

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE
OPERATIONS & REGULATIONS COMMITTEE
OPEN SESSION

Thursday, January 19, 2012

4:42 p.m.

Legal Aid Society of San Diego
1764 San Diego Avenue, Suite 200
San Diego, California 92110

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairman
Harry J.F. Korrell, III
Robert J. Grey Jr.
Laurie I. Mikva

OTHER BOARD MEMBERS PRESENT:

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

STAFF AND PUBLIC PRESENT:

James J. Sandman, President

Richard L. Sloane, Special Assistant to the President

Victor M. Fortuno, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary

Katherine Ward, Executive Assistant, Office of Legal
Affairs

Mattie Cohen, Senior General Counsel, Office of Legal
Affairs

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

Jeffrey E. Schanz, Inspector General

Joel Gallay, Special Counsel to the Inspector General,
Office of the Inspector General

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

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

John Constance, Director, Office of Government
Relations and Public Affairs

Stephen Barr, Communications Director, Office of
Government Relations and Public Affairs

Janet LaBella, Director, Office of Program Performance

Dennis Holz, Managing Attorney, Legal Aid Society of
San Diego

Toby Rothschild, General Counsel, Legal Aid Foundation
of Los Angeles

Chuck Greenfield, National Legal Aid and Defender
Association (NLADA)

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

Justice Earl Johnson, Jr., American Bar Association
(ABA) Standing Committee on Legal Aid and Indigent
Defendants (SCLAID)

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P R O C E E D I N G S

(4:42 p.m.)

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

The first item is the approval of the agenda.

And I should pause here and mention there was a little bit of a glitch with the agenda this time, and hopefully it'll operate a little bit smoother going forward. And we may have a chance to discuss that.

But with that note, may I have a motion to approve the agenda, as written?

M O T I O N

MR. KORRELL: So moved.

CHAIRMAN KECKLER: Second?

MS. MIKVA: Second.

CHAIRMAN KECKLER: Thank you. All in favor?

(A chorus of ayes.)

CHAIRMAN KECKLER: I will then deem the agenda approved, and we can now move on to the minutes of our meeting of October 17, 2011 and our telephonic meeting

1 of December 16, 2011. People have taken a look at
2 those minutes. They seem relatively accurate to me.

3 M O T I O N

4 MR. KORRELL: Move their approval.

5 CHAIRMAN KECKLER: Second?

6 MS. MIKVA: Second.

7 CHAIRMAN KECKLER: All in favor?

8 (A chorus of ayes.)

9 CHAIRMAN KECKLER: The motion carries, and the
10 minutes are approved.

11 Our first item of substantive business carries
12 over from last meeting, which is to consider and act on
13 the potential initiation of rulemaking on enforcement
14 mechanisms and sanctions. And in the board book, you
15 should have received a draft of the notice of proposed
16 rulemaking for LSC's regulations. And to comment on
17 this draft notice, I recognize Ms. Mattie Cohan.

18 MS. COHAN: Thank you. Yes, for the record,
19 this is Mattie Cohan from the Office of Legal Affairs.

20 Everyone has the draft notice of proposed
21 rulemaking that was prepared in response to the request
22 at the last meeting. The draft -- I don't want to go

1 into too much detail, although I'm happy to answer
2 questions, because I know that time is short and I want
3 to leave time for the committee's actual deliberations
4 on this.

5 CHAIRMAN KECKLER: Let me pause you right
6 there, then. And since you have -- in the draft,
7 there's an extensive discussion at the beginning, and
8 then the actual proposed language. Last time, what
9 this committee asked is for management to build upon
10 the prior work that had been done in this area.

11 If you could elaborate a little bit on how you
12 went about that so that we understand a little bit more
13 about the process and the changes, modifications to the
14 prior work that resulted in the document we have before
15 us.

16 MS. COHAN: Right. There was the 2008 draft
17 NPRM that never got approved for publication. So there
18 was that work. And then there was several iterations
19 of memoranda and the rulemaking options paper that had
20 been previously presented.

21 So I essentially went back and took the 2008
22 NPRM plus additional work that had come -- comments

1 that we had gotten that had come out through that 2008
2 process as well as talking to folks internally and at
3 the staff level at LSC, the folks at the Office of the
4 Inspector General; weighed all of that; came up with a
5 draft that went up through management, and Jim weighed
6 in on it. So what is proposed represents that. That's
7 the process we went through to get there.

8 Some of the specific changes with respect to
9 why the NPRM does not look exactly the same as it did
10 in 2008, I think, was a result of a few things, one of
11 which was the 2008 memorandum of NPRM reflected what
12 was management's proposal at that time, which quite
13 frankly was not necessarily staff's proposal. And so
14 this NPRM represents management's proposal at this
15 time, with several more years of experience under the
16 collective belt, looking at it.

17 So I don't want to take up too much time doing
18 that. But does that answer your question, or is there
19 something more you want?

20 CHAIRMAN KECKLER: I think it does. If there
21 is some specific, significant alteration that arose
22 through that process that might be reflected, then you

1 can comment if it --

2 MS. COHAN: Well, I will say that the main
3 difference between the 2008 draft NPRM and this one
4 with respect to the process for limited reductions in
5 funding is that the process is a little more
6 streamlined in this one, to reflect that we're really
7 trying to find a streamlined process that still affords
8 sufficient due process.

9 The proposed change to 1618, that is new.
10 That's come out of ongoing discussions that have been
11 taking place about what we can and can't do from an
12 enforcement perspective. And then the biggest change
13 in 1623, the proposed change, is to the suspension reg.

14 In 2008, the proposal was to extend the
15 maximum suspension period from, currently, 30 days to a
16 total of six months, and this NPRM only actually
17 suggests extending the maximum suspension period to 90
18 days, from 30 days to 90 days, reflecting a distinction
19 that that's a more appropriate window, given the effect
20 that a suspension of 90 days would have on a recipient,
21 and balancing off whether, if a 90-day suspension is
22 not sufficient to compel compliance, whether you're

1 then looking at a situation where a different remedy is
2 really what you need.

3 CHAIRMAN KECKLER: Thank you. I will at this
4 time recognize -- we can come back; thank you,
5 Mattie -- recognize Laurie Tarantowicz from the Office
6 of the Inspector General to comment on this draft NPRM.

7 MS. TARANTOWICZ: Thank you, Mr. Chairman.
8 For the record, Laurie Tarantowicz, assistant IG and
9 legal counsel to the Office of the Inspector General.

10 As you know, we have been supportive of the
11 Corporation's efforts in regard to exploring
12 opportunities to have more enforcement mechanisms in
13 its toolbox, and we are pleased at the Corporation's
14 efforts in this regard, set out in the notice of
15 proposed rulemaking. Just offer a few comments as to
16 the specifics proposed.

17 As to the limited reduction in funding, we
18 find that it provides an appropriate process, and also
19 will very likely offer a very effective tool as the
20 Corporation engages in its grants management.

21 The special grant conditions, we had in the
22 past comments that we didn't believe it was necessary

1 to engage in a rulemaking to have the ability to put in
2 special grant conditions during the term of a grant.

3 We note that the notice of proposed rulemaking
4 alludes to the fact that it may not be required, and we
5 just wanted to highlight that it's probably not only
6 because of the relationship between special grant
7 conditions and required corrective actions. And we
8 just want to make sure that everyone's aware that as
9 the Corporation puts required corrective actions in
10 currently during the grant term, that that would
11 continue to be a proper exercise. And so we just
12 wanted to highlight that.

13 As to extending the suspension period, we are
14 also supportive of that. We had recommended that the
15 Corporation extend suspensions to up to -- until the
16 recipient comes into compliance or puts in required
17 corrective action, rather than putting a set 90-day or
18 180-day period on it.

19 We are still of that view although, as I said,
20 supportive of at least extending it from the 30 days
21 because, as for the reasons set out in the notice of
22 proposed rulemaking, the 30-day suspension really

1 wasn't an effective tool, or wasn't found to be one
2 that the Corporation would use.

3 The reason is that the suspension usually is
4 put in place when it's necessary to protect funds going
5 forward. And we just didn't see that that might end at
6 the 90-day period, but it might also be necessary going
7 beyond that. And it also is, I would note, consistent
8 with what's set out in the government's common rule for
9 federal agencies that engage in grants oversight that a
10 suspension can be put in place until corrective action
11 is taken to cure the deficiency.

12 So with those comments, we are, as I said,
13 supportive of the Corporation's efforts in this regard.

14 CHAIRMAN KECKLER: Thank you very much, and
15 our thanks to the Office of the Inspector General for
16 spending the time and effort to provide their insight
17 into this proposed rule.

18 With that, I guess I'll open it up for
19 questions from members of the committee and the Board
20 to either one of you, but particularly to Ms. Cohen.
21 I'll recognize Laurie Mikva.

22 MS. MIKVA: Thank you, Mr. Chairman.

1 I think I asked this before, but I'm still
2 unclear when the reduction -- what circumstances under
3 which you think it would come into play, and if there
4 have been any instances in the past where you thought
5 this tool was necessary in the toolbox.

6 MS. COHAN: Right. At best, I can speculate
7 on that because not having had it, it wasn't that we
8 had an opportunity to use it and reject it. We didn't
9 have an opportunity to use it. So I can't say with
10 specificity, well, if only we had had it back then.

11 But I can say one of the reasons, one of the
12 drivers, behind this has been our current toolbox tends
13 to include a slap on the wrist and a nuclear bomb and
14 very little in between.

15 And I think where we have had situations where
16 we have ultimately either threatened to terminate
17 someone because they were coming to the end of the
18 grant period anyway, and we made it clear that they
19 were not going to get another grant if they did not
20 come into compliance -- and in one situation I am
21 thinking of, the grantee actually really did turn
22 themselves around; in another situation, the grantee

1 has ceased being a grantee, and another applicant was
2 found after a lot of hard work.

3 These were ongoing, continuing compliance
4 problems that did not respond to the tools that we
5 currently had. And quite frankly, the grantee knew
6 that they had no financial consequence to not coming
7 into compliance until it was too late.

8 And that's really a shame to have to let it
9 get to that point because it was disruptive for the
10 grantee. It was disruptive for their clients. And it
11 was difficult to find -- in one particular instance,
12 since it was a statewide grantee, it was hard to find
13 somebody else to apply to become a grantee.

14 I think the feeling has consistently been if
15 we had had an intermediate tool that we could have
16 either threatened and/or actually applied, it would
17 have gotten more attention when they didn't have the
18 money they had to spend, frankly.

19 As it says in the NPRM, it is unfortunate that
20 our tools, our biggest tools, are monetary. But that's
21 where we're living, that we're a grant-making agency
22 and control over the funds is what we have. Like any

1 other agency throughout the federal government that
2 gives out federal grants, that's their biggest tool, is
3 the control of the money.

4 MS. MIKVA: I'm sorry, Mattie. I'm still not
5 clear. So the instance you're thinking of, the failure
6 to come into compliance, the grantee didn't think it
7 had to? It just didn't want to? It didn't --

8 MS. COHAN: It failed to do things -- the
9 grantees failed to do things that they were told to do,
10 that they had agreed to do. In one instance, they were
11 telling the Corporation that they were doing them, but
12 they weren't. In other instances, it was just the
13 grantee executive director did what he wanted to do and
14 he did it for years, and so then when we got to the
15 point of discovering what he had done, there wasn't a
16 whole lot of effort made to get him to fix his own
17 problem or the board to fix his problem until we were
18 saying, yes, you're not going to get another grant.
19 You're going to go out of business.

20 I think it's less disruptive to everybody to
21 have some sort of intermediate step there. And I think
22 a lot of the value in -- and now, at this point, I'm

1 going to sit here and say, I think this is reflected in
2 the draft. And if Jim wants to contradict me or
3 correct me, I invite him to do so.

4 But from my staff position, I think some of
5 the value is also in the potentiality. If the grantee
6 community knows that we have a sanction that is
7 applicable, we might not even have to apply it because
8 right now, unless things have gone so far off the track
9 that we're actually going to cut a grantee off and
10 terminate them -- we don't even -- we don't generally
11 use the termination clause.

12 Under the reg, the termination is 5 percent or
13 more. We don't use it for termination in part because
14 it has such a detrimental effect on the grantee, on the
15 client base. It's such a suck of resources on
16 everybody's part. So we're really only going to use
17 termination, and historically really only have looked
18 at termination, if we're looking to terminate in whole.

19 At that point, that's your nuclear bomb
20 option. But for a grantee not particularly interested
21 in getting on board, they know that they really have to
22 push and push and push until we're at the point that

1 we're willing to terminate in whole.

2 And I think this is reflected in the draft,
3 and I want to restate it, that most grantees want to be
4 in compliance. They work actively to be in compliance.

5 I'm not saying they don't. In fact, I will sit here
6 and say they do. And they respond to OCE. Yes.

7 But not everybody does. And sometimes, it's
8 when they don't respond that there's an issue, or that
9 a grantee has chosen, for whatever reason, to engage in
10 activities that may be one singular activity, but
11 that's a major violation.

12 Before the attorney's fees restriction was
13 lifted, we had a grantee that just went out there and
14 applied for attorney's fees. You can't go back and
15 undo the past, so there was no way to remedy that
16 violation. There was no more compliance to come into
17 except to adopt more stringent internal procedures to
18 make sure that the rule was not violated in the future.

19 But essentially, without some sort of lesser
20 sanction, we also had no way of applying any meaningful
21 sanction to that grantee for having flouted a major
22 restriction.

1 CHAIRMAN KECKLER: Let me -- you can follow up
2 if you want, Laurie. In the discussion there, the
3 primary tool for violations, whether accidental,
4 egregious, intentional, flagrant, and so on, is
5 basically questioned cost, is it not? To recover the
6 money spent on the violation?

7 MS. COHAN: And a questioned cost proceeding
8 is only a sanction to an extent. In this particular,
9 the example of an attorney's fees violation, the amount
10 of money that the grantee put into its attorney's fees
11 petition relative to the amount of money it spent on
12 the litigation was very, very small.

13 So the underlying litigation was totally fine.
14 So there was no questioning of the costs of the
15 litigation. It was just the costs of the fee petition,
16 which were really minuscule and not in proportion to
17 the violation.

18 There's also an argument to be made that it's
19 certainly not a sanction in terms of a punishment. It
20 can have a punishing effect, but there's a -- somebody
21 embezzles money, they're made to give it back; that
22 doesn't mean they don't go to prison. Their making the

1 restitution is separate from the punishment or a
2 sanction.

3 So although clearly, clearly a questioned cost
4 can have a significant effect, it also may not. It may
5 have very little effect. If we had a grantee who was
6 violating the lobbying restrictions by sticking stuff
7 up on its website, that would be very little cost
8 but --

9 CHAIRMAN KECKLER: Right. And I think that it
10 would be -- you might call -- depending on how bad that
11 was, that might be very egregious and might have
12 extreme consequences from a funding perspective for
13 Legal Services Corporation and legal aid as a whole.

14 So the cost -- it's astounding how much
15 trouble people can cause with relatively little cost.
16 Let's just put it that way.

17 (Laughter.)

18 MS. COHAN: I think that's right.

19 CHAIRMAN KECKLER: That might be the simplest
20 way to put it.

21 MS. COHAN: And I think the point is to have a
22 variety of tools available to the Corporation to apply

1 in differing situations as they are needed. I don't
2 think the expectation is that, oh, well, if we had a
3 limited reduction in funding procedure, all of a sudden
4 OCE is not going to keep issuing reports with
5 recommended corrective actions. They're still going to
6 be doing that.

7 And the Corporation is still going to start at
8 the first place in its enforcement position in 1618 to
9 seek informal compliance as it's required to do. So
10 even with additional tools, that stuff is still going
11 to go on. It just gives us something in between when
12 that works and when it totally doesn't.

13 MS. MIKVA: I guess one last question. Was
14 there some consideration in the process about how this
15 would appear with the grantees, how they would react?
16 Is there any concern for this?

17 MS. COHAN: Concern? Certainly an
18 understanding of it. We don't propose something
19 without having thought about it. I'm going to go out
20 on a limb and guess that the grantees aren't going to
21 be thrilled with it.

22 But quite honestly, the Corporation's job is

1 to safeguard these funds and ensure that compliance is
2 happening for the bigger picture of everybody's
3 program. And to shy away from its enforcement and
4 oversight responsibility simply because the field
5 doesn't like it, I think, is not -- personally, and I'm
6 expressing a personal opinion -- I don't think that's
7 the best role of the Corporation.

8 That said, I think the Corporation does
9 recognize that most grantees want to be in compliance
10 and takes that approach with them, that they want to be
11 in compliance. We want to work with you to be in
12 compliance. But that doesn't mean that having the tool
13 is not appropriate in those situations in which it
14 would be necessary.

15 CHAIRMAN KECKLER: Julie?

16 MS. REISKIN: Yes. This whole discussion
17 feels like some kind of mixed messages, so I'm going to
18 try and see if I can explain this.

19 First, in the document it says that most
20 everyone takes this stuff very seriously. And I can
21 tell you, as a director of a nonprofit, when a funder
22 says, this is a problem, you take it -- unless you're

1 really screwed up, you take it seriously. Someone who
2 wouldn't, do we want them?

3 It seems to me like our best enforcement
4 mechanism is competition. And I know that that's
5 sometimes an issue. But I think that's what we
6 shouldn't shy away from, is assuming that we can't get
7 competition. And I know sometimes it'll be a lot of
8 work to make it happen.

9 But I guess, as a client -- so now I'm going
10 to put on my client hat -- I don't want a provider out
11 there that you guys are having to force to do the right
12 thing. And if you're having to go that far and they're
13 not doing it, do we want them? Should we maybe have
14 the nuclear bomb?

15 And then I guess my final thing is this whole
16 thing of the taking away money to show -- because
17 someone's doing a bad job. That's how the government's
18 worked, like with Medicare and Medicaid. And that
19 hasn't worked very -- and they don't do it
20 because -- it almost never happens because everyone
21 thinks, well, it's going to hurt the client and we
22 don't want to do that.

1 So it's something that's very hard to do;
2 plus, with all of the due process and appeals, wouldn't
3 the three years be up anyway where you could compete
4 anyway?

5 So I guess all of those thoughts are going
6 around, thinking -- but then also, because it's such a
7 small number, is it a good use of public policy,
8 debate, all of this time and resource just to do
9 something like this when it's really a small number,
10 and would our resources be better used doing whatever
11 it is one can do to encourage more competition, and let
12 that be the enforcement?

13 Not that you shouldn't do other enforcement;
14 not that you shouldn't tell people when they're doing
15 something wrong. But if they don't clean up their act,
16 should this be a regulatory daycare? If that makes
17 any -- anyway, I don't know if that made any sense.

18 MS. COHAN: I will try to address all of your
19 points. If I forget any or lose them, please remind me
20 of them.

21 Maybe I'll start with the last one first. I
22 think the problem of it taking a long time is the

1 problem we have with the termination procedure we have.
2 So we generally don't apply it, and we end up waiting
3 people out.

4 I don't know if waiting someone out for three
5 years is the best approach. It could be in certain
6 instances. The whole point of having tools is that you
7 have a multiplicity of tools to pick and choose from in
8 a particular instance.

9 I think having to necessarily default to just
10 waiting out a grantee is not necessarily in the
11 Corporation's best interest. I'm not sure it's in the
12 grantee's best interest, the client's best interest,
13 the Corporation's best interest. I'm not sure the
14 answer of waiting them out is what Congress wants to
15 hear. But that's a piece of it.

16 MS. REISKIN: But that wasn't really -- what I
17 was saying is that you said that you would use
18 lesser -- you'd always start with lesser first. So
19 what I was saying is, since you're not going to go to
20 the bigger ones immediately, which is what you just
21 said, by the time you do the letter, and then they
22 don't do something, and then you do -- by the time you

1 get to some of these bigger things, aren't you getting
2 close to three years or not?

3 MS. COHAN: Let me clarify what I was saying.

4 I think the Corporation will always start with trying
5 to get informal voluntary compliance first.

6 MS. REISKIN: Yes.

7 MS. COHAN: If that doesn't work, if we found
8 something was just that horrible that imposing a 1
9 percent sanction would really not be appropriate, I
10 don't think the Corporation would -- there's nothing
11 that would compel the Corporation to work its way up
12 percentage by percentage.

13 It's just that in some -- you might still have
14 a case where you've got to go all the way and terminate
15 them. And if that's the situation, that's the tool
16 that exists, and that's the tool that could be used.

17 But there might be a situation where, if you
18 had a credible tool where you said, look, you did this;
19 either you need to clean up your act or -- you knew
20 this was wrong and you did it anyway, and we're going
21 to take .5 percent of your money, enough to make you
22 sit up and take notice but not enough to cripple you,

1 well, then maybe you have a grantee that fixes its
2 problem.

3 Maybe you have a grantee that, knowing that
4 that might happen, thinks a little more carefully about
5 whether they're going to engage in whatever it is.
6 They will apply greater supervisory discretion before
7 engaging in certain actions.

8 So I think it's the variety of circumstances,
9 the variety of tools to be applied and the variety of
10 circumstances, and the opportunity to have a smaller
11 penalty to make a smaller problem stay a smaller
12 problem and not become a bigger problem.

13 CHAIRMAN KECKLER: Is there something -- oh,
14 okay. Go ahead.

15 MS. REISKIN: Please.

16 CHAIRMAN KECKLER: Yes.

17 PRESIDENT SANDMAN: Julie, I agree with you
18 completely that the prospect of competition would be
19 possibly the best compliance tool we might have, if it
20 worked. But my assessment is that in many service
21 areas, the challenges in generating competition are
22 formidable, and that as a practical matter, it's not a

1 realistic option or enough of a realistic option in
2 many places to be of utility to us.

3 But I think you make an excellent point. I
4 agree with you 100 percent as a theoretical matter.
5 There are likely some places where it would work, but I
6 don't think it would work across the board.

7 CHAIRMAN KECKLER: Thank you very much, Mr.
8 President, and I also am in sympathy with your
9 comments. It's something that we're working on as an
10 organization, as you know. It comes up in strategic
11 planning. I don't see them as mutually exclusive.
12 It's something that we need to try to look at and do
13 where we can, and here's also another option to hold
14 for accountability.

15 Yes?

16 MR. KORRELL: Thank you, Mr. Chairman. I hope
17 it's a quick question and answer.

18 The notice of proposed rulemaking says that
19 federal grant-making agencies are not limited in
20 applying suspensions of funding to any particular day
21 limit. We're talking now about the proposal to
22 increase the maximum period of suspension of funding

1 pending corrective action.

2 And it's my understanding from the OIG and Ms.
3 Tarantowicz, her comment is she thinks the 90-day
4 limit -- OIG's view is the 90-day limit is too short.

5 Previously, there was a discussion of six
6 months. Why stop at 90 days? The analysis of why it's
7 useful seems like it would apply out further. And why
8 wouldn't the Corporation want the flexibility, the
9 discretion, to go longer than 90 days if that's
10 necessary?

11 MS. COHAN: I believe that's -- that's a good
12 point, and I think one can argue that. The 90-day
13 limit was chosen as a long enough suspension period to
14 probably compel -- because a suspension isn't going to
15 be used to remedy a violation that occurs in the past
16 and that you can't do anything about. That's just not
17 the right tool. So it's really that you're trying to
18 compel something.

19 But I think it was a balance of what a 90-day
20 suspension would likely do to a grantee -- well, really
21 to the client community of the grantee -- balanced
22 against that a 90-day suspension would probably be

1 taken -- a feeling that it would be taken seriously
2 enough that it wouldn't go all the way to -- we would
3 rarely have to go all the way to 90 days.

4 And if we did have to go all the way to 90
5 days, then you probably have a bigger compliance issue,
6 a bigger attitudinal issue. Hopefully it would never
7 come to that, but --

8 CHAIRMAN KECKLER: Jim?

9 PRESIDENT SANDMAN: The 90-day limit was my
10 judgment. It reflects a balance between trying to have
11 a remedy that is effective and being mindful of the
12 consequences on client service and the severity of the
13 remedy when it's invoked.

14 I read the history of the prior consideration
15 of expanding enforcement options, and I thought that
16 the explanation that was given for a longer suspension
17 period was not persuasive to me. A prolonged
18 suspension can be absolutely debilitating for some
19 programs.

20 Although on average our programs in 2010, the
21 last year for which we have full-year data, get only
22 43.6 percent of their funding from LSC, we have a

1 number of programs still that get more than 60 percent
2 of their funding from LSC. Maybe more importantly, LSC
3 funding can be used for general operating purposes, but
4 a lot of the other sources of funding that make up that
5 57, roughly, percent of funding for grantees on average
6 is restricted. It can be used for only particular
7 purposes.

8 So I thought it was important to try to find a
9 middle ground to give the Corporation a more meaningful
10 suspension option to be used in appropriate
11 circumstances, but to be mindful of the consequences on
12 the programs, and even more importantly, on clients,
13 informed by the process, the amount of due process that
14 is provided to grantees in these situations.

15 MR. KORRELL: If I might follow just briefly,
16 Mr. Chairman.

17 CHAIRMAN KECKLER: Go ahead.

18 MR. KORRELL: It just does seem to me that
19 those are the kinds of considerations that the
20 Corporation would take into consideration, that would
21 apply when deciding whether to extend beyond 90 days.
22 Of course, it's not a requirement that you go to 90

1 days or 120 or whatever.

2 It seems to me that it would be in the
3 Corporation's interests to have the flexibility and
4 then take into consideration those very important
5 factors that the president just mentioned rather than
6 propose to be restrictive.

7 CHAIRMAN KECKERL: Ms. Tarantowicz?

8 MS. TARANTOWICZ: Yes. I would say that the
9 OIG is in agreement with Mr. Korrell's conclusion in
10 that regard. Also, we, in making this comment, are
11 obviously mindful of the debilitating effect that a
12 suspension could have on a program, and thought, though
13 that might actually induce a program to come into
14 compliance earlier than a 90-day suspension might, a
15 program might be of the view that it could wait out a
16 90-day suspension but could not wait out a longer
17 period.

18 Also, we'd note that the difference in process
19 that's due or that's applied in the room between a
20 termination and a suspension, I think, reflects the
21 fact that with a suspension, the grantee has the power
22 to end it by taking the required action, and that

1 that's not necessarily the case with the other
2 sanctions that are looking back, or the other tools
3 available to the Corporation that they might apply.

4 Thank you.

5 CHAIRMAN KECKLER: Thank you.

6 Mr. Grey?

7 MR. GREY: It's interesting. I was listening
8 to this, and it caused me to remember having to wear a
9 hat as a regulator when I chaired the ABC board and we
10 came across the same issue, and debated as a board
11 about suspending licenses. And we had a maximum,
12 actually, of 90 days.

13 Beyond that, we were putting people out of
14 business, basically. But the signal to the community,
15 one was that this was going to be graduated. We knew
16 we had, as Mattie talked about, the nuclear option, and
17 so did they, on revocation of the license.

18 So more effectively is to get people's
19 attention. And you can get it in increments that then
20 allow the business to go on. But sometimes, the
21 proprietor doesn't understand the relationship that
22 they have as a licensee of the state. And so having

1 had this option, this to me sends the right signal to
2 the field.

3 And the last thing I would say is this. The
4 potential -- and no one ever wants to go there -- but
5 you don't want something that can be a hammer that is
6 so heavy because you can start there. You can start
7 with six months. Just because you can go up to six
8 months doesn't mean that that's not available. And you
9 don't like to see the abuse on the regulator's side.
10 And I know you know that because you do this work as
11 well.

12 We can always go there if this doesn't pan
13 out, and we can get to a higher level. And I always
14 felt comfortable as a regulator that if it wasn't
15 working from this perspective, I would certainly ask
16 for that from my board or from the General Assembly or
17 whoever I had the power with.

18 But I like this incremental approach, at least
19 in this instance, because you want people to work with
20 you. And I would hope that we are sending a very
21 positive signal that we are not interested in hammering
22 anybody. We're interested -- and we're also talking

1 about a pretty small group of people. That's the other
2 part I think is important.

3 So I like this incremental approach that we're
4 using, for what it's worth.

5 CHAIRMAN KECKLER: Sharon?

6 MS. BROWNE: I really like the idea of having
7 more weapons available to you to bring grantees into
8 compliance. Did you look at any other potential tools
9 that you could add to your toolbox, or is it just by
10 this suspension?

11 Then second, what about the advantages of
12 publicizing a grantee who has not come into compliance,
13 and that the group is being suspended? That would have
14 the advantages of showing that this tool is available,
15 that you will use it if necessary, and it puts all the
16 other grantees who are in the same position aware that
17 this is not where they want to go.

18 But have you looked at those things?

19 MS. COHAN: Well, the NPRM actually proposes
20 three different tools. There's the limited reduction
21 in funding, there's a regulatory option to make it
22 clear that special grant conditions can be imposed

1 during the year of a grant term, and increasing the
2 maximum potential period of suspension. So the NPRM is
3 actually proposing three additional tools in the tool
4 kit.

5 Some additional tools have been looked at over
6 time, not pursued at this time because of various
7 problems with them. One idea that had surfaced -- I
8 think this was in the ROP -- that had surfaced back in
9 the '90s, I believe it was, was to make the board of
10 each grantee have specific compliance responsibilities.

11 That has advantages and disadvantages. Yes,
12 it highlights that the board of each grantee has a
13 responsibility. But it also arguably puts the board of
14 the grantee in a position of engaging in day-to-day
15 management issues over the grantee, over situations
16 that they may not particularly have the expertise in.
17 And they may only meet four times a year, and that may
18 not be sufficient to move some things on as timely a
19 manner as they would be at the executive director
20 level. Certainly, special grant conditions are brought
21 to -- the board chair has to sign them.

22 But so there were some other things. We've

1 also looked at, over the years a number of times,
2 exercise of additional direct management authority.
3 But we have a statutory issue. Some of the agencies
4 that can actually put one of their grantees into
5 receivership have statutory authority for that, which
6 we don't.

7 So we have looked at other issues on and off,
8 and these are the ones that have come up to the fore,
9 these three at this time.

10 CHAIRMAN KECKLER: And if I'm recalling my
11 history correctly, the limited reduction in funding, in
12 particular, arose as part of a regulatory scheme that
13 involved -- there's an incomplete regulation there.
14 There's regulations for above 5 percent, and then you
15 don't need a regulation for doing nothing. So there's
16 the in-between there, in between zero and 5 percent.

17 MS. COHAN: That's correct. When the
18 termination rule was amended in I guess I was '97 or
19 '98, it specifically called for the adoption of
20 regulations for procedures for limited reductions in
21 funding. And that never happened.

22 CHAIRMAN KECKLER: Well, if there's no other

1 questions, I'm going to go ahead and invite public
2 comment on the publication of this proposed rule at
3 this time.

4 MR. SCHANZ: Mr. Chairman, if I may, not a
5 public comment but a comment from the IG.

6 CHAIRMAN KECKLER: Always welcome.

7 MR. SCHANZ: Thank you. If you refer to page
8 42 -- this is a technical matter that I want to make
9 sure that we have right -- this issue surfaced in a GAO
10 report.

11 On the agenda later today, and usually in
12 congressional hearings, they ask how we are doing on
13 the resolution of all the GAO findings. It's not fair
14 because I'm just bringing this up as I read this, and
15 John Constance isn't here, who I believe is going to
16 talk about our compliance with GAO recommendations at a
17 later date in the agenda. That's point 1. If we're
18 saying that's resolved, we'd better make sure that it's
19 resolved.

20 Point 2 is a lot of IG work, as you may or may
21 not know, revolves around deterrence. This would be a
22 great deterrent thing to use around the grantee; 136

1 grantees, they communicate with each other quite
2 frequently. If we had a suspension that was applied to
3 one grantee, it's like throwing a stone into a pond.
4 There's going to be a ripple effect around the rest of
5 the community.

6 So that's my two cents' worth as far as before
7 public comment. So thank you.

8 CHAIRMAN KECKLER: Thank you.

9 MS. COHAN: As Don's coming to the table, I
10 just want to say, I don't recall that there was a
11 specific finding in that GAO report that we -- or a
12 specific recommendation that we adopt regulations on
13 that. I think if there was, we probably would have
14 mentioned that in the actual NPRM.

15 But it's an observation that this was
16 something that they observed and commented on to us
17 about.

18 CHAIRMAN KECKLER: It's a problem that's been
19 noted by others. And I would add it's also been noted
20 in discussions on the Hill as well.

21 All right. Don?

22 MR. SAUNDERS: Thank you, Mr. Chairman. Don

1 Saunders, VP of civil legal services for the National
2 Legal Aid and Defender Association. And I know your
3 time is not only late but over, so I will make --

4 CHAIRMAN KECKLER: This is relevant enough for
5 us to continue.

6 MR. SAUNDERS: -- two very brief points.

7 One is really -- it's not the best time to do
8 it, but I do want to take a moment of privilege and
9 introduce my colleague Chuck Greenfield, who all of you
10 know. I know it's a little odd to introduce him to
11 you.

12 But as you know, Chuck has become our general
13 counsel at NLADA, replacing Linda Perle, who's worked
14 with this committee for many, many years and prior
15 boards. I think all of you know Chuck's background,
16 both working for the Corporation and in the field.

17 He will be advising your grantees fully as to
18 compliance issues with regard to various federal
19 statutes, and of course your regulations and advisory
20 opinions. He also will be staffing our regulations
21 committee, which consists of a broad range of
22 stakeholders who are generally engaged in looking at

1 regulatory policy matters such as this and providing
2 input and comment to the committee and to the Board.

3 The second point I wanted to make is just to
4 reiterate the points we have made with your predecessor
5 board and with this committee before. Working with the
6 field, as was noted, we do have strong reservations
7 about the proposal.

8 I want to defer to my new colleague to share a
9 few and summarize a few of those concerns with you.

10 CHAIRMAN KECKLER: Thank you.

11 MR. GREENFIELD: Thanks, Don. Good evening,
12 everyone. Chuck Greenfield from NLADA.

13 From what NLADA has gathered from our members
14 on this issue, when it started in 2008 and went on for
15 a while, and now it's reappeared including a more
16 recent call with our regulations committee, there's
17 strong objection from the field on this proposal and
18 the former proposal, modified, as Mattie said, a little
19 bit from the former proposal. But there's strong
20 objection to this, and I'll summarize a couple of the
21 points, trying to be brief.

22 In hearing the conversation so far, one would

1 think that there are no tools in the toolbox. In fact,
2 the toolbox is overflowing. Required corrective
3 actions, we know. Special grant conditions, we know.
4 Short-term funding, including month-to-month funding.
5 Questioned costs under 1630, a booming industry in the
6 last couple of years for LSC.

7 Suspensions of funding for up to 30 days. We
8 know that. Termination. Disbarment. Decisions not to
9 re-fund a program. All are in that toolbox. A fairly
10 significant arsenal, as Sharon mentioned. Fairly
11 significant weapons that are currently existing.

12 Secondly, reduction in funding and the lack of
13 use or the restriction by not allowing a program to use
14 funds during a suspension really harms clients and
15 potential clients. Grantees, as you all know and have
16 heard testimony, operate on very limited budgets.
17 Reserves are either low or nonexistent. Penalties
18 could very well cause and likely will cause staff
19 layoffs if they're at the levels that we're talking
20 about.

21 What are we talking about? Well, for a
22 million-dollar grant, what is 5 percent of a million?

1 \$50,000. Does that sound small? Well, it's an
2 attorney. It's actually more than a number of staff
3 attorneys are paid throughout the country by legal aid
4 programs.

5 What about a program that receives \$5 million
6 from LSC? \$250,000 would be 5 percent penalty. What
7 about a suspension of 90 days, from 30 to 90? What
8 about a 90-day suspension? For a million-dollar
9 program, a million-dollar funded LSC program, that's
10 \$250,000, a \$1.25 million penalty for a program that
11 receives \$5 million in LSC funds. These are
12 substantial amounts. There's no doubt that they will
13 affect client services.

14 A couple of other points. There's an exciting
15 movement going on in legal services about
16 evidence-based decision making, and some of you may be
17 familiar with it. There's studies going on. There's
18 some law school professors that are involved in this.
19 And it really is exciting to look at what's going on in
20 terms of studying the delivery of legal services and
21 how effective legal services can be.

22 That concept, evidence-based decision-making,

1 should apply to this decision by this Board. There
2 should be evidence before the decision is made by the
3 Board to take such a drastic action. And I submit this
4 is a drastic action.

5 We've heard some possibilities, and we've
6 heard some incentives or disincentives to do certain
7 actions. Have we really looked at -- and even the
8 chart that's provided in the earlier memo to this
9 committee doesn't display this, doesn't give us enough
10 information about this -- have we really looked at
11 those grantees that have failed to comply after having
12 gone through these number of sanctions? I think,
13 Laurie, you were getting to that point earlier.

14 Have we really looked at what examples there
15 are of grantees that have failed to comply once the
16 other tools have been applied? I submit we have not.
17 This decision, if it is made to publish this, is not
18 based on a demonstrated need or based on evidence-based
19 decision-making.

20 Fourth, there's a need to ensure due process.
21 You've heard the type of money we're talking about.
22 It doesn't have to be 5 percent; it could be less than

1 5 percent. I recognize that. Legal aid lawyers are
2 very familiar with procedural due process arguments.
3 It's an arsenal in the legal aid lawyer's toolkit.

4 Goldberg v. Kelly, Mathews v. Eldridge, cases
5 in the Supreme Court that were brought by legal aid
6 lawyers. This proposal does not have adequate due
7 process built in. It is particularly true when you
8 look at the potential for a loss of funds and the
9 amount of funds that I mentioned.

10 Even the current regulation on termination
11 doesn't provide an administrative law judge, unlike
12 many federal agencies. It's an appointed person by the
13 Corporation, the president. And here we have a
14 suspension which allows a grantee, once the allegations
15 surface, five days to ask for an informal meeting.

16 And unlike the previous proposal, the previous
17 notice of proposed rulemaking in '08, the procedural
18 due process provisions have been cut back in this
19 current one. In fact, there's no longer an ability to
20 go to the president after a decision is made, so that
21 even though the 180 days has been pared down to 90
22 days -- recognize that for a suspension -- in fact, the

1 procedural due process provisions are wholly
2 inadequate. Legal aid lawyers know procedural due
3 process. They'll see this is lacking in procedural due
4 process. It's a serious flaw.

5 The Board should carefully consider how this
6 sanction proposal fits in its ongoing strategic
7 planning process. The Fiscal Oversight Task Force
8 recommendations did not recommend this, by the way. Is
9 this part of a considered and planned regulatory
10 agenda? Is this the first major regulatory change that
11 this Board wants to make? Is this the message this
12 Board wants to give to grantees?

13 Mr. Grey, you talked about being a positive
14 message. I think not. I think it will not be a
15 positive message. I think it will be viewed, in fact,
16 as a negative message for those programs that are
17 struggling, which are all of them right now. Those
18 programs that are laying off lawyers and closing
19 offices and reducing services, it will not be viewed as
20 a positive message.

21 A couple of other points. There are some
22 technical problems -- I don't want to spend too much

1 time -- in one part of the proposed regulation.
2 1606.15(a) talks about an amount not to exceed 5
3 percent for the reduction in -- for the sanction,
4 reduction in funding. And in fact, the definition
5 later talks about an amount less than 5 percent. So
6 there's some of those difficulties.

7 To conclude, you might ask, well, what's the
8 problem with just publishing the notice? Just publish
9 the notice and see what people think about it. Well,
10 one of the problems with just publishing the notice is
11 that it's a clear indication that the agency, that this
12 Board, has made a decision that this is a serious
13 problem, that there are apparently a number -- we don't
14 know how many, we don't have the evidence-based
15 information in front of this Board -- apparently this
16 is a serious problem, that there are a number of
17 programs that are failing to comply with regulations.

18 Well, it's not just regulations, is it? It's
19 instructions. It's grant conditions. It's guidelines.

20 It's rules. So it goes much broader than a regulation
21 or a statutory violation.

22 Other people have characterized this as, once

1 an agency makes that decision to publish a rule, that
2 the train has left the station, that they've really
3 decided, this is necessary. This is a problem, and
4 this is necessary to rectify it.

5 What message are we sending to the public?
6 Are we sending to the press? Are we sending to others
7 when we do this? There's a problem in legal services.
8 There are grantees that are violating -- is that true?
9 Do we have the evidence for that?

10 I'll just conclude with a note, a quote, I
11 should say, from Sarah Singleton, who was on this
12 committee, a former Board member who, when confronted
13 with the same issue in 2008, said, "Not only has the
14 train left the station, but all the tickets have
15 already been sold."

16 So once you publish it, in fact, it is likely
17 to occur. You've made a decision that's necessary.
18 You've made a decision it's a serious problem. I
19 submit that this committee and the Board should turn
20 down this request and should, in fact, close
21 rulemaking. That apparently was a problem; it wasn't
22 closed before. It was voted down by the previous

1 board. It wasn't closed before.

2 This committee should close it. Thank you.

3 MS. MIKVA: Can I ask two questions? One is,
4 you didn't address the grant conditions, and I wondered
5 if you had any view on that. And the other is, can you
6 imagine a good reason why a program would not come in
7 compliance within 30 days if it could, or 90?

8 MR. GREENFIELD: Maybe a disagreement on
9 interpretation would be my guess as to why -- I'm
10 answering the second question first -- as to why a
11 program wouldn't come into compliance within 30 days.
12 In possibility, I suppose, that's an argument you could
13 make to LSC.

14 My guess is it's a disagreement on
15 interpretation as to the right of LSC to require this,
16 and maybe there's some state law involved or other
17 issues involved.

18 And the other one was grant conditions and the
19 effectiveness of grant conditions? Was that your
20 question?

21 MS. MIKVA: Well, that was the third piece of
22 it.

1 MR. GREENFIELD: Yes. Or was it the
2 suggestion that grant conditions be allowed to occur
3 during the course of -- yes. We haven't really talked
4 a lot about that.

5 I will note that during the rulemaking
6 workshop, which involved a number of grantee executive
7 directors, that was suggested as a possibility, was
8 that grant conditions be applied during the course of
9 the grant. We haven't taken a formal position, but
10 I'll just note that that was discussed.

11 MR. KORRELL: Mr. Chairman, just a quick
12 question on suspensions.

13 CHAIRMAN KECKLER: Yes. Go ahead.

14 MR. KORRELL: With a suspension, at the end of
15 the 30- or 60- or whatever-day period, is the funding
16 then restored retroactively, so it's just a delay? Or
17 do they actually lose the funding during the window?

18 MS. COHAN: No. They get all the money back.

19 CHAIRMAN KECKLER: Good point.

20 Further public comment?

21 MR. JOHNSON: My name is Earl Johnson, and I'm
22 here on behalf of the American Bar Association's

1 Standing Committee on Legal Aid and Indigent
2 Defendants, a committee that has existed for 92 years
3 and whose first chair was Charles Evans Hughes.

4 And welcome to the birthplace of the Legal
5 Services Corporation. I don't know how many of you
6 know it, but Richard Nixon signed the Legal Services
7 Corporation Act in his summer home there in San
8 Clemente, just 50 miles from where we are today.

9 I'm here on behalf of SCLAID, but I'm no
10 longer a member of SCLAID as of about a year and a half
11 ago. And I'm also at the disadvantage that SCLAID has
12 not yet made any comments on this particular proposal.

13 There wasn't enough lead time this time, as there was
14 in 2008.

15 But they did, in 2008, and I was a member of
16 SCLAID at that time, send a five-page, single-spaced
17 letter of comments regarding the 2008. And I'm not
18 going to read the five-page letter to you, but I'm sure
19 others can have it.

20 I just wanted to make sure you understood that
21 I am not communicating what the current views of the
22 current SCLAID would be as to the current proposal.

1 I'm only summarizing, very briefly, the comments that
2 were in the letter of October 21, 2008. And there were
3 really four major points that were made in there.

4 First, and you've heard a bit of the same
5 kinds of comments earlier, but one was that LSC has
6 sufficient tools already. It has quite a panoply of
7 tools I saw in Vic's background memo for this issue.

8 Second, that some of these new proposed
9 sanctions seem to punish the poor, the clients of these
10 organizations, probably more than the organizations.

11 Third, that they shouldn't be expanding the
12 sanctions powers without very clear descriptions of the
13 nature and degree of violation that it takes to impose
14 those additional sanctions or different sanctions, and
15 without clear due process procedures commensurate with
16 the degree of the violation that's involved.

17 And fourth, some real concerns about enhancing
18 the sanctions still more, not because -- I have no
19 problem, and I don't think SCLAID would have any
20 problem with this Board and this staff and how they
21 would use them. But I've been working on a history of
22 civil legal aid for the last 135 years; it's been

1 taking me almost 135 years to do that.

2 (Laughter.)

3 MR. JOHNSON: But along the way, I found a
4 number of situations where there were boards that
5 misused the sanctions they had, and sometimes got
6 slapped on the wrist by federal courts for having done
7 so, violations they deemed material or deemed not
8 material by the courts, and interpretations they had of
9 various provisions, regulations, and so forth were
10 deemed not to be proper interpretations, either of the
11 regulations or of the statutes.

12 That's essentially what I have to say today.
13 I wish I was in a different position, that being on
14 SCLAID, and I wish SCLAID had had the time to actually
15 make already the comments. Now, their next meeting
16 will be in early February at the American Bar
17 Association's semiannual -- or their midwinter
18 meetings, and I'm sure they will have comments then,
19 hopefully before you decide to send this out for
20 comment.

21 Thank you.

22 CHAIRMAN KECKLER: Thank you.

1 Were there further comments from the Board or
2 the committee on this matter?

3 MR. GREY: I'd like to hear all the public
4 comment.

5 CHAIRMAN KECKLER: Oh, okay. Was there
6 further public comment? I didn't notice anybody else
7 coming up. But if there is -- if there's not, go
8 ahead.

9 MR. GREY: Mr. Chairman, I want to make two
10 observations. The first is that I'm very appreciative
11 of the comments and take seriously the gravity in which
12 they were presented.

13 The second is, it's not what you do, it's how
14 you do it. It's not what you say, it's how you say it.

15 And we have to be careful what we say and how we say
16 it, and what we do and how we do it.

17 But that doesn't change my decision about how
18 I feel about this. I think flexibility is really
19 important for us in the way we work with our grantees.

20 And more flexibility, to me, is a good thing, not a
21 bad thing.

22 The second point I would make is, I am

1 sympathetic and appreciative of the fact that there are
2 burdens of proof or standards upon which you do make
3 decisions when you have to make a decision. This is
4 not a bad time to establish some of those as the
5 evidence issue.

6 And so I like that approach because again,
7 going back and putting on my regulator hat, I had a
8 defined set of conditions upon which I had to use. And
9 it prevented me from abusing my discretion.

10 So I like that. I think what's good for the
11 goose is good for the gander kind of thing. But I feel
12 pretty strongly about the flexibility issue, and I
13 think that it should -- but I think how we say it is
14 important, and I think how we execute is even more
15 important.

16 But this, I think -- it's hard to say this
17 when you're on the receiving end of a sanction -- but I
18 think this is more likely to give -- if it's used
19 properly, obviously -- to give the field a better sense
20 of a closer relationship with LSC as opposed to a cloak
21 and dagger or a hammer over their head kind of
22 approach.

1 This is, I'm going to get your attention. I'm
2 going to get it swiftly. I'm going to get it in a way
3 that should protect the people we're trying to service,
4 I hope.

5 M O T I O N

6 MR. GREY: So it is with those comments,
7 Mr. Chairman, that I would ask that we consider this
8 proposal.

9 CHAIRMAN KECKLER: Thank you. And is there a
10 second?

11 MR. KORRELL: Second.

12 CHAIRMAN KECKLER: Let me add one more thing
13 before we do that, which is that I take the public
14 comments very seriously. And on reading the
15 regulation, I see that there are some things that we
16 need to think about and discuss publicly about due
17 process, among other things, because the whole emphasis
18 of the rule is about accountability. It's about
19 accountability for grantees.

20 But that means, as you say, we need to be
21 accountable as an organization, too, and there needs to
22 be built into the rule accountability for us as an

1 organization making these very consequential decisions.

2 And the fact that there's a lot of public
3 comment and a lot of public concern about that is
4 something that I recognize. But that cuts the other
5 way, too. There's a lot of other people out there that
6 are interested in this issue. And that's why I think
7 that we should recommend to the Board to publish it and
8 receive the public comments of everybody who's not here
9 about it.

10 And one thing I do take issue with the
11 comments is the idea that the train has left the
12 station, the idea that what you're looking at is the
13 final rule. That's not at all the way that I perceive
14 it. Okay?

15 The public comments are going to be
16 thoughtful. This is a long process. People have been
17 thinking about these issues for years. There's going
18 to be a lot to say. There's going to be a lot of
19 things that we need to work with.

20 I intend this, and have thought of this, as a
21 real notice and comment, a real getting them back,
22 revising the rule in response to the comments, once

1 they're written, and then looking at the final product
2 of that collaborative process, essentially, before
3 anybody gets regulated by it.

4 So with that, the motion is on the floor, and
5 I'm asking -- yes, further -- and ask for discussion.

6 MS. MIKVA: I'm wondering how the committee
7 would feel about taking these what I see as really
8 three separate tools and taking them up separately?
9 I'm not sure why it should be an all or nothing
10 proposition.

11 CHAIRMAN KECKLER: Well, my own response to
12 that is that since we're just asking for public comment
13 at this point, I think that your point is a good one
14 for us to keep in mind because if the public comment
15 comes back and everybody hates the suspension rule and
16 they say, well, don't do that, don't bother with that,
17 then separate that out and consider it ultimately
18 separately, for instance.

19 So I think that when it finally comes to
20 regulating people and finally comes to voting on it, we
21 very well may want to split the -- split our
22 consideration. But at this point, management wants

1 intermediate enforcement tools. Here's their proposal.
2 What we're asking for is public comment on those
3 proposals.

4 MR. GREY: I think there's another reason not
5 to do that, and I think things have to be looked at in
6 context. And it, I think, is not fair. This is, I do
7 believe, an issue of fundamental fairness. I think
8 people need to know what's on our mind, not piecemeal
9 it out to them. I think that could be really
10 misinterpreted.

11 So I like the idea of putting it in a whole
12 sense and in dealing with it so that it is done in a
13 way that people understand the context in which we're
14 trying to present these ideas.

15 MS. MIKVA: I'll just say that I really
16 think -- I can see where two of the three seem designed
17 to obtain compliance, and one of them just seems
18 punitive. And I think by published it for notice and
19 comment, it still sends a message, and that for that
20 reason, we should worry about what message we're
21 sending to the field and to the public, and that we
22 should take them up separately.

1 CHAIRMAN KECKLER: All right. Is there
2 further discussion?

3 MR. KORRELL: Charles, I just would like to
4 echo your comment about the deliberative process. I
5 haven't been on the Board terribly long; I suppose none
6 of us has. But I think we all take very seriously the
7 obligation to debate and consider these things.

8 And I agree with the Chairman that the train
9 hasn't left the station just because we've published
10 our current thinking. We're inviting comment, and we
11 all take it very seriously.

12 CHAIRMAN KECKLER: All right. Well, with
13 that, the motion on the floor is the recommendation to
14 the Board to publish the draft NPRM prepared in the
15 board book. All those in favor?

16 (A chorus of ayes.)

17 CHAIRMAN KECKLER: Opposed?

18 MS. MIKVA: Nay.

19 CHAIRMAN KECKLER: The motion carries. The
20 recommendation will be presented to the Board.

21 I now note that we are now considerably over
22 time. On this agenda, the next item of business is the

1 self-evaluations. I want to make a very brief comment
2 about that. Thank you for filling them out and for
3 adding them. Thank you for some good comments about
4 the committee.

5 One thing that is noted is that the committee
6 would like further prior consideration of the agenda
7 before it gets published. I fully support that, and I
8 know that that has not always occurred. But I will
9 assure that it will happen. And when I get a proposed
10 draft agenda, I will circulate it, and maybe that
11 will -- before I myself sign off on it. So that will
12 hopefully resolve that issue going forward for the
13 committee.

14 But further discussion of the committee's
15 goals is very welcome, and we'll just take that up in
16 further meetings, telephonic or the next quarter. If
17 members wish to have ideas about further agenda items
18 and goals, they can, of course, send those to me at any
19 time.

20 The fifth item is a staff report on notice and
21 comment, which is actually an interesting issue and is
22 another one of these issues that we may -- there's not

1 a consider and act on it at this time. You can read
2 the staff report. I recommend that people do read the
3 staff report and think about that, and we will probably
4 take that up at some point this year.

5 The public comment, I think, has been covered
6 by the public comment on our only substantive item of
7 business.

8 So as I move to item No. 7, I will note only
9 one further thing, which is at the prior telephonic
10 meeting, this committee has been asked to do a couple
11 of things by the Chairman, Chairman Levi, which we will
12 again have to put on our agendas for future meetings.

13 One is to look at the protocols that are
14 involved in LSC, to consider those; and in particular,
15 to look at our fundraising protocols. And so those are
16 items that will occur in the near future on this
17 committee's agenda.

18 Is there any other business which people wish
19 to bring before the committee?

20 (No response.)

21 CHAIRMAN KECKLER: Seeing none, I will now
22 entertain a motion to adjourn this meeting of the

1 Operations and Regulations Committee.

2 M O T I O N

3 MR. GREY: So move.

4 MR. KORRELL: Second.

5 CHAIRMAN KECKLER: All in favor?

6 (A chorus of ayes.)

7 CHAIRMAN KECKLER: The motion carries and the
8 meeting is adjourned.

9 (Whereupon, at 5:57 p.m., the committee was
10 adjourned.)

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