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LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS & REGULATIONS COMMITTEE

Friday, October 27, 2006

4:03 p.m.

The Charleston Marriott Town Center
200 Lee Street East
Charleston, West Virginia

COMMITTEE MEMBERS PRESENT:

Lillian BeVier, Acting Chairman
David Hall
Michael D. McKay
Bernice Phillips
Jonann C. Chiles

BOARD MEMBERS PRESENT:

Herbert S. Garten
Sarah Singleton
Frank B. Strickland, ex officio

1 STAFF AND PUBLIC PRESENT:

2 Helaine M. Barnett, LSC President

David L. Richardson, Treasurer and Comptroller

3 Patricia D. Batie, Manager of Board Operations

Charles Jeffress, Chief Administrative Officer

4 Karen M. Dozier, Executive Assistant to the President

Mattie Cohan, Senior Assistant General Counsel

5 Thomas Polgar, Director, Office of Government Relations
and Public Affairs

6 Karen Sarjeant, Vice President for Programs and
Compliance

7 Richard (Kirt) West, Inspector General

Laurie Tarantowicz, Assistant Inspector General and

8 Legal Counsel

Joel Gallay, Special Assistant to the Inspector General

9 David Maddox, Assistant Inspector General for Resource
Management

10 Ronald (Dutch) Merryman, Office of the Inspector
General

11

Linda Perle, Center for Law & Social Policy (CLASP)

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

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

2 CHAIRMAN BeVIER (Acting): I'm Lillian BeVier,
3 and I'm going to call the meeting to order in place of
4 our chairman, Tom Meites, who finds himself now driving
5 in a very cheap rental car from Pittsburgh to
6 Charleston, West Virginia, having not been able to take
7 off from Pittsburgh.

8 So he took off in a car, and he says he's
9 pedaling as fast as he can. So he does hope to be here
10 maybe for the reception, and certainly for dinner. So
11 we look forward to seeing him. But in his stead, I'm a
12 poor substitute, but I will do my best.

13 The first item is to approve the agenda. Do I
14 hear a motion to approve the agenda?

15 M O T I O N

16 MR. HALL: So moved.

17 MS. BeVIER: Second?

18 MS. CHILES: Second.

19 CHAIRMAN BeVIER: All in favor.

20 (A chorus of ayes.)

21 CHAIRMAN BeVIER: Thank you.

22 About the minutes of the committee's July 28th

1 meeting, I invite a motion.

2 M O T I O N

3 MS. PHILLIPS: So moved.

4 CHAIRMAN BeVIER: Second?

5 MS. CHILES: Second.

6 CHAIRMAN BeVIER: All in favor.

7 (A chorus of ayes.)

8 CHAIRMAN BeVIER: Thank you.

9 Now, the first item on the agenda is -- the
10 third item on the agenda, excuse me, is to consider and
11 act on the Draft Final Rule revising 45 CFR Part 1624,
12 Prohibition Against Discrimination on the Basis of
13 Handicap. Mattie Cohan is going to be giving us the
14 staff report. Mattie?

15 MS. COHAN: Thank you. For the record, my
16 name is Mattie Cohan. And 1624, the board of directors
17 had us publish a notice of proposed rulemaking revising
18 our regulation on Prohibition Against Discrimination on
19 the Basis of Disability.

20 That NPRM was published in May 12, 2006. The
21 comment period closed on June 26th. LSC received five
22 timely and one late comment on the notice of proposed

1 rulemaking. I will also note that in accordance with
2 the rulemaking protocol, the draft final rule that's in
3 your books has also been posted to the LSC website.

4 And in kind of comment on the draft final
5 rule, one of the commenters, the Wayne State University
6 Disability Law Clinic, sent some additional follow-up
7 comments to Chairman Meites, taking issue with some of
8 the things in the draft final rule. That I guess I'll
9 get to when I get to that part of the presentation.

10 I will say as a starting point, management is
11 only proposing one change to what the draft -- what the
12 NPRM proposed, and that's -- there was a suggestion
13 that where we had used the phrase "auxiliary aids" in
14 the original rule and we proposed to change it to
15 "auxiliary aids and/or other assistive technologies,"
16 there was one place where we missed it in the proposed
17 rule. And so we thought that was a good comment, so
18 we've gone back to fix that.

19 CHAIRMAN BeVIER: They should all be so
20 straightforward.

21 MS. COHAN: Yes. Otherwise, I thought unless
22 anybody wants me to do otherwise, I will just walk

1 quickly through section by section and discuss some of
2 the comments we received and management's proposals
3 relating thereto. All of this is discussed at length.
4 All of the comments that we received, not counting that
5 last comment that we received from Wayne State
6 University the draft final rule, all of the comments on
7 the notice of proposed rulemaking are discussed at
8 length in the preamble to the draft final rule.

9 Section 1624.1, Purpose: LSC proposed
10 changing the terms "handicapped persons" as they appear
11 in this section to "persons with disabilities." In
12 addition, LSC proposed adding language to make
13 reference to the ADA -- not incorporating the ADA,
14 Americans with Disabilities Act, but making reference
15 to its existence out there, and that our grantees may
16 have responsibilities under the ADA that are separate
17 from their responsibilities under 1624, which is what
18 LSC's responsible for.

19 We received no comments opposing those
20 changes. Several comments -- actually, I think just
21 about every comment approved the change in the use of
22 the terminology. And so the draft final rule proposes

1 to go ahead with that.

2 As I go through, every place where -- each
3 other provision where we change that term, I'm not
4 going to repeat myself. I'm just going to go with
5 that.

6 Section 1624.2, Application: LSC didn't
7 actually propose any changes to this section. We
8 received no comments suggesting any changes to this
9 section. Accordingly, the draft final rule continues
10 to recommend no changes.

11 Definitions: LSC, in addition to the
12 "handicapped person/person with disability," proposed
13 to add a definition of the term "auxiliary aids and/or
14 other assistive technologies," and to use the single
15 term "auxiliary aids and/or other assistive
16 technologies" throughout the regulation.

17 We received a couple of comments supporting
18 our proposed definition. We did receive one comment
19 suggesting that LSC failed to define the term, and
20 proposing that LSC use the definition found in Title 3
21 of the Americans with Disabilities Act. I think that
22 commenter just missed the fact that we actually do have

1 a definition proposed -- that we did propose a
2 definition, and it's management's position that
3 the -- well, there's actually not a definition of that
4 "auxiliary services" in Title 3 of the act, but there
5 is one in the Department of Justice regulations.

6 Went back and reviewed that definition, and it
7 is not in any way inconsistent with the definition that
8 we proposed. Since no other commenters commented or
9 suggested any change to the definition as proposed,
10 management believes that the definition as proposed is
11 sufficient and does not need to be changed, and
12 recommends adopting it as proposed.

13 The Equal Employment Opportunity Commission
14 suggested that LSC cross-reference some of its
15 regulations definitions of "reasonable accommodation,"
16 "undue hardship," and "direct threat" as those terms
17 are used in the proposed Employment section, 1624.6.

18 Management agreed that the EEOC's definition
19 of those terms are appropriate for use in the context
20 of the proposed Employment section. Rather than simply
21 cross-referencing the definitions, management took the
22 position that it was probably more useful for our

1 grantees to actually have the text of the definitions
2 reprinted in the preamble so that there's a handy
3 reference without having to have EEOC's regulations at
4 the ready. Otherwise, we didn't receive any other
5 comments on proposed definitions.

6 Section 1624.4, Discrimination Prohibited:
7 This is the basic section which discriminates against
8 prohibition in the provision of services on the basis
9 of disability. We received several comments supporting
10 the proposed changes to the section. This was the
11 section where somebody pointed out we missed the
12 "and/or other assistive technologies," so we're
13 proposing to fix that.

14 We also received one comment suggesting that
15 this section as proposed was inconsistent with the ADA
16 and misstates the law. The draft final rule, the
17 preamble, explains that the provision being objected to
18 wasn't based on the ADA; it was actually adopted in
19 1979. So it can't be a misstatement of the ADA,
20 whatever else it may be.

21 But I think more importantly, from a
22 substantive basis, the prohibition as written does not

1 contradict -- doesn't impose any responsibility which
2 contradicts any responsibilities recipients have on the
3 ADA. It doesn't create a situation where compliance
4 with our regulation will force somebody to be not in
5 compliance with the ADA.

6 In fact, if they're in compliance with the
7 ADA, they're pretty much guaranteed being in compliance
8 with our regulation. As such, it does not appear
9 necessary or desirable for LSC to have to change its
10 long-standing requirement in this matter.

11 1624.5, Accessibility of Legal Services:

12 Again, this is -- the only two really notable changes
13 that LSC proposed in here was the terminology change,
14 but not a substantive change. We did get one comment
15 suggesting that LSC add a subsection to require
16 recipients to make reasonable modifications in
17 policies, practices, and procedures to avoid engaging
18 in discrimination on the basis of disability.

19 While management agrees that recipients should
20 not in fact have policies, practices, and procedures
21 which have the effect of discriminating on the basis of
22 disability, and furthermore, that management does

1 expect that as part of a recipient's obligation to be
2 in compliance with 1624 is to ensure that it does not
3 have policies, practices, or procedures which result in
4 discrimination on the basis of disability.

5 However, because of that, management doesn't
6 believe it's necessary to create an additional specific
7 requirement saying that, that adding a substantive
8 requirement saying that they have to "ensure that their
9 policies" is really duplicative of the underlying
10 requirement that they not engage in disability-based
11 discrimination. So, as a result, the draft rule does
12 not include this suggested new subsection.

13 Section 1624.6, Employment: LSC received a
14 comment from the EEOC suggesting that the proposed
15 provision appears to be modeled after a 1980 Department
16 of Justice regulation, and suggesting as an alternative
17 that LSC add a cross-reference to the EEOC's regulation
18 and include language embodied in the joint 1994
19 EEOC/DOJ rule regarding coordination between Section
20 504 of the Rehabilitation Act, which applies to
21 recipients of federal financial assistance, and the
22 Americans with Disabilities Act.

1 Management believes that the current
2 requirements, as embodied in the NPRM, continue to be
3 appropriate. The current DOJ rules implementing
4 Section 504 with respect to employment are essentially
5 the same as LSC's current and proposed rules
6 implementing Section 504 with respect to employment.

7 The final rule that the EEOC cited in its
8 comment is not a substitute for those provisions. That
9 regulation actually talks to coordination of
10 investigations of complaints. And rather than
11 addressing that in this section, there is -- LSC has a
12 separate section on enforcement that was proposed, and
13 believes that that section in enforcement covers kind
14 of the same ground in a way appropriate for LSC and its
15 grantees.

16 Finally, Section 1624.7 -- there's my segue to
17 the section on enforcement -- the NPRM proposed a new
18 section talking about enforcement to explicate and set
19 and codify the current policy that has been in place
20 for a number of years.

21 Currently, as the policy goes, when we
22 receive -- we received very few comments; I will add

1 that in -- very few complaints of violation of 1624 as
2 it stands now, either from an employment context and
3 particularly from a services provided context.

4 When those complaints do come in, OCE will let
5 the person who is complaining know that, you know,
6 there are limits to what we can do -- we can't obtain
7 injunctive relief for an individual -- and recommending
8 to them that they contact their -- either EEOC or the
9 Department of Justice, as appropriate, and/or their
10 state or local agencies, who may be able to provide
11 them with injunctive relief and get them a remedy
12 that's more appropriate for them.

13 And then otherwise, take the complaint under
14 consideration and act on it as OCE and the Corporation
15 sees fit, sometimes deferring to -- if there's another
16 investigation going on, deferring till the results of
17 that investigation are made, and of course, including
18 the discretion to directly and immediately investigate
19 any complaint that comes in without having to wait for
20 another agency if that's what OCE and the Corporation
21 feels is appropriate in that case. So that's what we
22 propose to make part of the regulation.

1 We had comments that agreed with that approach
2 and comments that disagreed with that approach. One
3 commenter agreed with the substance of the policy, but
4 suggested that the language as proposed wasn't
5 sufficiently clear or definitive, and suggested some
6 alternate language.

7 Management was not comfortable with the
8 suggested alternate language because, while it was more
9 specific and more definitive, it also basically
10 provided for less discretion on the Corporation's part
11 to be able to pursue its enforcement policies. And
12 management believes that the exercise of discretion was
13 more important in this particular case than the level
14 of specificity being suggested.

15 Another commenter kind of went the other way
16 around and urged us not to codify the current policy at
17 all, but rather adopt a new policy, under which LSC
18 would commit to investigating and processing all
19 complaints directly without referral or reference to
20 any other agency's investigation. That commenter
21 argued that LSC's expertise in legal services made it
22 uniquely qualified to do so, and that LSC has the

1 better leverage to force recipients to provide specific
2 relief.

3 I think there's a long discussion in the draft
4 final rule about LSC's limited resources and limited
5 ability to obtain injunctive relief that management
6 believes mitigates against such a policy. Further, the
7 current policy has been in place for some time and
8 seems to be functioning well for LSC for recipients as
9 well as complainants and, as is practicable, within LSC
10 authority. Therefore, management does not recommend
11 adopting this commenter's suggestion, and instead
12 adopting the language as proposed.

13 We received another comment on this section
14 suggesting that LSC create a tracking system to flag
15 repeat offenders, engage in increased efforts to
16 represent individuals, and that the language of the
17 regulation allow for LSC to retain, for the purpose of
18 enforcement, cases at its discretion.

19 I'll kind of start with that last one. The
20 language as proposed in fact expressly does create that
21 use of discretion to retain jurisdiction and
22 investigate immediately any complaints. So I think we

1 already proposed that, and I think the commenter just
2 missed that.

3 With respect to creating a tracking system to
4 flag repeat offenders, we'd like to point out that we
5 don't really think we have repeat offenders. I mean,
6 that's been one of the experiences when we talk to the
7 enforcement folks, is that they don't find a lot.

8 We don't get a lot of complaints. They don't
9 find a lot of complaints. But we're confident in the
10 Corporation's general overall enforcement capacity to
11 find repeat offenders, if they're out there, and to
12 deal with them properly.

13 And finally, with respect to the suggestion
14 that we engage in increased efforts to represent
15 individuals with disabilities, LSC can't do that. That
16 is not something that's within LSC's purview. So even
17 if we wanted to, we are without legal authority to
18 represent individuals.

19 And that's part of the reason that the
20 enforcement policy has grown the way it has, is because
21 we can't represent individuals and get them injunctive
22 relief that way, that they're better off oftentimes

1 pursuing another avenue, even if they're pursuing it in
2 conjunction with a complaint they've filed with LSC.

3 The last thing I will say was that the NPRM
4 proposed eliminating a self-evaluation requirement.
5 And that's where this last comment comes into play, the
6 one that we received on the draft final rule.

7 There is a current -- in the current
8 regulation, there is a requirement that grantees
9 conduct self-evaluations by I believe it was January 1,
10 1980. It was adopted in accordance with the basic
11 Section 504 enforcement regulations, as other agencies
12 were adopting them, to require these federal grantees
13 to engage in these self-evaluations because this was a
14 brand-new requirement for them. It was something that
15 in 1979/1980, many federal grantees weren't really
16 doing anything in this area. This was a new
17 requirement, so they were required to do a
18 self-evaluation.

19 However, the regulations don't
20 necessarily -- the other agencies' regulations don't
21 necessarily, as ours did not, contain any sort of
22 continuing specific self-evaluation requirement. To

1 the extent that there isn't a continuing
2 self-evaluation requirement, the current regulation as
3 it reads is in fact obsolete. And so management
4 proposed getting rid of it.

5 Management did not propose -- in the NPRM that
6 was published did not propose a new or a continuing
7 self-evaluation requirement, on the theory that since
8 grantees are required to be in compliance, if they need
9 to do some self-evaluation to make sure that they're in
10 continuing compliance, they need to go ahead and do
11 that for themselves.

12 I don't think it's anybody's idea that the
13 grantees want to sit around and wait for LSC to come
14 whack them over the head, but that adding an additional
15 administrative requirement that they do this isn't
16 really going to serve a good purpose.

17 Most of our other regulations, presumably they
18 have to do some sort of self-evaluation to make sure
19 they're in compliance. We don't have continuing
20 self-evaluation requirements in all of our other
21 regulations. But the grantees do what they need to do
22 to make sure they're in compliance, and if they do find

1 themselves in noncompliance either through, you know, a
2 program visit or complaint investigation, that they
3 take the steps they need to take to remedy that
4 particular noncompliance.

5 So that's why we had proposed just eliminating
6 the requirement and not including it. There were some
7 comments, and they are in fact -- we did
8 receive -- Wayne State had in fact originally in their
9 comments opposed just eliminating that section of the
10 regulation.

11 And there's a long discussion, which I have
12 just summarized very briefly here, in the preamble to
13 the regulation about why management is not proposing to
14 include that. And I think, having read quickly through
15 the comments that came in, I don't think management has
16 any reason to change its recommendation on this
17 particular point.

18 The one comment I will specifically respond to
19 right now, rather than saying, I think we already said
20 this, is the reference to the DOJ regulations, where it
21 says the assertion that DOJ's regulations don't contain
22 any specific self-evaluation requirement. The comment

1 says this assertion is incorrect.

2 Well, the particular piece of the DOJ
3 regulations has to do -- that they cite has to do with
4 agency implementing regulations and saying that when
5 you implement Section 504, you have to have a
6 self-evaluation requirement. Well, that was at the
7 outset that they did, and at the outset our regulation
8 did contain a self-evaluation requirement similar to
9 that.

10 The substantive portion of DOJ's rules that
11 are applicable to grantees that kind of -- you know,
12 the DOJ mirror of 1624 don't have an explicit
13 self-evaluation, ongoing self-evaluation, requirement
14 in them.

15 They may well -- the Department of Justice may
16 well figure that grantees have to engage in
17 self-evaluation to make sure that they are continuing
18 to be in compliance, but it's not a separate regulatory
19 requirement.

20 And I think one of the situations that
21 management did not want to set up by adopting a
22 separate evaluation requirement -- and this is

1 discussed in the preamble -- is to have a grantee who
2 is, you know, the model of compliance.

3 Their facilities are 100 percent
4 disability-friendly. They have every publication they
5 have ever made also in Braille. They have a sign
6 language interpreter on staff. You name it, they've
7 got it. And one year by the deadline comes and goes,
8 they don't get their self-evaluation in.

9 Now they're in violation of Part 1624, which
10 is not really a situation we thought was necessary to
11 set up, to try to create. Given that the requirement
12 is there that they not be out of compliance, we thought
13 that that's basically sufficient.

14 That is a very quick rundown of the major
15 comments we received and the draft proposed rule -- I
16 mean, the draft final rule. So I'm happy to answer any
17 questions you have before you discuss it.

18 CHAIRMAN BeVIER: Mattie, I have one question
19 that I hope I'm not going to be too embarrassed for
20 having asked. But you refer too the preamble often,
21 and I take it by that what you mean is the notice of
22 proposed rulemaking, the draft final rule?

1 MS. COHAN: Right. The preamble is the
2 portion of any either notice of proposed rulemaking or
3 final rule that's all of the supplementary information.
4 In your book, the preamble is what runs from page 28
5 through 51.

6 CHAIRMAN BeVIER: Sure. Okay.

7 MS. COHAN: That's the preamble to the rule.
8 It's the explanatory information that addresses the
9 comments and tells everybody basically what the agency
10 was thinking when it was in adopting.

11 CHAIRMAN BeVIER: If you don't understand what
12 we said, here's what we meant?

13 MS. COHAN: Right.

14 CHAIRMAN BeVIER: Okay. With respect -- can I
15 just ask a question with respect to the Wayne State
16 request?

17 MS. COHAN: Yeah.

18 CHAIRMAN BeVIER: In very brief terms, the way
19 I understand management's response to that is as
20 follows. We have very few complaints about
21 noncompliance with this provision anyway. To add a
22 self-evaluation requirement would be costly and it

1 would probably not produce sufficient benefits in terms
2 of additional compliance to justify the additional
3 costs imposed on grantees.

4 Is that a fair summary, or am I missing
5 something?

6 MS. COHAN: No. I think that's a very fair
7 summary.

8 CHAIRMAN BeVIER: Okay. Other questions from
9 board members? Committee members?

10 MR. McKAY: Madam Chair?

11 CHAIRMAN BeVIER: Yes?

12 MR. McKAY: Mattie, and I've made certain
13 assumptions over the months and years when I've heard
14 you say management believes or management recommends.
15 Clearly, you have an intimate knowledge of this. Who's
16 management? I mean, is it you? Is it Vic? Is it
17 Charles? Is it Helaine?

18 MS. COHAN: Management is the -- when I say
19 that, I mean the executive team.

20 MR. McKAY: Right. And I understand that.
21 But to what extent then -- I mean, how is this done?
22 Do you come back and make a presentation to the

1 executive team?

2 MS. COHAN: The last few rules, what has
3 happened is I read all the comments. I come up with
4 the draft final rule. I'll be candid to say that in
5 this case, the draft final rule reflects my judgment.

6 The executive team obviously agreed with it.
7 And if the executive team had not been in agreement
8 with it, they would have been not at all shy about
9 telling me where they disagreed and having the final
10 rule reflect -- the draft final rule reflect their
11 judgment as different from mine.

12 In this case, you know, I send up the product.
13 They read it. they review it. They decide -- see if
14 they agree with the policy calls that I've put in the
15 draft. And if they do, it goes on. If they don't, you
16 know, we talk about, you know, well, why did you do
17 this? Why didn't you do that? And eventually, you
18 know, they're the executive team. What they recommend
19 is what we recommend.

20 MR. MCKAY: Of course. And so -- and this is
21 Vic, Charles, and Helaine?

22 MS. COHAN: Vic, Charles, Helaine, Karen, and

1 Tom Polgar.

2 MR. MCKAY: And Tom Polgar. All right. Yes.
3 And in this last time around, it was a memo that went
4 up? There wasn't a meeting or anything like that?

5 MS. COHAN: It was the draft final rule.

6 MR. MCKAY: Okay. Thank you.

7 CHAIRMAN BeVIER: Is this something that OCE
8 checks for when they go to a compliance visit, on a
9 compliance visit, do you know?

10 MS. COHAN: I'm not the right person to ask
11 that.

12 MS. SARJEANT: When OCE visits and when OPP
13 visits, they do look to see what the accessibility of
14 facilities is.

15 CHAIRMAN BeVIER: Thank you.

16 MR. HALL: A question.

17 CHAIRMAN BeVIER: Yes?

18 MR. HALL: Mattie, just for my own
19 clarification, you were going over 1624.4, the
20 discrimination one, which is at the heart of it. You
21 mentioned that one of the commentators felt that as it
22 is drafted, it is inconsistent with the ADA. And you

1 said that's not true.

2 And I don't recall who the commentator was.

3 But is this someone who just didn't understand the ADA?

4 I mean, what was the essence of their argument as to
5 why our rule would make someone in noncompliance with
6 the ADA, which is the kind of fundamental thing here?

7 MS. COHAN: I'm not -- well, I can't get in
8 the head of the commenter.

9 MR. HALL: Surely.

10 MS. COHAN: I will say that there were a
11 number of places where I thought there was a misreading
12 of the regulation or of what we proposed --

13 MR. HALL: A misreading of our --

14 MS. COHAN: Of our regulation and what we
15 proposed. Those were all from the same commenter, who
16 is someone who has an extensive history with the ADA.
17 And I am not going to disparage their credentials or
18 their experience with the Americans with Disabilities
19 Act.

20 I think there was a little -- perhaps a bit of
21 a disconnect about where our regulations originally
22 came from and what we were intending to do. I don't

1 know if -- I mean, the NPRM makes clear that LSC is not
2 making any attempt to bring the ADA into these
3 regulations, and that there is a difference -- to the
4 extent that there's a difference between the ADA and
5 our regulations, it's LSC's job to enforce our
6 regulations. It's not LSC's job to enforce the
7 Americans with Disabilities Act and make our grantees
8 who may have responsibilities under the Americans with
9 Disabilities Act answer to LSC for that act.

10 I think our process was trying to make sure
11 that nothing in our regulation was contradictory to the
12 act so that we would not be placing our grantees in a
13 situation where, if they had to comply with our act,
14 they would have to not comply with the ADA. And I'm
15 confident that nothing in our regulation does that.

16 MR. HALL: Okay. Good.

17 CHAIRMAN BeVIER: Sarah?

18 MS. SINGLETON: Is there any way to briefly
19 say what conduct this regulation would require that's
20 not already required by the ADA or Section 504?

21 MS. COHAN: I don't think there's anything
22 that this regulation requires that is not already

1 required, certainly by Section 504. Because these
2 regulations are intended to important Section 504.

3 MS. SINGLETON: So does it cover any people
4 that are not covered by 504 or the ADA, or any programs
5 that are not already covered by those laws?

6 MS. COHAN: Not that I'm aware of. I got the
7 impression that the commenter was concerned -- there
8 are a few places where -- and this is getting into some
9 fairly nitty-gritty about the comment and the
10 regulation.

11 The commenter talked about the fact that we
12 have a requirement that applies to grantees of 15
13 employees or more. And he said, well, that's not the
14 same as the ADA. That's true. But there was a reason
15 that -- the reason that that 15-employee limit was
16 originally adopted in 1979, which predates the ADA, had
17 a good justification then, and management believes that
18 that same justification is still appropriate. And it
19 doesn't put anybody not in compliance.

20 And so even if there may be a smaller grantee
21 which might have responsibilities under the ADA that
22 they don't have under our rule, well, then, so be it.

1 Grantees have responsibilities under all sorts of laws
2 that they don't have under our rules and, you know,
3 that's just the way it is. They answer lots of
4 different funders. They answer to state and local
5 laws, you know.

6 CHAIRMAN BeVIER: Other comments or questions
7 from members of the board?

8 (No response.)

9 CHAIRMAN BeVIER: Are there public comments?
10 That is next on the agenda. Is there any public
11 comment on this proposed final rule?

12 (No response.)

13 CHAIRMAN BeVIER: Thank you, Mattie.

14 I think the task for the committee at this
15 point then is to decide whether to recommend the
16 adoption of this proposed final rule to the full board.

17 MS. COHAN: That's correct. And management's
18 recommendation is that you do so.

19 CHAIRMAN BeVIER: And management recommends
20 that we propose the adoption of this regulation to the
21 full board tomorrow. Is there a motion to that effect?

22

1 M O T I O N

2 MR. MCKAY: So moved.

3 CHAIRMAN BeVIER: A second?

4 MR. HALL: Second.

5 CHAIRMAN BeVIER: All in favor?

6 (A chorus of ayes.)

7 CHAIRMAN BeVIER: Opposed?

8 (No response.)

9 CHAIRMAN BeVIER: Thank you. Thanks for your
10 presentation, Mattie. That is what will be done.

11 The next item on the agenda is to consider and
12 act on a draft final rule revising 45 CFR Part 1621,
13 Client Grievance Procedure. And I understand there's a
14 change in our thought about what we ought to do with
15 this since the agenda was adopted.

16 MS. COHAN: It is my understanding that a
17 clients group, through NLADA -- and if somebody wants
18 to -- you know, if I say anything wrong, correct me,
19 please -- would like to have some additional time to
20 comment.

21 Go for it.

22 MR. SAUNDERS: Thank you. Madam Chair, I'm

1 Don Saunders. I'm the civil director of NLADA. And we
2 would appreciate, if it meets with the desires of the
3 committee, if you would postpone final action on this
4 rule until your January meeting.

5 We certainly appreciate the staff's very hard
6 work to get us to this point. We participated fully in
7 both regulatory workshops. And certainly a number of
8 clients have spoken to us about it.

9 We filed an extensive comment. But between
10 the time between the regulatory workshops and the final
11 draft, it's been brought to our attention that leaders
12 in the client community would like some more time and
13 would like NLADA to help educate them with regard to
14 this particular reg and to give them an opportunity
15 potentially to file supplemental comment.

16 1621, just because of the nature of the
17 regulation, is particularly important and critical to
18 the client community. This regulation has been in
19 place since 1977. We did hear at the regulatory
20 workshop that it's generally working well. We didn't
21 hear a lot of problems with the regulation.

22 So we would respectfully ask this committee,

1 Madam Chair, if it would, to defer action until the
2 January meeting. We do intend -- at our annual
3 conference in a couple weeks, we will have significant
4 client participation, to take this issue up directly
5 with them, to spend a great deal of time educating them
6 about what the proposal is and seeking input from them
7 that, if appropriate, we would bring back to the
8 committee.

9 CHAIRMAN BeVIER: Thank you, Mr. Saunders. I
10 appreciate that.

11 I think it's important for the committee and
12 the board to be apprised of the fact that if we decide
13 to postpone the adoptions of this -- or the
14 consideration of this rule or to postpone recommending
15 its adoption to the board, we are going to have to open
16 up the comment period formally in the Federal Register
17 and so forth. I mean, the comment period is closed,
18 and therefore we are not free to consider just one more
19 comment from somebody who's, you know, had the
20 opportunity prior to this.

21 I'm not sure that there's anybody who objects
22 to opening up the comment period again and getting more

1 comments, but those, I take it, will be put on the
2 record just like, you know, everybody else's. But I
3 think that so long as the committee is apprised of that
4 and the board is willing to undertake to open up the
5 comment period again, personally I don't see any
6 objection to that. But I think that that would have to
7 be the nature of the motion.

8 Do I hear a motion to that effect, or other
9 questions about this?

10 MR. McKAY: I'm assuming there's no problem
11 associated with this. It's just registered again, and
12 we wait for other notices. There's no additional
13 expense. It's just the time that Mr. Saunders has
14 asked for. And the only possible problem is that we
15 are deluged with a ton of comments from other sources.

16 CHAIRMAN BeVIER: That's right. And we might
17 learn more about what the rule is going to do and how
18 it's going to affect people that we didn't know before.
19 And that would be a good thing. So --

20 M O T I O N

21 MR. McKAY: Well, I move that item No. 4 on
22 the agenda be deferred to our January 2007 meeting.

1 CHAIRMAN BeVIER: And that the comment
2 period --

3 MR. McKAY: And that the comment period be
4 extended until that time.

5 CHAIRMAN BeVIER: Thank you. Is there a
6 second?

7 MS. COHAN: May I suggest a technical
8 correction to your motion?

9 MR. McKAY: Sure. A 45-day comment period.

10 MS. COHAN: A 45-day comment period.

11 MR. McKAY: Yes. I amend my motion
12 accordingly.

13 CHAIRMAN BeVIER: Thank you, Mr. McKay. Is
14 there a second to that motion?

15 MR. HALL: Second.

16 CHAIRMAN BeVIER: The motion is that we
17 recommend to the board that they defer consideration of
18 this draft final rule, 1621, until January, and that in
19 the meantime, the comment period be reopened and a
20 45-day comment period be published in the Federal
21 Register.

22 All in favor?

1 (A chorus of ayes.)

2 CHAIRMAN BeVIER: All opposed?

3 (No response.)

4 CHAIRMAN BeVIER: Thank you. Appreciate that.

5 MR. SAUNDERS: Thank you very much.

6 CHAIRMAN BeVIER: It saves us some time, which
7 we need to do right now.

8 The next item on the agenda is to consider and
9 act on Freedom of Information Act Improvement Plan and
10 Resolution No. 2006-014. Mr. Fortuno and Mr. West.

11 MR. FORTUNO: For the record, I'm Victor
12 Fortuno, general counsel.

13 MR. WEST: Kirt West, inspector general.

14 MR. FORTUNO: Recognizing that we're very
15 short on time and the shuttle will be boarding in about
16 30 minutes, I will cut to the chase.

17 Executive Order 13392, issued on December 14,
18 2005, calling for improvements in agency disclosure of
19 information, required that government agencies submit a
20 FOIA plan to the Office of Management and Budget. It
21 required more than that; we needed to -- those entities
22 needed to determine how best to improve its FOIA

1 operations and to submit a plan with proposals for how
2 it would do that.

3 Technically speaking, LSC's not subject to
4 that. We are not subject to FOIA by the terms of FOIA.
5 We are subject to FOIA by the terms of the LSC Act,
6 which says that notwithstanding the fact that we're not
7 a government agency, we are subject to FOIA.

8 The executive order is directed at government
9 agencies, or uses the term "agencies." Again, since
10 we're not an agency, we're not subject to it. But as a
11 discretionary matter, the Corporation determined that
12 it was wise to examine how we could improve our
13 documentation disclosure, information disclosure
14 process, and submit a plan.

15 We, along with a number of other entities that
16 weren't, strictly speaking, subject to the executive
17 order, did that. We did so without bringing the plan
18 to the board prior to submitting it to OMB because it
19 was a need to get it to them before they could turn it
20 around and submit a report that they were going to be
21 submitting to the Department of Justice.

22 The report has been provided for you. I think

1 it's in your board book at page 152. What we have done
2 is also taken the liberty of drafting a resolution by
3 which you would adopt that plan, and also delegate to
4 the president authority to make changes to the plan,
5 and further delegate the ministerial function whereby
6 the inspector general would, with respect to any FOIA
7 function pertaining exclusively to their office, would
8 be in a position to direct that changes be made to the
9 plan, and the president would go ahead and implement it
10 and make those as well. And that's, I think, why the
11 IG is here, is to make sure that we're clear on that.

12 You have the resolution in your board book,
13 appearing at page 164. And in case you're interested,
14 the executive order itself appears at page 166, and
15 it's entitled Improving Agency Disclosure of
16 Information.

17 We don't feel that there's a need to have
18 extensive discussion, but thought it was important for
19 the matter to come to the board, for the board to be
20 informed of the fact that there is such an executive
21 order, and that we are, as a discretionary matter,
22 complying with it and what steps we have taken. And

1 that's why we're here today.

2 CHAIRMAN BEVIER: Go ahead.

3 MS. PHILLIPS: Vic, I have a question. So the
4 plan has been submitted to --

5 MR. FORTUNO: It has -- I believe Tom Polgar
6 submitted it on September 29th to the Office of
7 Management and Budget.

8 MS. PHILLIPS: Well, I noted here that this
9 plan was issued in December 2005. Why did it take so
10 long for you to bring it to the board?

11 MR. FORTUNO: Oh, the executive order --

12 MS. PHILLIPS: Exactly.

13 MR. FORTUNO: -- was issued on December 14,
14 '05.

15 MS. PHILLIPS: Right.

16 MR. FORTUNO: There was actually some
17 discussion at the LSC management level concerning
18 whether it was -- whether we were, one, subject to it;
19 and two, if not subject to it, whether we should
20 voluntarily comport with the executive order.

21 Initially the decision was that since we
22 weren't subject to it and we were a very small

1 operation with relatively few FOIA requests and largely
2 in compliance with what the executive order envisioned,
3 that there would be no formal steps taken by the
4 Corporation along the lines suggested by the executive
5 order.

6 MS. PHILLIPS: So would we -- I'm sorry.

7 MR. FORTUNO: Yes?

8 MS. PHILLIPS: So would we had of been in
9 noncompliance with the order if we hadn't submitted it?

10 MR. FORTUNO: Well, we technically are not
11 subject to the executive order, so we would not have
12 been in noncompliance. But it was decided that
13 especially since other entities who, like us, were not
14 subject who -- let me go back.

15 Other entities that, like us, are subject to
16 FOIA but not government agencies and therefore not
17 subject to the executive order by its own terms, since
18 those entities were all submitting plans, it seemed
19 inappropriate for LSC to not submit a plan, especially
20 since there was no prejudice to LSC.

21 In fact, if anything, while it would take some
22 work, it doesn't hurt to reexamine our FOIA processes

1 and evaluate whether they can be improved, which is
2 what's done here, with a proposal for some changes,
3 with an eye towards improving our agency information
4 disclosure process.

5 So I guess it's the long-winded way of saying,
6 the executive order was issued in December. LSC's
7 initial determination was -- since it didn't govern
8 LSC, was not to conform to it, at least insofar as
9 submitting a plan.

10 That decision was revisited more recently, and
11 it was decided to instead go ahead and submit a plan.
12 And that's why the plan is dated September of '06, even
13 though the executive order itself is dated December of
14 '05.

15 MS. PHILLIPS: Yeah. Because it's public, a
16 public document. It's on the website, LSC website, and
17 the Department of Justice website, too.

18 MR. FORTUNO: Yes.

19 MS. PHILLIPS: So is that the procedure, where
20 if something like that happens, you just take it and
21 run with it, and then submit it to the board, the head
22 of the agency, afterwards?

1 MR. FORTUNO: Well, actually, the executive
2 order by its terms as I said, applies to agencies. And
3 for those agencies to which it applies, the requirement
4 is that actually the plan be adopted by the head of the
5 entity.

6 So for any -- if, for example, the executive
7 order by its terms applied to LSC, then it's the head
8 of the entity that would have had to adopt the plan.
9 So management would not on its own have been in a
10 position to promulgate a plan and submit it.

11 In this case, because executive order doesn't
12 apply and because compliance is on a discretionary
13 matter, management felt that it could go ahead and
14 submit the plan that's being submitted on a voluntary
15 basis, but to nonetheless bring it to the board so that
16 the board was involved. And if the board was
17 dissatisfied with the plan in any way, then of course
18 the board could direct amendment to the plan.

19 So the plan that was submitted was submitted
20 to OMB. I believe Tom made clear to them that it was
21 being submitted on September 29th, but that it was
22 going to be brought to the board at this meeting, with

1 the understanding that if the board sought any changes,
2 those changes could be made to the plan.

3 MR. POLGAR: This is Tom Polgar, director of
4 government relations for LSC. Just to clarify, there
5 was another factor involved, and that was the
6 Department of Justice was compiling all the plans and
7 publishing them, I think, on their website together in
8 one big volume.

9 And having gone through this exercise, we
10 didn't want to miss their deadline for collecting the
11 plans. And OMB made it very clear that we had to get
12 it to them by the end of September, and that that was
13 one of -- that was a driving factor in proceeding on
14 our own and without bringing it to the board first
15 because we couldn't wait for this meeting.

16 MS. PHILLIPS: I'm still -- I just don't
17 understand why it wasn't brought to the board when it
18 was first --

19 MR. FORTUNO: I understand the question to be
20 since the executive order was issued in December of
21 '05, why are you now for the first time hearing about
22 it.

1 MS. PHILLIPS: Right. Hearing about it.

2 MR. FORTUNO: And I think the only answer that
3 I can provide is that you didn't hear about it earlier
4 because management had decided not to provide a plan,
5 submit a plan, as called for by the executive order.
6 And it was only recently that that decision was
7 revisited and that the decision was then changed to
8 yes, let's submit a plan.

9 That decision didn't occur until after the
10 last board meeting. So from the point in time when the
11 decision was made to in fact submit a plan, there has
12 been no meeting other than this one.

13 CHAIRMAN BeVIER: So it was between July and
14 now that --

15 MR. FORTUNO: Yes. Actually, it was
16 September.

17 MR. POLGAR: It was late August/early
18 September when we revisited it and decided maybe, with
19 all the furor going on around the Corporation and, you
20 know, the thought that we should look to see what we
21 could do to conform to Executive Branch behavior, maybe
22 we should voluntarily submit a plan and not stick by

1 our earlier decision to not submit one.

2 CHAIRMAN BeVIER: All right. Does that
3 explain it for you? Maybe not justify it, but explain
4 it?

5 MS. PHILLIPS: Yeah.

6 CHAIRMAN BeVIER: Thanks.

7 MR. MCKAY: And I thought I heard you saying,
8 Vic, and maybe you can confirm this, is that if for any
9 reason any of us who have studied this document think
10 that changes should be made and the board agrees, then
11 those changes would be made and they'd be filed with
12 OMB. Isn't that right?

13 MR. FORTUNO: Absolutely.

14 MR. MCKAY: So in many ways, it's really no
15 harm, no foul, particularly if no one has a problem
16 with what was submitted.

17 MR. FORTUNO: That's correct.

18 MR. POLGAR: Right. And in fact, the Office
19 of Inspector General has not submitted anything with
20 respect to their piece of it yet. And if you look at
21 the executive order, it is envisioned that these plans,
22 once written, are not cast in stone. It is presumed

1 that they will be updated and modified and changed
2 going forward.

3 MR. MCKAY: Although I do embrace -- just to
4 complete my thought -- I do embrace the concern that
5 Bernice expresses, is that this kind of thing should be
6 done as a rare exception rather than the rule. I
7 certainly haven't seen it in my time being here.

8 But I think the message should be
9 communicated, implicit in Bernice's comments. And I
10 certainly embrace them, that we don't want to make a
11 practice of this. And I certainly don't hear you
12 saying that you will.

13 MS. PHILLIPS: I just have --

14 CHAIRMAN BEVIER: Go ahead, Bernice. Yes.

15 MS. PHILLIPS: With respect to the time
16 targets that's put in this draft here --

17 MR. FORTUNO: In the plan?

18 MS. PHILLIPS: -- in the plan, is staff
19 required to implement those or to make sure they're on
20 time with each plan?

21 MR. FORTUNO: Those are -- those are the goals
22 that we've established for ourselves.

1 MS. PHILLIPS: So there's no set -- there's no
2 set time because --

3 MR. FORTUNO: There are benchmarks so that
4 there are specific dates by which we propose for
5 ourselves to do certain things. If we don't do that,
6 then we have fallen short of our own plan and can and
7 should be held accountable for that.

8 But the plan simply sets out what, after
9 management's review of our FOIA process, was determined
10 to be the best way of improving it. And so we set out
11 certain objectives and time frames for accomplishing
12 those, and that's what they are, is that they are
13 targets that we have set by which we hope to achieve
14 those objectives.

15 And the objectives, taken as a whole, are
16 intended to improve our response to public requests for
17 information. What the executive order sought to do was
18 to have implemented government-wide changes in agency
19 practices that would make the agencies more responsive
20 to public requests for information, that they'd be more
21 user-friendly, that the public would find it easier to
22 interact with the agency, easier to navigate those

1 waters, and easier to get the documents that they seek.

2 MS. PHILLIPS: So if the time targets are not
3 met, then they fall on management's shoulder?

4 MR. FORTUNO: Yes.

5 MS. PHILLIPS: It falls on management's
6 shoulder?

7 MR. FORTUNO: That's correct.

8 MR. WEST: I would like very briefly just to
9 explain sort of -- there's some maybe unusual wording
10 in the resolution. And it's something that Vic and I
11 worked out together.

12 And the reason it's worded as such as because
13 under the IG Act, I'm under the general supervision of
14 the board. So I couldn't -- if you're going to
15 delegate authority to Helaine to change the FOIA plan
16 for management, Helaine could not change anything I
17 would do. I'd have to bring it to the board.

18 But instead of doing that, we kind of worked
19 out a mechanism where I would be -- we would in fact be
20 working with Vic and with the FOIA officer. We would
21 submit our -- if we have any modifications, we would
22 submit it, and Helaine would have a ministerial act of

1 incorporating it. Otherwise, it would have to be
2 brought to the board for action since it involved my
3 office.

4 MR. FORTUNO: I think that to best understand
5 it, it's important to be aware of the fact that under
6 our FOIA reg, the OIG has a FOIA function separate and
7 distinct from that of any other component of the
8 Corporation.

9 So if there's a FOIA request that's asking for
10 OCE reports or OPP reports, they come to the Office of
11 Legal Affairs. We then send out a request for the
12 information and we review it and we provide the
13 information to the requesting party.

14 In the case of a narrow category of documents,
15 that is, documents that are exclusively within the
16 control of the OIG and that don't exist elsewhere in
17 the organization, the concern once upon a time was,
18 well, gee, in order to review those documents and make
19 a determination as to whether disclosure is required,
20 then those documents are going to have to be provided
21 to somebody outside the OIG to review and make that
22 determination.

1 There was concern about that. There was
2 discussion about that. And what the board did was to
3 carve out of the general scheme -- that if a FOIA
4 request comes in and comes to Legal Affairs, we get the
5 documents; we review them; we make a determination as
6 to whether a disclosure is required -- to carve out of
7 that general scheme an exception for documents that are
8 exclusively in the control of the OIG.

9 And when it's a request for those documents,
10 what happens is the request goes to the OIG. OIG's
11 counsel reviews the documents to determine if they're
12 responsive. And the determination as to whether or not
13 to release is made by OIG's counsel.

14 If there is an appeal from that decision,
15 ordinarily the appeal would be to the president of the
16 Corporation. But with respect to that narrow category
17 of records, the appeal would go to the IG.

18 To respect those -- that bifurcation, that
19 separation of functions, and recognition of the fact
20 that the OIG has their own FOIA function, we have a
21 plan that if it addresses exclusively the OIG FOIA
22 function, I think what we discussed was having a

1 resolution that says, it's not management that will
2 impose changes to the OIG system. It's the OIG who
3 will decide what changes they want to implement.

4 The OIG then communicates those to management,
5 and management will go ahead and amend the FOIA plan to
6 incorporate those. That is if the board adopts this
7 resolution, which would delegate to the president, in
8 the case of the OIG, a ministerial function; in the
9 case of management, a more substantive function of
10 making changes to the plan.

11 I don't know if that confused everybody or
12 clarified anything.

13 MS. PHILLIPS: So will it say, OIG and -- the
14 inspector general and president of LSC?

15 MR. FORTUNO: What would say that?

16 MS. PHILLIPS: Would --

17 MR. FORTUNO: The resolution, I think,
18 captures that concept.

19 MS. PHILLIPS: Exactly.

20 MR. FORTUNO: The report itself doesn't say
21 president and IG because the report itself -- the plan,
22 I should say, the plan is the plan submitted by LSC.

1 So it's kind of like the budget request that's
2 submitted to the Congress is LSC's budget request.

3 But clearly within the budget request there is
4 an item that relates to the IG, a line that relates to
5 the IG. And that would be the same here. That is, the
6 plan is a plan of the corporation. But the process put
7 in place and reflected in this resolution is one that
8 respects the independent function of the OIG and their
9 FOIA function.

10 CHAIRMAN BeVIER: Sarah?

11 MS. SINGLETON: I see the distinction for the
12 OIG and the resolution. But am I correct -- I don't
13 see it in the plan. Is that because you said the OIG
14 is not --

15 MR. WEST: Yeah. Correct. We have not, for
16 reasons of -- I think the Corporation went pretty
17 quickly on this. And for other work-related issues, we
18 didn't have a chance to look at the plan and modify it.
19 We're in the process of doing it. When we do it,
20 you'll get a copy of whatever we do.

21 MS. SINGLETON: And you want to do it? Your
22 office wants to do it?

1 MR. WEST: Yes. Yes, we definitely -- we are
2 going to do it.

3 MS. SINGLETON: Well, I just wanted to make
4 sure that this was an exercise you wanted the --

5 MR. WEST: And I think you will have it before
6 the next board meeting.

7 MS. SINGLETON: What if the board decides it
8 doesn't want to voluntarily comply with the executive
9 order? Is it too late since we've already turned in a
10 plan?

11 MR. FORTUNO: No. You know, it seems to me --

12 MS. SINGLETON: It kind of makes us look bad,
13 though.

14 MR. FORTUNO: -- what we've been
15 discussing -- it seems to me that if the board were to
16 determine it doesn't want to voluntarily comply, it
17 would direct management to so communicate to OMB. We
18 would do so, and that would be --

19 MS. SINGLETON: This would look really good.

20 (Laughter.)

21 MR. FORTUNO: I think that one of the --

22 MS. SINGLETON: Well, I mean, I guess it's

1 back to the same thing. As a philosophical matter, who
2 ought to make the decision whether or not LSC complies
3 with the executive order when it's not required to?
4 I'm asking you. Who should make that decision?

5 MR. FORTUNO: In this case, management made
6 the decision.

7 MS. SINGLETON: Well, I understand that. Who
8 should make the decision?

9 MR. FORTUNO: I would think it would be ideal
10 for the board to make the decision. While it's
11 not -- it would have been ideal for the board to be
12 informed that there is this executive order, it does
13 not apply to us.

14 We could, however, on a discretionary basis
15 voluntarily comply with the executive order. Do you
16 want us to do so? I, quite frankly, think that would
17 have been the ideal, yes.

18 CHAIRMAN BeVIER: Yeah. I think there's a
19 policy decision of great moment, actually, involved in
20 all of these decisions about compliance with laws and
21 regulations that do not, in terms, apply to the Legal
22 Services Corporation.

1 I take it there's an implicit legislative
2 judgment in not having us be subject to those things,
3 and that, moreover, it really matters in terms of
4 setting precedents and so forth. And so I do
5 understand why this happened in the way it did.

6 MS. SINGLETON: Yeah. I'm more really
7 concerned about the initial decision, whenever it was
8 made, to not comply. Why weren't we involved at that
9 stage? Because we might have said way back when, well,
10 no. We think it would be a good idea. Or we might
11 have said, yes, go ahead. Let's not do anything.

12 CHAIRMAN BeVIER: Mr. Garten?

13 MR. GARTEN: Yeah. Footnote 1. Why --

14 MR. FORTUNO: Footnote 1 of the plan?

15 MR. GARTEN: Yeah. Why did you insert the
16 words "strictly speaking"? Why not delete it?

17 (Laughter.)

18 MR. FORTUNO: What?

19 MR. GARTEN: Why insert the words "strictly
20 speaking"?

21 MR. FORTUNO: I don't recall specifically. I
22 think it was -- the plan was discussed at the executive

1 team. I think that there was a draft that went to the
2 executive team. I think there was --

3 MR. GARTEN: Well, the inference I get is that
4 you're not --

5 MS. SINGLETON: Is loosely speaking. Loosely
6 speaking is correct.

7 MR. GARTEN: I mean, to me, I would delete
8 those words.

9 CHAIRMAN BeVIER: Yeah. Because we either are
10 or we're not.

11 MR. GARTEN: Yes. And as I understand it, the
12 inspector general will review this, and if the
13 inspector general wants any changes, the president is
14 directed to accept whatever changes the IG wants with
15 reference to his --

16 MR. FORTUNO: To his portion of the plan.

17 MR. GARTEN: -- his part, yeah.

18 MR. FORTUNO: Yes. That's correct.

19 MR. GARTEN: Does everybody understand that?
20 Okay.

21 MS. SINGLETON: About the IG's part?

22 MR. GARTEN: Yes.

1 MS. SINGLETON: Yeah. Right.

2 CHAIRMAN BeVIER: Are there any other comments
3 from members of the board?

4 M O T I O N

5 MR. HALL: Only having learned our lesson and
6 hopefully pulled a lot out of this discussion, I move
7 that we adopt the resolution on page 164.

8 CHAIRMAN BeVIER: You move that we recommend
9 that we adopt.

10 MR. HALL: Yes. That we --

11 MR. GARTEN: Strictly speaking.

12 MR. FORTUNO: Strictly speaking.

13 (Laughter.)

14 MR. HALL: I move that we recommend to the
15 full board to adopt the resolution on page 164. I
16 don't see a resolution --

17 MR. FORTUNO: Yes. It's --

18 MR. HALL: -- No. 2006-014.

19 MR. FORTUNO: That's right.

20 CHAIRMAN BeVIER: Is there a second to that?

21 MR. MCKAY: Second.

22 CHAIRMAN BeVIER: All those -- thank you.

1 Strictly speaking, I should have waited. All those in
2 favor.

3 (A chorus of ayes.)

4 CHAIRMAN BeVIER: Thank you. Thank you, Vic.
5 Thank you, Kirt.

6 We have two items that come 6 and 7 on the
7 agenda. And my own personal view, since I know that at
8 least one of them was put on here at my instance, and
9 the chart was prepared because I thought it was
10 important, and Tom Meites agreed with me, my own view
11 is that these are matters that we should not due when
12 we're already past the point when we should have
13 adjourned the meeting.

14 These are terribly important because I think
15 we may very well decide -- I personally hope we
16 do -- to undertake a rather thorough review of the
17 regulations that implement the statutory restrictions.
18 I think that is appropriate for this board to do, and
19 to become very familiar with not only the regulations
20 but how they are enforced.

21 And so I suggest -- I don't know how to do
22 this legally, but I would suggest that we postpone

1 these two issues, treat them -- they are very related
2 to one another and dependent on one another, I think,
3 and put them on the agenda for our January meeting. I
4 do not think myself that we can productively even begin
5 a discussion today.

6 MR. FORTUNO: I would think that the chairman
7 would entertain a motion to defer taking up those two
8 items until the January meeting, and direct staff to
9 place them on the agenda for the January meeting.

10 M O T I O N

11 MR. MCKAY: So move.

12 CHAIRMAN BeVIER: The chairman surrogate would
13 entertain such a -- so we got it. Is there a second?

14 MS. SINGLETON: Putative chairman.

15 MR. HALL: Second.

16 MR. FORTUNO: Strictly speaking.

17 CHAIRMAN BeVIER: I'd rather be surrogate,
18 strictly speaking.

19 All those in favor?

20 (A chorus of ayes.)

21 CHAIRMAN BeVIER: All those opposed?

22 (No response.)

1 CHAIRMAN BeVIER: Thank you. The motion
2 passes unanimously.

3 We do -- I believe --

4 MR. FORTUNO: If I may, it's been called to my
5 attention that the last vote -- I guess that was the
6 vote on recommending to the board adoption of
7 Resolution 014 -- that yes votes were called for but
8 there was no call for no votes.

9 CHAIRMAN BeVIER: I should have done that,
10 strictly speaking. Okay. That's the last time I'm
11 going to say that.

12 (Laughter.)

13 CHAIRMAN BeVIER: Did anybody oppose that last
14 motion? Would you like to have your vote recorded now?

15 (No response.)

16 CHAIRMAN BeVIER: Thank you. Thank you for
17 calling that to our attention.

18 Now we're going to move on to item 8 on the
19 agenda, the staff report on the dormant class actions.
20 Vic, this is yours, I believe.

21 MR. FORTUNO: Yes. We have every six months
22 reported back to the board on the status of dormant

1 class actions in which our grantees remain as counsel
2 of record. I think that the number of grantees is
3 down; it's four.

4 Two of the four initially had taken the
5 position that because they weren't required to remove
6 themselves from the cases, that they respectfully
7 declined to do so. They've reconsidered. So that now
8 all four of the grantees that we understand to be
9 involved in dormant class actions are looking to find
10 substitute counsel.

11 I've given you a memo dated October 25th which
12 runs through the background of this issue. That is,
13 our monitoring dormant class actions runs through the
14 four grantees that currently have dormant class actions
15 in which they are counsel of record, and what has
16 occurred since we last reported on this issue to the
17 committee.

18 Rather than summarize that, I think it's a
19 short memo. If there are questions, I'd be happy to
20 respond to the questions. But it may be that the memo
21 is sufficiently comprehensive to -- I see that
22 Mr. McKay has a look on his face like maybe he hadn't

1 seen the memo.

2 MR. MCKAY: And it's rare. It's not in the
3 binder. Did we get it subsequently?

4 MR. FORTUNO: It should have been left for you
5 at the front desk.

6 MR. MCKAY: Ah, I didn't get anything at the
7 front desk, so -- but I'll read it at my leisure.
8 Thank you.

9 MS. SINGLETON: It was hidden behind trip
10 notes. No, seriously, it was.

11 MR. FORTUNO: Yes, it was.

12 MR. MCKAY: Oh, in here?

13 MS. SINGLETON: In the trip notes. No, not --

14 CHAIRMAN BeVIER: In your white package.

15 MR. MCKAY: Oh, yes. I didn't get a white
16 package, so that --

17 CHAIRMAN BeVIER: Well, Vic has suggested that
18 perhaps we do not need to have much of an oral
19 elaboration of his memo. It is fairly thorough. The
20 way I read it is we're up one. We're not down any --

21 MR. FORTUNO: That's right.

22 CHAIRMAN BeVIER: -- but there's one

1 additional class action that has no longer -- that is
2 no longer out of the hands of the grantee because the
3 attorney who had agreed to take it backed out.

4 MR. FORTUNO: That's right.

5 CHAIRMAN BeVIER: But it's a small number we
6 still have, and we are --

7 MS. SINGLETON: The backup counsel --

8 MR. FORTUNO: One development aside from that
9 is -- material development is that one of the grantees,
10 a grantee that has just one of these dormant class
11 actions, the last time indicated that they were looking
12 for substitute or backup counsel.

13 I think that the change there has been that
14 they have identified not substitute counsel, but backup
15 counsel, with an eye towards should the matter become
16 active, that the backup counsel would then step in.
17 That's the case in New York. And I think there's a
18 footnote identifying --

19 MS. SINGLETON: So I think it's a wash,
20 Lillian.

21 MR. FORTUNO: -- footnote 3.

22 CHAIRMAN BeVIER: You think it's a wash?

1 MS. SINGLETON: I think it's a wash.

2 CHAIRMAN BeVIER: Okay. I'll take that as an
3 amendment to my comment. So it's a wash. And so we've
4 made progress, and we've also not made progress.

5 MR. FORTUNO: One step forward and one step
6 back, you may say.

7 CHAIRMAN BeVIER: That's right.

8 MR. FORTUNO: If the committee would like,
9 however, we could, I think, continue to monitor this
10 and communicate to the four grantees involved the
11 committee's interest in the issue, and report back in
12 six months, which is what we've been doing on this
13 issue generally.

14 CHAIRMAN BeVIER: I think that is absolutely
15 required myself, Vic. And so I would on behalf of the
16 committee invite and request that you do that.

17 MR. FORTUNO: Will do.

18 CHAIRMAN BeVIER: Is there other public
19 comment of any kind on the Ops & Regs agenda?

20 (No response.)

21 CHAIRMAN BeVIER: Is there other business to
22 come before the committee?

1 (No response.)

2 CHAIRMAN BeVIER: Do I hear a relevant motion
3 at this time?

4 M O T I O N

5 MR. McKAY: Move that we adjourn.

6 CHAIRMAN BeVIER: Second?

7 MS. PHILLIPS: Second.

8 CHAIRMAN BeVIER: All those in favor.

9 (A chorus of ayes.)

10 CHAIRMAN BeVIER: All those opposed? Let me
11 hear it loud and clear.

12 (No response.)

13 CHAIRMAN BeVIER: All right. The meeting is
14 adjourned.

15 (Whereupon, at 5:14 p.m., the meeting was
16 adjourned.)

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