

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS AND REGULATIONS COMMITTEE
OPEN SESSION

Thursday, January 22, 2015

5:20 p.m.

Westin Colonnade Hotel
180 Aragon Avenue
Coral Gables, Florida 33134

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson
Robert J. Grey Jr.
Harry J.F. Korrell, III
Laurie I. Mikva
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

Victor B. Maddox
Martha L. Minow
Father Pius Pietrzyk, O.P.
Julie A. Reiskin
Gloria Valencia-Weber

STAFF AND PUBLIC PRESENT:

James J. Sandman, President
Lynn Jennings, Vice President for Grants Management
Wendy Rhein, Chief Development Officer
Rebecca Fertig Cohen, Special Assistant to the
President
Ronald S. Flagg, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary
Mark Freedman, Senior Assistant General Counsel,
OLA (by telephone)
Stefanie Davis, Assistant General Counsel, OLA
(by telephone)
David L. Richardson, Comptroller and Treasurer,
Office of Financial and Administrative Services
Carol A. Bergman, Director, Office of Government
Relations and Public Affairs
Carl Rauscher, Director of Media Relations, GRPA
Marcos Navarro, GRPA
Jeffrey E. Schanz, Inspector General
Laurie Tarantowicz, Assistant Inspector General and
Legal Counsel, OIG
Daniel O'Rourke, Assistant Inspector General for
Investigations, OIG
David Maddox, Assistant Inspector General for
Management and Evaluation, OIG
Janet LaBella, Director, Office of Program
Performance
Bristow Hardin, Program Analyst, Office of Program
Performance
Lora M. Rath, Deputy Director, Office of Compliance
and Enforcement
Herbert S. Garten, Non-Director Member, Institutional
Advancement Committee
Allan J. Tanenbaum, Non-Director Member, Finance
Committee
Nikole Nelson, Executive Director, Alaska Legal
Services Corporation
Richard Austin, Executive Director, Legal Services of
the Virgin Islands, Inc.

Don Saunders, National Legal Aid and Defenders
Association (NLADA)
Robin C. Murphy, NLADA
Lisa Wood, American Bar Association SCLAID Chair
Richard K. Leefe, Leefe, Gibbs, Sullivan & Dupré, LLC

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

2 (5:20 p.m.)

3 CHAIRMAN KECKLER: Good afternoon. Because of
4 our extensive agenda today and the proximity to dinner,
5 I think we'll go ahead and get started. Noting the
6 presence of a quorum, I call to order the noticed
7 meeting of the Operations and Regulations Committee.

8 Our first item of business is an approval of
9 the agenda today.

10 M O T I O N

11 MR. GREY: So moved.

12 MS. MIKVA: Second.

13 CHAIRMAN KECKLER: All in favor?

14 (A chorus of ayes.)

15 CHAIRMAN KECKLER: The agenda is approved.

16 Our next item of business is the minutes from
17 our last quarterly meeting, found at page 163.

18 M O T I O N

19 MR. GREY: So moved.

20 MS. MIKVA: Second.

21 CHAIRMAN KECKLER: All in favor of approving
22 these minutes?

1 (A chorus of ayes.)

2 CHAIRMAN KECKLER: The minutes are approved.

3 We now turn to our first item of substantive
4 business, which is a discussion of the Committee's
5 evaluations for 2014 and our goals for this year. And
6 I want to thank everybody for filing them out and for
7 your comments.

8 You can see in our book the summary that Carol
9 Bergman has kindly prepared, beginning at page 169. In
10 general, people are happy with the Committee, which is
11 gratifying.

12 I think, if you look at -- the comments are
13 actually on the next page, page 170 -- some useful
14 thoughts came out of the evaluation process. And I'll
15 just give my comments, and if people want to add in or
16 elaborate on things that they might have said.

17 It seems a lot of us got confirmed by the
18 Senate, and we've started in. And it feels somewhat
19 like the middle of our service. But actually and
20 realistically, we're at an important point at this
21 meeting and over the next few meetings here because
22 there's a time lag for anything that we do on this

1 Committee.

2 So to the extent that we want to leverage the
3 experience that we've gained over the last few years
4 with this organization and with the regulatory process
5 into something big and something strategic that
6 advances our strategic plan, we need to start thinking
7 about it soon because if it's not started soon, then
8 it's probably going to be difficult, given the things
9 that we've already got in the queue, to get it done
10 before the Board, or at least some of us, comes to an
11 end.

12 Then the new Board will come and we'll have
13 all these transition issues. And they'll have to get
14 acquainted with it, and it won't be back to square one
15 because we'll have a transition program. But it will
16 be a couple steps back. So if you have some strategic
17 ideas with regulatory changes, now or soon is the time
18 to start thinking about them.

19 Another comment in there is elimination of
20 unnecessary and not mandated restrictions on grantees.
21 That's something that I agree with, but we need to
22 think about what those are and how we can think of the

1 case to change them.

2 But this has to do with larger issues. If you
3 want to revisit the 12-1/2 percent requirement, that's
4 been there for a long time; it would be a big change.
5 If you want to look at ways for the grantees to start
6 earning program income the way a lot of other
7 nonprofits do nowadays, that would be another big
8 change.

9 If you want to think about ways to increase
10 the number of applicants for our grants and increase
11 the competition on the ground, which has been a
12 longstanding issue -- and a lot of these things extend
13 out beyond the jurisdiction of this Committee, but they
14 do have a regulatory aspect.

15 So we can't do all these things. That would
16 be difficult, or a variety of other things. But if you
17 want to do something of this nature, using those
18 illustrations, we need to think about that and to put
19 them on the regulatory agenda and get them evaluated
20 and thought about and brought to the Committee and the
21 Board.

22 So that's, I think, the essence of what I'm

1 hearing about how this Committee can think big. If
2 it's going to think big, now is the time to think big
3 because thinking big in 2017 won't do us -- we'll be
4 thinking for somebody else.

5 So with that, I'll open it up for other
6 comments about the evaluations. Yes. Robert?

7 MR. GREY: Well, this Committee has done a lot
8 of work in the last couple of sessions -- actually, the
9 last couple years. And I think, Charles, in large part
10 you have been very meticulous about leading a very
11 thoughtful approach to a lot of the issues that have
12 come up, some of which have been ticklish, to say the
13 least.

14 But I think one of the things that might be
15 instructive, and it's mentioned in here and it's
16 mentioned in the evaluation, is that it might be a good
17 idea to go back and look at the strategic plan as a
18 Committee and to understand what we've done, check that
19 off the list to see what else is left to do, and
20 collaborate with staff to see what we could do to
21 facilitate a better operational organization in support
22 of the grantees and the mission.

1 But I'm like you. I don't want to pick
2 anything out of thin air because that doesn't serve us
3 well, but to go back and do that the same way we
4 started, which was, here are things that popped up as a
5 result of the strategic plan we thought we needed to
6 work on.

7 It may be a time to revisit that, check some
8 off, and say, we didn't take these. I remember that we
9 left a couple because we said, we can't do everything.

10 So it might be time to do that and to do it in a
11 comprehensive way so that we are following the path
12 that we set for ourselves and how we thought the
13 organization ought to evolve.

14 CHAIRMAN KECKLER: Yes. I think that's good
15 advice, and in a moment, we'll get the strategic plan
16 report, and in a sense, in our operational hat. But as
17 we look about and think about what we as a Committee on
18 the regulatory side can do for each of these areas that
19 the Corporation is doing, and so look at it with both
20 perspectives, I guess.

21 Are there other comments on the evaluations?

22 (No response.)

1 CHAIRMAN KECKLER: If not, I will turn it over
2 to President Sandman to discuss the strategic plan and
3 Management's report.

4 PRESIDENT SANDMAN: Thank you, Charles. Your
5 Board book includes a comprehensive report that we
6 prepared that lists all of the things that we have done
7 over the course of the please few years, actually, to
8 implement the goals and initiatives identified in the
9 strategic plan.

10 The report focuses particularly on things that
11 we did in 2014, but a number of things that we did in
12 that year were follow-ons from matters that began in
13 the prior years.

14 One thing that the Committee has asked me to
15 consider in making this report is whether I continue to
16 think that these are the right goals, whether we need
17 any mid-course adjustments. I continue to think that
18 these are the right goals. I certainly wouldn't
19 subtract anything from them.

20 I think there may be some things that we could
21 do to further refine them or additional initiatives
22 that we might identify. But my bottom line is, this

1 was a good plan, and it was well thought through, and
2 we identified the right initiatives.

3 I'd want to be cautious about adding to the
4 list because we still have work to do to implement the
5 plan that we adopted and the initiatives we identified.

6 I'd be happy to answer questions. If the
7 Committee would like any additional information or has
8 any suggestions about the format or how I might do the
9 report next year, I would appreciate them.

10 CHAIRMAN KECKLER: Jim, where do you think
11 that we've made the most progress, and where are we
12 facing the most challenges on our initiatives?

13 PRESIDENT SANDMAN: It's easiest for me to
14 identify progress in concrete terms. And I think we've
15 made the most concrete progress in improving our fiscal
16 oversight.

17 I think there are a number of specific things
18 we can point to, new processes that we've implemented,
19 people that we've hired, the involvement of OCE very
20 actively in the grantmaking process, that are very
21 different from how we were doing things a few years ago
22 that is directly the result of the recommendations of

1 the Fiscal Oversight Task Force.

2 I think the results are borne out, as you'll
3 see in the presentation that I make on Saturday, in the
4 number of special grant conditions we impose for fiscal
5 reasons. There are very specific things we're doing to
6 follow up with grantees where we see yellow flags or
7 red flags in a way that we weren't doing previously.

8 The area that I think is the hardest is
9 strategic plan goal number 2, to become a leading voice
10 advocating for civil legal aid in the United States.
11 That's difficult to measure. We're hardly the only
12 voice out there. We need to coordinate our work with
13 Voices for Civil Justice, the new communications hub.
14 And it's a huge task.

15 I continue to be struck, when I do have an
16 opportunity to speak to non-lawyer audiences, at how
17 many sophisticated, intelligent, generally
18 well-informed people are unaware of the fact that you
19 have no right to counsel in a civil case in the United
20 States of America. That's the level of ignorance that
21 we're dealing with and trying to remedy. And it's a
22 big task to try to address that.

1 I'd put our progress on strategic plan goal
2 number 1, maximizing the effectiveness, efficiency, and
3 availability of resources for our grantees, in between
4 those two.

5 CHAIRMAN KECKLER: Thanks. Are there
6 questions from the Committee regarding the report?

7 (No response.)

8 CHAIRMAN KECKLER: I have a quick question
9 about initiative 2, which is on the standards, the
10 metrics. I guess everything is guided by their own
11 experience, and so sometimes I still will look at a
12 collection of something like 134 grantees in the way
13 that I would look at a class of 134 students. Right?

14 I would say, at the end of this, some of these
15 people are going to be As, and some are going to get
16 Bs, and some are going to get Cs. And I hope nobody
17 will get a D or an E, but if they do, I need to know
18 that.

19 So when I think of the ultimate goal of having
20 a performance standard, I'm thinking of evaluation.
21 I'm thinking of better and worse -- maybe not globally,
22 but saying, in this year, this organization is better

1 at pro bono. This other one is better at being very
2 efficient. Another is better at innovation. Another
3 is better at client satisfaction.

4 So there's not necessarily a global
5 assessment. But there's still always better and worse.

6 And I'm still struggling with this capacity to assign
7 grades or grade groups to this set of organizations.

8 So my question now is, am I asking the wrong
9 question? Is my desire wrong-headed?

10 DEAN MINOW: I don't think the desire is
11 wrong-headed. I wonder, though, if grading is the
12 right way to think about it instead of rating or
13 something like that, especially as you've amplified now
14 with the different dimensions, which I totally agree
15 with.

16 There'll be some that will be very strong in
17 one thing and not so strong in something else. So
18 ratings might be a better way to put it.

19 PRESIDENT SANDMAN: I think it's a fair
20 question, but I think it's a complicated question and
21 has to be approached with great delicacy. There are a
22 number of things we do to rate. We score applications

1 for grants.

2 We have metrics that we look at in terms of
3 how any individual grantee compares to medians for all
4 grantees in terms of number of cases closed total,
5 number of cases closed with private attorney
6 involvement. We have a scoring system for fiscal
7 capacity.

8 The thing that I have become more and more
9 aware of over time, though, is the great disparities
10 that exist among the programs that LSC funds because we
11 are a minority funder, on average. We don't own these
12 programs. We don't control them. And for the majority
13 of them, we're funding them at less than 50 percent.

14 I think the way we would approach the rating
15 of a program where we're an 85 percent funder, I think,
16 shouldn't necessarily be the same as the way we
17 approach the rating of a program where we are a 15
18 percent funder. I think the way we approach a grantee
19 that is a telephone hotline service statewide as
20 opposed to a statewide full-service program in an area
21 with large rural expanses, I think we need to recognize
22 differences between those.

1 I think you will often find that the best
2 performing programs that we have are the ones that have
3 the most funding from other sources, and one of the
4 reasons they're so good is because of the other funders
5 that they have.

6 So all of those things need to be factored in.
7 It's not a monolith that we're dealing with out there.
8 These are not all students taking the same class who
9 are similarly situated. You've got a lot more
10 diversity among the group than that.

11 CHAIRMAN KECKLER: That's fair enough. But
12 I'll just close with this. I can remember coming in
13 and saying -- again, with that perspective which I
14 understand is simplistic -- but saying, well, who are
15 our best? Who are our best and who are our worst? And
16 where's the list that says who's our best and who is
17 our worst?

18 Of course, there's no list. And then I was
19 told. I was said, well, we know. I said, well, I
20 don't know. Right? And our other stakeholders don't
21 have a sense. So anyway, my desire is still there, to
22 know the answer to that question, who are the worst and

1 who are the best, given that there are different
2 dimensions to that and different explanations for it.

3 Are there other comments or questions? Harry?

4 MR. KORRELL: Yes. I'm interested in Jim's
5 comment that we're the minority funder or even a small
6 funder. I guess to me that doesn't change whether we
7 would want to do the rating because they're still
8 spending LSC money.

9 The other issue is that I'm not sure anybody
10 else is doing this kind of rating, or whatever the
11 right term is. I think we could provide a pretty
12 valuable service to the community, assuming we get some
13 buy-in on what we use, if we were providing that kind
14 of rating, grading, evaluation. I think it would be
15 helpful.

16 I think it would be helpful for the other
17 contributors to a recipient that they're only getting
18 15 percent of its funding from us to see the LSC
19 assessment of what this does. So the fact that we
20 might be only a portion doesn't make me think we want
21 to shy away from doing this if this is what we think we
22 want to do.

1 To respond to Charles's question, I don't
2 think you're asking the wrong question. I think that's
3 the question that we said we were going to ask when we
4 drafted the strategic plan. So I think it's still a
5 good question.

6 CHAIRMAN KECKLER: Thanks, Harry. I agree,
7 though, with the comments that there's a complicated
8 answer to that question. The question is there, but
9 the answer's complicated. But that still doesn't mean
10 we shouldn't try to provide that complicated answer.

11 Go ahead.

12 MS. REISKIN: Yes. I think it's hard when you
13 talk about best and worst. So you could have an
14 organization that does all the right things from a
15 nonprofit management perspective but they have crappy
16 lawyers. And we don't want that. On the other hand,
17 you could have some excellent lawyers but horrible
18 management, and that will lead to bad things, too.

19 So there's a bunch of gradations in there.
20 But one thing I think we can do, and I think we've
21 started to do a little but I think we can do more of,
22 is do a better job coordinating with other funders

1 because there are certain best practices in the
2 nonprofit world, and we don't serve our grantees well
3 when we're asking the same question that they've had to
4 answer for six other people.

5 I think we've started to do that better, but I
6 think that's a lower-hanging fruit. But I think if
7 we're looking at ranking or rating or whatever, first
8 we have to ask, so what are we rating? And I think
9 that we haven't answered.

10 I'd love to discuss it because I don't know.
11 I could argue two sides of the same question. What is
12 the best bang for our buck? I personally have concerns
13 about going to less and less extended representation
14 because I think that's a really important part of legal
15 aid work. I'm not saying that that's the only thing.
16 But I think when it's less and less available, that
17 really is a disservice to poor people.

18 But that's not going to be the best bang for
19 the buck. You're not going to have high numbers. So
20 we haven't really decided, I think, what is good.

21 CHAIRMAN KECKLER: Yes. That's a good point.

22 Our statutory mandate is to provide economical and

1 effective legal service to the poor. And there are
2 different ways to do it. But the question of figuring
3 out what is the most effective and the most economical
4 way to do it presents the question of better and worse.

5 There are different dimensions to that but, as
6 you say, I want to know those different dimensions. I
7 don't want a global assessment. I want a more
8 sophisticated, complicated answer.

9 FATHER PIUS: Just a question for you, really.
10 To develop this idea of rating, I really like. But
11 who is the targeted audience for this? Is the idea of
12 doing this so that LSC Management can properly manage
13 the quality of the services being provided? Is it so
14 that the Board can properly supervise to make sure this
15 is happening? Or is this the ultimate goal of the
16 public, so the public can know that the recipients of
17 these funds -- because it makes a difference.

18 I have no idea what the internal use of this
19 information -- and I remember the comment early on in
20 the Board that, we know who the good ones are. And
21 that's helpful. But I don't think, if that exists,
22 that information is, I don't think, transmitted to the

1 Board.

2 That is, the Corporation is very good at
3 providing financial information to the Board about
4 audit reviews and that sort of things, and that's one
5 of the things I want to talk about in the Delivery of
6 Legal Services Committee, is that's one thing -- I'm
7 hoping that that happens more with that, is that
8 Management gives more reports to the Committee similar
9 to the way audit reports are done -- not exactly, of
10 course, but there is some communication between the
11 Corporation and the Committee on behalf of the Board as
12 to what the quality issues are.

13 Then as we get more of that information, we
14 can target it more. Then we can narrow it more. Now,
15 obviously, we have to be sensitive to confidentiality
16 issues on those things a little bit more, the way we
17 might not be just in strict financial.

18 But just a question for you is what audience
19 were you targeting or thinking of when you're thinking
20 of this rating system?

21 CHAIRMAN KECKLER: Well, if you ask me the
22 question, the audience is anybody who's making

1 decisions and directing resources in order to encourage
2 the best, to make the interventions.

3 Julie made this very good example, in a sense,
4 of organizations that are weak in some areas and strong
5 in the others. Well, we know what kind of
6 interventions. We know what kinds of learning. We
7 know who to select and to emulate and in what way, the
8 organization that's following best practices in
9 management. We want to promote them and emulate them,
10 and we want to intervene to improve their legal work
11 and vice versa.

12 So the idea ultimately is that this
13 information will allow us to, once you find better and
14 worse, show others what's better and what's worse.

15 FATHER PIUS: And since we do have what's
16 better and worse -- that is, we have this whole
17 document called the performance criteria. Right? And
18 these are meant to tell us that if you're doing these
19 things, this is what we decide as good and bad.

20 But the question that I don't think we have as
21 a Board is who is meeting these performance criteria
22 well and in what sections and who isn't. And that's

1 one thing I'd like us to move a bit towards.

2 CHAIRMAN KECKLER: All right. Martha?

3 DEAN MINOW: Well, one thought to figure out:

4 Is there a name that we could give to an honor roll of
5 those organizations that hit the excellent best
6 practices in some X number of domains?

7 One reason I suggest that is we may want to be
8 careful about labeling organizations as bad till we
9 know that our rating system is good. And in addition,
10 we will always be under-inclusive, and it's better to
11 say, these are exemplary, rather than, we've covered
12 the waterfront and we know everybody else has not.

13 So it's just as a way to test the waters
14 because your point about who the audience is, I share
15 that view. And we want organizations that are
16 struggling, that have a new director, for example, it
17 would be great to be able to say, here's a model
18 program, and not just have it be the anecdotal, here's
19 the model program.

20 CHAIRMAN KECKLER: Right. And I think that
21 making the positive aspects of it, I think, is
22 absolutely great, and the issue of best practices and

1 emulation. And to the extent that there's other ways
2 that we can do that kind of recognition, that's a key
3 way to begin.

4 I think we talked about that, I remember,
5 during the strategic plan, that that was where we were
6 moving towards. But we still -- anyway, that's an area
7 of opportunity.

8 FATHER PIUS: I do hope maybe we can discuss
9 this more in the Delivery of Legal Services Committee
10 because I think that's an aspect of something I want to
11 discuss more. And maybe it can form a part of our
12 discussions.

13 PRESIDENT SANDMAN: I do want to point out
14 that we post on our website the reports that are done
15 as a result by OPP and OCE. They're out there for
16 everybody to look at. And I have to pore through them,
17 and they're not ranked or listed in any kind of
18 numerical order.

19 I just want to underscore, I take Harry's
20 point. I agree with it, that our standards for a 15
21 percent funded program and an 85 percent funded program
22 shouldn't be any different. And I am acutely aware of

1 the fact that Congress expects no less of us simply
2 because we're a 15 percent funder rather than an 85
3 percent one.

4 But the thing that concerns me about any kind
5 of public rating system, even an honor roll, is the
6 assumption that will be drawn from that, that there is
7 a set of uniform fair standards that apply across the
8 board fairly to everybody.

9 I just look out there at an environment where
10 I see some programs that may be struggling and they'd
11 say, you know, we could do a lot better if we were in a
12 state where the legislature supported funding for legal
13 aid the way they do in that other state over there that
14 you've put on your honor roll.

15 I see it in the city where I live and work.
16 In the District of Columbia, there are 27 civil legal
17 services providers just in the city. Our grantee in
18 the District of Columbia is funded in the same way it
19 would be if it were the only one in the city.

20 Compare that to other parts of the country,
21 where the LSC-funded program may in effect be the only
22 game in the state. How do you equate those, if

1 somebody who doesn't make the honor roll is implicitly
2 going to be viewed as second-rate?

3 I think the nuance here is a little too
4 complicated to lend itself to these kind of public
5 listings that I think cause potential to do harm.

6 FATHER PIUS: I understand that. And I
7 understand, too, that the reports are issued
8 individually. But I do think we need in some way to
9 aggregate some of that data, to give us a broader
10 picture of what's going on with the grantees rather
11 than individual, one by one.

12 It's certainly something I think we should at
13 least start thinking about approaching the way we do
14 financial oversight.

15 CHAIRMAN KECKLER: All right. Thank you,
16 Father.

17 Let's go ahead and move on to the rulemaking
18 agenda and an update on that, as well as a couple of
19 substantive rules on the rulemaking agenda. Mr. Flagg?

20 MR. FLAGG: Thank you. I'm hoping that
21 Stefanie Davis is on the line as well?

22 MS. DAVIS: I am, and Mark Freedman is here

1 with me as well.

2 MR. FLAGG: Great. Let me put the update on
3 rulemaking agenda into a bit of context in two ways.

4 First, I should advise the Board that within
5 the last year, Legal Services Corporation has been
6 asked to join or have a representative to the
7 Administrative Conference of the United States.

8 That's a useful development for us because
9 ACUS, the Administrative Conference of the United
10 States, is the agency, a small agency in the federal
11 government, which exists to promote improvements in
12 efficiency, adequacy, and fairness of the procedures by
13 which federal agencies, and here we are lumped with
14 them, conduct rulemakings and regulatory programs and
15 administering grants and benefits.

16 I mention that because I'm the person at LSC
17 is our representative to ACUS, and I can tell you that
18 in this rulemaking agenda process, that LSC is really
19 at the front of the class, with some others.

20 But that is, ACUS recommends that
21 organizations regularly look at their universe of
22 regulations and identify in a systemic way regulations

1 that should be modified, regulations that should be
2 rescinded, areas that are not subject to rules where it
3 might be helpful to do it.

4 We and you are doing that. And I can tell
5 you, most organizations don't have the wherewithal to
6 do that on a regular basis, and we're trying to do that
7 annually. So I think that's a good thing.

8 The second point I want to make is that we
9 actually reported to -- and this Committee approved a
10 rulemaking agenda for 2015. And just as a reminder,
11 the active pieces of that rulemaking agenda include a
12 revision to 45 CFR Part 1640, which deals with the
13 definition of federal law relating to the proper use of
14 federal funds; we're going to have a report on that and
15 a proposal for you momentarily.

16 Then we have two other rulemakings we're
17 actively working on. One relates to subgrants and
18 subcontracts that relates to or deals with Parts 1610
19 and 1627 of our regulations. We're working on that
20 right now, and expect to have to you at the next Board
21 meeting in April a proposed rule.

22 Then lastly, probably the most ambitious of

1 our current rulemaking undertakings is reviewing Part
2 1630 and the property acquisition and management manual
3 known as the PAMM. Sorry, Jim. And that is a very
4 significant undertaking, and we expect and hope to have
5 to you next January a proposed set of revisions to
6 those rules.

7 What we wanted to do today is update you on
8 two other rules because even though we set an agenda in
9 advance, we react to things in realtime. So one of the
10 things that Stefanie will report on is a proposed
11 revision; Management proposes a new modification to
12 Part 1628, which she'll get to in a moment.

13 Then also, in the course of setting our
14 rulemaking agenda for this year, we talked about Part
15 1603 and the state advisory councils, and we wanted to
16 update you on our research and our recommendations in
17 those regards.

18 So with that introduction, Stefanie, do you
19 want to talk about 1628 and Part 1603?

20 MS. DAVIS: Sure. I'd be happy to. Thank
21 you, Ron.

22 As Ron mentioned, we set our agenda, and

1 shortly after we set the rulemaking agenda, we were
2 faced with a situation in which a grantee had received
3 a huge attorney's fee toward the end of the year.

4 They wanted to know whether they would be able
5 to keep that money, if they would be able to seek a
6 waiver to keep those funds because the result of
7 getting these funds led them to have a larger balance
8 of LSC funds in their account at the end of the year
9 than is permitted under our regulations.

10 So we looked at Part 1628, which governs
11 recipient fund balances, and we came to the conclusion
12 that, well, that scenario wasn't covered by the
13 regulation.

14 Part 1628 was amended in 2000 to give more
15 guidance to Management about when it could authorize
16 recipients to hold onto some of their LSC funds at the
17 end of the year. Normally, programs should spend all
18 of their funds because we give them what they can spend
19 and they should be able to spend that by the end of the
20 year. But in some instances, programs may have money
21 left over.

22 Part 1628 currently allows recipients to

1 withhold or hold back up to 10 percent of their LSC
2 funds at the end of the fiscal year, at the end of the
3 calendar year, without needing to ask LSC for
4 permission.

5 If they want to keep between 10 and 25 percent
6 of their LSC fund balance, they need to request
7 permission from LSC. And if they want to retain more
8 than 25 percent of their LSC fund balance, they need to
9 ask LSC for a waiver.

10 As the rule is currently written, LSC can
11 grant a waiver in extraordinary and compelling
12 circumstances. But the circumstances in which LSC can
13 grant a waiver of a fund balance in excess of 25
14 percent is limited to three circumstances.

15 Those are insurance reimbursements,
16 proceedings from the sale of real property, and a
17 payment from a lawsuit in which the recipient itself
18 was a party. So that's not an attorney's fee award;
19 that's an actual payment when the recipient itself was
20 a party.

21 So we had this question come up from a
22 grantee. And as explained in the memo, that was the

1 last in a series of situations we had seen in the past
2 couple of years in which recipients had very valid
3 reasons for wanting to retain more than 25 percent of
4 their LSC funds at the end of the calendar year but we
5 didn't have the ability to allow them to do that. And
6 so recipients had to make hard choices about spending
7 their money or using or losing a disaster grant
8 received from another funder.

9 So in response to those situations, Management
10 would like to undertake a rulemaking to amend Part 1628
11 to allow it to have more flexibility to grant waivers
12 in excess of 25 percent.

13 We're not proposing to relax the extraordinary
14 and compelling circumstances; we think that's the right
15 standard. But we think the way that the rule is
16 currently written is far too limiting in the
17 circumstances that are considered extraordinary and
18 compelling.

19 We understand that the reason that the rule
20 has these limitations in it was a concern on the part
21 of a prior Board about LSC Management having too much
22 discretion. I'm sorry? We're getting an echo here.

1 (Whereupon, at 6:00 p.m., the examination
2 continued in evening session.)

3 E V E N I N G S E S S I O N

4 (6:00 p.m.)

5 CHAIRMAN KECKLER: Oh, I'm sorry, Stefanie.
6 You're fine here on this end.

7 MS. DAVIS: We're echoing here, so I apologize
8 for that.

9 We understand there was concern on the part of
10 a previous Board that LSC Management have too much
11 discretion in granting waivers in these circumstances,
12 and so that was why the decision was made to limit
13 these waivers of greater than 25 percent fund balances
14 to these three discrete situations.

15 So in the interest of ensuring accountability
16 and ensuring that the Board is certainly aware of these
17 things, of these waivers when they're granted, we
18 propose including notice to the Board before granting a
19 waiver over 25 percent.

20 We also propose stating explicitly in the rule
21 that recipients can request waivers before the end of
22 the fiscal year. Currently, the rule only provides for

1 recipients to make requests and for LSC to act on
2 requests within 30 days after a recipient has submitted
3 its annual audited financial statement. But we think
4 it might be useful for recipients who have advance
5 notice that they may be in one of these situations to
6 ask for the waiver.

7 Because this is an area where we've been
8 getting a lot of questions and where we've been seeing
9 more and more circumstances where grantees are running
10 up against the 25 percent limit, we've created a fairly
11 ambitious timeline to allow for maximum time to
12 consider the rule prior to the end of the 2015 grant
13 year.

14 So we propose to present an NPRM to the
15 Committee in April along with a rulemaking options
16 paper, and to have a Final Rule out in July of this
17 year if there are no hugely substantive changes to the
18 NPRM. So that's where we are on --

19 MR. FLAGG: I would just add that the
20 presentation here is just to request permission to go
21 forward to make a more detailed presentation. This is
22 obviously a complicated issue, and the Committee would

1 have a full opportunity, and the Board, to look at the
2 details of what we propose.

3 There are certainly circumstances where I
4 think no reasonable person could say, gee, you
5 shouldn't have discretion. I mean, for example, if a
6 grantee was hit by an earthquake and couldn't spend
7 money for two months, would we really want them in the
8 last 30 days of a fiscal year to say, oh, my gosh,
9 we've got three months of cash left because we were hit
10 by an earthquake and we're going to lose it unless we
11 do something, so let's go buy some cars or something.

12 CHAIRMAN KECKLER: Yes. I think that's
13 reasonable. So do you think, Ron, just to posit, in
14 terms of protocol, are we thinking that amendments to
15 the rulemaking agenda should be a Committee vote?

16 MR. FLAGG: I'm trying to remember, Charles.
17 Did the Board actually --

18 CHAIRMAN KECKLER: I don't think the Board
19 did. The Committee voted to approve the rulemaking
20 agenda.

21 MR. FLAGG: Yes. I think it would be helpful
22 for the Committee to approve the addition of 1628 to

1 the agenda for 2015. And then, consistent with the
2 schedule set forth in this memo, we'd aim to, in April,
3 present you with a proposed rulemaking document both
4 for 1628 as well as for 1610 and 1627, which are
5 already on the agenda.

6 CHAIRMAN KECKLER: That seems agreeable. Are
7 there questions from the committee on this? Laurie?

8 MS. MIKVA: A quick question. If you know,
9 how much does LSC carry over as a percentage? Are we
10 within that 10 percent?

11 MR. FLAGG: I'll differ to --

12 PRESIDENT SANDMAN: We're not currently.
13 We're above 25 percent currently. Well, actually, it's
14 a cumulative amount, but the amount that we carried
15 over from fiscal year '14 to '15 was more than 25
16 percent of our MGO appropriation for that year.

17 CHAIRMAN KECKLER: Julie?

18 MS. REISKIN: Martha was first.

19 DEAN MINOW: Well, Laurie's question actually
20 anticipates my concern. I guess I think this is
21 getting into the merits, and I certainly approve the
22 amendment of the agenda to consider this rule. But I

1 would worry about a rule that simply elaborates more
2 circumstances under which exceptions can be created.

3 MR. FLAGG: No. Management's proposal, not to
4 jump too far ahead or presuppose anything, would
5 clearly list things as examples because as soon as we
6 list six exclusive events, something else in the real
7 world will intervene and we'd clap ourselves side of
8 the head and say, gee, why didn't we think of that?

9 DEAN MINOW: I do understand where the rule
10 came from. But I also think we're living in a
11 different time, where there's a lot of unpredictable
12 qualities of budgeting for nonprofit organizations
13 right now.

14 I just think we need to be mindful of that and
15 maybe make it more of a tracking device, and not have
16 every one of these come to the Board but come up with
17 some way to monitor. Because, running a nonprofit at
18 the moment, let me just say every nonprofit I know is
19 having these kinds of lumpiness in their budgeting
20 process.

21 CHAIRMAN KECKLER: I think that the previous
22 discussion about the diversity of funding sources for

1 our nonprofits is obviously relevant here. And I just
2 note the irony, from a regulatory standpoint, that this
3 is a regulation about extraordinary circumstances, and
4 that it then attempts to list what's extraordinary.

5 Anyway, I'm sure that's not uncommon, but
6 there's something odd about it. Okay. Go ahead,
7 Julie.

8 MS. REISKIN: Well, I might be the only one
9 who doesn't understand where this came from or why it
10 is. Those of us who run nonprofits that don't get
11 government money always laugh because it's like at the
12 end of the state fiscal year and the end of the federal
13 fiscal year, everyone's running to waste money because
14 they have to spend it or lose it.

15 Why do we have any restrictions? I don't
16 understand. If someone isn't doing their work, if
17 someone is taking money and they're not hiring lawyers
18 and they're not doing the legal work, that's a separate
19 issue and we need to obviously take action.

20 But does the law say that we have to do -- I
21 just don't get it. Part of good fiscal management is
22 good fiscal management, and there are certain things

1 that you can do better if you -- are we going to lease
2 copiers at outrageous amounts so that we're spending
3 every month, or do we just buy one?

4 All kinds of stuff that, having sat on boards
5 where there's government money, I just see that these
6 things lead to what I think are bad financial
7 decisions. And this might be for discussion the next
8 time or now, but I don't know where it comes from.

9 CHAIRMAN KECKLER: Yes. I think we'll put
10 that in the background, the purpose of the rule, just
11 as a general matter, to get people to spend their
12 grant. I won't add too much to that. I guess my own
13 perspective is that I certainly hear you, and spending
14 money when you don't need to spend money is always bad.

15 But a grant is in the nature of a contract in
16 the sense that we're asking you, here's this money to
17 do this. And if you didn't do it, there should be a
18 reason.

19 Go ahead.

20 MS. MIKVA: I'm just wondering if, though, as
21 part of when you give us the next report and a
22 proposal, to at least address some of these issues and

1 whether a 10 percent and a 25 percent cutoff still make
2 any sense.

3 CHAIRMAN KECKLER: Yes. I think it's
4 worthwhile, if we're going to do this rule, to go ahead
5 and at least say if you're comfortable with those as
6 well so that we can be intentional about those cutoffs.

7 MR. FLAGG: I think that's helpful, and we'll
8 address those. And if, in the course of addressing
9 those issues, we think that, as often turns out to be
10 the case, this is more complicated than we realized,
11 we'll let you know that and suggest a different
12 timeline.

13 CHAIRMAN KECKLER: So is there a motion to add
14 this rule to the rulemaking agenda?

15 M O T I O N

16 MS. MIKVA: So moved.

17 CHAIRMAN KECKLER: Is there a second?

18 MR. KORRELL: Second.

19 CHAIRMAN KECKLER: All in favor?

20 (A chorus of ayes.)

21 CHAIRMAN KECKLER: Opposed?

22 (No response.)

1 CHAIRMAN KECKLER: So that is a Committee
2 motion that carries, and that's added to our rulemaking
3 agenda.

4 MR. FLAGG: Thank you. And now, really, a
5 followup report to an item that has been at least on
6 the potential agenda for a while, 1603. And again,
7 I'll turn the microphone over to Stefanie.

8 MS. DAVIS: Sure. Thank you. The history of
9 Part 1603, of course, originated out of a
10 recommendation from the Inspector General in his July
11 rulemaking agenda memo to the Board, recommending that
12 because Part 1603, which regulates the state advisory
13 councils, has been taking up real estate with no actual
14 action for a while, it either truly be implemented or
15 be rescinded.

16 In response to a request from the Committee in
17 July for more information about particularly whether
18 LSC had complied with its statutory mandate regarding
19 the state advisory councils and the aftermath of the
20 development, what the councils had done, where they
21 went, we had one of our law fellows, Peter Karalis, do
22 a lot of research into both of these things, and his

1 work is laid out in the memo that we provided to you.

2 What you can tell in this memo is that LSC did
3 in fact do what Congress wanted it to do. LSC complied
4 with the requirement to ask the governor of each state
5 to establish a state advisory council. That was
6 basically all that the statute directed us to do.

7 LSC was authorized to then step in and
8 establish state advisory councils in states where the
9 governor did not act. It does not appear that LSC
10 acted under that authority at any point.

11 The legislative history of this provision is
12 really interesting because it shows, in fact, that
13 there was this conflict where the House and the Senate
14 had differing provisions. The House wanted to require
15 LSC to appoint councils; the Senate merely authorized
16 it, and the House receded. So the Senate language
17 prevailed, and LSC was merely authorized to act if a
18 state governor did not.

19 So we satisfied our statutory mandate. We
20 received some questions after the regulation went into
21 effect about whether LSC had complied with its mandate
22 and whether the councils were effective, whether we

1 were receiving complaints for councils, whether we were
2 receiving any input from councils at all. And as you
3 can see, basically it appears that in at least 2002,
4 there were no operational councils.

5 We did some fact-finding informally here at
6 LSC with longtime staff who could not remember having
7 heard anything about councils, any reports from
8 councils, anything about the functioning of councils,
9 since at least the mid-1980s.

10 So against that background, we have this rule
11 that's on the books that we have been considering.
12 What do we do with it? Do we allow it to stay on the
13 books, or should we repeal it at this point since there
14 are no operational councils? We've looked at it --

15 CHAIRMAN KECKLER: Let me pause you right
16 there because I think that what you say is very
17 important, that there's no operational councils and
18 nobody's talked to us about it in ten years. But I
19 think --

20 MS. DAVIS: It's like 30, Charles.

21 CHAIRMAN KECKLER: Well, somebody asked a
22 question about it ten years ago.

1 MS. DAVIS: Right.

2 CHAIRMAN KECKLER: And there weren't any
3 councils for 30 years, but somebody noticed that fact
4 ten years ago. That's the last time somebody noticed.

5 MS. DAVIS: Right.

6 CHAIRMAN KECKLER: I guess the other question,
7 which I think I know the answer to, is there any reason
8 for such councils, which have been superseded by our
9 other compliance and reporting mechanisms?

10 MS. DAVIS: I think that's an interesting
11 question. I'm not sure that I'm the best person to
12 answer it. I think that there are certainly
13 oversight -- there are a lot of oversight mechanisms,
14 as you point out.

15 We have our own Office of Compliance and
16 Enforcement. We now an Office of the Inspector
17 General, which we did not at the time the LSC Act was
18 enacted. We have the internet, where anyone who wants
19 to complain certainly can, and can do so rather easily.

20 So I would defer to others on this. But I'm
21 not sure that there's a function that they would
22 satisfy that is not already being met in other ways.

1 CHAIRMAN KECKLER: That's certainly the way
2 the empirical situation seems to have been gone. So
3 now we turn to the question, which you're about to turn
4 to, of what to do about it.

5 MS. DAVIS: Right. So we had
6 presented -- OLA, through Ron, has sent an email to the
7 Board with this memo describing Management's position
8 being, nothing has really happened. Nothing has
9 happened. The boards are not functioning.

10 Our recommendation is not to -- or Management
11 prefers not to act on 1603 at this time because it's
12 lying dormant, and there are questions about what would
13 happen if we moved to repeal? Would that raise new
14 questions? If a council were to come up down the line,
15 would it follow this rule? If we rescinded the rule,
16 what guidance would we use?

17 So at this stage, and I can let Ron speak more
18 to the Management recommendation, but I think at this
19 point we are not inclined to recommend taking action on
20 1603.

21 MR. FLAGG: I would just elaborate briefly.
22 Simply put, we live in a world of constrained time and

1 resources. I would suggest that the items that are on
2 the existing regulatory agenda for 2015, the item that
3 we just added, particularly the revision of 1630 and
4 the property acquisition and management manual, which
5 will be very labor-intensive, are all far more
6 important than whether or not 1603 remains on the books
7 or not.

8 So I think it should remain an item for
9 consideration on our regulatory agenda. But I don't
10 think it at this point should be given the priority
11 that these other things have. And if we were going to
12 address something else that is currently on our list
13 but on the back burner, I would be in favor of revising
14 our rulemaking protocol before we address 1603.

15 CHAIRMAN KECKLER: I appreciate that.
16 Obviously, it's true that it's not a matter of crisis.
17 People aren't calling in.

18 One thing I would add, though, and I asked to
19 add in Executive Order 13563, which is -- we're not
20 bound by that directly, but that's the guidance that's
21 given out on regulation. I might phrase, personally,
22 some of it differently. But it's got a lot of

1 interesting and good points in it.

2 One of the things it talks about that's
3 relevant here is, in Section 6 -- this is page 192 of
4 your Board book -- the retrospective analysis of
5 existing rules, which is a new initiative the
6 Administration has put forward as a best practice.

7 One of the things that it's asking people to
8 do who are regulators, federal regulators, is look at
9 these old rules. If they're outmoded, get rid of them.

10 But from a priority standpoint, they're looking for
11 the ones that are actually burdening commerce, and
12 grantees look to those in particular.

13 So the question, since it's not providing a
14 major burden, it's not a party. But at the same time,
15 if it's outmoded, we should probably dispense with it.

16 Father Pius, you brought this up at one time
17 and pointed it out. What do you think?

18 FATHER PIUS: I tend to agree. I tend to
19 think that if we're not using a statute, why clutter
20 everything up? I'm not sure how much energy it's going
21 to take to put out a notice and comment to say, we're
22 thinking of replacing this entire rule with the

1 following statement: These councils are optional on
2 the part of the Corporation. They no longer exist.
3 There are no resources to support them. And therefore,
4 there are no more regulations, and leave that as the
5 sentence for this section of the regulation, and then
6 move on with life.

7 CHAIRMAN KECKLER: Or as just a preamble to
8 our rescission.

9 FATHER PIUS: Yes.

10 CHAIRMAN KECKLER: It's still on the agenda
11 but on the back burner, but I think that what we
12 might -- I don't think we necessarily need a motion for
13 this. But I think that to the extent that it remains
14 on the agenda, we know what we're going to do with it,
15 which is a rescission.

16 Harry?

17 MR. KORRELL: A question for Ron and for
18 Charles. How often in your career in government
19 service do you have the opportunity to simply repeal a
20 regulation and make it go away?

21 (Laughter.)

22 MR. KORRELL: We only have, what, a year and a

1 half, two years left. I really do think that it would
2 be a high mark, in my short time in government service,
3 if we could simply eliminate a regulation. And for
4 that reason, I'm going to support that we do it.

5 CHAIRMAN KECKLER: Let's do it. I think that
6 it's on the agenda. We know what to do with it when we
7 can get to it, the next step is -- the memo and the
8 materials here can be easily adapted into a
9 justification.

10 So when you want to do it, get somebody back
11 in the summer and present us with an NPRM for
12 rescission. Yes?

13 DEAN MINOW: Far be it from me to rain on
14 anyone's high point. But I would say three things.
15 One, this looks very low priority.

16 Second, I actually do think there's a risk of
17 simply repealing it without actually doing a thorough
18 analysis of the other substituted forms of oversight
19 and review. And I certainly wouldn't want a headline
20 saying we've undone oversight and review, which would
21 be a risk if it weren't done carefully.

22 Third, if anything, I would be interested in

1 proposing a rule that allows for a desuetude
2 recognition; that is, when there is a rule that has not
3 been used and no one has invoked it and no one has
4 raised it in over ten years, it should go in an
5 asterisked form and not be an operational rule, or
6 something like that, so it's not specific to this one.

7 I don't know if we have others that are like
8 this. But if there really are lots of rules cluttering
9 up our rulemaking process and we never get to them, I'd
10 rather deal with them as a group rather than spend a
11 lot of time on this one.

12 CHAIRMAN KECKLER: I agree with you, Martha.
13 I wouldn't want to spend a lot of time. Your idea is
14 extremely interesting, but I'm not sure exactly how to
15 do that. It should be in the next Executive Order that
16 goes out government-wide. That should be the place for
17 that.

18 So anyway, it's on the agenda. The Committee
19 has spoken and have Board thoughts on it.

20 MR. FLAGG: Again, I think we're going to be
21 providing you with a new rulemaking agenda for next
22 year, and I think we've agreed to do that in July. So

1 you will see 1603 somewhere on that list.

2 CHAIRMAN KECKLER: Thank you, Ron.

3 MR. KORRELL: I do feel it's starting to rain
4 a little bit, though.

5 (Laughter.)

6 MR. KORRELL: We will study the idea of
7 repealing to death so that we don't repeal it. I
8 recognize that's a risk.

9 CHAIRMAN KECKLER: No, Harry. We've set on
10 the path. There's a path. And we don't know how long
11 that slope is, but 1603 --

12 PROFESSOR VALENCIA-WEBER: It's going into
13 hospice.

14 FATHER PIUS: It's already in the morgue, so
15 do bury it or not?

16 CHAIRMAN KECKLER: That's right. All right.
17 Do we have any more items on item 5?

18 MR. FLAGG: No. That completes our report.

19 CHAIRMAN KECKLER: Thank you. So let's move
20 on to talk about 1640.

21 MR. FLAGG: I'll turn the microphone over
22 again to Stefanie. And we're joined also by Laurie

1 Tarantowicz from IG's office, who helped initiate this
2 rulemaking, and is helping us think about these issues.

3 MS. DAVIS: Great. Thank you, Ron. So today
4 we actually have the substantive Notice of Proposed
5 Rulemaking and rulemaking options paper for the
6 proposed changes to Part 1640. This was one of the
7 priorities for both Management and the IG on the
8 rulemaking agenda for this year.

9 A brief history is that during the grant
10 assurances process for fiscal year 2015 grants, LSC and
11 IG discovered that the list of statutes covered in Part
12 1640 was not exclusive.

13 Part 1640 sets out the federal law relating to
14 the proper use of federal funds by which all LSC
15 recipients are bound. Congress created a provision in
16 the 1996 appropriation stating that all LSC recipients
17 had to agree to be bound by a contractual agreement,
18 which is what we do through our grant assurances. The
19 grant assurances are the contractual agreement.

20 But recipients would enter into this contract
21 to agree that they would be bound by certain federal
22 statutes governing the proper use of federal funds,

1 violation of which would result in summary termination
2 of the grant. So the actual consequence is, violation
3 of any of the laws on this list in this category may
4 result in a recipient's grant being summarily
5 terminated.

6 We agreed with the IG that Part 1640 should be
7 updated to include appropriate statutes, and we in OLA
8 involved our other graduate fellow, Sarah Anderson, in
9 investigating what those statutes might be.

10 The legislative history of the provision in
11 the 1996 Appropriations Act that made this requirement
12 applicable to all grantees shows that Congress had a
13 certain type of statutes in mind. Congress was really
14 thinking about federal statutes prohibiting fraud,
15 waste, and abuse in federal programs.

16 So that's the understanding that LSC carried
17 into the original 1640 rulemaking and in the approach
18 that we took to the rulemaking this time as well. So
19 we identified three other statutes that were not on the
20 list in existing 1640 that we believed were appropriate
21 for inclusion on the list.

22 So as we were trying to decide what made the

1 most sense for amending this rule, we looked to the
2 IG's recommendation to remove the list from the
3 regulation and put it somewhere on our website.

4 We thought that idea made a lot of sense
5 because as Congress changes statutes, as laws change,
6 if they needed to be put onto the list or removed from
7 the list, if the list remained in the rule, we would
8 have to go through notice and comment rulemaking every
9 time a change needed to be made; whereas if we removed
10 it to the website, the laws are still applicable and
11 recipients would still have notice of them, but LSC
12 would have a lot more freedom and flexibility in making
13 changes to the list as statutes were added or removed
14 from it.

15 So we considered that proposal at the same
16 time we were considering whether the list should remain
17 exclusive, as it is in the current regulation, or
18 whether it should be more inclusive or illustrative.
19 So the problem with the existing rule was that it says
20 federal law relating to the proper use of federal fund
21 means this exhaustive list.

22 So that was a concern about whether that

1 language necessarily meant that the list would be
2 over- or under-exclusive, and we considered whether
3 making it more illustrative to say, federal laws
4 relating to the proper use of federal laws includes, or
5 includes but is not limited to, the list.

6 What we ultimately concluded was that the
7 exhaustive list is necessary to give recipients notice,
8 adequate notice, of the laws that they may lose their
9 grants summarily in response to a violation of those
10 particular statutes.

11 So that is the proposal that you see before
12 you today, is a rule proposing that we remove the list
13 of statutes from the rule and move it to our website,
14 but continue to have it be an exclusive list of
15 statutes.

16 We would change the grant assurances to
17 reflect the move of the list from the regulation to the
18 website so that it's still in the grant assurances
19 which laws apply, so it's still in the contractual
20 agreement.

21 In the interest of transparency, and again
22 having Board awareness of what's happening, Board

1 oversight of what's happening, the proposal is that the
2 Board would have to approve any changes, either
3 additions to or removal from the list before those took
4 effect.

5 CHAIRMAN KECKLER: Stefanie, this reminds me a
6 little bit of when we were doing our alien rule. We
7 talked about the type of information.

8 MS. DAVIS: Yes. Yes.

9 CHAIRMAN KECKLER: The information and
10 documents that were acceptable.

11 MS. DAVIS: Yes.

12 CHAIRMAN KECKLER: But we were phrasing it a
13 little bit different because there, we did it as an
14 appendix of acceptable documentation. Is there a
15 reason we're not doing it that way here?

16 MS. DAVIS: Well, when we revised 1626 the
17 last time, we pulled the list of acceptable
18 documentation out of the appendix to 1626 and turned it
19 into a program letter. And it was in part for this
20 reason. The immigration documents are constantly
21 changing, so we didn't want to have to update the reg
22 every time a new status was added or something changed.

1 I'm not sure if that's what you were asking or
2 if you were asking about the kind of --

3 CHAIRMAN KECKLER: Are we doing it pretty much
4 the same way, or is that the general plan? Or is there
5 any sort of nuance difference there?

6 MR. FLAGG: It's basically the same. It's
7 basically the same approach.

8 MS. DAVIS: Yes.

9 MR. FLAGG: The idea is to give notice by
10 having a definite list, give notice exactly where the
11 information appears, and give people an opportunity to
12 see it. So I think it's basically the same approach.

13 MS. DAVIS: I think that's right.

14 MR. FLAGG: So I think at this point we'd ask
15 if there are any other questions about this.

16 CHAIRMAN KECKLER: All right. Does the IG
17 have a comment?

18 MS. TARANTOWICZ: No. Just that we're
19 generally supportive of Management's recommendation in
20 this regard, and appreciate the cooperation that
21 Management showed in involving our office in this
22 undertaking.

1 CHAIRMAN KECKLER: Well, thank you for your
2 help in this.

3 Father Pius?

4 FATHER PIUS: Just to clarify, you
5 agree -- because there were four options provided under
6 this, and IG and Management are in agreement which one
7 that should be done at this stage?

8 MS. TARANTOWICZ: Yes. That's correct.

9 FATHER PIUS: The OIG and Management
10 have -- okay. That's what I just wanted to see.
11 Thanks.

12 CHAIRMAN KECKLER: Harry?

13 MR. KORRELL: Ready for a motion?

14 CHAIRMAN KECKLER: I am ready for a motion if
15 there's no further comments or questions. The motion
16 would be to approve this NPRM for presentation to the
17 Board.

18 M O T I O N

19 MR. KORRELL: You anticipated me. That was my
20 motion.

21 CHAIRMAN KECKLER: Okay. All in favor?

22 (A chorus of ayes.)

1 CHAIRMAN KECKLER: Opposed?

2 (No response.)

3 CHAIRMAN KECKLER: Hearing no opposition, we
4 will present this to the Board for their approval of
5 publication and solicitation of comment on Management's
6 proposed rule.

7 With that, we can now turn to our next
8 item -- oh, before we do that, let's listen to any
9 public comment on 1640 that we can carry there to our
10 presentation of the Board. Yes? Please state your
11 name.

12 MS. MURPHY: Robin Murphy, representing NLADA
13 as chief counsel. I think I missed a couple public
14 comments on the other regulations, but that's fine.
15 I'm going to be short and sweet because in this
16 instance, NLADA, as a preliminary matter, given that
17 these are proposals, really supports all three
18 proposals from the Office of Legal Affairs for the most
19 part.

20 The one exception would be there are some
21 comments in terms of 1628, that there shouldn't
22 necessarily even be limits on carryovers of LSC funds.

1 And so that would probably be the preferable position.

2 But absent taking that position, we are fully
3 supportive of the position presented to the Committee
4 by the Office of Legal Affairs on that regulation.

5 1640 as well; we understand there will be a
6 public notice and comment period. We will make
7 comments. But we agree with the LSC staff that an
8 illustrative list does not provide the notice that
9 grantees need. The stakes in this area are very high
10 for the most part, probably 100 percent with some
11 exceptions.

12 The staff on these programs are committed
13 providers of legal services to poor people. They are
14 not intentionally violating federal laws. So it's very
15 important that they have the appropriate notice.

16 I think the function of identifying what
17 federal statutes apply in this situation is best given
18 to the LSC staff and to the LSC Board and the OIG, and
19 giving notice to the programs so they are aware of what
20 they need to do, as opposed to having a list where
21 they're just illustrations. So once again, we really
22 support the comments of the Office of Legal Affairs

1 here.

2 FATHER PIUS: And just speaking as a Board
3 member on that, I'm especially interested in the
4 field's view on which of those four options the Board
5 should take on 1640. So the more you can encourage
6 members in the field to express their opinion on that,
7 that's something I would certainly like to hear from
8 the field on.

9 MS. MURPHY: We will definitely be submitting
10 written comments. And I know the field will be on line
11 with the Office of Legal Affairs in terms of exhaustive
12 versus illustrative list because the stakes are so
13 high. It's really important that they have notice of
14 what is happening there.

15 As to the other regulation, we take the
16 position let sleeping dogs lie is the best thing there.
17 That would be our advice on that. I know it would be
18 fun the repeal, but given the current environment, it
19 may be just better to let sleeping dogs lie.

20 I did want to -- and I hope the Committee will
21 entertain some comments on -- the consideration of
22 rating programs. That does raise concerns for me,

1 given the contact that I have with the field. One of
2 the things I would ask the Committee to consider is
3 what would be the purpose of the rating? How would
4 they be used? How would they add to the work of the
5 Committee? To the work of LSC? Would they really be
6 helpful?

7 I would also ask the Committee to consider the
8 ramifications of putting in a rating system. In
9 addition to the problems that President Sandman raised
10 and Dean Minow raised with even instituting a rating
11 system, given the current complexion of the legal
12 services programs around the country, really consider
13 the effect on morale.

14 There can be, even in a program that's
15 struggling or having difficult problems, very
16 effective, devoted attorneys. And having a rating, a
17 negative rating, would really have a very severe impact
18 on morale.

19 These are also attorneys that are working well
20 below market rate, often very long hours, to support
21 their clients. And so I ask you to consider that and
22 the morale impact this would have.

1 Also, what would be the impact on other
2 funders? If they're going to look at a rating system,
3 would this be used as a supportive means or would this
4 be used as a way to basically end a program as opposed
5 to do what OCE, OIG, OPP do now to some extent, other
6 than questioned costs and some other sanctions, but
7 really to support the program and shore up those things
8 that are negative as opposed to just yanking the funds.
9 And I'd be very concerned about those ramifications.

10 If you are going to consider the rating
11 system, I think comments along Dean Minow's line would
12 be the better way to go, illustrating best practices or
13 model programs in a particular area because there's
14 such a divergence, a lot due to budgetary reasons, a
15 lot of unexpected things that happen in different
16 states. It really raises a lot of problems.

17 So those are all my comments. I'm short and
18 sweet. And thank you for your consideration.

19 CHAIRMAN KECKLER: Thank you very much, and
20 we're sensitive to those issues.

21 Well, let's go ahead and turn to our last
22 substantive item, the updating of population data on

1 migratory farmworkers. You will find a useful, brief
2 reference here next to you. And what we'll do this
3 evening is we'll work through it page by page.

4 (Laughter.)

5 CHAIRMAN KECKLER: No. Please. I'll turn it
6 back over to Mr. Flagg as well as Bristow Hardin to
7 summarize this matter.

8 FATHER PIUS: Before you get into this too
9 far, if you could remind me just the statutes or the
10 authoritative source for the separate migratory fund.
11 It's not statutory, I think, is it? Or is it?

12 MR. FLAGG: No.

13 FATHER PIUS: Just remind me of where that
14 authority source comes from. I couldn't find it.

15 MR. FLAGG: Yes. Actually, it's covered in
16 our memo.

17 FATHER PIUS: Which one?

18 MR. FLAGG: It's at page 217. It's dealt with
19 both in a general way and in a specific way. The
20 general way is, and Charles alluded to this earlier
21 before, that the LSC Act requires us to structure
22 grants for the most economic and effective delivery of

1 legal assistance.

2 The specific way in which this is addressed
3 is, in an amendment to the LSC Act in 1977, Congress
4 directed us to conduct a study of the special legal
5 needs of various subpopulations, including migrant or
6 seasonal farmworkers.

7 That study quite emphatically found that
8 specialized legal expertise and knowledge were needed
9 to address the distinctive, unmet, specialized legal
10 problems that migrant and seasonal farmworkers because
11 of the type and conditions of work in which they are
12 engaged, and their cultural and ethnic background.

13 For a number of years, Congress actually did
14 break out separate subpopulation line items for our
15 budget. They have not done that in a number of years,
16 but clearly are well aware of the fact that we have --

17 FATHER PIUS: Just to get to the heart of the
18 matter, I just want to be clear: I'm not advocating
19 this. But were LSC to simply fold the migrant grant
20 back into the field grant, do you think we would be in
21 violation of the statutory obligations?

22 MR. FLAGG: Yes. Because, based on the

1 evidence we have assembled here --

2 FATHER PIUS: You think it's still required
3 under the '77 --

4 MR. FLAGG: Well, I think the evidence
5 is -- there's a judgment here. We're not legally
6 obligated to have a separate migrant grant. But we are
7 legally obligated to provide service in the most
8 efficient and effective way possible, and I think the
9 record here and the record before the LSC in 1977 was
10 that the most efficient and effective way to provide
11 service to farmworkers, who are in many isolated
12 geographically, culturally, and otherwise, is through
13 these separate programs.

14 We looked at that issue in the course of this
15 study, and maybe most tellingly, when we asked the
16 question of the basic field programs -- not the migrant
17 programs, who of course were in favor of and spoke
18 about why this was the most efficient and effective way
19 to serve this population -- but when we asked the same
20 question of the basic field programs, they likewise
21 said that the most efficient and effective way to serve
22 this population is through these separate grants.

1 FATHER PIUS: It's not that I want to create
2 more work. But the fact that this assessment was done
3 nearly 40 years ago is something we should keep in
4 mind.

5 MR. LEVI: What you've done is update the work
6 now. Aren't we having a presentation here of that?

7 MR. FLAGG: Yes.

8 MR. LEVI: Of the new --

9 MR. FLAGG: Yes. So again, there have been
10 specialized grants to serve migrant and agricultural
11 workers going back to the '70s and maybe even before.
12 The amount of the migrant grant in each geographic
13 area, generally states, is based on the migrant
14 population of that area, which is then deducted from
15 the total poverty population for that area.

16 The basis on which LSC has allocated these
17 migrant grants over the last 25 years currently raises
18 two separate issues. One is the data on which that
19 allocation are based are old. They're 25 years old.
20 So we're handing out current dollars based on
21 25-year-old data.

22 Second, and Congress was aware of this at the

1 time, but the count that was done 25 years ago was of
2 migrant workers. And the problem with that is that the
3 people who have actually been served by the programs
4 receiving these monies going back 40 years are not just
5 migrant workers but other farmworkers eligible for LSC
6 services who share the specialized legal needs of
7 migrants.

8 So it doesn't make sense to allocate to
9 programs based on a definition of the population that
10 is not the population being served. So those were the
11 two problems that we were addressing in this study.

12 So the study methodology was essentially
13 twofold. First, LSC Management, and largely Bristow
14 and others within LSC, analyzed the issue of what
15 population -- if any, to your point -- of agricultural
16 workers and their dependents face barriers to access to
17 civil justice and share legal needs that could be most
18 efficiently and effectively addressed by legal
19 assistance and delivery approaches. And that is an
20 issue that is discussed at length in the materials that
21 we provided to you.

22 In answering that question, we identified a

1 specific set of agricultural and dependents who do
2 share legal needs and who do share barriers to access
3 and who, as a result, can be most effectively and
4 efficiently served by a specialized program.

5 Having defined that group, we then went to the
6 Department of Labor and said, we don't know how many
7 people there are in these groups. Please tell us. And
8 the Department of Labor performed an analysis to
9 estimate the populations that fell in those groups.

10 There's no U.S. census data that allows you to
11 push a button and get the number; it requires a study.

12 Now, there are government data that address those
13 populations, and the Department of Labor accessed those
14 data and really put together an expert panel that
15 provided the data, which we propose to use to allocate
16 these grants.

17 So Management's proposal to this Committee is
18 really threefold at this point. One is to approve a
19 request for public comments on what we've proposed
20 here.

21 Second is to feather in the changes that would
22 occur as a result of these new population estimates

1 over two years, just as we did with the census data, so
2 that in 2016, 50 percent of the change would go into
3 effect and in 2017, the full effect of the new
4 population would go into effect.

5 Then the third aspect of Management's proposal
6 is that these data regarding the agricultural
7 population be updated every three years coincident with
8 the updating of the general poverty population census.

9 CHAIRMAN KECKLER: Let me pause you right
10 there, Ron. But today, for the Committee, the
11 census -- since this isn't a regulation; it's going to
12 be a Federal Register request for comments, and
13 presumably you're also going to send it out to the
14 grantees separately and notice them -- IGs my first
15 question is, what about the report? Is the report
16 going to be made public, or how is that going to be?

17 MR. FLAGG: The report is already public. The
18 report is on our website in several different places.

19 CHAIRMAN KECKLER: All right. Very good.

20 MR. FLAGG: I think all stakeholders have
21 already had access to the report. So in your materials
22 at page 224 is the actual notice that would appear in

1 the Federal Register. And that notice includes links
2 to the report and to the data.

3 CHAIRMAN KECKLER: Yes. But the request for
4 the Committee today is that we would just act to vote
5 to take this to approve it for comment, or to take it
6 to recommend to the Board to approve for comment?
7 What's your --

8 MR. FLAGG: This would be akin to a rule, even
9 though it's not a rule per se. But we would ask the
10 Committee to recommend to the Board that this notice be
11 approved for comment. Presumably, given the importance
12 of the issue, we will get public comments.

13 We would expect at some future date, possibly
14 as early as April, armed with those public comments
15 we'll make a recommendation to the Committee as to how
16 to proceed. And obviously at that point the Committee
17 and the Board would determine how to proceed.

18 CHAIRMAN KECKLER: Laurie, then Father Pius.

19 MS. MIKVA: I have three questions. One is,
20 why 100 percent of poverty as opposed to 125? My other
21 question is, why are the numbers so different? And my
22 third question is, do the grantees know how this is

1 going to affect their money? Isn't that something they
2 want to know, as opposed to what the raw numbers are?

3 MR. FLAGG: Well, let me answer those in
4 reverse order. They essentially know, as a result of
5 the numbers that are here, as much as they can possibly
6 know. We don't know what the dollars are until we know
7 what Congress appropriates to us for 2016.

8 But we can tell them today, your
9 percentage -- I'm looking at a chart; Montana is at the
10 top of this page -- Montana knows that, for migrant
11 purposes, its share of the total migrant grant
12 allocation is .48 percent, so less than 1 percent.

13 It knows that if the new population estimate
14 is adopted, it will go up to .89 percent. And so every
15 program knows exactly how their share increases or
16 decreases.

17 MR. HARDIN: And it will roughly correspond.

18 MR. FLAGG: Right. And lengthier be no
19 mistake: Some of the changes are very significant. A
20 number of large states with large migrant programs are,
21 under this estimate, having smaller shares, and a
22 number of states that, under the prior count, had very

1 small or even shares of zero, now have larger shares.

2 Your second question, I think, was, why was
3 that? And the reason that is so is because the
4 approach we're taking now is quite different from the
5 approach that was taken in 1990, and you'll not be
6 shocked to hear that I think the way we're doing it now
7 is right and the way we've been doing it before is less
8 than optimal, in two regards, at least.

9 One is one I've already mentioned, which is in
10 1990, we were just counting migrant workers. It makes
11 no sense to just count migrant workers if the services
12 being provided are being provided to a larger
13 population. You ought to identify who it is you think
14 you're serving and try to count those people. And
15 that's what we're doing today. We didn't do that in
16 1990.

17 Second, we took into account eligibility,
18 which was not done in 1990. So we have, really, two
19 approaches that have differing effects directionally.
20 We're counting a broader group of people so that should
21 have, everything else being equal, increased the
22 population.

1 But we're taking into account the percentage
2 of that broader group who are, based on credible
3 evidence, eligible for our services. And that was not
4 done in 1990, and that obviously has an effect of
5 decreasing the population.

6 So it's not surprising that we got quite a
7 different answer. And of course, you have a 25-year
8 passage of time, so even if you did things exactly the
9 way they were done in 1990, I would have expected to
10 get a different answer. So I think that's the answer
11 to your second question.

12 The answer to your first question is, we used
13 100 percent because that is the percentage used with
14 regard to the general census and poverty population
15 allocation.

16 PRESIDENT SANDMAN: Sorry. If I could just
17 follow up one point that Laurie raised.

18 I think we did learn, when we made the census
19 adjustment, that it was important and useful to the
20 grantees to express the changes in dollar amounts and
21 to show them how the new percentages we propose to use
22 would affect what their current grant was.

1 So we can take the 2015 grants and apply these
2 numbers and say, all other things being equal, this is
3 how these changes would affect the dollar amount of
4 your migrant grant. And I think we should consider
5 doing that.

6 MR. FLAGG: Sure.

7 FATHER PIUS: My point was simply to encourage
8 you to do just that.

9 CHAIRMAN KECKLER: Martha?

10 DEAN MINOW: Laurie's first question -- isn't
11 the general population 125 percent for eligibility?

12 MR. FLAGG: The census data that we use to
13 allocate the grants across the states -- so we get \$350
14 million, say, for field grants, and that's allocated on
15 a per capita basis based on a population count. And
16 the count is done at 100 percent of the federal poverty
17 line.

18 DEAN MINOW: It's not about their individual
19 eligibility; it's about the state allocation?

20 MR. FLAGG: Right. Correct.

21 DEAN MINOW: But their individual eligibility
22 would still be 125 percent?

1 MR. FLAGG: Or -- yes. Correct.

2 DEAN MINOW: Or whatever. Right?

3 MR. FLAGG: Correct. Yes.

4 CHAIRMAN KECKLER: If there's nothing further,
5 we're just hoping for comment from the field on this.

6 Is there a motion to take this to the Board for
7 approval for publication?

8 M O T I O N

9 MR. GREY: So moved.

10 MR. KORRELL: Second.

11 CHAIRMAN KECKLER: All in favor?

12 (A chorus of ayes.)

13 CHAIRMAN KECKLER: Opposed?

14 (No response.)

15 CHAIRMAN KECKLER: Without opposition, that
16 recommendation will be presented to the Board at the
17 next board meeting.

18 Is there any other public comment?

19 MR. SAUNDERS: Thank you, Mr. Chairman. Don
20 Saunders with the National Legal Aid and Defender
21 Association. It's not the first time I've stood
22 between the Committee and dinner, so I will be very

1 brief.

2 (Laughter.)

3 MR. SAUNDERS: First of all, on behalf of
4 NLADA and the field of your grantees, I want to
5 congratulate you on your confirmations and your ability
6 to move forward in the very positive manner that the
7 Chairman and you have been taking this Corporation. So
8 congratulations.

9 I just wanted to make one followup comment on
10 this issue because it's a critically important issue to
11 the field and has been for a number of years. This
12 affects some of the most vulnerable clients in the
13 United States and a cohort of some of the most
14 dedicated advocates that you have funded over the
15 years.

16 We have really appreciated the opportunity to
17 work with Ron and Mark and certainly Bristow throughout
18 this process. We commissioned a study to look at the
19 overall national count of agricultural workers in the
20 United States.

21 We also worked with our farmworker section to
22 provide a white paper that brought -- this is not meant

1 to be a pun, but brought the position of the field to
2 the process. And we are delighted, frankly, with the
3 Management memo to you with respect to the updating of
4 how this program works, why it remains important, and
5 then why it should remain a priority to the Board.

6 I just want to make one comment. We very much
7 welcome the opportunity to engage in public comment.
8 We saw all of those documents last night, and had been
9 pretty involved with the discussion of the national
10 number. I have actually read them all, but I wouldn't
11 begin to tell you I understand everything.

12 But we do have some concerns about the issue
13 that Laurie raised about the fluctuations in the
14 state-by-state redistribution. We think the national
15 figure is a reasonable, reflective figure of the
16 reality of who is eligible for LSC services across the
17 country, and we've been aware of that methodology for
18 some time.

19 We only saw the methodology last night. No
20 problem from LSC; it's just the DOL data getting here.

21 And indeed, those fluctuations are significant. They
22 will have an impact on both your basic field programs

1 and your existing farmworker programs.

2 One of the things we were able to do when we
3 looked at the national numbers is to suggest some of
4 the realities in the field, such as issues like family
5 violence is a real problem here. You have pockets of
6 retired farmworkers across the country -- things that
7 might escape the radar at DOL. Some were accepted;
8 some were not. But I think the process was better for
9 the conversation.

10 I just wanted to highlight at the beginning
11 that we don't know enough yet to even comment on
12 whether this redistribution is exactly right. We will
13 be discussing this with people in the field, both basic
14 field programs who this will affect directly as well as
15 your farmworker programs. And hopefully we'll be able
16 to provide some input during your 45-day period, both
17 to LSC and hopefully, through you, to the Department of
18 Labor.

19 But I just wanted to take the opportunity to
20 stress how important it is. I think we were surprised,
21 frankly. I don't think we were surprised; we were
22 surprised at the degree of the change from states like

1 California, Texas, the state we're in here, where you
2 think of the traditional crop pickers and the
3 agricultural systems being very large parts of the
4 economy.

5 So we're still trying to get our hands around
6 these numbers. And we will be working very hard in the
7 next month and a half to do that.

8 CHAIRMAN KECKLER: Thank you, Don. And our
9 thanks to NLADA for their interest and information and
10 studies of this subject. And we'll look forward to
11 your comments.

12 MS. MIKVA: Could I ask one question?

13 CHAIRMAN KECKLER: Yes. Laurie?

14 MS. MIKVA: Mr. Saunders, do you think you
15 would benefit from additional time, or you think the
16 time frame we're talking about is reasonable?

17 MR. SAUNDERS: I think it's just right.

18 CHAIRMAN KECKLER: Gloria?

19 PROFESSOR VALENCIA-WEBER: Yes. I want to add
20 two comments of appreciation, first to Bristow and Ron
21 and the people at LSC to undertake what is a very hard
22 area to study. I come to this not just from my own

1 academic experience, but I come from a family with two
2 people who were farmworkers organizers, traveled with
3 Cesar Chavez, and also established programs to try to
4 track migrant children educationally as they go across
5 the United States.

6 I hope that in the comment period we can get
7 to the data that is not captured, that is, the people
8 who reside in colonias and the border and other places
9 that continually escape whatever documentation, whether
10 it's census or state, municipal. Because there are
11 these other kinds of elements involved in this kind of
12 work.

13 So I thank you for your efforts.

14 CHAIRMAN KECKLER: Thank you. Thank you,
15 Gloria.

16 Is there any other business to bring before
17 the Committee?

18 (No response.)

19 CHAIRMAN KECKLER: If there is not, I will now
20 entertain a motion for the adjournment of the meeting.

21 M O T I O N

22 MS. MIKVA: So moved.

1 MR. KORRELL: Second.

2 CHAIRMAN KECKLER: All in favor?

3 (A chorus of ayes.)

4 CHAIRMAN KECKLER: The Committee stands
5 adjourned.

6 (Whereupon, at 7:02 p.m., the Committee was
7 adjourned.)

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