


## RULEMAKING OPTIONS PAPER

**TO:** Operations & Regulations Committee  
Board of Directors

**FROM:** Victor M. Fortuno   
Vice President & General Counsel

**DATE:** July 12, 2007

**SUBJECT:** Rulemaking to Develop "Lesser Sanctions"

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### *Introduction*

This Rulemaking Options Paper ("ROP") has been prepared by the Office of Legal Affairs ("OLA") and LSC's senior management. The ROP is structured as follows: a summary of Management's recommendation; a "Background" section to provide some legal and programmatic context for the issue(s) at hand; a "Scope of Potential Rulemaking" section, which sets forth a variety of policy options; a "Rulemaking Process" section, which sets forth a discussion of the various rulemaking process options available; and, finally, there is a "Management Recommendation" section which sets forth Management's recommendations with respect to the rulemaking scope and process options. This ROP is intended to aid the Committee and the Board in the deliberation and decisionmaking process.

### *Summary of Management's Recommendation*

For the reasons set forth below, Management recommends that LSC initiate a rulemaking for the development of a rule for the imposition of special grant conditions during a grant year. Adding this option to LSC's enforcement "toolbox" will be useful to assist LSC in securing compliance. Not all enforcement mechanisms need to be applied to be effective; rather the potential for a sanction may have a deterrent effect. Management further recommends that such rulemaking be undertaken through Notice and Comment Rulemaking only.

## ***Background***

### LSC's Enforcement Authority & Tools

LSC takes seriously its responsibilities to ensure compliance. The LSC Act provides general enforcement authority to the Corporation.<sup>1</sup> LSC's main regulation discussing general enforcement authority and procedures is the Enforcement Procedures regulation at 45 C.F.R. Part 1618. In accordance with the requirements of Part 1618, Management uses a variety of enforcement mechanisms, formal and informal, to ensure compliance. Among these are: the imposition of Corrective Action Plans, temporary suspension of funding, questioned cost proceedings, and termination (in whole or part) of a recipient's grant -- any of which may be imposed during a grant year; placing recipients on month-to-month funding (which may be done only at the outset of a grant term); and imposing special grant conditions (which may be done at the outset of a grant term or between grant years of a multi-year grant term). These mechanisms, along with on site CSR/CMS reviews, informal consultations and compliance training, generally suffice to ensure that recipients remain in compliance with applicable requirements and come back into compliance when violations occur.

LSC has also adopted regulations providing for additional enforcement mechanisms. In particular, LSC has adopted suspension procedures at 45 C.F.R. Part 1623 and questioned cost procedures at 45 C.F.R. Part 1630. Finally, LSC has adopted grant "termination" procedures at 45 C.F.R. Part 1606. With respect to "termination" of funding, Part 1606 of the Corporation's regulations contains procedures for the termination of funding in cases of substantial noncompliance by a recipient with LSC statutory or regulatory requirements and other policies, instructions or grant terms and conditions. Under the regulation, any contemplated reduction of 5% or more of a recipient's funding is considered a termination and triggers the termination procedures.<sup>2</sup> Reductions of funding of less than 5% are not considered terminations. However, LSC may not reduce a grantee's funding in an amount of less than 5% absent a formal rulemaking to establish standards and

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<sup>1</sup> LSC Act, §2996e(b)(1)(A); 42 U.S.C. §1006(b)(1)(A).

<sup>2</sup> 45 C.F.R. § 1606.2(d).

procedures therefor.<sup>3</sup> LSC has never adopted regulations establishing such standards and procedures.

### Previous Consideration of the Development of a “Lesser Sanctions” Regulation

Although the 1998 revision to Part 1606 contemplated further rulemaking to adopt procedures for limited reductions in funding, no further action was taken at the time, or subsequently, to develop such a rule. In previous years staff has recommended the consideration of a monetarily-based “lesser sanctions” rule. In particular, in 2002 the Regulations Review Task Force undertook its review of LSC regulations. Upon conclusion of its review, the Task Force recommended that LSC undertake a “lesser sanctions” rulemaking in the context of a comprehensive consolidation of Parts 1606, 1618 and 1623 into one regulation setting forth the Corporation’s enforcement and sanction standards. This recommendation was adopted by LSC management at the time of the issuance of the Task Force Report (January 2002) and was “accepted” by the LSC’s Board of Directors, but no rulemaking was initiated prior to the end of the tenure of the then-existing LSC leadership.<sup>4</sup> Since the appointment of the current Board and executive management, there have been limited staff level communications but no management position has been taken.

### Enforcement and Sanctions in Federal Grant Programs

Federal grant-making agencies have, by regulation, adopted what is colloquially known as the “common grant rule.” This is a uniform rule issued by the Office of Management and Budget as Circulars A-102 (Grants and Cooperative Agreements with State and Local Governments) and A-110 (Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations). Each Federal agency has adopted the common grant rule in its own regulations. Circular A-110 (and the various agency regulations implementing A-110) is what governs grants which LSC’s recipients receive from Federal agencies such as the Department of Justice, and the Department of Housing and Urban Development.

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<sup>3</sup> 45 C.F.R. § 1606.2(d)(2)(v).

<sup>4</sup> Subsequently, the Board deferred all action on rulemaking pending the appointment of a new Board of Directors.

Under this general authority, Federal agencies are authorized to: temporarily withhold cash payments pending correction of the deficiency by the recipient; disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance; wholly or partly suspend or terminate the current award; withhold further awards for the project or program; or take other remedies that may be legally available. Examples of other tools used by other agencies include converting the grantee to a reimbursement method for payment and withholding of awards of other discretionary grants.

### *Scope of Potential Rulemaking*

#### Rulemaking - Non-Monetary Mechanisms

The following section addresses two options which do not provide for imposing monetary-based penalties. The significant advantage of non-monetary enforcement mechanisms is that they avoid the potential drawback of reducing a recipient's already overstretched resources.

#### *Adoption of a Regulation Providing Authority and Criteria for the Imposition of Special Grant Conditions During a Grant Year*

As noted above, LSC's current grant assurances provide that special grant conditions may be imposed on a recipient prior to the awarding of a new grant or between years of a multi-year grant term. Special grant conditions may not currently be imposed on a recipient *during the course of a grant year*. Therefore, one "lesser sanction" option would be to develop a rule providing LSC with the express authority to impose special grant conditions during a grant year, in accordance with criteria specified by regulation.

It would be helpful to LSC to be able to impose special grant conditions, pursuant to regulatory criteria, during the course of a grant year in instances in which a recipient has been found to be in violation of an applicable requirement. Although Corrective Action Plans can be imposed during a grant year and often contain similar requirements as special grant conditions, imposing such requirements as special grant conditions is a particularly effective way of capturing a recipient's attention and securing compliance.

Another advantage of adopting a regulation providing express authority for imposing special grant conditions during a grant year is that it would ensure that recipients have notice that special grant conditions may be imposed and would not constitute a modification of the grant agreement inconsistent with principles of contract law underlying the grant agreement. Having a regulation setting forth the criteria for the imposition of special grant conditions during a grant year would also help ensure that when such special grant conditions are imposed, they are appropriate and of greatest efficacy.

#### *Other Non-Monetary Mechanisms*

In its memo of December 21, 2006, the Office of Inspector General (“OIG”) suggested potential legislative changes to increase LSC’s authority to debar, or impose a trustee to replace certain senior level employees or Board members responsible for serious malfeasance or violations of applicable laws and regulations. To the extent adopting such mechanisms would require additional legislative authority, however, they would lie beyond the scope of the Corporation’s current authority to enact via rulemaking. However, even to the extent that adoption of regulations concerning the sort of actions proposed would be within LSC’s current statutory authority, contemplating actions of this nature may raise significant concerns.

A strong argument can be made that such actions would constitute an unnecessary interference with the independence of recipients and are incompatible with the structure of the legal services system (whereby each recipient is an autonomous organization, legally separate from LSC). With respect to Board members, LSC’s Governing Bodies, 45 C.F.R. Part 1607 requires the appointment of Board members by relevant local organizations (State, local bar associations, local organizations which have an interest in the delivery of legal services to low income persons, client and community-based organizations which advocate for or deliver services to the client community and the recipient itself). The regulation implemented a statutory directive to ensure that the governing body member selection process reflects local control.<sup>5</sup> A policy allowing LSC to override that process, even for enforcement reasons, would be at odds with the local control policy embodied in Part 1607. Although there is no similar regulatory policy with

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<sup>5</sup> 59 Fed. Reg. 65249 at 65249 (December 19, 1994).

respect to employees, the selection of recipient management and employees is even more a matter of local control and the responsibility of the recipient as a separate, independent entity. A policy allowing LSC to dictate local employment decisions appears to be overly intrusive into the recipient's authority and prerogatives and inconsistent with the local control contemplated by the statutory framework.

LSC already has the authority, through its grants management and oversight, to require recipients to obtain management training, consulting or other similar services, in order to improve recipient compliance with various requirements. As such, authority to interpose itself into recipient management appears unnecessary.

### Rulemaking - Monetary-based Mechanisms

#### *Amending Part 1606 to Include Standards and Procedures on Limited Reductions in Funding*

In its memo of December 21, 2006, the OIG suggested a rulemaking on the development of standards and procedures for the imposition of limited reductions in funding. Under such an approach, LSC could amend Part 1606 to include such new standards for limited reductions in funding.

Monetary penalties run the risk of being counterproductive because they would reduce resources available for the delivery of client services, which could then lead to fewer clients being served and more people suffering the consequences of the lack of legal assistance. In addition, the imposition of monetary penalties would reduce resources necessary to implement corrective action, which might require the hiring of consultants, developing compliance mechanisms or conducting training. Management remains convinced that additional monetary penalties are unnecessary.

### ***Rulemaking Process - Options***

Under the LSC Rulemaking Protocol, LSC may pursue rulemaking by Notice and Comment Rulemaking only, or through the use of Negotiated Rulemaking (followed by a brief notice and comment process). If LSC pursues a Notice and Comment rulemaking only, LSC has the option of conducting a public Regulatory Workshop to engage in a discussion with interested parties about the

subject of the rulemaking prior to the development of a Notice of Proposed Rulemaking.

As this rule does not call for discussion of issues relating to the provision of legal services, it does not appear that a prolonged face-to-face dialog with grantees would be necessary in this instance. In our view, the time and expense of a Negotiated Rulemaking would not appear to be warranted. Rather, the rulemaking would focus on process issues and procedures LSC must follow in taking an enforcement action. A Notice and Comment rulemaking would appear to suffice.

Although the regulation is likely to be of significant interest to the grantee community, the issues do not appear to be of such a nature as to require the convening of a Regulatory Workshop. The LSC Rulemaking Protocol calls for the use of Regulatory Workshops to elicit information through open discussion about problems or concerns with a particular issue and to provide an opportunity for sharing ideas on how to address that issue. However, since the contemplated rulemaking would involve largely procedural matters, a public discussion (beyond that which may occur at the Board meeting in which this issue is raised) does not seem likely to raise issues or create novel approaches to problem-solving which will be of significant assistance to LSC in the drafting of a Notice of Proposed Rulemaking. In this instance, the normal exchange of ideas through the written notice and comment process will likely be adequate.

### ***Management's Recommendation for Action***

Having considered the various options discussed above, Management recommends the initiation of a rulemaking for the development of a rule for the imposition of special grant conditions during a grant year. Management further recommends that such rulemaking be undertaken through Notice and Comment Rulemaking only. Management is of the opinion that Negotiated Rulemaking is neither appropriate nor necessary in this instance and that convening a Regulatory Workshop would not represent an effective or efficient use of resources. Rather,

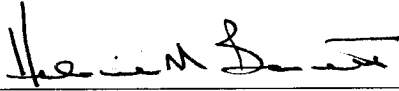
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Notice and Comment Rulemaking by itself would provide sufficient opportunity for all interested parties to comment on LSC's proposed course of action.

Approved:

A handwritten signature in black ink, appearing to read "Helaine M. Barnett", is written above a horizontal line.

Helaine M. Barnett  
President