



**7050-01**

## **LEGAL SERVICES CORPORATION**

### **45 CFR Chapter XVI**

#### **Revised Rulemaking Protocol**

**AGENCY:** Legal Services Corporation.

**ACTION:** Announcement – adoption of revised rulemaking protocol.

**SUMMARY:** This document sets forth the text of the revised rulemaking protocol adopted by the LSC Board of Directors.

**DATE:** This policy statement and protocol became effective on July 18, 2015.

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**SUPPLEMENTAL INFORMATION:** In order to carry out its mission, the Legal Services Corporation (“LSC” or “Corporation”) is authorized under the LSC Act to issue binding federal regulations with the force of law. The United States Court of Appeals for the District of Columbia Circuit has described LSC as possessing “general rulemaking authority.” Texas Rural Legal Aid, Inc., et al. v. Legal Services Corporation, 940 F.2d 685, 692 (D.C. Cir. 1991); see 42 U.S.C. 2996e. The LSC Act specifies, however, that the Corporation “shall not be considered a department, agency, or instrumentality, of the Federal Government.” 42 U.S.C. 2996d(e). Consequently, the Corporation’s regulatory process is not statutorily tied to the Administrative Procedure Act (APA, 5 U.S.C. Ch. 5

et seq.), which binds federal agencies. Instead, Congress has required more specifically that LSC “shall afford notice and reasonable opportunity for comment to interested parties prior to issuing rules, regulations, and guidelines, and it shall publish in the Federal Register at least 30 days prior to their effective date all its rules, regulations, guidelines, and instructions.” 42 U.S.C. 2996g(e). The scope of LSC’s Rulemaking Protocol encompasses “rules” and “regulations,” which are interpreted as essentially synonymous and which result in codified federal regulations.

Although the APA does not bind LSC, the Corporation has identified the broad purposes of that statute – public participation and reasoned, orderly, decision-making based on high- quality information – as consistent with its own statutory requirements and the general goals of regulation. LSC is also guided by other best practices broadly adopted by federal agencies, which include Executive Orders 12866 (1993) and 13563 (2011) and Office of Management and Budget Circular A-4 (2003).

Collectively, these documents suggest that regulation should proceed by demonstrating why action is needed and should be justified by a consideration of the costs and benefits of the regulatory approach chosen. Costs and benefits may be qualitative or quantitative and include outcomes related to the widespread distribution of “equity, human dignity, [and] fairness,”<sup>1</sup> which is in accord with the goals of the LSC Act. In addition, these federal best practices remind us to maintain regulatory flexibility where possible by specifying objectives rather than detailed rules, and also to engage in a regular examination of existing regulations to identify those that are redundant, unnecessary, or in need of modification.

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<sup>1</sup> See E.O. 13563, sec. 1(c).

LSC intends that an important source of new rulemaking activity and agenda items will be an ongoing retrospective review of its existing regulations. LSC's regulations are not voluminous, and to the extent they can be improved, they should be, as time and resources allow. In particular, LSC will examine its regulations to identify those where costs and burdens can be lessened without compromising effectiveness, or where effectiveness can be increased without increasing cost. It also will identify, with the input of the Office of Inspector General, regulations that are outdated or otherwise no longer useful or manageable, and those rules implicated by LSC's Strategic Plan. In order to maintain this process of continuous improvement, however, LSC anticipates the need for assistance from the regulated community, which is in the best position to highlight unanticipated problems that have arisen from particular regulatory provisions.

Similarly, existing nonregulatory guidance, including Program Letters and External Opinions, may often be a basis for agenda items. For a variety of reasons, it may be useful to codify successful guidance following a notice and comment process. In other cases, LSC may identify this guidance as founded in outdated regulation and as problematic in practice; revision of the underlying regulations would then be called for. Because of these important relationships between guidance and regulation, LSC's commitment to retrospective review extends to its guidance documents, as does its reliance on the communicated experience of the public and regulated community.

#### Rulemaking Protocol of the Legal Services Corporation (2015)

##### **I. Purposes, Principles, and Authorities**

The purpose of this protocol is to explain the procedures used by LSC in the development, modification, rescission, and promulgation of its regulations, currently

codified beginning at 45 CFR part 1600. The regulatory principles guiding LSC are intended to advance its overall mission as an organization: to provide financial support for legal assistance in civil matters to persons financially unable to afford legal assistance in a manner consistent with the LSC Act and other statutory directives of Congress. See 42 U.S.C. 2996b(a). LSC, in particular, is asked “to insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons” eligible for LSC-funded services. 42 U.S.C. 2996f(a)(3).

LSC first developed a formal rulemaking protocol in 2000. The rulemaking protocol was revised in 2002. The Board of Directors of LSC (“Board”) at that time believed that while there was no legal requirement for rulemaking procedures to be formalized in a written protocol, it was appropriate for LSC to produce such a document. As an independent entity not bound by the Administrative Procedure Act, LSC does not follow precisely the standardized regulatory processes of federal agencies, and in the interests of conducting its business in an open and fair way, LSC should make its rulemaking procedure generally known. The Board issuing this Protocol has determined these views to be sensible and has also determined that further revisions would be useful. This 2015 revision reflects more than a decade’s worth of experience in rulemaking under the prior protocol and in addition incorporates certain trends in regulations, such as the emphasis on outcomes and on cost-benefit analysis.

It should be noted that because this Protocol is a statement of LSC internal procedure and is not itself a “rule, regulation, guideline or instruction,” LSC is not required by law to publish this Protocol or seek public comment. LSC is choosing to publish this Protocol in the Federal Register (and has also posted it on the LSC website at

<http://www.lsc.gov>) in furtherance of LSC's general policy of transparency.<sup>2</sup> The Protocol begins with an overview of the rulemaking process as usually conducted and then proceeds to a more detailed discussion of the steps involved and certain variations that may occur.

## **II. Summary of the Usual Rulemaking Process**

The Operations and Regulations Committee (“Committee”) is responsible for identifying rulemaking priorities for the Corporation in consultation with LSC management (“Management”) and LSC’s Office of Inspector General (“OIG”), and for laying the groundwork for the Board’s initial consideration of a regulatory change. The usual vehicle for the Committee’s work will be a Rulemaking Agenda (“Agenda”), revised at least annually. Through the Agenda, Management will propose a prioritized list of regulatory actions that the Committee will consider for action and presentation to the Board. The Agenda will serve as a work plan for the Committee and LSC staff.

As items from the Rulemaking Agenda come up for Committee consideration, LSC staff will produce a written statement describing the need for regulatory action. This document, termed a Justification Memorandum (“Memorandum”), is intended to be flexible in character, and will be of a length and scope appropriate to the issue. The Memorandum will contain a recommendation from Management regarding whether or not to authorize rulemaking.

Final authority over LSC rulemaking policies and actions rests with the Board. Under the LSC Act, the Board has the legal authority to initiate, terminate, or otherwise

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<sup>2</sup> Although this Protocol reflects LSC policy, it is not intended to and shall not create or confer any rights for or on behalf of any person or party and shall not establish legally enforceable rights against LSC or establish any legally enforceable obligations on the part of LSC, its directors, officers, employees and other agents.

direct a rulemaking at any duly authorized meeting. Under normal circumstances, the Board will take three votes on a rulemaking:

(Vote 1) To authorize rulemaking

(Vote 2) To publish a Notice of Proposed Rulemaking (“NPRM”) for notice and comment

(Vote 3) To publish a Final Rule

Prior to each of these votes, the Committee normally will engage in public deliberation on the rulemaking, and the meeting or meetings at which such deliberations occur will include an opportunity for public comment. Upon concluding its deliberations, the Committee will vote on and issue a recommendation to the Board.

### **III. Rulemaking Protocol in Detail**

#### Step 1 –Issue Identification and Inclusion on the Agenda

The initial impetus for a rulemaking may come from a variety of sources, including:

- New studies or other evidence;
- Initiatives arising from the Corporation’s Strategic Plan;
- Retrospective review of the Corporation’s regulations;
- Congressional directives;
- Board or Committee decisions;
- Requests from Management, the OIG, or individual members of the Board or Committee; or
- Petitions or recommendations from the regulated community and general public.

Management is responsible for compiling and conveying these possibilities, together with its views, for Committee consideration. At minimum, this will occur annually during revision of the Rulemaking Agenda.<sup>3</sup> It may, however, occur at any time as

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<sup>3</sup> This parallels the practice followed by many federal agencies of publishing their regulatory plans semi-annually in the Unified Agenda of Regulatory and Deregulatory

circumstances dictate or if a potential rulemaking is time-sensitive. From the possibilities presented by Management, the Committee will determine which items to include or exclude from further consideration for the coming year and will also indicate general priorities among the items included.

The annual preparation of the Agenda (and any significant revisions) will be reported to the Board at its Spring quarterly meeting. The Committee normally will develop the Agenda without Board action, but rather in consultation with Management and the OIG. The Board may specifically act to place (or remove) items on the Agenda. During the course of the year, the Committee may authorize LSC to undertake rulemakings that were not placed on the Rulemaking Agenda.

#### Step 2 – The Need for Regulation and the Justification Memorandum

Generally, Management will work on items on the Rulemaking Agenda in the order of priority established by the Committee. Management will present each item to the Committee at a public meeting. Prior to that meeting, Management will prepare a Justification Memorandum discussing the potential rulemaking for the Committee and the Board. This Memorandum will discuss the need for the regulatory action and Management's views on whether action is necessary or desirable. The Memorandum represents Management's considered view on the initiation of rulemaking and is developed in consultation with the OIG. OIG's views may be incorporated in the Memorandum submitted by Management, or OIG may submit them to the Committee independently.

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Actions ([www.reginfo.gov](http://www.reginfo.gov)). LSC is not required to include its regulatory plans in this document, and its creation of a Rulemaking Agenda should not be interpreted as indicating intent at this time to participate in the Unified Agenda or to follow its requirements.

Beyond these elements, the format of the Memorandum will be determined by the characteristics of each particular proposed rulemaking. Often, the focus at this early stage of the rulemaking will be simply on whether some change is warranted, rather than an assessment of any specific changes or routes by which they could be achieved. The Memorandum may discuss and evaluate:

- The effects of acting or not acting on a particular rulemaking proposal;
- The costs and benefits of engaging in rulemaking, compared to the status quo;
- Whether LSC needs additional information from the public before it can proceed with drafting an NPRM; and
- The suitability of particular processes, such as fact-gathering through a rulemaking workshop with stakeholders.

In other circumstances, where rulemaking is needed to conform the rule to statutory or regulatory changes, none of these analyses may be necessary.

Management may provide the Committee and the Board with privileged advice related to a proposed rulemaking. That advice may be provided in writing, as well as in a closed session of the Committee or Board's meeting, as permitted by the Government in the Sunshine Act.

The Committee will consider the Memorandum at a public meeting, and a copy of the Memorandum (but not any privileged material) will be publicly available, either physically or online, at the time of the meeting. The Committee will then provide an independent recommendation to the Board on the advisability of initiating rulemaking. Instead of issuing a recommendation, the Committee may also choose to request further work by Management on particular issues and development of a revised Memorandum, which the Committee will consider at future public meeting.

If the Committee makes a recommendation to the Board, it is asking the Board to take the first of its votes on a particular rulemaking. The Board also has the option of

requesting further work and a revised Memorandum before acting on the Committee's recommendation. If the Board votes to not initiate rulemaking without further instruction, it is effectively removing the rulemaking from the Rulemaking Agenda. If the Board votes to initiate rulemaking, it may attach to its vote further instructions regarding the scope of the rulemaking, particular changes desired, or processes to be used in developing the rule.

In certain circumstances, including time-sensitive matters that are relatively straightforward and anticipated to be uncontroversial, an accelerated process may be employed that combines Step 2 and Step 3 (discussed below). This would involve Management's preparation, with the concurrence of the Committee, of a Memorandum and a draft of an NPRM. If the Committee votes to recommend rulemaking, it could then proceed at the same meeting to consider a recommendation regarding the draft NPRM, and then present both recommendations in a combined motion to the Board. The Board could then choose to authorize both the opening of rulemaking and the publication of the NPRM for comment. In these circumstances, the Memorandum should contain a separate justification for the use of this accelerated process.

### Step 3 – The Development of the Proposed Rule

Once the Board votes to open rulemaking, Management and the Committee will work together to oversee the process of developing the rule. For relatively straightforward rules, this may involve simply converting the Memorandum into the preamble of a draft NPRM, accompanied by proposed regulatory changes.

More complex rulemakings, especially those with different alternatives for regulating a particular issue, may call for public engagement at an early stage. The

Committee, after consulting with Management, may vote at a public meeting to authorize preliminary information-gathering actions. Should the Committee use these methods, it will regularly report its actions and the results of its efforts to the Board.

In particular, rulemaking may be enhanced in some cases by the issuance of an Advanced Notice of Proposed Rulemaking (“ANPRM”) or a Request for Information (“RFI”) that solicits comments on certain issues or requests certain factual information at an early stage of the rulemaking process. An ANPRM or RFI may also be useful in collecting public views on the scope of the proposed rulemaking and on what issues to include or exclude from the proposed rule. In addition, if the costs and benefits associated with the rulemaking are unclear, LSC may use an ANPRM or an RFI to request that public input and data be provided to help understand the costs and benefits more clearly and accurately.

Alternatively, LSC may choose to seek public input through Rulemaking Workshops. Rulemaking Workshops consist of one or more publicly noticed meetings of the Committee with the participation of Management, invited stakeholder representatives, and other interested and well-informed parties. Workshops are open discussions designed to elicit information about problems or concerns with the regulation (or certain aspects thereof) and provide an opportunity for sharing ideas regarding how to address those issues. Using whatever electronic and online methods are feasible, the Workshop should be open to observation by, and input from, the general public, including those not physically present with the Committee. The Workshop is not generally intended to develop detailed alternatives or to obtain consensus on regulatory proposals, and the

primary anticipated role of Committee members would be to engage other participants with relevant questions rather than issue immediate decisions.

A Negotiated Rulemaking<sup>4</sup> is another alternative to develop an NPRM for a particular item. If the Committee determines this is the best approach, it will work with Management to designate a group of external representatives that will then meet with Management over an extended period, under supervision of a professional facilitator, in order to develop consensus regarding particular regulatory alternatives and the form of a draft NPRM.

The above mechanisms do not exhaust the ways LSC may develop its proposed rules. Where appropriate, LSC may publish general or specific requests for comment or surveys or use social media to seek public input on a proposed rule.

After gathering the necessary input, and as directed by the Committee, LSC staff will be responsible for drafting the NPRM in consultation with the OIG. LSC staff will submit the draft for review and approval or revision by the President of LSC. Once approved, Management will submit the draft NPRM to the Committee for consideration at a public meeting.

Management will provide the draft NPRM to the Committee sufficiently in advance of the meeting to allow adequate time for consideration. The draft also will be made available both electronically in advance of the meeting and in physical form at the meeting. LSC will publish in the Federal Register a notice of the meeting announcing the

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<sup>4</sup> For further general information, see Negotiated Rulemaking Act of 1990, codified at 5 U.S.C. 561-70. LSC would be generally guided in the conduct of a negotiated rulemaking, should it choose to conduct one, by the principles and models contained in these statutes, but its particular parameters would be designated by the LSC Board of Directors, acting through the Committee.

placement of the draft NPRM on the Committee agenda and the availability of the draft NPRM on LSC's website. At the Committee meeting, Management will present the draft NPRM, and the Committee will provide a designated opportunity for public comment prior to a vote of the Committee to recommend publication. The Committee will then deliberate and decide whether to recommend that the Board publish the NPRM, recommend that the Board terminate the rulemaking, or make no recommendation to the Board, but instead return the draft to Management for further development.

If the Board authorizes by its vote publication of the NPRM, Management will make any necessary technical revisions to the document and submit it to the Federal Register for publication. The comment period will be at least 30 days, but may be longer at the discretion of the Committee and Management, or at the direction of the Board.

#### Step 4 – Public Comment and the Development of the Final Rule

LSC will accept comments submitted in either physical or electronic form by the closing date stated in the NPRM published in the Federal Register. LSC will publish the notice and the NPRM on LSC's website.

Copies of all comments received during the designated comment period will be provided to the Committee and made available to other Board Members upon request. Copies of all comments will also be placed in a public docket available for inspection and copying in the FOIA Reading Room at the Corporation's offices, as well as in an electronic docket accessible from LSC's website.

In addition to comments received during the comment period, any relevant public comments made to the Committee during its public meetings on the rulemaking – including written comments submitted in conjunction with oral presentations – will be

considered part of the administrative record of the rulemaking and included in LSC's docket. LSC will not consider or respond to comments submitted outside of the public comment period or the relevant Committee meetings for a particular rulemaking. In the event a comment submitted outside the time periods described above raises significant substantive or procedural questions that LSC believes are likely to affect the outcome of the rulemaking, LSC may provide another opportunity for the submitter to provide the comment to LSC in a public forum or by reopening the rulemaking.

In some circumstances, LSC may determine that publication of a revised (or "further") NPRM ("FNPRM") or a supplemental NPRM is necessary. These notices may be used to request comment on specific issues, on revisions to discrete parts of an NPRM, to clarify or add missing information to an existing NPRM, or in other instances where LSC wishes to obtain from or share information with the public. Such instances may include times when LSC makes material changes to the rule text proposed in the NPRM. With notice to the Board, the Committee may authorize an FNPRM or a supplemental NPRM at a public meeting, designating an additional period of public comment for no less than 30 days. The Committee may also authorize an extension or re-opening of the comment period on an existing NPRM.

Upon the close of the comment period, and upon determination that no further comment periods are needed, Management will draft the Final Rule in consultation with the OIG. Management will submit the draft Final Rule to the Committee for consideration at a public meeting. The draft also will be made available both electronically in advance of the meeting and in physical form at the meeting. LSC will publish in the Federal Register a notice of the meeting announcing the placement of the

draft Final Rule on the Committee agenda and the availability of the draft Final Rule on LSC's website. At the Committee meeting, Management will present the draft Final Rule, and the Committee will provide a designated opportunity for public comment prior to a vote of the Committee to recommend publication. The Committee will then deliberate and decide whether to recommend that the Board adopt the Final Rule as a federal regulation, recommend that the Board terminate the rulemaking, or make no recommendation to the Board, but instead return the draft to Management for further development.

If the Board authorizes by its vote adoption of the Final Rule (as amended, if it chooses to do so), Management will make any necessary minor revisions to the document submitting it to the Federal Register. Any changes to LSC's regulations will also be reflected on LSC's website. In accordance with the LSC Act, any regulatory change will not be operative for at least 30 days after publication as a Final Rule, and this period may be extended at the discretion of the Committee and Management, or at the direction of the Board.

Dated: August 10, 2015

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[FR Doc. 2015-20025 Filed: 8/13/2015 08:45 am; Publication Date: 8/14/2015]