules to
5 take that into account. So the question, really, to my
6 mind, to Harry's point, is: Is it better to handle the
7 one rare instance like that in the way I just
8 described, or to require, every time a new law is added
9 to this list, to go through an elaborate public notice
10 with written comments?

11 And it just strikes me that what is in this
12 proposal both gives public notice, gives an opportunity
13 to be heard, and does it without overburdening the
14 system.

15 CHAIRMAN KECKLER: Go ahead.

16 MS. MURPHY: I just want to emphasize, our
17 concern is not with this Board or this administration.
18 Our concern is, because of the commitments that have
19 been demonstrated to the carry-through.

20 So we're not concerned, and we would have no
21 concerns at this point. We are concerned with what
22 happens in the future and who's to come in the future

1 and whether they would be willing to honor the same
2 commitments that this Board and this Management have
3 done. Thank you.

4 CHAIRMAN KECKLER: No. I understand, and
5 thank you for your comments.

6 MR. LEVI: But even a succeeding Board has to
7 abide by the notice and comment regulations.

8 CHAIRMAN KECKLER: Right. The question really
9 is if there's anything that be said that's helpful,
10 there will be some provision in there. Some things in
11 there are implicit that it'll be on the agenda.

12 In theory, we can think of ways that it just
13 could come up and not be on the agenda. We would never
14 do that, but that's --

15 MR. FLAGG: You could add, in 1640.2, "The
16 list may be modified with the approval of the
17 Corporation's Board of Directors at a public meeting,"
18 because the public meeting triggers all of the
19 protections of the Sunshine Act, including public
20 notice and right to appear at the meeting and bring
21 public comment to the Board at that meeting.

22 CHAIRMAN KECKLER: I think that might be wise.

1 MR. LEVI: I think so.

2 CHAIRMAN KECKLER: Just in the sense of having
3 that assurance. In theory, we can do things like have
4 notational votes. We'd very rarely use it, and
5 certainly not for anything like this. But in this
6 case, that would allow somebody to be there, and they
7 would know, and they would see it, and they could make
8 comments on it.

9 FATHER PIUS: We should formally agree to
10 that.

11 CHAIRMAN KECKLER: Yes. I agree with you,
12 Father Pius. Right. We're just discussing it.

13 MR. LEVI: Is that made as a proposal? I
14 think it is.

15 CHAIRMAN KECKLER: Yes. I think it is made as
16 a proposal. Is there further discussion on it? Harry?

17 MR. KORRELL: At the appropriate time, I'm
18 just happy to make the motion with that modification.

19 MR. LEVI: I think this is an appropriate
20 time.

21 CHAIRMAN KECKLER: I think it is an
22 appropriate time.

1 M O T I O N

2 MR. KORRELL: I make the motion, with the
3 addition of "at a public meeting," as just indicated."

4 MR. LEVI: I'll second. Am I allowed to?

5 CHAIRMAN KECKLER: Absolutely. All in favor?

6 (A chorus of ayes.)

7 CHAIRMAN KECKLER: Opposed?

8 (No response.)

9 CHAIRMAN KECKLER: The motion is approved.

10 FATHER PIUS: And this will be recommended to
11 the Board?

12 CHAIRMAN KECKLER: And this will be
13 recommended to the Board for publication as a Final
14 Rule of the Corporation. Thank you for everyone, and
15 for public comments.

16 So we now move to a report on program letters
17 governing governing bodies.

18 MR. FLAGG: This is really more of a notice to
19 the Board, and particularly since one of our Board
20 members, Julie, gave us the impetus to address these
21 issues.

22 Julie raised a number of issues related to the

1 governing bodies of our funding recipients, and that
2 led to additional consultations and two program
3 letters, which were issued recently to deal with two
4 different topics -- one, the fiduciary duties that
5 recipient board members have, and two, who qualifies as
6 eligible client members under our regulations.

7 And we thank Julie for raising those issues.
8 And again, Sarah worked on these, principally, along
9 with Stefanie. And if anybody has questions, I'm happy
10 to answer them.

11 CHAIRMAN KECKLER: Julie? Thanks for making
12 this suggestion. And please ask your question.

13 MS. REISKIN: I don't have a question. I just
14 want to say thank you very much for addressing it, and
15 I think this will be very well-received by the client
16 community. Jim and I will be able to report about this
17 at NLADA when we do our annual meeting with the client
18 community, and I think that's awesome. Thank you.

19 CHAIRMAN KECKLER: Thank you. And I
20 particularly appreciated this. And I don't know if
21 other Board members have thoughts on the attachment to
22 Program Letter 15-2, which is Sample Guidance.

1 I thought this is very interesting, to have a
2 one-page sheet there. And I wonder how that will work
3 from the recipients' standpoint, whether they'll use
4 that, whether that'll be useful to them. I hope it
5 will be.

6 But I thought that was very nice, to summarize
7 all of that, whole courses in law school and so forth,
8 on one page made relatively simple and straightforward
9 for somebody who's volunteering to serve on one of our
10 recipient's boards. I thought that was very nice.

11 MS. DAVIS: We are actually very dedicated
12 here in the Office of Legal Affairs to simplifying and
13 making our stuff as easy to understand as possible.

14 CHAIRMAN KECKLER: If there are no further
15 questions or comments on that item, we can move to a
16 report on enforcement mechanisms.

17 MR. LEVI: I just want to say I think the
18 letter on fiduciary duties of members -- I can't tell
19 you how many times this comes up on not-for-profit
20 boards. It's not an LSC issue.

21 CHAIRMAN KECKLER: Right. I think that maybe
22 other people outside LSC might find it useful in the

1 nonprofit world.

2 MR. LEVI: They should be tuning in. They
3 would benefit.

4 CHAIRMAN KECKLER: Yes. I've never seen
5 something that's a one-page guide for a nonprofit board
6 member.

7 MR. LEVI: It's great.

8 CHAIRMAN KECKLER: Yes.

9 MR. LEVI: It should go viral.

10 (Laughter.)

11 MR. FLAGG: Well, again thank you to Sarah
12 Anderson, who was largely the author of that list.

13 MR. KORRELL: You've got to figure out how to
14 sell it now.

15 CHAIRMAN KECKLER: So now we move to item 7,
16 our annual report on enforcement mechanisms. Mark
17 Freedman.

18 MR. FREEDMAN: Mark Freedman, Senior Assistant
19 General Counsel from the Office of Legal Affairs.

20 As you'll recall, we annually provide a report
21 on the use of enforcement mechanisms, as per Resolution
22 2013-4 that Father Pius introduced.

1 FATHER PIUS: You're welcome.

2 (Laughter.)

3 MR. FREEDMAN: In short, we haven't used any.

4 CHAIRMAN KECKLER: That's a lot of pages for
5 having used any.

6 MR. FREEDMAN: Nonetheless, notwithstanding
7 what Stefanie's noted about us trying to make things
8 simple and concise, we've taken I don't know how many
9 number of words in these regulations and put them into
10 I don't know how many numbers of words as guidance.

11 To get to the main point, the resolution asks,
12 what have you done? What would you improve? Et
13 cetera. And we haven't done anything, but we still
14 think that these are very useful, and that we are very
15 glad that we have them.

16 And as a matter of fact, it has come up in
17 meetings, the question of, well, is this a scenario in
18 which we want to think about a limited reduction of
19 funding? And while we have not initiated any such
20 thing, it is still relevant. It is still useful. It
21 is still, I think, very useful and good that we've
22 added this.

1 So as to this extensive document to explain
2 them, one of the things that the Board noted and we
3 noted through the process is that we have these
4 enforcement mechanisms spread out through the regs.
5 They have similar but not identical procedures. I
6 think we've harmonized the definitions so that they now
7 at least have the same definitions. And the Federal
8 Register is probably not formatted in the most
9 user-friendly fashion.

10 Hence we sat down and we said, let's create a
11 document that's a little more user-friendly that's a
12 good nutshell guide so that our own staff -- quite
13 frankly, in the course of developing this, I have used
14 this guidance. Someone has said, well, what can we do
15 here? And I've pulled out my draft of this and said,
16 oh, well, here's what we do.

17 The idea is that our staff, our grantees,
18 NLADA, anyone, can pull this out and get a sense of,
19 all right. What are these? How do they work? If I'm
20 looking at option A, how is that going to work? What
21 can I expect? And then, if I'm really curious, because
22 I'm thinking that I'm about to get one of these

1 notices, where do I go in the reg to find out what the
2 reg actually says?

3 We've largely paraphrased the regs in here,
4 mostly for clarity. In many cases we've taken the
5 exact language of the regs and we've broken it down
6 into bullets and used outline formatting and visual
7 spacing so that they're easy to understand.

8 But we've included the links to the reg
9 language itself so that then it's easy to go from this
10 document to what's the core language, since I know if
11 we ever use one of these, our grantees are very
12 thorough lawyers, and they will go through every word
13 and every comma with as much detail as Jim went through
14 every word and every comma as we were revising the
15 rules.

16 So that finishes my presentation. But I'm
17 happy to take any questions on this. And I also should
18 note that, as I think I've mentioned, we had OPP, OLA,
19 OCE, and the IG all involved in developing this to make
20 sure that we had a good sense of the perspectives.

21 We did not include 1640; 1640, we don't have
22 real developed procedures there. I think that there's

1 certainly no harm in adding it. Quite frankly, it
2 wasn't something that was under active consideration.
3 But I have a note to think about that.

4 CHAIRMAN KECKLER: Thank you, Mark. And
5 thanks for your work on this document. I mentioned
6 earlier that one of the ideas of regulation is fair
7 warning. And I think this is part of that as well as
8 it will be useful.

9 MR. LEVI: We could get a little artwork and
10 blow it up and make it into a nice big poster. I'm
11 just kidding, but --

12 DEAN MINOW: And an app.

13 (Laughter.)

14 CHAIRMAN KECKLER: An app. Are there other
15 comments from the Committee or the Board or questions
16 regarding this guidance? So this will be a guidance
17 document published, ultimately, on the website?

18 MR. FREEDMAN: It is. We have distributed it.
19 We've emailed a link to it to all the grantees with an
20 announcement from Jim Sandman that we have it; the
21 basic reasons for it, so that they don't get worried
22 that, oh, they're sending us this guide because the

1 next letter --

2 (Laughter.)

3 MR. FREEDMAN: It is on our website.

4 Actually, it will be in a few different locations or
5 linked to in a few different locations. It's available
6 currently on the program letters page, so if one goes
7 to the program letters page, there's the explanatory
8 program letter and the guide.

9 As we are revamping our website to make it a
10 much more user-friendly experience, it will also be one
11 of the documents that's available when one goes to see,
12 what's all the guidance about what do I do and how do I
13 do it and what do I do if I mess it up? I expect it
14 would prominently be linked to there as well.

15 CHAIRMAN KECKLER: Yes. And one of the
16 questions I had, or thoughts, as you're redesigning the
17 website, and I thought about this from the application
18 of federal law issue, is there's going to be this
19 exhaustive, authoritative list. And we did this a
20 little bit with some of the other rules about services
21 to aliens and so on.

22 Are we going to have easy ways and permanent

1 links where people can look to our guidance? Because
2 we have the regulations, but we're using guidance now a
3 little bit more. And I think that's fine. But if
4 we're going to do that, then it's easy to find our regs
5 that are in the CFR. It's not always as easy, I think,
6 to find guidance as it's assembled.

7 MR. FREEDMAN: We have our best people working
8 on it.

9 (Laughter.)

10 MR. FREEDMAN: And your point is one that has
11 come up many times in our meetings about how we're
12 designing the website. Our goal is to make the website
13 as the portal -- as the information portal that it
14 primarily is, for example, for our
15 grantees -- user-friendly and easy to navigate.

16 In addition to that, we're through this
17 process trying to come up with more guidance -- for
18 example, the frequently asked questions that we posted
19 already involving the revisions to the PAI rule, which
20 has already generated more questions. And there's
21 going to be more of that.

22 We're really trying to make that a much better

1 process. Interestingly, you mentioned that on our
2 website, it's very easy to find the regs, but the
3 guidance documents are kind of buried in our
4 grants.lsc.gov. And one of the things we're doing is
5 planning to incorporate all that so there aren't
6 multiple websites.

7 Interestingly, when we're researching what an
8 agency does, I frequently find the opposite. I will
9 find agency guidance that's describing, we do this. We
10 do that. Here's what applies. Here's what doesn't.
11 And then I want to go see, well, what's the reg and
12 what's the exact language? And it's not there.

13 I end up spending -- well, or I ask one of our
14 law fellows to spend -- a fair amount of time figuring
15 out this language that's in this guidance document,
16 what reg is it? What's the actual regulatory or
17 statutory language?

18 So we have a little bit of the inverse of
19 that, in part because we don't have a lot of guidance.

20 But I think we are moving towards a world in which we
21 will not only have more guidance, but we'll also have
22 that well-integrated in with our regs, as per the

1 enforcement mechanisms.

2 If I had a little more thoroughness on it, we
3 would have hyperlinked for every single regulatory site
4 and back-hyperlinked from the regs. But we're not
5 quite there.

6 CHAIRMAN KECKLER: Yes. I think over time the
7 issue, particularly with something like the application
8 of federal law where the regulation itself is
9 referencing guidance -- but I think, as a general
10 matter, where we're doing that, we're relying partly on
11 incorporating guidance by reference and things like
12 that.

13 Having a hyperlink back between wherever
14 people find our regulation -- and they find that
15 regulation and it says, there's an exhaustive
16 list -- well, there should be a link to that list.
17 Right? When your best people are done, part of their
18 job should be something along those lines and have that
19 cross-linked.

20 Laurie?

21 MS. MIKVA: I just had a question. Limited
22 grant conditions are not considered an enforcement

1 mechanism, I take it?

2 MR. FREEDMAN: Special grant conditions
3 are -- one of the things, for example, that we mention,
4 1618, which is the front door for the enforcement regs,
5 mentions special grant conditions as one of the things
6 that we do.

7 And the special grant conditions don't have a
8 particular process. We think of them more as an
9 extension of compliance visits, programmatic concerns,
10 because in the special grant conditions we're not
11 taking out money.

12 And I suppose that it would be more precise to
13 say that this guide is, when we're going to stop giving
14 you or take away money, here's what to expect. And we
15 don't have more explicit procedures there. Special
16 grant conditions are much more discretionary, so rather
17 than appeals or anything, grantees could say, well, can
18 we talk about this? And we may have back and forth.

19 CHAIRMAN KECKLER: Are there further questions
20 or comments about the enforcement mechanism? Gloria?

21 PROFESSOR VALENCIA-WEBER: I want to
22 compliment the legal staff for putting, first, the

1 descriptive document, but especially the table on 102,
2 and I hope that's on the website, because not only is
3 it important for those of us that read law, but we have
4 the whole question of our grantees' board of directors.

5 And this chart, which first connects the
6 critical kinds of violations, but also goes to the
7 procedure, I think could be understood and then be part
8 of meaningful discussion of a board that has more than
9 lawyers on it.

10 And I think that's one of the problems when we
11 talk to grantees and how their boards are trained and
12 educated. Sometimes the materials are too much in
13 legalese for the non-lawyers. And to the extent we can
14 do this, I would recommend -- and early, Martha
15 mentioned, for instance, when we were talking about
16 grants, subgrants, all of that -- a similar kind of
17 illustrated chart or some kind of mechanism like that
18 would be very helpful. And thank you very much for
19 what you provided here.

20 MR. FREEDMAN: You're welcome. So this table
21 is included in the document that's available. The
22 enforcement mechanism program letter includes both the

1 appendices. That table actually was the result of the
2 Board's inquiries. It originally appeared in the
3 Federal Register notice of the Final Rule.

4 Unfortunately, the way the Federal Register
5 does things, no matter how well we format those tables,
6 they're not going to come out in nearly as useful a
7 fashion in the document that the Federal Register
8 produces. Hence, among other things, a reason for
9 having this is so that we could have it in a simple one
10 page, laid out, looking very easily readable.

11 Similarly, with regards to 1627 and the
12 subgrants, one of the things that we've done is by
13 using the language from the federal grants guidance, in
14 addition to us potentially producing some guidelines,
15 some tables, some checklists, whatever's appropriate,
16 it'll also be easier for our grantees to look at those
17 types of materials that have been produced by other
18 agencies.

19 Now, we won't be bound by those. But the
20 general ideas of what does this language mean in a
21 grants context will be more familiar and a little more
22 universal.

1 CHAIRMAN KECKLER: Thank you.

2 PRESIDENT SANDMAN: Charles?

3 CHAIRMAN KECKLER: Yes, Jim?

4 PRESIDENT SANDMAN: Resolution 2013-4 requires
5 that Management report annually to the Board on five
6 items regarding enforcement. And just so the record is
7 clear, I want to report on those five items.

8 FATHER PIUS: Why are you looking at me, Jim?

9 PRESIDENT SANDMAN: I'm speaking to you,
10 Father Pius.

11 (Laughter.)

12 PRESIDENT SANDMAN: The resolution requires
13 that we provide an accounting annually of all
14 suspension, debarment, termination, or reduction of
15 funding proceedings initiated under the regulations in
16 the past year. As Mark indicated, we didn't use any of
17 those mechanisms in the last year.

18 The resolution requires that we provide a
19 description of the effect of any such proceedings on
20 the provision of legal services to the poor. Because
21 we didn't use them, there was no effect.

22 The resolution requires that we report on any

1 due process concerns raised by grantees in the course
2 of those proceedings. There were none.

3 The resolution requires that we provide
4 Management's opinion as to the ongoing need for an
5 effectiveness of the enhanced enforcement procedures
6 provided for in the rules changes that were adopted two
7 years ago. Even though we have not used them in the
8 past two years, we continue to believe that they're
9 important. I think they have a deterrent effect. And
10 the fact that we haven't used them to date does not
11 mean that we might not need to use them in the future.

12 The resolution requires that we provide
13 Management's suggestions, if any, of proposed changes
14 to the enforcement regulations. We don't have any
15 changes to propose. And to provide any guidance issued
16 in the prior year, that is the program letter that Mark
17 has just described.

18 MR. MADDOX: Jim, what resolution was that,
19 again?

20 PRESIDENT SANDMAN: That was Resolution
21 2013-4.

22 CHAIRMAN KECKLER: Julie?

1 MS. REISKIN: I did have a thought when I was
2 reading this over. It says that if you're going to
3 start this, you notify the board chair and the
4 executive director. And given some of the OIG reports
5 we've had, I'm wondering if it should be the entire
6 board. I'm not saying -- just something to think about
7 because if a board chair and a director were in
8 cahoots, just a thought.

9 CHAIRMAN KECKLER: Other comments or
10 questions?

11 (No response.)

12 CHAIRMAN KECKLER: If there are not, then I
13 think we can thank you for your report, Jim, and we can
14 now move to item 8, which is an update that we're
15 receiving on our revisions to the grants for
16 agricultural and migrant farmworkers. And I see
17 Mr. Hardin is coming to the table.

18 FATHER PIUS: Is there a document on that in
19 the Board book?

20 CHAIRMAN KECKLER: I don't believe there is a
21 document in the Board book.

22 MR. FLAGG: No, there is not. This is really

1 just a brief oral update.

2 CHAIRMAN KECKLER: A brief oral update.

3 MR. FLAGG: The Board at the January meeting
4 approved publication of a notice of proposal for
5 updating and rationalizing the data used as the basis
6 for granting what have been referred to as migrant
7 grants.

8 That notice was issued shortly after the Board
9 meeting. The Board and the Committee will recall that
10 the methodology and the data underlying the proposal
11 were fairly complicated, and we have had a number of
12 questions about the methodology and the data.

13 The methodology and the data were provided to
14 LSC by the Department of Labor, an expert panel that
15 the Department of Labor convened for that purpose. And
16 as these questions have arisen, they've been referred
17 to the Department of Labor.

18 We shortly before the original deadline for
19 comments on this proposal received a request from the
20 NLADA, on its own behalf and really as representative
21 of a number of recipients, both migrant programs and
22 field programs, that had an interest in this issue,

1 requesting more time so that they could better
2 understand the methodology and the database issues that
3 are connected with it.

4 We thought that was a reasonable request and
5 the request was granted. So the due date for comments
6 is now a week from tomorrow. And our expectation and
7 hope is that at the next meeting of this Committee and
8 Board, we will have had n opportunity to consider all
9 of the public comments and any staff analyses of those
10 public comments, and have a proposal to the Board on
11 how to go forward.

12 CHAIRMAN KECKLER: Ron, how many comments have
13 we received so far on this item?

14 MR. FLAGG: Again, the deadline
15 has -- comments are not yet due. I think we received
16 two or three very short, one-paragraph or one-sentence
17 comments. And then we received at least one more
18 substantive set of comments from one of our recipients,
19 and I think that's all. So my assumption is we'll
20 around the end of the day on April 20th be getting
21 more.

22 CHAIRMAN KECKLER: Thank you.

1 Are there further questions or comments about
2 that? So if we get this analysis through, what's our
3 schedule for the grant, for the revisions to be put
4 forward?

5 MR. FLAGG: Well, again, the final proposal
6 would be before the Board in July. We're right now in
7 the grants cycle. Applications for 2016 funding have
8 been invited. We haven't hit the due date yet for
9 those applications; I believe those are due in
10 June -- yes, June 1.

11 One of the issues that is in the notice is how
12 to implement use of the new data. What is in the
13 notice is a proposal to use the updated data on a 50
14 percent basis vis-a-vis the 2016 grants, and 100
15 percent for 2017.

16 We've asked for public comment. In fact, the
17 one substantive public comment we've already received
18 addressed that proposal. I suspect we will get other
19 public comments on that issue. I expect that our staff
20 will have views on that issue. And we'll present them
21 to Management, and based on those comments and the
22 staff analysis, we'll have a proposal to make to this

1 Committee and the Board in July.

2 CHAIRMAN KECKLER: So I guess the point is
3 that depending on how you implement it, though, the
4 revised data would affect the size and distribution of
5 the next set of grants, the 2016 grants, when they're
6 awarded. Is that the current schedule and plan?

7 MR. FLAGG: That is what is embedded in the
8 current proposal. Whether we will continue that in the
9 final proposal I suspect will be a function of what we
10 hear from the field. We have two conflicting goals.

11 On one hand, we have new data, which I think,
12 as reflected in the notice, are superior to the
13 existing data which are being used as the basis for
14 migrant grants. In a perfect world, we would use the
15 new data, assuming we've decided that those data indeed
16 are better -- when I say "we," I mean the Board -- we
17 would use those data as soon as we could.

18 On the other hand, in a perfect world, you'd
19 want everybody to know what those data meant before the
20 grant applications were in. You can't do both of those
21 things. And as it stands today, applications for
22 grants are always made without certainty as to what the

1 funding will be because we don't know what the
2 congressional funding will be. There could be cuts.
3 There could be additions.

4 Now, in fairness, the proposal, the current
5 proposal that is up for public comment, would quite
6 substantially affect some of those amounts. So these
7 are complicated issues, and as I said, we expect to get
8 public comments on that issue in the next week.

9 And we expect our staff to have views on how
10 best to implement use of the new data that both uses
11 the new data as quickly as we reasonably can but takes
12 into account the effects on funding issues that we've
13 just described. And we'll have to give you a proposal
14 on that in advance of the July meeting.

15 MR. LEVI: But those programs know, don't
16 they, where --

17 MR. FLAGG: Yes. Yes.

18 MR. LEVI: We're not doing this in secret.

19 MR. FLAGG: No. No, that's right.

20 MR. LEVI: If you want, I guess if some
21 program was going to be affected by more than 5 percent
22 were we to act while this is -- you could give them a

1 special little email saying --

2 MR. FLAGG: No. Clearly, all --

3 MR. LEVI: I assume they're paying attention.

4 MR. FLAGG: Yes. All of the programs that are
5 directly affected -- and this is both the migrant
6 programs as well as the corresponding field programs,
7 that is, the field programs in the states where the
8 migrant programs' numbers are affected.

9 So if the migrant grant in a state is going
10 up, that money is coming out of field programs; and
11 conversely, if money in a state devoted to the migrant
12 program is going down, then field funding in that state
13 is correspondingly going up because the funding for the
14 state remains the same.

15 So to your point, John, yes. Everybody is
16 well aware of this, and that's why this has generated
17 such high interest.

18 CHAIRMAN KECKLER: Martha?

19 DEAN MINOW: It's such a complicated problem,
20 and of course it all gets more complicated because the
21 more time that passes, the less reliable the data
22 themselves are. But even given that, I think we all

1 want to use the best data that's available.

2 The proposed implementation, and I know it's
3 in anticipation of a change that we haven't adopted yet
4 because we're waiting for the comments that haven't
5 come in yet, but let's assume that the implementation
6 proceeds as you've indicated.

7 That would be a strict requirement that
8 everyone goes with 50 percent? Not allow some people
9 to go with 50 percent and other people to go to 100
10 percent?

11 MR. FLAGG: No. We would be doing it the
12 exact same way as the census implementation was done.

13 DEAN MINOW: Yes. Right.

14 MR. FLAGG: So 50 percent of the change would
15 come in in year one, and then the change would be 100
16 percent implemented in year two. So if there was a big
17 change, half of that big change would occur in the
18 first year and half in the second year. If there was a
19 very small change, half of that small change would
20 occur in year one and half in the second year.

21 DEAN MINOW: Thank you.

22 CHAIRMAN KECKLER: Are there further comments

1 on this?

2 (No response.)

3 CHAIRMAN KECKLER: We'll look forward to
4 hearing more about this and receiving the comments on
5 Management's proposal.

6 The final substantive item is an update on
7 performance management and human capital management
8 from President Sandman and Traci Higgins.

9 PRESIDENT SANDMAN: Thank you, Charles. This
10 report is being made pursuant to our risk management
11 protocol. And I'll ask my colleague Traci Higgins, our
12 Director of Human Resources, to make the report.

13 MS. HIGGINS: That's me. Good afternoon.

14 DEAN MINOW: Hi.

15 MS. HIGGINS: How are you? I will update you
16 on our progress in implementing our performance
17 management process and our human capital plan, and
18 we'll start with a review of our performance management
19 process since it's still new to us. It's even more new
20 to you folks.

21 The cornerstone of our performance management
22 process is the LSC strategic plan, which as you know is

1 not self-implementing. It is put into effect in large
2 part through the office performance plans that each of
3 our offices are required to draft.

4 And those also detail how that office is going
5 to carry out its core work, whether it be visiting
6 grantees or reviewing contracts, rulemaking, or in the
7 case of my group, how we're going to go about
8 recruiting and hiring people here.

9 And tied to those office performance plans are
10 our employee performance plans, which detail the work
11 that the employee needs to perform against the office
12 performance plan and the strategic plan. Now, the
13 employee performance plans also include a training and
14 professional development plan that I'll talk about a
15 little later.

16 So the key to our performance management
17 process is effective communication, ongoing
18 communication, two-way communication between the
19 manager and the staff. We are working on encouraging
20 that, working out our muscles, our voices, in finding
21 our voices in this regard because it allows us to
22 continue to assess our progress, identify issues, deal

1 with them in a timely manner, which is what we want to
2 do. And I think we have met with some success in doing
3 so.

4 An example or a way that we formalize that
5 communication is through our employee check-ins, which
6 is an interim written feedback that is provided at the
7 six-month mark. And it is again just another
8 opportunity to keep that dialogue going, to talk about
9 new opportunities, challenges, progress against the
10 employee performance plan, and our eight core
11 competencies.

12 The final leg of our performance management
13 process takes place in the fall, and it includes
14 several components: the employee self-assessment,
15 which, as the name suggests, is a opportunity for
16 self-reflection and soul-searching, in some instances;
17 colleague feedback, which would allow individuals other
18 than the employee's manager to offer insights and
19 reflections about that individual's work ethic and work
20 habits and camaraderie and the like.

21 There is also an employee manager assessment
22 on leadership qualities, which allows staff to assess

1 their manager against our five leadership qualities;
2 and then finally, the manager assessment of employee,
3 which is the manager's assessment of the employee
4 against the employee's performance plan and against our
5 eight core competencies.

6 In 2014, we implemented all of these
7 components with the exception of colleague feedback and
8 the manager assessment of employee. We got a late
9 start, so we really didn't have time to pull it off.
10 But we are committed to implementing the full process
11 in 2015.

12 When I mentioned the employee performance
13 plan, I mentioned the training and professional
14 development plans. These are a key component of our
15 performance management process, and they inform our
16 human capital work.

17 One of the things that I noted in the report
18 is that staff will begin taking Microsoft assessments
19 that will allow us to gauge their skills in Word and
20 Excel for everyone, and then possibly other
21 applications for particular individuals. But the idea
22 is we want to be able to provide targeted support.

1 If you leave it to someone to assess their
2 Word skills or their Excel skills, I think we all think
3 we're a little more expert than we are. So this will
4 allow us and Jessie Posilkin to really focus and group
5 individuals accordingly so that we provide them the
6 support that they really need.

7 An additional component is that HR is taking
8 the lead in supporting the implementation of these
9 plans. So we are responsible for researching courses
10 and webinars and tools that will allow the employee to
11 maximize the plan. And we'll also be responsible for
12 monitoring their compliance and issuing reminders and
13 making sure that we meet our goals in that regard.

14 Additionally, I continue to meet twice monthly
15 with each of our office directors. And that provides
16 us an opportunity to speak in a timely manner about any
17 employee concerns and allows us to talk about how we're
18 going to go about meeting those needs and addressing
19 those concerns. And it also allows an opportunity to
20 talk about monitoring the implementation of the
21 performance management process.

22 Now I'd like to talk about our efforts with

1 respect to recruitment and hiring.

2 So far, in 2015, we have conducted five
3 searches for eight hires, four of which are new
4 positions.

5 MS. REISKIN: Calendar year?

6 MS. HIGGINS: Yes. Exactly. So we have hired
7 two of the three fiscal compliance analysts that we
8 have slated. We have a prospect for a third, but we
9 want to wait until the end of the month to see if we
10 receive additional interest.

11 We have hired a program counsel for the Pro
12 Bono Innovation Fund. That individual actually was
13 already an LSC employee, so that created a vacancy, and
14 added to a departing employee. So we had two vacancies
15 for program counsel in the Office of Program
16 Performance. We have filled one of those, and this
17 next week we should begin scheduling our finalist
18 interviews to fill the other opening.

19 We also have hired an associate general
20 counsel, and we are continuing our search for a general
21 ledger accountant in OFAS. And that is a new position.

22 And this week we're going to begin searches

1 for a development associate, OPP grants coordinator,
2 which will bring to seven the number of searches that
3 will be either underway or completed at this point in
4 2015 for ten hires.

5 One of the things that is going to help us
6 tremendously with recruitment and hiring is the rollout
7 of the applicant tracking system, which will be part of
8 our Paycom system, which is our HR and payroll system.

9 It's a web-based system that will allow us to really
10 get more detailed information from our applicants.

11 Currently, applicants apply by ending us an
12 email to which they attach their cover letter and their
13 resume, and that's it. So we can actually ask them
14 questions. We can ask them what are called knockout
15 questions so that if they answer the wrong way, we
16 don't have to spend our time with that application.
17 It's going to save us a lot of time.

18 And also, to the extent that HR is providing a
19 preliminary review of applicants, that will go away and
20 hiring managers will be able to see applicants in
21 realtime. As soon as they apply and if they meet our
22 requirements, they'll be accessible to the hiring

1 manager.

2 It will allow us to create pipelines so that
3 we can really be more efficient. It'll allow us to
4 track where folks are coming from. Where did they see
5 our posting? Which will allow us to, as necessary,
6 make any adjustments to our sites. At this point,
7 Idealist and the LSC website are our number one and two
8 sources for our applicants.

9 And I think that's it, unless you have
10 questions. Martha?

11 DEAN MINOW: It's grant to see all these
12 developments on every front.

13 I wonder, in the searching, do you ever find a
14 need to use search firms? Do you use LinkedIn? Do you
15 Google people when they apply? I see your face. I've
16 been told that this is now a standard practice in many
17 professional fields.

18 MS. HIGGINS: We haven't been Googling
19 individuals. I'll consult with OLA for guidance in
20 that regard because the thought has occurred to me.
21 But a little apprehensive about that. And LinkedIn, we
22 have used LinkedIn, but it hasn't really been a useful

1 tool for us, especially with the cost associated. It's
2 not a good return.

3 MR. KORRELL: I don't want to supplant advice
4 of counsel in-house at LSC, but I think it is pretty
5 common, when you're recruiting and hiring for people at
6 this level, at the lawyer level, at the senior manager
7 level, to do some basic internet research, including
8 Google. And some might argue that we'd be remiss if we
9 didn't.

10 Obviously there are limits on what you can do
11 with certain information, and if it's a process that is
12 shepherded along by office legal counsel or by the
13 Human Resources Department as opposed to, say, by
14 individual managers -- but one suspects that happens
15 anyway -- but I think it's a good idea, and I think
16 most companies are doing it. And those who don't
17 usually wish they had.

18 MS. HIGGINS: Well, knock wood, we've been
19 lucky so far. So we'll enhance our chances moving
20 forward, and we'll look interest doing that.

21 CHAIRMAN KECKLER: John? And then Laurie.

22 MR. LEVI: No. I was just going to follow on

1 with that and say that not only do other not-for-profit
2 boards that I'm on and for-profit institutions that I'm
3 aware of do this as a matter of common practice, but
4 unfortunately, you'd be amazed at what they may learn.

5 So it's actually very helpful.

6 PROFESSOR VALENCIA-WEBER: And the career
7 counseling that's going on at colleges and
8 universities, especially for the professional
9 graduates, business graduates, is very frank about
10 telling them that all of these internet sites are going
11 to be searched. So what's on there? You need to be
12 careful.

13 And the career counseling starts early in the
14 students' career, tries to warn them in the beginning
15 not to put the pictures of the drunken fraternity party
16 on there.

17 CHAIRMAN KECKLER: Father Pius?

18 FATHER PIUS: Just two quick questions. I'm
19 very glad we're moving forward with this evaluation
20 process, and I think it's a good idea regardless of
21 where it came from. But if I understand correctly,
22 part of this did not just come out of the blue for us,

1 but this was a requirement from the GAO report. This
2 was something that the GAO insisted on that we do, and
3 this is part of our implementation of a request from
4 GAO. Yes?

5 MS. HIGGINS: Correct.

6 DEAN MINOW: Can I just say yes?

7 (Laughter.)

8 FATHER PIUS: I just want to make that clear,
9 that we're doing this in part because I think it's good
10 business, but we're also doing it because we're trying
11 to be responsive to the GAO.

12 The second question I have is to Management.
13 Does this just apply to in-house LSC? Does this apply
14 to the OIG as well? Does the OIG have a separate
15 evaluative process? And how are those two related?

16 MS. HIGGINS: The OIG is not following our
17 current performance management process, our revised
18 form. They continue to utilize the previous iteration
19 of the performance management process.

20 CHAIRMAN KECKLER: I recognize the Inspector
21 General as coming up to answer your question more
22 fully, Father Pius.

1 MR. SCHANZ: Well, I actually don't have to
2 because Traci just answered.

3 (Laughter.)

4 MR. SCHANZ: So thank you. But I did want to
5 mention that we have a comparability study out for bid.
6 We have four bidders to try to see how we match within
7 the IG community within the OIG.

8 CHAIRMAN KECKLER: Great.

9 MR. SCHANZ: David, do you have anything else?

10 MR. D. MADDOX: Yes. I just wanted to add
11 that the Management system is a brand new, developing
12 system, and we decided that we'd let Management
13 prototype it and see how it went, and then consider
14 adoption at a later point in time.

15 MS. HIGGINS: Yes. I'll just add that they
16 have been inquiring and have asked many questions. So
17 they are fully aware of where we are and some of our
18 challenges. So Dave has actively pursued additional
19 information about our process.

20 CHAIRMAN KECKLER: Thank you.

21 Jim?

22 PRESIDENT SANDMAN: Traci, could you say

1 something about our experience in using USAJOBS, the
2 government website for posting job openings, and
3 whether that's yielded anything for us?

4 MS. HIGGINS: Yes. We began using USAJOBS in
5 August of last year. And we use it the most with
6 respect to Office of the Inspector General postings.
7 We have used it for our fiscal compliance analyst
8 positions as well, and it has yielded candidates.

9 Our numbers are up because of USAJOBS. I
10 can't necessarily speak to quality, but numbers are
11 certainly up. And I think the Office of the Inspector
12 General has had maybe more success with those postings
13 than we have, in part because all of their positions go
14 up on USAJOBS.

15 CHAIRMAN KECKLER: Julie?

16 MS. REISKIN: Yes. A comment and two
17 questions.

18 I'm thrilled to see this because I think it's
19 unfair to employees not to have this. I think it's
20 awful to work and not know what your expectations are
21 and not to get feedback, and it's easy to let that
22 slide if there isn't a process just because of

1 busyness. So I'm very happy to see that, we should
2 have done it whether or not someone told us we had to.

3 I have two questions. One is, does this
4 happen at the same time for everyone, or is it based on
5 the employee's year? So if everyone does it in
6 October, what happens if someone just started in July?

7 I'm just curious.

8 And then also, do you have in terms of
9 recruitment -- I think it's called Schedule A. It has
10 to do with federal government jobs and a way to hire
11 people with disabilities. Are you guys set up with
12 that, or is that not relevant to you because you're not
13 a federal --

14 MS. HIGGINS: Right. To answer your question,
15 no, it is not relevant to us because we are not a
16 federal employer.

17 With respect to the rollout of the performance
18 management process, everyone is reviewed at the same
19 time. When we get new hires, we incorporate them into
20 the process as soon as it makes good sense to do so,
21 allowing them a little time to get their feet wet and
22 acclimated to us before we put them through their

1 paces, so to speak.

2 CHAIRMAN KECKLER: Are there further comments
3 about this?

4 (No response.)

5 CHAIRMAN KECKLER: I had one quick
6 thought -- and good, Jim came back in the room -- which
7 is that one of the things that we're thinking about all
8 the time increasingly is the strategic plan and the
9 next strategic plan and how we're going to proceed with
10 that.

11 One item that was discussed during the last
12 period of strategic planning is the issue -- but I
13 don't think we necessarily had the infrastructure for
14 it -- of things like annual metrics as part of the
15 annual plan.

16 And I feel like, particularly with the
17 development of office performance standards and
18 targets, we're moving into a realm in which that's
19 something that might be feasible or might be worth
20 thinking about as even rolling out before we develop
21 the new strategic plan in a piloting, reporting model
22 to us. I certainly would be interested in some sort of

1 summary statistics about how each office is doing when
2 Management is ready to provide that kind of
3 information.

4 One reason is just general oversight. But the
5 other is to think about those as the prototype, as the
6 beginning for the kinds of annual metrics that we might
7 begin to develop and ask for in a subsequent strategic
8 planning process. So thank you for helping develop
9 that infrastructure for it.

10 MS. HIGGINS: Sure. Thank you.

11 CHAIRMAN KECKLER: So with that, we can now
12 move to -- is there any other public comment on the
13 issues that we discussed today? Any public comment
14 should come up and be recognized. State your name for
15 the record, please.

16 MR. LEVI: We have very few minutes here.

17 CHAIRMAN KECKLER: Right. So it's a very
18 short time. So please make comments brief.

19 MR. MEYER: Hello. I'm John Meyer. I'm the
20 former Director of the Office of Information
21 Management. I worked at LSC for 30 years. I have
22 comments on LSC's human capital and employee relations.

1 Contrary to what has been said, LSC policies
2 are losing human capital and creating a disastrous
3 climate of employee relations. It is not just the
4 contentiousness of the labor union situation, but an
5 overall policy of wanting to get rid of many long-time
6 employees without good reason or fair process.

7 Furthermore, these actions are not only
8 ill-advised, but they also form a discriminatory
9 pattern. Since September, out of 100 employees in LSC,
10 excluding OIG, four have been let go, all of whom have
11 three things in common.

12 All four of these victims of LSC Management
13 are black. All four had 25 to 30 years of service.
14 And all four were 55 years of age or more. They are
15 Ruby Short, fired in September; and Lulu Waldy, Ron
16 Jordan, and Jean Edwards, let go in an illegal RIF on
17 February 9, 2015. I have sent details of the
18 wrongfulness of these actions to all LSC employees and
19 several Board members, so I will not repeat the sorry
20 story here.

21 Now, when I retired from LSC, I did not plan
22 to be vocal on LSC affairs. But LSC Management has

1 completely lost its moral compass in its treatment of
2 its employees. The four actions I have just discussed
3 are only some of the arbitrary and unfair actions LSC
4 Management has taken towards its employees.

5 LSC Management has embraced the worst elements
6 of private sector capitalism, considering employees as
7 interchangeable robots, easily replaceable and
8 disposable. But of course, as we all know, unlike in
9 the private sector, you're definitely not going to get
10 rich working for LSC no matter how good a job you do or
11 whatever you contribute.

12 So now they want employees to take all the
13 private sector risks with none of the rewards. And in
14 my years in LSC Management, the recent ones, I've heard
15 again and again in discussions of employees that no one
16 is irreplaceable, by which they mean they feel free to
17 dispose of anyone, irrespective of past contributions,
18 time of service, or anything else.

19 CHAIRMAN KECKLER: John, could you wrap it up?

20 And then we'll have --

21 MR. MEYER: I have just a couple more
22 paragraphs.

1 You may consider this approach to Management
2 to be acceptable or even good. But even so, it has
3 resulted in serious conflict at LSC. It is undermining
4 any chance of accomplishing the LSC mission.

5 Indeed, the erosion of morale at LSC is so
6 palpable that it is also leaking into the grantee
7 world. Therefore, it is imperative to make major
8 changes and seek peace through compromise and
9 accommodation before the damage becomes disastrous.

10 You probably know that LSC Management is
11 currently the subject of nine unfair labor practice
12 complaints before the NLRB stemming from the actions
13 I've discussed and others undertaken in the same
14 spirit.

15 If LSC Management is to be in any position to
16 weather the difficulties coming in the next few years,
17 it must undo the specific actions it has taken against
18 individual employees and adopt a completely new
19 approach, where everyone in the LSC community is in it
20 together. LSC cannot afford to use such a large
21 proportion of its resources on internal conflicts.

22 If this change in direction does not occur,

1 the problems and conflicts to date will only be a
2 foretaste of the disasters coming in the not too
3 distant future.

4 MR. FLAGG: Can I make two comments in
5 response?

6 One, we categorically deny any unlawful,
7 illegal, or improper employee actions.

8 Two, LSC does not comment on personnel actions
9 out of compliance with law and out of deference to our
10 employees' confidentiality.

11 CHAIRMAN KECKLER: All right. Is there any
12 further public comment from the room?

13 (No response.)

14 CHAIRMAN KECKLER: Seeing none, we'll now turn
15 to item 11, consider and act on other business.

16 (No response.)

17 CHAIRMAN KECKLER: If there is no other
18 business before the Board, I will consider a motion to
19 adjourn the meeting.

20 M O T I O N

21 MR. KORRELL: So moved.

22 MS. MIKVA: Second.

1 CHAIRMAN KECKLER: All in favor?

2 (A chorus of ayes.)

3 CHAIRMAN KECKLER: The meeting is adjourned.

4 (Whereupon, at 4:39 p.m., the Committee was
5 adjourned.)

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