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## LEGAL SERVICES CORPORATION

### 45 CFR Part 1622

#### Public Access to Meetings Under the Government in the Sunshine Act

**AGENCY:** Legal Services Corporation

**ACTION:** Notice of Proposed Rulemaking

**SUMMARY:** The Legal Services Corporation (“LSC” or “Corporation”) is proposing to amend to its regulation on public access to meetings under the Government in the Sunshine Act (“Sunshine Act”) to exempt from coverage meetings of the Governance and Performance Reviews Committee of the LSC Board of Directors when it meets to conduct the performance review of the LSC President or Inspector General. Although meetings of all LSC Board committees are currently subject to the same public access provisions as are meetings of the full Board, the Government in the Sunshine Act does not so require. Because of the sensitive nature of discussions which take place during performance reviews, and the possibility that information of a personal nature about persons other than the President or Inspector General may be disclosed, such Committee meetings may more appropriately be exempted from the public access provisions that the Board of Directors has voluntarily applied to its non-executive committees.<sup>1</sup>

**DATES:** Comments on this Notice of Proposed Rulemaking (“NPRM”) are due on [insert date 30 days from the date of publication].

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<sup>1</sup> The federal Government in the Sunshine Act, 5 U.S.C § 552b, applies to a committee of the board if it is either an executive committee (i.e., authorized to act on behalf of and bind the governing body) or has present for the meeting a quorum of the directors in office. The LSC Board of Directors went beyond what is required by the Sunshine Act and, in the Corporation’s implementing regulation, 45 CFR Part 1622 (Public Access to Meetings Under the Government in the Sunshine Act), extended the requirements of the Sunshine Act to all of its committees, whether or not authorized to act on behalf of and bind the Board or consisting of a quorum or more of the directors in office.

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**ADDRESSES:** Written comments may be submitted by mail, fax or email to Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K St., N.W., Washington, DC 20007; 202-295-1624 (phone); 202-337-6519 (fax); [mcohan@lsc.gov](mailto:mcohan@lsc.gov) (email).

**FOR FURTHER INFORMATION CONTACT:** Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K St., N.W., Washington, DC 20007; 202-295-1624 (phone); 202-337-6519 (fax); [mcohan@lsc.gov](mailto:mcohan@lsc.gov) (email).

**SUPPLEMENTARY INFORMATION:** Under the terms of the Legal Services Corporation Act, as amended., 42 U.S.C. 2996e(g), LSC is subject to the Government in the Sunshine Act.<sup>2</sup> The Sunshine Act provides for public access to meetings of agencies in order to provide the public with information regarding agency decisionmaking, while protecting the rights of individuals and the ability of the Government to carryout its responsibilities. 5 U.S.C. 552(b). LSC has implemented Sunshine Act procedures through the adoption of regulations found at 45 CFR Part 1622.

Under the provisions of §1622.3, “every meeting of the Board, a committee or a council shall be open in its entirety to public observation except as otherwise provided in §1622.5.” The regulation defines “committee” as “any formally designated subdivision of the Board established pursuant to §1601.27<sup>[3]</sup> of the By-Laws of the Corporation.” 45

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<sup>2</sup> Absent this authority, LSC would not otherwise be subject to the Sunshine Act since LSC is not an agency, department or instrumentality of the Federal government. 42 U.S.C. 2996d(e)(1).

<sup>3</sup> 45 CFR Part 1601, which used to set forth the By-laws of the Corporation, was removed from the Code of Federal Regulations in 1994 because the By-Laws are purely internal procedural rules that do not affect the rights and interests of parties outside the Corporation. 59 FR 21666 (April 26, 1994). References to Part 1601 in Part 1622 are to be read as referring to the commensurate provision in the By-Laws.

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CFR §1622.2. As noted in the preamble to the original Sunshine Act rule adopted by LSC, “[t]he open meeting requirements of the Sunshine Act apply not only to meetings of the full decisionmaking body, but also to meetings of ‘any subdivision thereof authorized to act on behalf of the agency.’ The regulations go beyond the requirements of the statute by applying the open meeting provisions to every committee appointed pursuant to § 1601.26<sup>[4]</sup> of the Corporation's By-Laws, regardless of the committee's membership or responsibility.” 43 FR 1807 (January 12, 1978).

It has been suggested by the LSC Office of Inspector General that LSC lacks the legal authority to amend the regulation as proposed herein because the Governance and Performance Review Committee<sup>5</sup> is in fact a subdivision of the Board authorized to act on behalf of the agency. The OIG finds support for this position in the legislative history of the Sunshine Act, as reported in the *Interpretive Guide to the Government in the Sunshine Act* by Richard Berg, Steven Klitzman and Gary Edles (Second edition, 2005) (hereinafter “the Guide”), which is widely regarded as the most definitive source of guidance available on the scope and application of the Sunshine Act. In particular, the OIG notes that the report of the House Government Operations Committee states that “panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission or to conduct hearings on behalf of the agency” are included within the meaning of subdivision. The Guide at 5. The Guide also notes that “[a]t a minimum a subdivision must have a specified membership and fixed responsibilities.” *Id.* However, the Guide does not suggest that *any* committee with a specified

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<sup>4</sup> In 1978, the establishment of committees was covered in §1601.26. In 1984, Part 1601 was amended and the relevant section was changed to §1601.27. 49 FR 23050 (June 4, 1984). A subsequent revision of Part 1622 updated the cross-referenced section number. 49 FR 30939 (August 2, 1984).

<sup>5</sup> And, presumably all of the Board's standing Committees.

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membership and fixed responsibilities is *necessarily* a subdivision for the purposes of the Act. Moreover, the Guide goes on to note that “[o]n the other hand, where a committee of members has been directed to draw up and submit an informal recommendation to the full collegial body, it is hard to regard such an assignment as an authorization to act on behalf of the agency in any meaningful sense” and that “[a] gathering of less than a quorum of the full body does not become a subdivision merely because it is preparing a recommendation for the full body.” *Id.*

The Corporation’s position since the original 1978 adoption of its regulations implementing the Sunshine Act has been that its Committee’s are not authorized to act on behalf of the Board and, are not, therefore subdivisions subject to the requirements of the Sunshine Act. It was not suggested to LSC during the rulemaking at the time that that determination was legally unsupportable. Moreover, in the intervening thirty-plus years, LSC has received no indication from anyone in Congress that its position on this matter was legally incorrect. Rather, recent reauthorization bills for LSC introduced in both the House and Senate (H.R. 3764; S. 718, respectively) would amend the LSC Act to legislatively subject all committees of the Board of Directors to the open meeting provisions of the Sunshine Act. While not definitive, this is suggestive that LSC’s position (that the Board’s Committees are not subdivisions of the Board authorized to act for the Board and, therefore subject to open meetings requirements) has been legally correct; if it were not, there would be no need for Congress to change the language of the LSC Act to expressly extend the Sunshine Act provisions to all of the Board’s

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Committees.<sup>6</sup> All things considered, LSC continues to believe that its Committees, including the Governance and Performance Review Committee, are not subdivisions authorized to Act for the Board. As such, LSC continues to believe that they are not required by statute to be subject to the Sunshine Act at that LSC is legally authorized to remove the Governance and Performance Review Committee from the scope of the term Committee within its regulations at Part 1622 as proposed herein.

Neither the preamble to the 1978 proposed rule nor the final version of the rule contains any additional discussion of why the Board chose to extend the open meetings provisions to all committees of the Board. It has now been more than thirty years since LSC's original Sunshine regulations were adopted. One change in LSC practice since the adoption of the original regulation has been the establishment of a performance review process applicable to the LSC President and Inspector General, both of whom are hired by the Board of Directors. Starting in 1997, the Board began conducting annual performance reviews of the President and Inspector General through the work of ad hoc committees established on a yearly basis (and dissolved upon the conclusion of their work). In 2008, the LSC Board formally established a standing committee, the Governance and Performance Review Committee, which has this function as part of its portfolio.

In the now more than ten years since the Board has begun conducting performance reviews, it has become evident that having the performance reviews

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<sup>6</sup> LSC acknowledges in this regard that if the relevant provisions of the reauthorization bills become law, this rulemaking would become moot as the law would essentially codify the current regulation with respect to inclusion of the Board's Committees. However, it is far from clear whether or when a final reauthorization bill might be enacted into law or whether the relevant proposed changes to the Act would remain in whatever the final version of the law might be. As such, LSC believes it is not inappropriate to continue with the publication for public comment of this NPRM.

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committee meetings subject to the provisions of Part 1622 presents challenges not otherwise apparent at the time of the original adoption of the regulation in 1978. LSC notes that the nature of the discussions which take place during performance reviews are usually sensitive and involve the possibility that information of a personal nature about persons other than the President or Inspector General may be disclosed. The regulation does provide for closing meetings when it is more probable than not that information of a personal nature, the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy, will be disclosed. 45 CFR §1622.5(e). However, the procedural requirements regarding when and how the closure provisions apply are administratively burdensome and present an obstacle to the Committee members being able to have a frank and open discussion with the President or Inspector General or amongst themselves about these sensitive issues. As such, LSC believes that the purpose of the regulation is no longer being served by having discussions of performance reviews conducted by the Governance and Performance Review Committee subject to the requirements of Part 1622.

Accordingly, LSC proposes to amend the regulation to exempt from coverage under the requirements of Part 1622 meetings of the Governance and Performance Reviews Committee of the LSC Board of Directors when it meets to discuss the performance review of the LSC President or Inspector General. Specifically, LSC proposes to amend the definition of “committee” in §1622.2 to exclude the Governance and Performance Committee when it is meeting to discuss the performance review of the LSC President or Inspector General. As proposed, this will render such deliberations of the Governance and Performance Reviews Committee not subject to the requirements of

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Part 1622 in its entirety. However, for all other purposes the Governance and Performance Review Committee will remain a “committee” under the definition and the requirements of Part 1622 will apply to meetings of that Committee when it is discussing any other business that may come before it. As noted above, LSC believes that this action is fully consistent with its statutory obligations under the Sunshine Act. Further, because the Governance and Performance Review Committee is not authorized to act for the Corporation, the Committee will have to report on its activities to the full Board and only the full Board will be authorized to act on any recommendations of the Committee. Such Board meetings will be fully subject to the open meeting requirements of Part 1622. As such, LSC is confident that the public will still have full access to the deliberations and decisions of the Board of Directors as contemplated by the Sunshine Act and §1622.1 of the regulations.

**For reasons set forth above, LSC proposes to amend 45 CFR Part 1622 as follows:**

## **PART 1622 – PUBLIC ACCESS TO MEETINGS UNDER THE GOVERNMENT IN THE SUNSHINE ACT**

1. The authority citation continues to read as follows:

Sec 1004(g), Pub. L. 95-222, 91 Stat. 1619, (42 U.S.C. 2996c(g)).

2. Section 1622.2, Definitions, would be amended to read as follows:

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Committee means any formally designated subdivision of the Board established pursuant to the By- Laws of the Corporation, except for the Governance and Performance Reviews Committee when it is meeting to discuss the performance review of the LSC President or Inspector General.

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