

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS & REGULATIONS COMMITTEE
OPEN SESSION

Thursday, July 16, 2015

12:51 p.m.

Radisson Blu Minneapolis Hotel
35 South 7th Street
Minneapolis, Minnesota 55402

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson
Robert J. Grey Jr. (by telephone)
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

Wendy Rhein, Chief Development Officer

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

Stefanie Davis, Assistant General Counsel, Office
of Legal Affairs

David L. Richardson, Comptroller and Treasurer,
Office of Financial and Administrative Services

Jeffrey E. Schanz, Inspector General

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

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

Tom Hester, Associate Counsel, Office of the Inspector
General

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

Carol A. Bergman, Director, Office of Government
Relations, and Public Affairs

STAFF AND PUBLIC PRESENT:

Janet LaBella, Director, Office of Program
Performance

Bernie Brady, LSC Travel Coordinator

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

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

Robert E. Henley, Jr., Non-Director Member, Finance
Committee

Allan J. Tanenbaum, Non-Director Member, Finance
Committee

Jean Lastine, Executive Director, Central Minnesota
Legal Services

Anne Hoefgen, Executive Director, Legal Services of
Northwest Minnesota

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

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

Terry Brooks, American Bar Association Standing
Committee on Legal Aid and Indigent Defendants
(SCLAID)

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

2 (12:51 p.m.)

3 CHAIRMAN KECKLER: Noting the presence of a
4 quorum, I will now call to order the duly noticed
5 meeting of the Operations and Regulations Committee.

6 May I ask for approval of the agenda?

7 M O T I O N

8 MS. MIKVA: So moved.

9 CHAIRMAN KECKLER: Is there a second?

10 MR. LEVI: Second.

11 CHAIRMAN KECKLER: Thank you, John. All in
12 favor?

13 (A chorus of ayes.)

14 CHAIRMAN KECKLER: The agenda is approved.

15 I'll next call your attention to the minutes
16 from our previous quarterly meeting in April. May I
17 ask for approval of these minutes?

18 M O T I O N

19 MS. MIKVA: So moved.

20 CHAIRMAN KECKLER: Second?

21 MR. LEVI: Second.

22 CHAIRMAN KECKLER: Seconding that. All in

1 favor?

2 (A chorus of ayes.)

3 CHAIRMAN KECKLER: The minutes are thereby
4 approved without objection.

5 Our first substantive item of business is to
6 find out what's going on with our proposed rulemaking
7 for 1610.7 and 1627. And for this update, I will turn
8 the mike over to our General Counsel.

9 MR. FLAGG: Thank you. We have received a
10 number of comments on the notice of proposed rulemaking
11 that was published earlier this year regarding
12 subgrants and related issues, Parts 1610 and 1627. Our
13 office, namely, Stefanie Davis, who's with me, and Mark
14 Freedman, who's on the phone, has been working on this
15 issue along with other offices in LSC, and
16 collaborating as well with the Office of the Inspector
17 General.

18 For further details, I would ask Stephanie.

19 MS. DAVIS: Sure. Thank you, Ron. Good
20 afternoon.

21 We had hoped to have a notice of proposed --
22 or not a notice of proposed rulemaking, a final rule

1 for you at this meeting. But we got a lot of
2 substantive comments on the notice of proposed
3 rulemaking for Parts 1610.7 and 1627.

4 We had actually received a request just prior
5 to the original May 30th closing date to extend the
6 comment period due to the voluminous and technical
7 nature of the changes we were proposing as well as the
8 fact that the grant assurances were also out for
9 comment as well as the proposed rule for Part 1628. So
10 we extended the comment period to June 10th, which
11 tightened up our schedule quite a bit.

12 We received five comments on the proposed
13 rule. The rule generally supported LSC's goal of
14 ensuring that the subgrant rule applies only to those
15 subgrants or those awards that a grantee makes to a
16 third party for the purpose of providing legal
17 assistance to eligible clients.

18 You'll remember that part of the reason we
19 undertook this rulemaking was that there was a
20 difference of opinion about whether the rule applied to
21 all third party awards granted from recipients to third
22 parties, whether it be for technical purposes, such as

1 code design or web development, or whether it was for
2 actual intake and delivery of legal services
3 activities. So again, the commenters generally
4 supported our change to have the subgrant rule apply
5 solely to third party awards to provide legal services.

6 We requested comments specifically on a
7 proposal that had been made by the Northwest Justice
8 Project to raise the \$25,000 threshold at which third
9 party contractor Judicare arrangements become subject
10 to the subgrant rule. They're not usually. And we
11 received three comments supporting the change. We
12 received three comments supporting NJP's proposal to
13 raise the limit to \$60,000.

14 We received five particular objections to our
15 proposed changes. Just very quickly, we received
16 comment that our proposed definition of programmatic
17 was too broad and too ambiguous, and we received
18 recommendations for proposed changes to that
19 definition.

20 We got significant pushback on the requirement
21 that all subgrants must be paid for in cash rather than
22 through in-kind exchanges of space or services to

1 provide legal assistance. This was particularly
2 problematic in the private attorney involvement realm,
3 where commenters noted that because the PAI rule
4 specifically allows recipients to provide support in
5 the form of facilities or office space to private
6 attorneys who are handling cases for them, that this
7 proposed change seemed inconsistent with that part of
8 the PAI rule.

9 We received concerns that the five
10 characteristics of the subgrant that we propose to
11 adopt were ambiguous and required recipients to use
12 judgment about when an agreement actually is a
13 subgrant, which could be a different determination than
14 LSC reaches. And so there was concern that a dispute
15 there could lead to a questioned costs proceeding if
16 LSC did not agree that a recipient had made a subgrant
17 or had not made a subgrant that was subject to the
18 prior approval requirements.

19 Commenters objected at this our proposal to
20 require timekeeping consistent with Part 1635
21 requirements for all subrecipients. They noted that
22 private attorneys and other attorneys already have

1 their own systems, which may be adequate to ensure
2 accountability, and they strongly encouraged LSC to
3 reconsider that requirement in favor of a more flexible
4 standard.

5 The final comment or the final objection that
6 was raised, NLADA raised a concern that the removal of
7 the 45-day subgrant approval period would leave
8 recipients uncertain about whether or not they could
9 proceed with their subgrants in a timely manner.

10 We are analyzing these comments and developing
11 recommendations for how to address them, and we intend
12 to publish a further notice of proposed rulemaking once
13 we've done that. The FNPRM would be limited to the
14 discrete areas that we are proposing to revise in light
15 of the comments received during the comment period.

16 Sorry. We hope to have this for you in
17 October.

18 CHAIRMAN KECKLER: So what you're planning on
19 doing is you're planning on bring the FNPRM to us in
20 October. Is that --

21 MS. DAVIS: That's correct, unless you'd like
22 it sooner.

1 CHAIRMAN KECKLER: Well, just whenever you can
2 get it by October.

3 So are there questions from the Committee or
4 the Committee or the Board regarding this rulemaking?

5 (No response.)

6 CHAIRMAN KECKLER: If not, we can then
7 proceed. And are those comments that you've discussed,
8 are those available on our docket on the website?

9 MS. DAVIS: Yes, they are.

10 CHAIRMAN KECKLER: The next item of business
11 is a final rule that we do have today, which is on 1628
12 on recipient fund balances. And I would turn it back
13 over to Ron Flagg to introduce that matter.

14 MR. FLAGG: Thank you. This is really, at
15 least by the benchmark of federal rulemaking, a very
16 speedy process. And really, I want to thank and
17 commend the Committee and the Board for moving as
18 promptly as you have.

19 Toward the end of last year, it came to our
20 attention as a result of ongoing events and oversight
21 of our grantees that there was an issue with Part 1628
22 insofar as it was, in our view, unduly limiting with

1 regard to carryover of amounts above 25 percent.

2 We brought the issue to the Board's attention
3 and to the Committee's attention in January, and you
4 gave us the go-ahead to prepare a notice. We presented
5 a notice of proposed rulemaking in April, and as
6 Stephanie will describe in greater detail, we have for
7 you today a proposed final rule.

8 Within our office, Stephanie and Peter Karalis
9 bore the laboring oar, and Stephanie will elaborate on
10 the final rule.

11 MS. DAVIS: Great. Thanks, Ron.

12 The proposed rule for Prior to 1628 was
13 published again on April 20th, the same --

14 MR. LEVI: I want to follow up on what Charles
15 says, the prior presentation there. Some of those
16 comments seemed compelling, and I wonder how we're
17 going to intersect that and what the process is for our
18 hearing about them in a deliberative way or thoughtful
19 way.

20 CHAIRMAN KECKLER: Yes. Could you turn back
21 to that previous item and speak to the Chairman?

22 MS. DAVIS: Sure, absolutely. So the comments

1 are public, and we have been looking at them internally
2 to determine what we think some solutions are. You're
3 right, they're very substantive. They are
4 deliberative, and in some cases they asked for
5 clarification of what we propose to do, and in other
6 cases they strongly recommended that we take a
7 different approach from the one that we propose to take
8 altogether.

9 Our internal process is for us in OLA to look
10 at the comments and develop recommendations, which
11 we'll then propose to the Office of Compliance and
12 Enforcement and the Office of Program Performance to
13 discuss through, and the Office of Inspector General,
14 to figure out how to address those.

15 We had not intended to propose a document or a
16 discussion prior to the further notice of proposed
17 rulemaking with this Committee, but we certainly can if
18 --

19 MR. FLAGG: Let's make something clear.
20 There's going to be an internal process, which
21 Stephanie just described. There'll be a set of
22 recommendations from Management about how to respond to

1 the public comments.

2 It will be presented to this Committee for
3 consideration. The overwhelming likelihood is that
4 will lead to a notice of further public comment. So
5 there'll be another round of public comments and at
6 least two more occasions for this Committee to consider
7 these issues, both when we ask you to publish a further
8 notice of proposed rulemaking and presumably, after we
9 get comments in response to that, a final rule.

10 MR. LEVI: I see. And then I was trying to
11 figure out that timing piece. So is that occurring
12 before the next time we're together, which is October,
13 so that the Committee would be having a telephonic
14 meeting, or do you not know yet?

15 MR. FLAGG: We're not certain. At the latest,
16 the proposed further notice for proposed comment would
17 be before this Committee in October.

18 DEAN MINOW: I wonder if it's helpful or not,
19 as you catalogue the different kinds of comments that
20 you're getting, if there's a discussion that you're
21 having about those comments, if a telephonic discussion
22 would be helpful.

1 MR. FLAGG: I think it depends, and this is
2 not limited to this rulemaking, but in general. If we
3 in Management review comments and they seem to us to
4 raise some fundamental policy questions that it would
5 be good to air and get the views of the Committee or
6 the Board on, then by all means we'd do that in
7 advance.

8 If, based on our review of the comments, we
9 think that the path forward to us, at least, seems
10 pretty clear, then we typically won't burden the
11 Committee or the Board with an additional meeting. The
12 Board and the Committee have full opportunity to look
13 at the comments, to see what we propose the path
14 forward should be.

15 But for example, on the PAI regulation, that
16 was a much more open-ended set of regulations where the
17 policy choices were, frankly, not clear because there
18 was no statute which said, this is what you must do.

19 So where we encounter a situation where there
20 are open-ended policy questions as to which we think
21 the process would be expedited by getting your sense of
22 those issues in advance, we do hold those sorts of

1 calls.

2 DEAN MINOW: That makes sense.

3 CHAIRMAN KECKLER: And just to tie a knot on
4 that, it depends on your perception as you process the
5 comments and then the resolutions you want. Talking
6 about scheduling in the interim, it's quite a ways
7 between now and October, and if it would be fitting in
8 your schedule with the other things you're developing
9 as well, if it would be useful to advance, just get
10 hold of me and we will see if something like that can
11 be arranged.

12 So thank you. Back to 1628.

13 MS. DAVIS: Yes. 1628, again, was published
14 on April 20th, with a 30-day comment period. We only
15 made very limited revisions to this rule to address the
16 issues that the Board had identified.

17 We removed language that previously limited
18 Management's discretion to grant waivers when
19 recipients ended up with more than 25 percent of their
20 LSC fund balance at the end of the year because that
21 was the problem that was preventing recipients who
22 experienced a natural disaster or who received

1 use-or-lose disaster funding from using their funds,
2 from spending all of their LSC funds by the end of the
3 year.

4 We also revised the rule to specifically allow
5 recipients who need a waiver or anticipate needing a
6 waiver for greater than 25 percent fund balance prior
7 to the submission of the annual financial statements.

8 The regular waiver process usually takes place
9 after the recipients have already submitted their
10 annual financial statements. We opted to give them
11 this kind of advance process so that they could move
12 forward with greater assurance about whether or not
13 they would have this very large amount of LSC funds
14 available for the following year.

15 They must still provide us with a plan for how
16 they're going to spend that excess during the following
17 fiscal year so that there's not a danger that it would
18 carry over from year to year.

19 We received two comments, one from Northwest
20 Justice Project and one from the National Legal Aid and
21 Defender Association. Both supported the increased
22 discretion to Management to grant waivers in

1 extraordinary and compelling circumstances.

2 NLADA recommended that we allow early approval
3 requests for waivers of fund balances up to 25 percent
4 in addition to those over 25 percent. We took that
5 comment in the spirit that it was meant and concluded
6 that we actually agreed with the other comment that was
7 made by Northwest Justice Project, which was basically
8 LSC generally grants waivers of fund balances between
9 10 percent and 25 percent.

10 It's a lower standard than the standard for a
11 waiver when you have more than 25 percent of your fund
12 balance remaining at the end of the year, and so the
13 benefit is not as great to recipients who aren't
14 seeking a waiver of such a large fund balance. And
15 it's burdensome on them to propose the waiver. It's
16 burdensome on us to look at it. So really, it makes
17 sense to limit it to requests greater than 25 percent.

18 So we adopted the rule, or we propose adopting
19 the rule without any provision from the proposed final
20 rule. And we're asking this Committee to recommend
21 that the Board adopt 1628 as a final rule.

22 CHAIRMAN KECKLER: Are there questions and

1 comments from the Committee or Board members? Julie?

2 MS. REISKIN: You mentioned in the documents
3 the types of things that cause fund balances. Do you
4 have any further data on how often this happens, how
5 big the balance? Are we ever looking at 50 percent?
6 Is this common? Is it uncommon? Is it --

7 MS. DAVIS: Right. I'm speaking from memory,
8 and Lora might be able to help me out here. But if I
9 recall correctly, there have only been something like
10 three or four requests for the over-25-percent waivers
11 over the course of the past ten years or so.

12 So they're pretty rare. And so the
13 circumstances that we could specifically speak about
14 were the grantee who received a large fee award in a
15 court case toward the end of the fiscal year; the
16 grantee who took on more LSC funding when it merged
17 with another grantee that had money left; and the
18 grantee that received use-or-lose disaster funding from
19 another source. We can name those because it's that
20 rare that it happens.

21 MS. RATH: This is Lora Rath. I just want to
22 confirm what Stephanie said. It has been extremely

1 rare. Typically, in a given year, OCE receives between
2 15 and 20 requests overall, which includes the between
3 10 percent and 25 percent. In the last three years
4 it's been the ones that Stephanie mentioned.

5 Then on one or two occasions a program would
6 ask for a waiver for over 25 percent, but it was
7 minimal and didn't involve any of these criteria. So
8 those were denied, and they were required to let us
9 recoup the funds, to return the funds. Does that
10 answer?

11 MS. REISKIN: Thank you.

12 CHAIRMAN KECKLER: Other questions?

13 (No response.)

14 CHAIRMAN KECKLER: We don't have it scheduled
15 on here, but I think if you look at the rulemaking
16 protocol that we're going to talk about later today,
17 normally before have a final rule in that, we have a
18 public comment before the Committee considers it. So
19 I'll open it up if there is a public comment on this
20 rule.

21 MS. MURPHY: I'm not going to take a long
22 time. Robin Murphy from NLADA. I'm chief counsel for

1 NLADA. And I just want to reiterate our written
2 comments that were very supportive of this. We
3 appreciate LSC's sensitivity to the needs of the
4 program. And I think this new, revised rule will be
5 very beneficial both to the programs and to the client
6 community. So thank you.

7 CHAIRMAN KECKLER: Thank you, Robin. Are
8 there any more matters before the Committee considers
9 and acts on its recommendation to the Board?

10 (No response.)

11 CHAIRMAN KECKLER: If not, I'll entertain a
12 motion to recommend approval of this final rule to the
13 Board.

14 M O T I O N

15 MS. MIKVA: So moved.

16 CHAIRMAN KECKLER: Is there a second?

17 MR. LEVI: Second.

18 CHAIRMAN KECKLER: Thank you. All in favor?

19 (A chorus of ayes.)

20 CHAIRMAN KECKLER: Opposed?

21 (No response.)

22 CHAIRMAN KECKLER: The recommendation will be

1 given to the Board to approve the changes to 1628, as
2 outlined, as a final rule, to the Board.

3 Now turning to our next item, item 5 on the
4 agenda, we will consider and act on our proposed
5 rulemaking agenda for the upcoming year. And I will
6 turn it back over to Mr. Flagg.

7 MR. FLAGG: The Administrative Conference of
8 the United States has, on a number of occasions,
9 recommended that government agencies and other agencies
10 that promulgate rules regularly review those rules to
11 determine whether or not any should be modified,
12 rescinded, or whether additions or other changes should
13 be made.

14 I think, across the federal government,
15 adherence to that recommendation is uneven. But
16 happily, I think LSC is at the front of the line in
17 terms of both now regularly reviewing our regulations
18 to make these sorts of determinations, and actually
19 doing it on an annual basis, which is, I think, quite
20 ambitious. This is the second year we've done it. I
21 think this has been a significant initiative on
22 Charles' part, and I think it's a good one.

1 Within Management, this is something that a
2 number of offices across the Corporation look at and
3 give us their thoughts on an annual rulemaking agenda.

4 It is something we collaborate on with the Office of
5 the Inspector General since the IG obviously, from its
6 perspective, has a different perspective than we do.
7 And we value getting their input on this as well, and
8 they've shared that perspective with the Committee.

9 Within our office, Stephanie and Mark Freedman
10 have again taken the lead, and I will ask Stephanie now
11 to give you further details concerning our suggestions
12 of the rulemaking agenda for the next year.

13 MS. DAVIS: Thank you, Ron.

14 We have a couple of carryover items that we
15 mentioned, partly as an update but also because work on
16 them is going to continue into the 2015-2016 year. We
17 decided to go ahead and list them on the agenda.

18 Those are Part 1610.7 and 1627, which we just
19 spoke about, where we are working on the further notice
20 of proposed rulemaking; and the second one that's
21 carrying over from this year that is in process are the
22 revisions or the proposed revisions to Part 1630,

1 governing cost standards and procedures, and the
2 Property Administration and Management Manual --
3 Acquisition and Management Manual, sorry -- which we
4 will be discussing momentarily. So those two things
5 are in process.

6 We have a new item on the agenda. This was
7 proposed by the Office of Inspector General, and that
8 involves revisions to Part 1629, which requires
9 fidelity bonding of our recipients. The rule currently
10 only requires that recipients cover directors,
11 officers, employees, and agents who handle funds or
12 property of the grantee to protect against losses due
13 to fraud or dishonesty on the part of those
14 individuals.

15 OIG recommends revising the rule to require
16 all employees to be covered. They have had experiences
17 in the field where recipients have been able to recover
18 losses because they had fidelity bond coverage that
19 went beyond what our rule currently requires.

20 We consulted with the Office of Compliance and
21 Enforcement on this matter. They concurred in the
22 recommendation, and suggested increasing the bond

1 coverage. It's currently at \$50,000, \$50,000 minimum.

2 And this rule has not been updated in a while, so they
3 would like to make that minimum more contemporaneous or
4 more contemporary.

5 We also proposed revising the definition of
6 "fee-generating cases" in Part 1609. This definition
7 -- well, this rule -- prohibits recipients from
8 accepting fee-generating cases except in accordance
9 with guidelines promulgated by the Corporation. That's
10 part of the LSC Act. We have chosen to enact our
11 guidelines through regulation.

12 Part 1609 has been around since 1976, with
13 intermittent revisions to the definition. The
14 definition is, "Any case or matter which, if undertaken
15 on behalf of an eligible client by an attorney in
16 private practice, reasonably may be expected to result
17 in a fee for legal services from an award to a client
18 from public funds or from the opposing party."

19 The original rule stated that this definition
20 includes every situation in which an attorney
21 reasonably may expect to receive a fee for services
22 from any source except the client. But it doesn't go

1 any further, and it doesn't give any examples.

2 We have received a number of questions about
3 when a case becomes a fee-generating case for purposes
4 of the rule. Some recipients have been concerned that
5 they can't provide brief advice to individuals who come
6 in seeking services because it is a case for which a
7 fee might be expected, if it's a damages case in
8 landlord-tenant court or a case in which statutory
9 damages may be expected.

10 We would like to clear up this definition to
11 make it clearer about when a fee-generating case
12 becomes one so that our recipients are able to give the
13 appropriate amounts of legal assistance at the
14 appropriate times.

15 There may be other areas of Part 1609 that are
16 appropriate for review, and we'll take a look at those
17 as we're undergoing that rulemaking if the Committee
18 chooses to approve it as an item on the agenda.

19 CHAIRMAN KECKLER: Stephanie, just a quick
20 followup to that.

21 MS. DAVIS: Yes?

22 CHAIRMAN KECKLER: So we've had discussions on

1 occasion about the availability as an option to have
2 sliding scale fees. Would that be incorporated into
3 1609, or do you think that would be part of a different
4 rulemaking?

5 MS. DAVIS: That's an excellent question.
6 Part 1609 is really geared toward implementing the
7 guidelines that our recipients may use to accept
8 fee-generating cases. We could consider it as we're
9 looking at the definition because the definition of
10 fee-generating looks further, and specifically
11 anticipates fees from sources other than the client.
12 So that is something that we could consider. We hadn't
13 considered that aspect in particular.

14 MR. FLAGG: Yes. Putting to one side the
15 merits of the sliding scale, I do think it is a
16 qualitatively different question. And I think, given
17 the obvious gap between available legal resources and
18 legal needs, I do think we and others ought to be
19 looking at every option to fill that gap.

20 So the sliding scale idea which you reference
21 is something that certainly would be appropriate to
22 look at. But I do think that's a different question

1 and we ought to probably keep it separate from the
2 issue that's referenced here, which is really a much
3 narrower question.

4 CHAIRMAN KECKLER: Please continue.

5 MS. DAVIS: Sure. We have two more items
6 which are carryovers from this year's agenda that have
7 not been worked on. One is the proposal to adopt Touhy
8 regulations or FOIA regulations -- I'm sorry, not FOIA
9 -- governing how we respond to subpoenas that are
10 issued for Corporation records or Corporation testimony
11 in cases where LSC is not a party. So these would be
12 cases in which someone is possibly suing one of our
13 recipients for an action taken or because the recipient
14 refused their case.

15 The other one is Part 1603, and the rescission
16 and any preliminary research that needs to be done
17 prior to rescinding Part 1603. We had provided a
18 report on this rule, which implemented the statutory
19 requirement to ask state governors to create state
20 advisory councils to essentially provide oversight to
21 our recipients. We determined they weren't operating,
22 and the Committee voted to rescind this regulation as

1 time permits. So it remains on the agenda at the very
2 bottom of the list.

3 MR. FLAGG: I'd just like to make one other
4 comment about the overall list, in particular the last
5 two items and why they're still there and so forth.

6 As I said before, we take a look at all of our
7 regulations every year now, and we try to undertake
8 what I think is quite an ambitious rulemaking agenda,
9 given the size of our Management and how busy the
10 Committee and the Board are on other things. But we
11 also believe in transparency.

12 So we have laid out for you all of the
13 regulations which we think are worthy of consideration
14 for further action in the next year, and we include the
15 Touhy regulation and the Part 1603 regulation. And I
16 think, as Stephanie described and as the memo sets
17 forth, in a world of unlimited time and resources,
18 those ought to be addressed. But in Management's view,
19 they're not as pressing as the other four matters that
20 lie ahead of them on this agenda.

21 But they're there for you and the public to
22 take a look at, and if you have a different view as to

1 the prioritization, we'll follow what it is you'd like
2 to do.

3 CHAIRMAN KECKLER: Ron, this is a good list,
4 and I put my two cents in for that. But last year, I
5 think the document that we had for the rulemaking
6 agenda was a little different in that it had in it
7 things that Management hadn't necessarily taken a
8 favorable position on. It was just neutrally that
9 these things had come up.

10 Are we maintaining such a document? How do
11 these broader possible things on which Management
12 hasn't taken a position yet presented or compiled?

13 MR. FLAGG: I don't think there was any
14 intention for there to be a difference in that regard.

15 For example, I think Part 1630 and the PAMM are an
16 example of a regulation and a regulatory provision
17 where there are a couple of things where we think
18 Management does have a view that a change should be
19 made.

20 We may or may not know specifically what we
21 think the change should be, but we do have a sense that
22 a change should be considered. 1630 and the PAMM are

1 broad, quite significant sets of regulations, and we
2 recognize when we look at them, both this Committee and
3 the Board, our stakeholders may well have views about
4 how those provisions might be changed in ways that we
5 hadn't considered.

6 I think the intention is not to limit this
7 list to things where Management has a set idea about a
8 part that should be changed and how it should be
9 changed. I think our list is meant to encompass
10 exactly what you said, areas of our regulations in
11 which we think changes ought to be considered.

12 Again, in some instances the path forward, at
13 least in our eyes, is clear. For example, on 1628,
14 which the Committee just dealt with, it was pretty
15 clear we needed to make it more flexible so that all
16 extraordinary circumstances could be considered and not
17 just the three examples that were codified in the prior
18 version of the rule.

19 With regard to more complicated issues, we
20 don't pretend to have a final answer as to all those.
21 But the list, while it may appear to be different from
22 last year, we went into the exercise with the exact

1 same mindset.

2 CHAIRMAN KECKLER: I just want to say that
3 it's okay, I think, at some point, if people are making
4 other suggestions that Management doesn't think need to
5 be addressed or ought to be addressed in guidance or
6 whatever, for us to hear about those and for Management
7 to say that. That's fine, if those come up.

8 MR. FLAGG: Yes. And again, we get comments
9 from the IG about regulatory areas that the IG's office
10 believe merit change. On occasion we get suggestions
11 from our grantees or from NLADA or the ABA and others.

12 And certainly, where we get those sorts of
13 suggestions, we would share them with you regardless of
14 whether we think that it's something that we would
15 agree ought to go forward in a particular year.

16 CHAIRMAN KECKLER: Thanks.

17 Laurie?

18 MS. MIKVA: You sort of answered me, but to
19 follow up, is there some process by which stakeholders
20 or the IG makes these recommendations? And if not, is
21 it something we should consider?

22 MR. FLAGG: I think it's covered in our next

1 document, the protocol. That's covered. We have
2 tried, and I'm getting ahead of myself, to not make the
3 process formalistic, that is, not require that if you
4 think we should add something to our regulations or
5 change something in our regulations, that you fill out
6 a form in triplicate and send it with a self-addressed,
7 stamped envelope to a particular post office box.

8 We encourage our stakeholders, the public,
9 others in the building, if they have ideas in that
10 regard, to share them with us by letter, email. And
11 we've said that. And when we started this annual
12 review process, we reached out to the IG's office and
13 said that explicitly, that this is something we wanted
14 their input on, although I think the IG's office, on a
15 regular basis even before that, certainly let us know
16 when they thought a regulation was affecting their
17 functions in a way that suggested a change might be
18 required.

19 So we are encouraging of it. There's no
20 formal process. There's no formal timing. And I think
21 my experience, in the two years I've been General
22 Counsel, is certainly when people out in the field or

1 NLADA have identified a regulation which is causing
2 questions or concerns, that we hear about those.

3 Sometimes that has led to opinions regarding
4 the interpretation of a regulation. Sometimes that has
5 led to a program letter giving a further gloss on our
6 regulations. And sometimes it has led to a proposal to
7 amend the regulations or add to them or modify them.

8 So I think we're very encouraging of input
9 from anybody who's interested, and we'd prefer to keep
10 that process flexible. And I believe that's what our
11 protocol which we're going to be considering says.

12 CHAIRMAN KECKLER: I'll also point out one
13 other item about the protocol, which I think is correct
14 and I looked at this morning, is that our future plans
15 are to produce this document, this agenda document, for
16 the spring meeting. Is that right? So we'll be
17 looking at it again in three quarters rather than four?

18 MS. DAVIS: That's correct.

19 CHAIRMAN KECKLER: Julie?

20 MS. REISKIN: Just a thought. This is great.

21 And I don't know if there's any government
22 publications -- and I know that we're small and that,

1 for example, CMS probably can't review all of their
2 rules every year.

3 But having the process and then having a
4 reasonable way for stakeholders to be able to give
5 input in a reasonable way and in a process for looking
6 at stuff is really awesome. And I think if there's a
7 way that you guys could identify -- so how does that
8 help you as an agency, and does that make for better
9 government? Are you doing this just because it's the
10 cool, politically correct thing to do, or are you doing
11 it because there's a good reason to do it, which is
12 what I would suspect?

13 If there's a way to publish that somewhere in
14 terms of good governance for government agencies, I
15 think that would be great. That's really more from the
16 perspective of an outside advocate. But I just think
17 this is really good, and it's really good transparency,
18 and the kind of thing that I think citizens in general
19 want to see from government.

20 MR. FLAGG: Thanks. Again, I think the
21 Administrative Conference of the United States has been
22 quite encouraging of agencies to do this kind of

1 review. And you're right, obviously it's a little
2 easier for us to take a look at our hundred pages or so
3 in 45 CFR than it may be for HHS to look through its
4 three or four volumes of CFR to do that.

5 But the Administrative Conference has really
6 published quite a number of recommendations and
7 publicized their strong encouragement for this sort of
8 regular review so that you don't end up with
9 regulations that are on the books just because they've
10 always been there and nobody's given them much thought.

11 CHAIRMAN KECKLER: Julie, I just want to agree
12 with you. And I think that as we do this and now that
13 Ron is our representative to the Administrative
14 Conference, which we now have a representative, which I
15 think is good, I think if we are doing good things, and
16 I think we are, it's worth not hiding your light under
17 a bushel and letting them know. And that's a good
18 forum for that.

19 Are there other comments about the rulemaking
20 agenda?

21 (No response.)

22 CHAIRMAN KECKLER: If not, the way that we do

1 it, I think, is that the Committee simply approves the
2 agenda because it's a work plan for the Committee and
3 OLA rather than the Board per se. It's a motion to
4 approve the rulemaking agenda. Is that correct?

5 MR. FLAGG: Yes.

6 M O T I O N

7 MR. LEVI: So move.

8 CHAIRMAN KECKLER: Is there a second?

9 MS. MIKVA: Second.

10 CHAIRMAN KECKLER: All in favor?

11 (A chorus of ayes.)

12 CHAIRMAN KECKLER: The rulemaking agenda is
13 thereby approved.

14 We can now turn to our next item of business,
15 which is the rulemaking protocol already referred to.
16 Mr. Flagg?

17 MR. FLAGG: The Committee is likely familiar
18 with the fact that we've long had on our books a
19 rulemaking protocol. I say "likely" because, frankly,
20 the protocol had a one-size-fits-all quality to it and
21 prescribed a set of procedures, ideally, which we would
22 follow in rulemakings.

1 I think anybody who has read it in recent
2 years would have come to the conclusion that it was not
3 as helpful as it might be because, in some instances,
4 it prescribed more process than you'd want to use, such
5 as in the 1628 example that we've just seen. And in
6 other instances, it prescribed process which might not
7 make sense, given the specific circumstances of a
8 rulemaking.

9 Charles has been appropriately avid about
10 taking on that protocol and revising it to make it a
11 much more practical and helpful tool. And to his
12 credit, he rolled up his sleeves and drafted a new
13 protocol, for which I think we should all be grateful.

14 We've worked with Charles since that first
15 draft and have developed a couple of documents, which
16 Stephanie will elaborate on. But I do think they are a
17 significant step forward from what we had before
18 because they're much more practical.

19 They do not try to say in advance of every
20 possible rulemaking, no matter how big, no matter how
21 narrow, no matter how complicated or uncomplicated,
22 that you must follow the same 37 steps, which really

1 doesn't make any sense.

2 So thank you to Charles, and Stephanie, if you
3 would elaborate on the protocol. Mark Freedman of our
4 office, who's still on the phone, also has been helping
5 us think and write about these issues.

6 MS. DAVIS: Great. Thank you, Ron, and thanks
7 also to Charles, who this is kind of his baby. He
8 provided us with the first draft, which we then
9 developed into the two documents that you have in your
10 Board book, really because it took a slightly different
11 approach from the previous protocol, which is that we
12 made a more explicit statement about exactly what our
13 policy and our approach to rulemaking would be.

14 It makes a general statement about the fact
15 that we will consider costs and benefits, and that we
16 will also look at our rules; that we will engage in
17 regulatory review to determine when we think rule
18 changes are necessary. We think this is important, and
19 we've adopted it.

20 This is especially important for an agency
21 like us that has had rules that have been in place for
22 something like nearly 40 years; that a lot has changed

1 in the delivery of legal services since that time, and
2 so I think it especially benefits us to take the
3 opportunity to look back at some of the rules that were
4 written way back in the day and had different funding
5 limits, different expectations about who the providers
6 were and who the community was, and make those more
7 relevant and real, to answer Julie's question much
8 later, to make them more relevant and real to the
9 community that we're facing and that we're serving now.

10 Both the policy and the protocol, you'll see,
11 do reflect the fact that we intend to engage in
12 consultation and collaboration with OIG, our regulated
13 community, and other stakeholders in moving forward
14 with any of our future rulemaking. So that's all set
15 forward in the policy document.

16 The protocol, I don't think, really changes a
17 lot of the substance or what we wanted out of the
18 protocol, what the protocol accomplishes. But as Ron
19 said, it really increased our flexibility. It reduced
20 the rigidity of the existing protocol's step-by-step
21 internal recitation about when certain things get done,
22 and when drafts get passed off and can be approved or

1 sent back for redrafting.

2 We've cut down on a lot of that and really
3 tried to make it clear that we are following a general
4 framework in which we will provide certain documents to
5 the Board and when we will seek public input.

6 We've made the development of the rulemaking
7 agenda a part of the process. We've specifically
8 identified it as something that we will do annually and
9 when we will do it.

10 We have replaced, much to my delight, the
11 rulemaking options paper with the justification memo.
12 This memo is really, I think, more of something that
13 you would see in an agency, in which we're saying,
14 here's the issue that we're facing.

15 Here are the costs to leaving it as it is,
16 here are the costs to fixing it, and here are the
17 relative benefits. And after looking at them, we've
18 decided either to recommend that you undertake
19 rulemaking or to not undertake rulemaking if we've
20 decided that it doesn't make sense and there is no
21 benefit to doing it.

22 The justification memo description allows for

1 flexibility in how much analysis and how much meat
2 actually needs to be in the document because, for
3 example, something like the 1628 justification memo, if
4 we had been writing them at the time, might have looked
5 very different and would have looked very different
6 from, for example, the PAI rule justification memo.
7 They're very different issues.

8 CHAIRMAN KECKLER: Stephanie, just to pause,
9 if people want a good example of a justification
10 memorandum as contemplated by the rulemaking protocol,
11 they need only look at the one that OLA has prepared
12 for the PAMM right afterwards, starting on page 49.
13 That's a good example of what I think we were thinking.

14 MS. DAVIS: Yes. And at this point I just
15 want to acknowledge Peter Karalis, our law fellow,
16 again. I said, "Here, write a justification memo."
17 And he's like, "What do you want it to say?" I was
18 like, "I don't know. We've never done one." So he
19 did, I think, a very commendable job of putting
20 together the first draft of the justification memo.

21 The last thing that I think the protocol does
22 that's new and important is that it has a clear

1 statement about when during the regulatory process LSC
2 will accept comments and where we're going to keep
3 them, where we'll keep them as part of the
4 administrative record.

5 This is particularly important now that we're
6 doing so much e-rulemaking. Before, when you said you
7 can mail your comments and they have to be received by
8 the closing date, it was pretty easy to tell when you
9 had received a comment in a timely fashion. Now it's a
10 lot more flexible.

11 So what we're thinking about in the
12 administrative record is really when we received
13 comments, either here at a Board meeting or during a
14 formal rulemaking process, and that we want to be
15 transparent about when we're taking comments and where
16 we're putting them and what our consideration of them
17 is.

18 CHAIRMAN KECKLER: Thank you, Stephanie, and
19 thank you for your kind comments. This was a great
20 collaboration with OLA, and a pleasure to work with the
21 office.

22 One of the items that came up during the

1 process of collaboration was that we separated the
2 policy statement from the protocol, that is, the
3 specific details and so forth. There's a policy
4 statement in the front.

5 Originally, when I was doing this draft you
6 mentioned, it was all together. That was mostly
7 preamble-type materials to it. OLA separated them, and
8 I concluded that that was a good idea.

9 The reason that I just mention it for the
10 Committee's consideration for why we did that is that
11 the policy statement can be separated from the protocol
12 that way, as policy emphases and things come in
13 administration practice or as boards change and the
14 things that they want rulemaking to accomplish, they
15 can put that in a policy statement. So they can be
16 somewhat separable.

17 Then we have the actual process of generating
18 rules with Management, the Committee, the Board, and
19 the allocation of responsibilities there in the
20 protocol. And then we have the reasons we're doing it
21 and the overarching goals in a policy statement. So
22 that may change, while the protocol can be stabilized.

1 So that's the reason I thought that was a good idea
2 and the way it's presented.

3 Are there comments from the Committee or the
4 Board at this time? Laurie, then Father Pius.

5 MS. MIKVA: Thank you. I'm thinking that it's
6 certainly suggested, but a source for possible
7 rulemaking, it seems to me -- something that I would
8 like the Committee to be aware of -- that there's
9 regulations that are causing a more-than-ordinary
10 amount of comments, questions, concerns, in the field.

11 I'm wondering somehow to explicitly state it.
12 Again, that's something as the Committee I would like
13 to know if that happens. Often that is the basis, but
14 that's not explicitly said.

15 MR. FLAGG: Well, we can certainly add that.
16 It certainly is the basis, I think. Again, this agenda
17 seems to be almost seamless today, but in talking about
18 the rulemaking agenda for the coming year, Stephanie
19 made reference to changes to Part 1609, potential
20 changes to Part 1609, the fee-generating case
21 regulation.

22 The genesis of the suggestion that the

1 Committee and the Board consider changes to that rule
2 is precisely what you're talking about. We've just
3 gotten an enormous number of questions, and they're
4 questions where we within OLA, in answering the
5 questions, had to answer them guided by a regulation
6 that didn't say much.

7 We would prefer for the Board to speak at a
8 little greater length about what it intends in this
9 area so that it's easier for our grantees to interpret
10 and, frankly, easier for OLA to interpret. So that's
11 certainly done, and we can certainly make explicit
12 reference to that.

13 CHAIRMAN KECKLER: Laurie, it's a good point,
14 and I'll just draw your attention to page 34 in the
15 second paragraph. This is in the policy statement. I
16 took your point. It's phrased in maybe a diplomatic
17 way.

18 It says, "LSC anticipates the need for
19 assistance from the regulated community, which is in
20 the best position to highlight unanticipated problems
21 that have arisen from particular regulatory
22 provisions." And that means complaints. That means

1 that there are some things that the people will
2 complain about. I think we tried to phrase it in that
3 way, but that's what it means.

4 We can make it more explicit, but the idea
5 certainly is that we comment a lot about LSC being a
6 relatively small agency and an even smaller amount of
7 staff that can be devoted to regulatory issues.
8 There's absolutely reliance on the 4,000 lawyers that
9 are out there who are being regulated by them, and that
10 is a practical necessity as well as something that is
11 desirable.

12 Father Pius, then Martha.

13 FATHER PIUS: Thank you, and thank you for the
14 great work on this. I thought this was very good.

15 One thing that I might add -- this is so small
16 -- I think 45 of the Board book, 10 of the draft
17 document, when we talk about when we want to do further
18 proposed rules, one that we might just -- I think it's
19 our practice and I think we should include it
20 specifically -- but when the draft rule is
21 significantly changed, that it should go out for
22 another notice period.

1 If we want to address a problem, and the way
2 that we're addressing the problem has changed so
3 significantly, we should really send it out for another
4 draft. This has happened with other agencies of the
5 federal government recently, which I thought were very
6 bad governance, and I just don't want to fall into
7 quite the same trap.

8 CHAIRMAN KECKLER: You're absolutely right,
9 Father Pius. That of course is, IGs, our practice as
10 well as administrative law. And I just want to make --

11 FATHER PIUS: Yes. Keep it a document to go
12 forward, but people realize this is a good reason to do
13 a new notice.

14 CHAIRMAN KECKLER: I agree with that. So
15 you're thinking of putting in a sentence to that
16 effect?

17 FATHER PIUS: Yes. In that last paragraph on
18 page 10 carried over to page 11, I think.

19 CHAIRMAN KECKLER: Right. In that paragraph.
20 Can that be accomplished?

21 MR. FLAGG: I think we can just add a clause
22 to the second set.

1 CHAIRMAN KECKLER: Yes. I think that would
2 work.

3 MR. FLAGG: Where the proposed changes from
4 the NPRM are materially different and merit further
5 Public Comment.

6 CHAIRMAN KECKLER: Thank you.

7 Martha?

8 DEAN MINOW: I just want to add my
9 commendations. I thought this was remarkably in plain
10 English, first of all, and also very, very sensible.
11 And I think that we're reaching the time in our terms
12 when we're wondering what will our legacies be. And I
13 think this is a real legacy.

14 CHAIRMAN KECKLER: Thank you, Martha.

15 Gloria?

16 PROFESSOR VALENCIA-WEBER: I am appreciative
17 of Charles and OLA staff for producing this. And I'm
18 thinking about when I first came on the Board and we
19 began rulemaking.

20 I remember going on the website trying to find
21 what in fact is what we're seeing in front of us today,
22 and I find it very informative, straightforward, and

1 understandable -- for instance, introducing the idea
2 that I had not understood before that we could even
3 consider negotiated rulemaking. And that was not
4 expressed in whatever documents I discovered in that
5 first search.

6 At the time I thought maybe I just didn't look
7 for the right things. But it's quite clear that
8 perhaps we didn't have that at the time. So thank you
9 again.

10 CHAIRMAN KECKLER: Thank you, Gloria.

11 John?

12 MR. LEVI: I just want to add my thoughts and
13 say that, Charles, you did this without even telling
14 me.

15 CHAIRMAN KECKLER: I believe it had come up in
16 prior discussions of the possibility that it might
17 occur.

18 MR. LEVI: But I think it's just terrific.
19 It's a great example of good Board/staff relations, and
20 just thanks so much. You really helped. And boy, we
21 didn't know each other that well at the time, and how
22 would I have known that at that moment, when we decided

1 who would be Committee chairs, that asking you to be
2 the chair of this Committee would lead to such a nice,
3 great result? And you're doing a great job. Thanks.

4 CHAIRMAN KECKLER: Thank you so much, John.

5 Are there further questions or comments
6 regarding the protocol?

7 (No response.)

8 CHAIRMAN KECKLER: If not, I believe this is
9 ultimately a Board protocol. Right. So the Committee
10 would be asked to make a recommendation to the Board in
11 its motion.

12 So I'll now entertain a motion to recommend
13 approval of the policy statement and protocol, with the
14 correction Father Pius made. Is there such a motion?

15 M O T I O N

16 MR. LEVI: I'll make it or Laurie can make it.

17 CHAIRMAN KECKLER: If both of you are making
18 it, there's a motion and a second to recommend
19 adoption.

20 MS. MIKVA: Second.

21 CHAIRMAN KECKLER: All in favor?

22 (A chorus of ayes.)

1 CHAIRMAN KECKLER: Opposed?

2 (No response.)

3 CHAIRMAN KECKLER: Hearing no opposition, a
4 recommendation will be made to adopt this protocol and
5 policy statement, as amended.

6 We can now turn to the next item, which is to
7 initiate rulemaking for 45 CFR Part 1630. This was an
8 item that was on the rulemaking agenda, too, from the
9 prior time as well as this time. And without further
10 comment, I will turn it back over to Mr. Flagg.

11 MR. FLAGG: Thank you. Again, we've already
12 alluded to this proposed rulemaking on Part 1630 on the
13 Property Acquisition and Management Manual, referred to
14 hereafter as the PAMM. And this certainly, in the
15 spectrum of our rulemakings, is a more complicated one
16 just because there are a host of issues.

17 Again, as I said before, there were a number
18 of issues that, over time, both the IG's office and our
19 own office and others had identified as things we
20 thought the Committee and Board should take a look at.

21 And as we were then surveying the rule, we saw still
22 other issues that might be considered.

1 We recognized that both Part 1630 and the PAMM
2 are quite important to the operations of our grantees,
3 and we anticipate that they will have views not only on
4 the issues that we've identified, but on other related
5 issues.

6 So as Stephanie will describe in greater
7 detail, our request is that the Board authorize a
8 rulemaking, and that we kick off the rulemaking by
9 issuing an advance notice of proposed rulemaking in
10 which we would seek public input regarding these issues
11 in a preliminary way.

12 Then obviously, assuming we went forward with
13 some or all of these issues, we would be publishing for
14 comment a notice which would give the public additional
15 opportunities to comment on more specific proposals.

16 Stephanie, could you elaborate, please?

17 MS. DAVIS: Sure. Thank you. In the Board
18 book, you have the first ever justification memo, which
19 is presented with the summary of the recommendation and
20 the justification for rulemaking. I think this is one
21 where the costs and the benefits really are not even in
22 question.

1 There are areas of these rules that are in
2 conflict with current practice. The main reason that
3 we had proposed this item for the agenda last year was
4 that there is a very significant difference between the
5 way the rules state that recipients shall ask for prior
6 approval before purchasing property and the way that we
7 actually implement that rule. So we think that those
8 two things need to be brought into harmony.

9 Also, as we've been discussing the areas that
10 we think need to change or just discussing these rules
11 generally, we've identified at least six or seven areas
12 that need to be revised. Some of these have to do with
13 changes in prior approval limits, which is currently
14 set at \$10,000, which is a pretty low amount for a
15 contract for property, for personal property.

16 One of them has to do with the fact that
17 neither of these documents covers contracts for
18 services. Recipients can currently go out and make
19 very large contracts for services, and we have no real
20 oversight over whether or not that's a good transaction
21 to make with our funds because none of our rules and
22 regulations cover prior approval for services

1 contracts.

2 So we see taking a look at both of these
3 documents, updating rules that have not been updated in
4 a long time, making changes that are appropriate to
5 coordinate with the Office of Management and Budget's
6 new Uniform Grants Guidance, since some federal
7 policies have changed with regard to procurement and
8 we'd like to be consistent with those policies to the
9 extent that we can.

10 So having had our internal discussions about
11 things that we think should be revised -- and I'm sorry
12 to go back to one -- one is an issue that has been
13 identified by Management and the IG as being essential
14 to LSC's oversight responsibilities, and that has to do
15 with the fact that there is a five-year lookback period
16 for questioned costs.

17 At the current time, that five-year lookback
18 period is triggered by the issue of a notice of
19 questioned costs, which can come very late in the
20 investigative process or can come after a lot of
21 investigation has been done, and the costs were
22 incurred many years prior.

1 But our internal processes have eaten into a
2 lot of that time, and so we may have lost some years
3 prior to the lookback period that we could have
4 assessed questioned costs or that we could have
5 questioned the costs for.

6 So those are the areas that we are currently
7 discussing and currently looking t revise. We have in
8 OLA a two-part thought about how we would like to see
9 the ANPRM be drafted. One is to -- yes?

10 CHAIRMAN KECKLER: Let me pause you. One of
11 the things that is mentioned, I think, unless I spaced
12 out here -- it's mentioned in the justification
13 memorandum but you didn't cover it -- which I think is
14 quite important has to do with the intellectual
15 property issue.

16 You'll see that on page 54 of your Board book.

17 And I think we are generating a certain amount of
18 intellectual property. It's becoming more and more
19 important within our business model, to put it that
20 way. And so I think that's another good reason to do
21 this, is in there.

22 I would add, or at least offer up for

1 consideration, that when you're asking questions
2 whether we ought to have in the PAMM some particular --
3 eventually the PAMM or the regulation -- results from
4 some particular provisions for intellectual property as
5 distinct from personal property -- and it's certainly,
6 I think, correct to revise the PAMM to defend our
7 interests in any intellectual property.

8 But to the extent that specific provisions
9 need to be considered defending that interest and
10 regulating it, I think that's possibly also a worthy
11 topic of discussion.

12 MR. FLAGG: Yes. Look. I think this
13 regulation and the PAMM go back a long ways, when
14 operations of organizations and the economy looked a
15 lot different. Today, service contracts are really
16 much more significant than a contract to build a house
17 or build a building or contract for something tangible.

18 Obviously, intellectual property has become a
19 much more significant item than, again, things that you
20 can hold in your hand. So technology and the economy
21 have marched on, and our regulations have stayed in
22 place. And I think this rulemaking is an opportunity

1 for our regulations to catch up to the way business is
2 conducted today by our grantees as well as LSC.

3 CHAIRMAN KECKLER: All right, Stephanie.
4 Please continue.

5 MS. DAVIS: No. I appreciate your pointing
6 that out, as one of the tidbits that I had not
7 mentioned was that the PAMM was last revised in 2001,
8 and Part 1630 was last revised in 1997. So yes,
9 intellectual property development has changed quite a
10 lot in the intervening time.

11 There's also one last item, which is we have
12 been considering whether or not to adopt the PAMM as an
13 actual rule. I understand that a prior board was not
14 interested in making it a formal rule within the Code
15 of Federal Regulations because they considered it to be
16 an internal document governing internal procedures.

17 But it's really not if it's telling the
18 grantees how they need to seek prior approval and what
19 we expect with regard to property transactions. So
20 that is one of the items that we are thinking, whether
21 it should become an actual rule. And rather
22 conveniently, there is space available in 45 CFR

1 Part 1631 for the PAMM to move into if we decide to go
2 ahead and do that.

3 So we are currently thinking about a two-part
4 document. One is to seek stakeholder input on our
5 thoughts about what we think the revisions should look
6 like, including if we have a couple of options which we
7 think make more sense or this is the direction we're
8 headed; as well as to seek any specific thoughts that
9 they have on parts of the rule that we have not
10 identified that they think are difficult, that they
11 have suggestions for improving. Because this really is
12 a very technical nuts-and-bolts document about how they
13 run their shows, how they administer their grants, and
14 so we think that input is extremely valuable in this
15 particular rule.

16 So we are seeking the Board's recommendation,
17 or this Committee's recommendation to the Board, to
18 authorize rulemaking on Part 1630 and the PAMM.

19 CHAIRMAN KECKLER: Thanks, Stephanie.

20 Are there questions and comments from the
21 Committee or the Board? Julie?

22 MS. REISKIN: I guess a question and a

1 comment. The question is simple. If you're looking at
2 dollar numbers, because things change, is there a way
3 to put something in about regular increases consistent
4 with inflation or whatever?

5 So that you don't have the situation of going
6 forward -- and I don't know exactly how to do that, but
7 I know that it's done in other rules around eligibility
8 for things like FPL. You don't have to change the
9 number every year, or at least you don't have to change
10 the regulations when the number changes.

11 My comment is -- and I don't have an answer
12 for this; it's just an observation -- as our grantees
13 have multiple funding sources, and we want them to
14 have; we don't want them to rely just on us, we want
15 them to have private grants and all of that, and those
16 funding sources are going to have their guidelines and
17 their concerns and their ideas.

18 I think especially around intellectual
19 property, this could get really complicated. I don't
20 want to have a regulation that's holding our people
21 back and not doing something because a private funder
22 says, well, no. They want their piece.

1 You know? We don't want to have too much
2 conflicting stuff that inhibits innovation. We want to
3 protect our resource. That's a balance, and I'm not
4 saying I have the answer. I just think this is
5 complicated and really important, and I think it
6 deserves a lot of careful thought and deliberation.

7 CHAIRMAN KECKLER: Thank you, Julie. I think
8 that's true.

9 MR. FLAGG: Yes, and clearly, we're going to
10 look at all of these things carefully. Some of what
11 we're looking at is simply in what circumstances is a
12 grantee required to get approval for a large purchase.

13 And it doesn't make much sense that if you buy a
14 large truck for more than \$10,000, you need approval,
15 but if you buy software that's valued at \$150,000, you
16 don't require approval.

17 I'm not prejudging either of those, whether
18 approval should be required. But clearly, the fact
19 that one is tangible and one is not, we've probably
20 long since moved past the point where tangibility is
21 the basis on which these distinctions ought to be made.

22 But no, clearly this is an area where we're

1 going to be looking for input from our grantees and
2 others. And as you say, we are going to have to tread
3 carefully.

4 MS. DAVIS: Right. And just to build on what
5 Ron said, we look to the federal rules quite a lot
6 since many of our recipients are also getting federal
7 funds, and since we are in this quasi-agency status,
8 that it's helpful, where it makes sense for us to be
9 parallel to the federal rules, we do.

10 But you're absolutely right that that is the
11 kind of thing that we would want recipients to tell us,
12 whether there are things that we could do, whether
13 there are things in the existing rules that conflict
14 with their state rules or with other federal funders or
15 private funders' rules. So we are aware of those
16 things; even if we can't entirely accommodate them,
17 that we are aware of the universe in which we're
18 regulating.

19 CHAIRMAN KECKLER: Other comments? Father
20 Pius?

21 FATHER PIUS: Again, I think this is very good
22 and very helpful given some of the background. Two

1 things that just occurred, and you can incorporate this
2 to whatever you want. I'm just going to give you my
3 two impressions when I was reading this.

4 The first thing I thought to myself when I was
5 reading this is, why are these two things incorporated
6 together? Why not do these as separate documents? And
7 then as I read, I realized. I understood why. So when
8 you're drafting it, you might be a little more explicit
9 in the introduction as to why these things are
10 dependent and why we're doing it as a single
11 rulemaking, assuming we suggest that we do rulemaking,
12 rather than splitting them up.

13 The other thing, and it was just a question
14 that I had reading it, it's this written consent for
15 federal matching funds. I have no idea why we would
16 ever want to do that. If there's anything in the
17 history or background that suggests -- and maybe I'm
18 just not thinking of a good reason -- but if there's
19 anything suggesting why we imposed this requirement in
20 the past, please do include that in the discussion
21 because I can't think of a good reason. And maybe
22 there is one that I'm just not thinking of.

1 MS. DAVIS: Well, I can give you the five cent
2 version and save the longer -- this is like the trailer
3 for the movie.

4 FATHER PIUS: Perfect.

5 MS. DAVIS: But my understanding is that
6 because we are federally funded, primarily, many
7 statutes prevent other federal funds from being used to
8 match where there's a cost-sharing or matching
9 requirement.

10 So this was our way of trying to say, we don't
11 think we're federal funds for matching purposes, so we
12 want you, agency, to also agree to it so that our
13 recipients would not be caught in some question from
14 their other agency or some difficulty with some other
15 process.

16 What actually is a little bit stranger about
17 this that I didn't realize until I looked at it closely
18 is that the way the rule is currently written, we can
19 disallow those funds if a recipient matches without
20 having gotten this written consent. It's very odd.
21 We're fixing it. We want to fix it, and we will be
22 putting this history into the rule so that everyone

1 knows why it was and why we were looking --

2 FATHER PIUS: We don't have to go into it now.

3 But if you could go into some detail, assuming we
4 approve this, some detail of the background of this,
5 just explaining why it was set up this way as to give
6 me, at least, a little bit more background.

7 MS. DAVIS: Yes.

8 FATHER PIUS: But we don't have to go into it
9 now, so much appreciated.

10 CHAIRMAN KECKLER: Other questions, comments
11 on this?

12 (No response.)

13 CHAIRMAN KECKLER: If not, we can entertain a
14 motion to recommend to the Board that we initiate
15 rulemaking on 1630 and the PAMM.

16 M O T I O N

17 MS. MIKVA: So moved.

18 MR. LEVI: Second.

19 CHAIRMAN KECKLER: All in favor?

20 (A chorus of ayes.)

21 CHAIRMAN KECKLER: Opposed?

22 (No response.)

1 CHAIRMAN KECKLER: Hearing no opposition, a
2 recommendation will be forwarded to the Board to
3 initiate rulemaking on these subjects.

4 We can now turn to the next item, a report on
5 2015 grant assurances. And I turn that over to our
6 President, Jim Sandman.

7 PRESIDENT SANDMAN: Thank you, Charles. The
8 materials for this item start on page 57 of the Board
9 book.

10 Each year LSC requires recipients of basic
11 field grants to execute what we call grant assurances
12 that are prescribed by Management. I think that the
13 prescription of the grant assurances is an appropriate
14 Management function related to our grantmaking role
15 under our governance structure. Nevertheless, I wanted
16 to include them on the Committee's agenda for two
17 reasons.

18 One, you could fairly read some of the grant
19 assurances as imposing policy requirements that go
20 beyond what's in our regulations. And if the Committee
21 has views on those things, I wanted to be sure that
22 they have an opportunity to express them.

1 Second, we put the proposed grant assurances
2 out for public comment. We received comment, and we
3 made changes in the grant assurances in response to
4 those comments. I wanted to be sure that there's an
5 opportunity for further public comment on the changes
6 we made in response to the comments that we received
7 before proceeding.

8 There are four changes in the grant assurances
9 this year from last. The first is in grant assurance
10 number 2. It is what I'd regard as a technical
11 amendment, to conform to a change that we made in
12 Section 1640 of our regulations earlier this year.

13 Second, we've added a new grant assurance,
14 grant assurance 13, that requires a recipient to have
15 both a conflict of interest policy and a whistleblower
16 policy. I think things are now at the point in the
17 world of nonprofit governance where having these
18 policies is a good practice. I wouldn't even call it a
19 best practice. I think not having these policies is a
20 deficiency in nonprofit governance.

21 There's been a focus on these policies at
22 least since Sarbanes-Oxley was adopted in 2002, I

1 believe. So I think we're just recognizing where good
2 nonprofit governance has gone in recent years.

3 The next change is in grant assurance 14,
4 which forbids a grantee from taking any disciplinary or
5 retaliatory action against a person for good faith
6 cooperation in the provision of information to LSC,
7 including the IG, or any other appropriate authority.

8 Finally, we have expanded the group of
9 employees of a grantee as to whom the grantee must
10 provide notice of certain problems to LSC to include
11 any employee with control over grantee finances or any
12 employee with financial management responsibilities.
13 If there are serious problems with people exercising
14 those roles in a grantee, we think that we should be
15 informed about that promptly.

16 The materials in the Board book explain our
17 process, explain the reasons for the changes that we've
18 made, explain the comments that we received and what
19 changes, if any, we made in response to those comments.

20 I'd be happy to answer questions from the
21 Committee.

22 CHAIRMAN KECKLER: Julie?

1 MS. REISKIN: I totally agree about the
2 nonprofit practices, and I don't know any funder that
3 would give money any more to someone that doesn't have
4 those policies, the whistleblower and the conflict of
5 interest. That's what I'm talking about.

6 My question is on training. What does that
7 mean? I guess I would hope that lawyers and paralegals
8 would know how to read a -- do they actually have to
9 have a class or what?

10 PRESIDENT SANDMAN: We haven't gone into
11 detail in prescribing the details of the training that
12 needs to be offered. The grant assurance requires that
13 the policies be distributed and that there be training
14 on them.

15 Not everybody subject to these policies is
16 necessarily going to be a lawyer or a paralegal. They
17 could be administrative personnel, financial people,
18 and particularly for a grantee that hasn't had these
19 policies before, I wouldn't want to just say, put them
20 out there and let everybody read them and make what
21 they might of them.

22 But I think we can appropriately leave to our

1 grantees some discretion in the details of how they
2 execute the training requirement.

3 MS. REISKIN: Make sure people understand them
4 but don't say how they have to do that?

5 PRESIDENT SANDMAN: Yes.

6 MS. REISKIN: You don't have to do this now.
7 At some point I need someone to explain to me what the
8 difference is between acting on reasonable belief and
9 good faith because it sounds the same to me.

10 PRESIDENT SANDMAN: That's a good question.
11 Good faith is the term that we use in our own policies,
12 LSC's own policies. I think it has a well-understood
13 meaning. I can't sit here and tell you there is a huge
14 substantive difference between them.

15 MS. MIKVA: I think good faith is more
16 subjective, and reasonable is more objective. And we
17 are opting for the subjective.

18 PRESIDENT SANDMAN: I think that's fair.

19 CHAIRMAN KECKLER: Also, if you want to
20 elaborate on that a little bit, Julie, functionally the
21 argument of the grant assurance, as it says, is, "The
22 proposed change is intended to provide stronger

1 protection."

2 So it seems like we're intending something of
3 a different standard. It's maybe a clearer standard
4 within the law since we have case law on good faith as
5 opposed to appropriate. I'm not sure how that would be
6 interpreted.

7 So the clarity, I think, is a reason to adopt
8 that standard in itself. But the intention appears to
9 be that it provides a stronger protection in some way.

10 PRESIDENT SANDMAN: That's correct.

11 CHAIRMAN KECKLER: Martha?

12 DEAN MINOW: I don't know if this is the right
13 time, but at some point will we talk about the comments
14 from NLADA?

15 CHAIRMAN KECKLER: Regarding these grant
16 assurances? That seems like this is the right time.

17 FATHER PIUS: Just a point that's so small.
18 There's a tiny grammatical thing on number 16 which I
19 will email to you separately. It's just very picayune,
20 so it'll just come separately.

21 PRESIDENT SANDMAN: Thank you, Father Pius.
22 And thank you for handling it that way.

1 (Laughter.)

2 CHAIRMAN KECKLER: What comments regarding
3 NLADA in specific are a matter of concern?

4 DEAN MINOW: Well, on page 80 and beyond,
5 there's a comment about the new paragraph 13, the
6 comment on the new paragraph 14, comment on the new
7 paragraph 17.

8 PRESIDENT SANDMAN: Well, I can respond to the
9 comments on grant assurance 13. I think that NLADA's
10 position was that there is already a legal requirement
11 imposed by the Internal Revenue Service that a
12 nonprofit have a conflict of interest policy and a
13 whistleblower policy. We don't read the IRS's
14 requirements as imposing that.

15 Form 990 asks, yes or no, do you have a
16 whistleblower policy? Do you have a conflict policy?
17 If you check no, there isn't any enforcement action
18 taken against you. I regard their asking that question
19 simply as requiring public disclosure to stakeholders
20 as to whether you have those indicia of good governance
21 or not, but without the imposition of a formal legal
22 requirement.

1 So we thought that it was necessary and not
2 superfluous to add these requirements.

3 CHAIRMAN KECKLER: Are there further
4 questions? Laurie?

5 MS. MIKVA: Are we going to hear from them
6 again? I think that was one of the thoughts. Would
7 this be the proper time?

8 CHAIRMAN KECKLER: Well, we will hear from
9 them again because we have a public comment scheduled
10 for this action item. We have a specific --

11 FATHER PIUS: Is there an action item? We
12 don't approve anything, do we? There's no action item
13 on this, is there?

14 CHAIRMAN KECKLER: No. We don't have an
15 action item. But on this agenda item, we have a public
16 comment after Management's presentation. So we can
17 respond further at that time.

18 Jim, did you have further comments?

19 PRESIDENT SANDMAN: I don't.

20 CHAIRMAN KECKLER: Are there further questions
21 or comments from the Board or Committee?

22 (No response.)

1 CHAIRMAN KECKLER: If not, I will then turn it
2 to this public comment.

3 MS. MURPHY: Thank you. Once again, Robin
4 Murphy on behalf of NLADA as chief counsel.

5 In terms of the IRS requirement, we don't
6 dispute with LSC that it has to be listed on the 990.
7 Our point was basically that it is such a basic, having
8 whistleblower and conflict of interest policies is such
9 a basic part of board governance, that it does not have
10 to be included as a grant assurance.

11 If somebody didn't have a policy in place,
12 that that could be rectified very quickly with LSC
13 requiring the program to have a policy in place and not
14 have them subjected to having their grant summarily
15 revoked.

16 That was basically our point. It's not that
17 we objected in any way. And we do support having
18 whistleblower policies and conflict of interest
19 policies as a part of good board governance. So we're
20 not going to give further public comment on that.

21 As to 17, we made some comments, and I think
22 the changes resolve our concerns. So once again, I

1 would commend LSC for taking our comments seriously and
2 incorporating them into the grant assurances, which LSC
3 is not required to do. So very many appreciated on the
4 part of the programs.

5 Then we come to the last comment, which is
6 whether the two standards, whether it's reasonable
7 belief or good faith. And the concern that our members
8 have and the concern of NLADA is that -- and we're not
9 privy to this information; I think LSC and the OIG are
10 in a much better position to know what is going on with
11 the hotline referrals -- we are aware, and some
12 programs have expressed to us, that they feel that
13 reports have been made about them, particularly
14 management, when an employee who's being appropriately
15 or legitimately subject to discipline or some kind of
16 management action because they are not doing what they
17 should be doing on the job have been subjected to
18 whistleblowing.

19 I did notice in the OIG report, out of 46
20 whistleblowing instances, it looks like 23 of them,
21 half of them, were not investigated. But it's just
22 conjecture on my part. I don't know specifically why

1 they were not investigated.

2 So our concern was really to have, as Board
3 Member Mikva points out, a standard that employed some
4 kind of objective standard so that if an employee was
5 really just disgruntled and had not made -- it's very
6 hard to prove good faith. There you have to get into
7 the mind of the person.

8 The Sarbanes-Oxley standard really requires
9 both an objective and subjective standard so that the
10 person has some kind of reasonable belief that what
11 they're reporting on is a problem. It's fine-tuning.

12 But really, that was the motivation, not an
13 objection that employees shouldn't be protected from
14 retaliation, but also that employers and the
15 management, in their efforts to run their programs
16 appropriately, also are not prevented from taking
17 action when the hotline report can just serve as a
18 protection against retaliation. And I'll stop there.

19 CHAIRMAN KECKLER: Thank you.

20 Well, are there further thoughts from the
21 Committee, Board, or Management regarding -- now we
22 have this issue of whether -- a classical legal issue,

1 whether we should have a reasonable belief or a good
2 faith standard. Are there --

3 PRESIDENT SANDMAN: I would like to add one
4 thing. I think it's important to recognize what the
5 trigger is for this protection. It's protection for:
6 "Any person for good faith cooperation with, or the
7 appropriate release of information to, LSC, including
8 the OIG or other entity authorized to receive such
9 cooperation or information."

10 So it relates to cooperation and release of
11 appropriate information to LSC done in good faith. I
12 think that provides adequate protection for the
13 whistleblower, but also does provide protection for the
14 grantees, too, that this is a limited category of
15 protection and it's only for -- a good faith standard
16 is very common in policies like this. It's LSC's own
17 policy.

18 CHAIRMAN KECKLER: Julie?

19 MS. REISKIN: So does that mean that it would
20 only apply if there was already an investigation, and
21 LSC or the OIG came to someone like a bookkeeper or
22 whatever and said, give us information, and they did,

1 and it wouldn't apply to an unsolicited hotline call?

2 PRESIDENT SANDMAN: I don't read it that way
3 because when it says "appropriate release of
4 information," I think --

5 MS. REISKIN: That could be --

6 PRESIDENT SANDMAN: -- that could be at the
7 initiative of the whistleblower and not simply in
8 response to a request from LSC.

9 MS. REISKIN: Another question would be, I
10 know when we were defining retaliation in terms of a
11 Medicaid issue, we said if there was -- I'm trying to
12 remember how it was -- but if someone's already in
13 trouble, then they don't get necessarily that
14 protection, like you can't call a hotline after you've
15 been written up and expect protection as a
16 whistleblower.

17 Is there anything like that? This is where I
18 think not being a lawyer makes things simpler because I
19 still don't totally understand the difference.

20 PRESIDENT SANDMAN: I think the circumstances
21 might bear on whether the employee is acting in good
22 faith or not. That would be something that you would

1 take into account in assessing good faith.

2 CHAIRMAN KECKLER: Gloria?

3 PROFESSOR VALENCIA-WEBER: Hearing this
4 discussion, this would allow an employee calling the
5 hotline; then on followup from the OIG and whoever
6 else, that then there is actual behavior for the
7 whistleblower that is cooperating with and providing
8 the information that's needed for appropriate inquiry
9 and followup. It can't just be run and put something
10 on the hotline and that's sufficient.

11 CHAIRMAN KECKLER: I'm trying to think of --
12 it's much easier to answer your kind of question,
13 Julie, when you get into concrete examples. But it's
14 hard to come up with exact concrete examples on the one
15 hand where somebody had a reasonable belief versus good
16 faith and put those forward.

17 A lot of times questions like this come up, in
18 my experience, in separate contexts where something is
19 acting in good faith. They really think there's a
20 problem. But their information is bad. And so they
21 operate on rumors, and they operate on misperceptions
22 of things. That can be a concern.

1 But I think that's a distinction that I
2 usually see with these two different standards. But
3 that's a choice. It would be better if people didn't
4 act on rumors and if they went and cleared things up so
5 that they didn't misperceive things. But maybe they
6 can still be acting in good faith.

7 Are there other thoughts on this?

8 (No response.)

9 CHAIRMAN KECKLER: We're not required to take
10 any particular action. This is informational on our
11 nature. And if we're not going to take any action,
12 we'll have Management proceed with its grant
13 assurances.

14 MS. MURPHY: Thank you for your consideration.

15 CHAIRMAN KECKLER: Thank you.

16 The final substantive item that we have to
17 consider this afternoon is a consider and act, and so
18 we are required to do that, but also an update on
19 getting new data on agricultural and migrant
20 farmworkers and proceeding with that project. I will
21 turn that back over to Mr. Flagg.

22 //

1 MR. FLAGG: Thank you. And I'm joined, I
2 hope, telephonically by Bristow Hardin and my colleague
3 in OLA, Mark Freedman, both of whom have devoted a good
4 deal of time and effort to this.

5 Let me just briefly remind the Committee where
6 we think we're going, where we intend to go, and where
7 we are. The LSC annually grants not only basic field
8 grants, but in addition to some other grants, we issue
9 grants referred to a migrant grants. That's a
10 misnomer, which I'll get to in a moment, but they
11 basically serve farmworkers. And we've done that since
12 1974.

13 The data on which these so-called migrant
14 grants are based go back 25 years. And not only do
15 they go back 25 years, but the count that was
16 undertaken 25 years ago on which we continue to rely
17 was a count of migrant workers, when in fact from 1974
18 -- actually, before 1974 and subsequent to 1974 -- the
19 agricultural workers served by those funds are beyond
20 migrants.

21 That is, you have working side by side with
22 migrants seasonal workers, and they have the same

1 characteristics, by and large, as migrants do, which
2 create the need for these separate funds and make
3 basically separate migrant services a more effective
4 and efficient way to serve those populations.

5 In any event, that was the impetus for this
6 undertaking, to both update the data and have the count
7 of the people being served match the people being
8 served and not some other population.

9 The challenge in all of this is, unlike the
10 census data that we use for field data, there is no
11 single count of agricultural workers such as the census
12 data provides, much less a count of agricultural
13 workers who are likely to be eligible for our services.

14 So we have a need to rely on Department of
15 Labor data that have pretty good data on agricultural
16 workers, and then make adjustments to those data based
17 on other data which reflect the likelihood that people
18 will be eligible for our services so that we are
19 allocating money based on current data, based on actual
20 agricultural workers who are likely to be eligible for
21 our services. That's the intent.

22 We contracted with the Department of Labor to

1 do this count. It's fairly complicated. It involves
2 bringing together a number of databases. We published,
3 after this Committee recommended and the Board
4 approved, comments on the new set of data that the
5 Department of Labor and its panel of experts that they
6 had put together for this endeavor recommended.

7 We received public comments on those data in
8 April. You may recall that the data produced
9 substantial changes on a state-by-state basis as to the
10 numbers of agricultural workers in various states and
11 the percentage of grants in each state that would be
12 allocated to farmworkers on one hand or general field
13 programs on the other.

14 So this actually does have an impact in the
15 real world, and obviously, as a result, is of
16 appropriate concern both on the part of field programs
17 and on our programs serving agricultural workers.

18 The comments, we received a large number of
19 comments. They're summarized in the document that is
20 -- it's not paginated here. I think it must be at
21 about page 87 of your Board books.

22 The comments were severalfold. They included

1 comments about that some of the underlying algorithms
2 that underlay the data produced by the Department of
3 Labor had not been included in the presentations that
4 we made public at the time.

5 Another set of significant comments, we
6 thought, is that certain adjustments made -- we had
7 state-by-state data with regard to agricultural
8 workers, but the adjustments to the data to try to
9 identify people who are likely eligible for LSC
10 services are generally not available on a
11 state-by-state basis but only by regions.

12 The Department of Labor grouped states
13 together by region, and there were comments that
14 certain states were not appropriately grouped together
15 because they didn't share -- the agricultural workers
16 in those states did not share common characteristics,
17 and that there was a better grouping of states. And at
18 least several comments along those lines struck us as
19 substantial and deserving of further examination.

20 So in light of the comments we received in
21 April, we have done several things. One, we've entered
22 into a new contract with the Department of Labor --

1 again, who we're relying for these data -- to examine
2 these comments and provide us with Department of Labor
3 and their expert panel's thoughts on those comments.

4 Two, we've asked the Department of Labor to
5 make publicly available the underlying formulas and
6 algorithms that underlay the data we published earlier
7 in the year, and I anticipate that that will be done.

8 We anticipate going forward, after we consult
9 further with the Department of Labor, and publishing
10 the formula and algorithms that underlay the original
11 data, considering what the Department of Labor has to
12 say, considering what the dozen or so commenters had to
13 say, and putting out a new proposal.

14 It's not going to be radically different, but
15 adjusting the data that we previously published as
16 appropriate, and then asking this Committee to take a
17 look at that, and if you agree, ask for further public
18 comments just on the changes that we propose to make.

19 Now, when we asked for comments originally,
20 the three topics we asked for comments on were that we
21 implement the new data for calculation of the grants
22 beginning in January 2016; that we phase in the funding

1 changes over a two-year period, 50 percent of the
2 change being effective in 2016 and full implementation
3 occurring in 2017; and that these agriculture worker
4 data, like the census data for the general population,
5 be updated every three years on the same cycle as the
6 Census Bureau data is updated.

7 I think all of the commenters agreed we should
8 definitely rely on updated data as soon as possible. I
9 think they, as well as we, want to make sure that to
10 the extent you can get something this complicated
11 right, that we attempt to do that.

12 So our proposal is that we, as I say, consult
13 with the Department of Labor, get additional thoughts
14 and data from them as appropriate; make any changes to
15 the previously published data that are appropriate,
16 given the comments we receive from the public and the
17 feedback we get back from the Department of Labor; and
18 seek further comment on any changes we propose to make.

19 That's going to take a bit more time. It will
20 not be possible to use these data for the 2016 grants,
21 which that grantmaking process is underway right now.
22 We do anticipate that we should be able to have these

1 new data available for the 2017 grants, and I believe
2 that's what we will be doing.

3 So that's a summary of where we are. And what
4 we're asking here is that the notice that appears in
5 your Board books be published with the anticipation
6 being -- the notice basically providing the status
7 update I just provided, and notice that the new data
8 will not be applicable for the 2016 grants.

9 Then I anticipate that we will come back to
10 you with a more substantive notice, which will set
11 forth additional data and additional changes, again
12 based on the public input we've gotten.

13 CHAIRMAN KECKLER: John?

14 MR. LEVI: Well, I just want to make sure
15 there isn't any confusion out there because when I read
16 the sentence, "Based on this review and any other
17 relevant information, LSC will publish for comment a
18 revised data proposal for implementation beginning in
19 January 2017."

20 So I don't know whether that meant you're
21 going to publish the data in 2017. You're going to
22 enforce the rule. You're going to have new numbers for

1 2017. And so I think we need to actually revise this
2 sentence to be clear as to what we mean. I think what
3 you just said was clear, but the way it's written to me
4 is somewhat unclear.

5 MR. FLAGG: Yes. I think it should read
6 something along the lines, "LSC will publish for
7 comment any revised data and a proposal that such data
8 be used for implementation beginning in January 2017."

9 So we anticipate publishing --

10 MR. LEVI: Well, before 2017.

11 MR. FLAGG: Oh, yes.

12 MR. LEVI: You're planning to implement for
13 the year 2017 --

14 MR. FLAGG: Correct.

15 MR. LEVI: -- and I'm not even sure -- take it
16 back for a minute, fix it up, and anyway, based on
17 that, I'll -- but I think it's confusing otherwise.
18 And I don't want to have any of our grantees trying to
19 use that as a basis for saying, well, that wasn't clear
20 to us, that you were actually going to put the thing
21 into place in 2017.

22 MR. FLAGG: Yes. Well, let the record be

1 clear because the intention is for these data to be
2 used to allocate and distribute the grants covering the
3 agricultural programs effective 2017. Now, we're not
4 prejudging anything.

5 We have to look and see what the Department of
6 Labor says. We have already taken a close look at what
7 the public comments we received have said. But that's
8 our intention. I think everybody agrees these grants
9 should be based on the best and most current data we
10 can possibly get, and that's our intention.

11 CHAIRMAN KECKLER: So if I can revise a little
12 bit on the fly here, that very last sentence -- I'm
13 just using the document that everybody should have
14 received at their desk -- I would say, "LSC will
15 publish for comment any revised data and a proposal for
16 implementation." Full stop. Period. "Implementation
17 would begin in January 2017."

18 Is that clearer?

19 FATHER PIUS: I think it needs to be two
20 sentences. I think that makes it clearer.

21 MR. FLAGG: And we would make that change on
22 page 5 of the document as well as on page 1 at the

1 bottom of the summary.

2 CHAIRMAN KECKLER: Right. And also on page 5,
3 as long as we're editing, you'll see that the first
4 full paragraph says, "On July 18th." It's the 16th
5 today. So the 16th, the Committee approved.

6 FATHER PIUS: Assuming.

7 CHAIRMAN KECKLER: Yes. Assuming.

8 Are there other thoughts from the Committee or
9 the Board on this?

10 MR. MADDOX: I'm just wondering, can somebody
11 remind me how much of our basic field grants is
12 allocated to the agricultural subgroup?

13 PROFESSOR VALENCIA-WEBER: There are some
14 figures given in the Finance Committee report from --

15 MR. FLAGG: Yes. Thank you, Gloria. On page
16 149 of the Board book, this is talking about the May
17 2015 financial reports. The basic field program budget
18 is \$343 million, and the grant expenses include migrant
19 grants amounting to \$11,313,619.

20 PRESIDENT SANDMAN: And that's in effect the
21 full year number. It's not just the number for the
22 fraction of the year through May.

1 CHAIRMAN KECKLER: Gloria?

2 PROFESSOR VALENCIA-WEBER: I appreciate the
3 thoughtfulness and thoroughness that you dealing with
4 how to properly generate the information and what will
5 be the implementation. This is very slippery data to
6 try to get a handle on it.

7 In agricultural states, even within the state
8 data collection system, monitoring and actually
9 calculating what is going on with agricultural workers
10 is quite slippery, and then further trying to figure
11 out among those who will be eligible by the federal
12 poverty standards. Most would be.

13 But just the whole cycle of seasonal work
14 makes life complicated because, for instance, most of
15 the northeast region's apples are picked by particular
16 sets of workers brought in from the Caribbean under
17 bona fide legal contract work for that seasonal work.
18 It's not the same story as you go further west and
19 northwest, so a lot of slippage there about the
20 numbers, and how does one in fact count them and for
21 what purpose.

22 MR. FLAGG: Thank you, Gloria. I think that's

1 absolutely true, and I think it underscores the point
2 that we all have to keep in mind. The standard here is
3 not perfection. We will never reach perfection, given
4 the level of complexity here. The concern here is that
5 we're very far from perfection using 25-year-old data
6 where the count was based on one population, with a
7 much larger population being served.

8 So I think, and I believe, most if not all of
9 the commenters agreed that the direction we're going
10 with the new data is a better direction. They're more
11 likely to be an accurate depiction of the current
12 situation.

13 I think some of the comments have pointed out
14 some aspects of this difficult count that we need to
15 take into consideration, and we're doing that. And the
16 aim here is to come up with the best count we possibly
17 can, recognizing that, exactly as you've described,
18 it's not a science.

19 CHAIRMAN KECKLER: In light of that, Ron, when
20 are you planning on getting these materials -- there's
21 a general timeline. We don't specify when we're going
22 to put something else out. When do you anticipate

1 that?

2 MR. FLAGG: If Bristow is on the line --
3 because the other aspect of this that makes it a little
4 more difficult than any of the other rulemakings we've
5 talked about today is that when we talk about 1610 or
6 1627 or even 1630 and the PAMM, where there's a lot of
7 complicated issues -- but we'll do outreach to our
8 grantees for comments, most of the information we can
9 fairly analyze in-house.

10 For this one we are completely reliant on our
11 expert agricultural population counters at the
12 Department of Labor. And with that lengthy windup,
13 Bristow, can you illuminate about what the timeline
14 looks like?

15 MR. HARDIN: Well, I hate to say it, but at
16 this point it's uncertain in that we still haven't
17 gotten a schedule back from DOL about what their
18 progress will be, the steps they will be taking, and
19 when they expect those steps to be finished, in time
20 for us to then evaluate and provide any other further
21 questions we may have before we can continue with the
22 process you've described.

1 I would expect and hope that we will certainly
2 have the information we require to do part of that task
3 by the end of August. But at this point, we can't say
4 because we are in communication with DOL to find out a
5 more precise timeline.

6 MR. FLAGG: But again, the aim is having this
7 by the end of the year. And this is not something
8 we're going to be studying for the next -- obviously we
9 want this to go into effect for the 2017 grants, which
10 means by this time next year we want to have this
11 process finalized.

12 So we are aiming to get this process completed
13 so that they can be effective for the 2017 grants. And
14 that includes time for us to analyze what the
15 Department of Labor gives us; time for us to present to
16 you those analyses and those data; time for the public
17 to comment on it.

18 So we are pushing the Department of Labor as
19 hard as we can to help us out and to help us out
20 expeditiously. And I think Bristow is in contact with
21 the Department of Labor on a weekly, if not more
22 frequent, basis to accomplish that.

1 MR. LEVI: Well, I think you hear the concern
2 of the Committee and the Board on this. And I don't
3 think we need to have a Committee meeting, but I do
4 think it would be helpful if you would keep us apprised
5 by email or somehow what the scheduling is evolving
6 with the Department in the coming weeks.

7 MR. FLAGG: Sure. I think certainly before
8 our next formal meeting, we should have a better sense
9 from the Department of Labor what their timeline is.
10 And that will give us a better sense, and we can --

11 MR. LEVI: Well, since the next formal meeting
12 is after August, that would certainly be a problem if
13 you haven't heard anything from them.

14 MR. FLAGG: Oh, no. As I say, Bristow is in
15 close touch with the Department of Labor. Again,
16 without boring you with too much detail, they are
17 separately contracting this process out to a group of
18 outside experts, who are taking their data and
19 analyzing it. So there are a lot of people involved.

20 MR. LEVI: Which adds even more to my concern.
21 And therefore, I would like you to make sure that the
22 Committee is kept abreast of this. Yes. Thank you.

1 CHAIRMAN KECKLER: Thank you, John. And not
2 to throw any monkey wrenches in that -- hopefully this
3 is actually helpful -- but based on the prior round of
4 experience that we've had now with this, are we
5 planning on having the Department of Labor, as part of
6 their process, also disclose any current new algorithms
7 and new methodologies as part of it? Because once they
8 do it, then people are going to say, well, how did they
9 do it? And we should have that all come with their
10 work product, their methods, as well.

11 MR. FLAGG: Yes. And further, it hasn't been
12 clear, but we considered a large n of issues in putting
13 the original data together. Most of those issues, most
14 aspects on which those data were developed, are not
15 controverted.

16 So we're talking about a handful of issues
17 with respect to those data. Any changes will be only
18 with respect to those handful of issues, which have a
19 potential significant impact on the data but are
20 discrete.

21 When we ask for public comment, we're not
22 going to say, let's just start over; comment on

1 whatever you want. We will be directing people's
2 attention to specific changes, and the intention will
3 be to bring this to an efficient resolution.

4 I think you know that we move forward in an
5 efficient way, and we're moving forward in an efficient
6 way in this proceeding as well. It just involves more
7 actors than we typically have in our rulemakings.

8 CHAIRMAN KECKLER: If there aren't any further
9 comments, we now have a scheduled public comment on
10 this item, which I'll also roll into item number 10,
11 which is other public comment. So public comment on
12 this issue as well as public comment of any other kind
13 is now open. Oh, I'm sorry -- well, I can't do that
14 yet. But just public comment on this.

15 (No response.)

16 CHAIRMAN KECKLER: Seeing no public comment,
17 if there's no further discussion of it, now it's
18 contemplated within the document that the Committee
19 recommends to the Board publication of this notice. Is
20 that correct?

21 MR. FLAGG: Yes. And again, the main purpose
22 of this notice is to let the public know that the data

1 that were previously published for public comment will
2 not be used to allocate the 2016 grants because those
3 data would have effected a substantial change in the
4 allocation of those dollars, and we feel it's important
5 that we put the public on notice that no, those data
6 you've previously seen will not be used to allocate and
7 distribute the 2016 data.

8 We contemplate an additional notice, hopefully
9 shortly, which we do believe and intend to affect the
10 2017 allocation and distribution, and that will be a
11 separate notice. So the main purpose of this notice is
12 to let people know where we stand.

13 MR. LEVI: This notice will move it, as it's
14 going to be prospectively cleaned up?

15 CHAIRMAN KECKLER: Yes. That's correct. So
16 now I'll entertain a motion to recommend to the Board
17 publication of this notice, as amended.

18 M O T I O N

19 MS. MIKVA: So moved.

20 MR. LEVI: Yes. Second.

21 CHAIRMAN KECKLER: All in favor?

22 (A chorus of ayes.)

1 CHAIRMAN KECKLER: Opposed?

2 (No response.)

3 CHAIRMAN KECKLER: Hearing no opposition, the
4 Committee will forward that recommendation with the
5 amendments to the notice noted. We will now turn to
6 any other public comment on items for today.

7 (No response.)

8 CHAIRMAN KECKLER: Hearing no public comment,
9 I ask if there's any other business to bring before the
10 Committee.

11 (No response.)

12 CHAIRMAN KECKLER: Seeing none, I will now
13 entertain a motion to adjourn the meeting.

14 M O T I O N

15 MR. LEVI: So move.

16 MS. MIKVA: Second.

17 CHAIRMAN KECKLER: All in favor?

18 (A chorus of ayes.)

19 CHAIRMAN KECKLER: The Committee is adjourned.

20 Thank you.

21 (Whereupon, at 2:59 p.m., the Committee was
22 adjourned.) * * * * *