



One Year Later: Time for Nonprofits to Implement the Super Circular

February 18, 2015

Venable LLP

Washington, DC

Moderator:

Jeffrey S. Tenebaum, Esq., Venable LLP

Panelists:

Dismas Locaria, Esq., Venable LLP

Andrea Wilson, Managing Director, BDO LLP

Gerry Vans, VP, National Fish & Wildlife Federation

Melanie Jones Totman, Esq., Venable LLP



Presentation



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Wednesday, February 18, 2015, 12:30 p.m. – 3:00 p.m. ET
Venable LLP, Washington, DC

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Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists
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Andrea Wilson, Managing Director, BDO LLP
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Agenda

- One Year Highlights
- Subrecipient Monitoring: Assessing Risk
- Procurement: Establishing a Workable Procurement System
- Addressing New Ethical Requirements
- Hurdles to Implementation



One Year Highlights

One Year Highlights

- **December 26, 2013** – Super Circular issued
 - January 27, 2014, Council on Financial Assistance Reform (COFAR), conducted an informational webinar on the Super Circular
 - Shortly thereafter, COFAR issued FAQs on Super Circular (<https://cfo.gov/wp-content/uploads/2013/01/2-C.F.R.-200-FAQs-2-12-2014.pdf>)
- **May 9, 2014** – National Science Foundation (NSF) issues preliminary revisions to its Proposal and Award Policies and Procedures Guide to align NSF's grant procedures with the Super Circular
- **December 19, 2014** – OMB and 28 Federal agencies issued a joint interim final rule implementing the Super Circular



Subrecipient Monitoring: *Assessing Risk*

Subrecipient Overview Implications for pass-through entities

- One of the most significant changes is the more stringent requirements for subrecipient monitoring
- Examples of expanded pass-through entity responsibilities include:
 - Requirement for consistent practice to distinguish subrecipient from contractor
 - Identifying or negotiating an appropriate subrecipient indirect cost rate at the time of award
 - Ensuring “flow-down” of new requirements are included within sub agreements, as applicable
 - Evaluating subrecipient risk of noncompliance and determining necessary monitoring activities – including on-site reviews
 - Imposing remedies for subrecipient noncompliance, when necessary





Subrecipient Monitoring Activities Risk Assessment

- Subrecipient monitoring plan must ensure that the subaward:
 - Is used only for authorized purposes
 - Is in compliance with Federal statutes/regulations and subaward Ts&Cs
 - Achieves its performance goals
 - Considers risk of subrecipient noncompliance
- Risk assessment is based on:
 - Prior/past experience with similar subawards
 - Previous audit results
 - Significant changes in personnel or systems
 - Extent and results of Federal awarding agency monitoring



Subrecipient Monitoring Activities Monitoring Plan

- Minimum monitoring activities must include:
 - Reviewing financial and programmatic reports
 - Conducting on-site reviews/audits based on risk assessment
 - Conducting follow-up reviews to ensure timely completion of corrective actions required to address deficiencies – as identified through on-site reviews, audits or other means
 - Issuing a management decision for audit findings pertaining to the Federal award
 - Verifying that each subrecipient receive completed audits, as required
- Design of monitoring plan will vary based on subrecipient risk assessment:
 - e.g., more stringent monitoring plan is required for high risk subrecipients



Subrecipient Monitoring Activities Additional Considerations

- Based on results of monitoring activities, pass-through entities should
 - Provide training and technical assistance to appropriate subrecipient staff
 - Determine if on-site reviews/audits necessitate adjustments to own records
 - Consider taking enforcement action against noncompliant subrecipients
- If subrecipient noncompliance is determined, pass-through entities may apply enforcement action through specific conditions (§200.207)
- If noncompliance cannot be remedied through specific conditions, more severe enforcement action may be taken (§200.338)



Subrecipient Monitoring Activities Additional Enforcement Action

- If noncompliance cannot be remedied through specific award conditions, consider more severe enforcement action, such as:
 - Applying temporary cash withholds
 - Disallowing all or part of the cost of the activity
 - Suspending or terminating the subaward
 - Recommending the Federal awarding agency initiate suspension or debarment proceedings
 - Withholding future awards to the subrecipient
 - Pursuing other remedies legally available





Subrecipient Monitoring Activities General Best Practices

- Subrecipient monitoring procedures should include:
 - Informing your subrecipient of pertinent information
 - Ensuring your subrecipients are receiving audits when necessary
 - Reviewing financial and programmatic reports
 - Reconcile the subrecipient's budgeted expenditures to actual expenditures
 - Perform an on-site visit to the subrecipient to review financial and programmatic records and observe operations
 - Desk review - review financial and program reports submitted by subrecipients for allowable use of the grant funds
 - Establishing a tracking system to ensure timely submission of required reporting
 - Having a second party within your organization periodically review the adequacy of subrecipient monitoring for all programs
 - Document! Document! Document!



Procurement: Establishing a Workable Procurement System



Choosing a Contract vs. a Subgrant

- How does your organization determine whether to use a subrecipient or a contractor?
 - “Subrecipient” – a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program but does not include an individual that is a beneficiary of such program
 - “Contract” – a legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award
- Create guidance for your template agreements on how to choose an instrument
 - Understand the timeline required for competition
 - Consider ability of subawardee to run a program that meets all Federal requirements



Understanding the New Contract Procurement Standards

- Old regulations required full and open competition to the “maximum extent possible”
- Full and open competition now required for all procurement contracts issued above \$150,000
- Consider ways to demonstrate “full and open competition”
 - Drafting your RFP to promote full and open competition
 - Clearly state all requirements
 - Do not limit competition to certain vendors (even those on retainer) or unnecessary requirements
 - Consider how to properly advertise each opportunity
 - Generally best practice to post opportunities online
 - How can you increase awareness for each proposal?



Establishing a Workable Procurement System

- Contracts can be sole-sourced when:
 - Item is available from a single source
 - There is a public exigency or emergency where delay is not an option
 - The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request
 - If after the solicitation of a number of sources, competition is determined inadequate
- Cost analysis is required where there is no price competition (profit must be separately analyzed)
 - Consider in advance how to analyze cost for your niche industries without competition



Establishing a Workable Procurement System

- All contract actions (e.g., solicitation, Q/A, evaluation, award decision) should be maintained in the contract file
 - Even documents related to unsuccessful offerors should be maintained
- Keep all modifications within the original scope
 - Failure to remain in scope compromises the integrity of the price competition



Threshold Organizational Issues

- Who in your organization is responsible for implementing the changes in the procurement system?
 - Does that person operationalize procurement?
 - If not, how are you training your procurement teams?
- How are you tracking the changes?
- Who should be contacted with procurement issues and questions?



Addressing New Ethical Requirements

Conflicts of Interest

- Reporting Conflicts of Interest (“COI”), (*id.* § 200.112)
 - Section 200.112 continues the practice of allowing agencies to establish their own COI policies that are “appropriately tailored to the specific nature of their programs”
- Non-Federal agencies must disclose any COI to an awarding agency
 - Agencies must assess COIs as part of their risk assessment
- Requires reporting of Organizational Conflicts of Interest (“OCI”)
 - Non-Federal entities must have “strong policies preventing organizational conflicts of interest which will be used to protect the integrity of procurements under Federal awards and subawards.”
 - FAR Part 9.5 outlines the FAR OCI rules that may provide guidance



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Mandatory Disclosure

- Mandatory Disclosure, (*id.* § 200.113)
 - Requires organizations to disclose “in a timely manner” and in writing “all violations of Federal **criminal** law involving fraud, bribery, or gratuity violations potentially affecting the Federal award”
 - An organization’s failure to make the required disclosures can result in a number of actions, including suspension and/or debarment
- A clear move toward the FAR arena, which has a mandatory reporting requirement
 - Unlike the FAR, however, this requirement does not currently apply to civil acts of fraud, such as those that may be alleged under the False Claims Act (“FCA”)
 - Notwithstanding a clear requirement to report potential FCA or similar civil violations, suspension and debarment is still a potential consequence of non-disclosure



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Creating Ethical Infrastructure

- Organizations should consider:
 - Top-level attention
 - Policy directive
 - Letter to staff
 - Policy and procedural changes
 - Policy requirements
 - Agreement provisions
 - Education
 - Communication
 - Training
 - Ongoing examination, oversight and enforcement
 - Compliance/Ethics Officer
 - Internal audit



Creating Ethical Infrastructure

- No one-size-fits-all approach
- What an organization does can depend on
 - Organizational structure
 - Size of organization
 - Mission
 - Philosophy for effectuating mission
- Thoughtful, reasonable approach
 - Consider documenting major decisions
 - Remain open and nimble should circumstances change



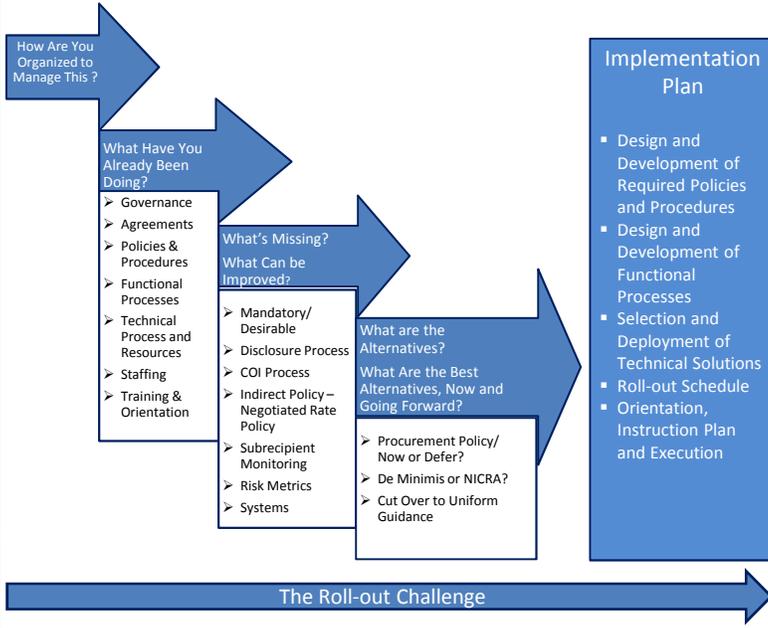
Failure to Address Ethical Issues

- The failure to implement processes to account for these new rules could have damaging impacts
 - Disallowance of funds
 - Suspension of grant
 - Grant termination
 - Civil penalties
 - Criminal penalties
 - Administrative action (e.g., suspension, debarment)

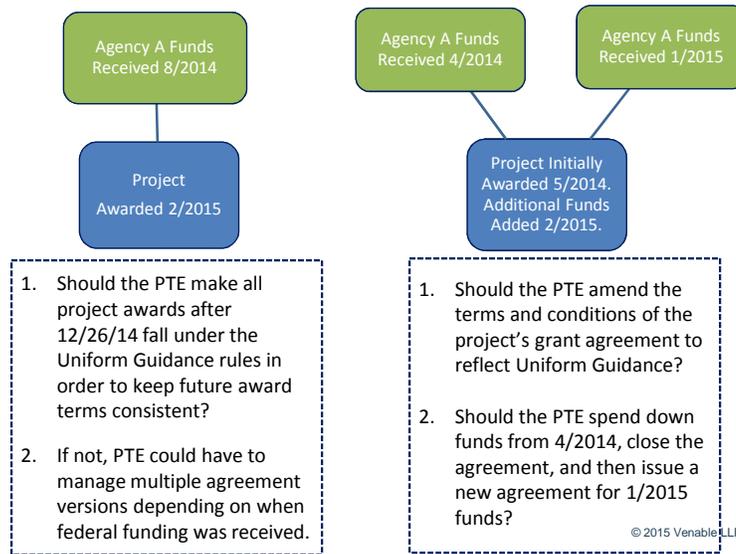


Hurdles to Implementation (or How Best to Jump)

Getting There



Funding Source Considerations (for PTEs and Grantmakers)





Other Process Considerations

Issue	Consideration
1. Pre-UG RFP/Post-UG Award	May require budgetary/indirect adjustments
2. COI & Mandatory Disclosure	Implementing reporting protocols
3. Performance Measurement (200.301)	Anticipating standards
4. Specific Conditions and SRM (200.207;331)	Implementing tracking mechanism
5. Impact of Indirect Policy	Focus on the rate problematic
6. Must v. Should	What's the cost/risk?



Questions?

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Speaker Biographies





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 Credit Counseling and Debt Services
 Financial Services
 Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Aide, United States House of Representatives

BAR ADMISSIONS

District of Columbia

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, one of only eight in the 2013 rankings, and one of only nine in the 2014 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-15 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014 edition of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
 Air Conditioning Contractors of America
 Airlines for America
 American Academy of Physician Assistants
 American Alliance of Museums
 American Association for the Advancement of Science
 American Bar Association
 American Bureau of Shipping
 American Cancer Society
 American College of Radiology
 American Friends of Yahad in Unum
 American Institute of Architects
 American Institute of Certified Public Accountants

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
America's Health Insurance Plans
Association for Healthcare Philanthropy
Association for Talent Development
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Association of Private Sector Colleges and Universities
Auto Care Association
Biotechnology Industry Organization
Brookings Institution
Carbon War Room
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Design-Build Institute of America
Endocrine Society
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
Institute of International Education
International Association of Fire Chiefs
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
Money Management International
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Council of Architectural Registration Boards
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America

Romance Writers of America
Telecommunications Industry Association
Trust for Architectural Easements
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United Nations High Commissioner for Refugees
University of California
Volunteers of America
Water Environment Federation

HONORS

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-14
Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.), 2012-15
Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014
Served as member of the selection panel for the inaugural *CEO Update* Association Leadership Awards, 2014
Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013
Washington DC's Legal Elite, *SmartCEO Magazine*, 2011
Fellow, Bar Association of the District of Columbia, 2008-09
Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006
Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004
Recipient, The Center for Association Leadership Chairman's Award, 2004
Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997
Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95
AV® Peer-Review Rated by *Martindale-Hubbell*
Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.



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BAR ADMISSIONS

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EDUCATION

J.D., *with honors*, University of Maryland School of Law, 2003

Articles Editor, *Maryland Law Review*

Dismas (Diz) Locaria is a member of the firm's Government Contracts Group. Mr. Locaria's practice focuses on assisting government contractors in all aspects of working with the Federal government. Mr. Locaria has extensive experience assisting clients with regulatory and contract/grant term counseling, compliance (including ethics and integrity compliance), responsibility matters, such as suspension, debarment and other contracting/grant exclusions, small business matters and GSA Federal Supply Schedule contracting. Mr. Locaria also represents and counsels clients with the peculiarities of the Homeland Security Act, including obtaining and maintaining SAFETY Act protections.

Government Contract and Grant Counseling and Compliance: Mr. Locaria has a wealth of knowledge regarding applicable contract (*e.g.*, the Federal Acquisition Regulation) and grant (*e.g.*, OMB Circular A-110 and A-122) regulations, including the application of these regulations to both prime contractors/grant recipients and subcontractors/subgrantees. This knowledge has enabled Mr. Locaria to assist both for-profit and nonprofit organizations with meeting the requirements for becoming a federal contractor or grantee, interpreting the implication of regulatory, contract and grant term to clients' work and operations, evaluating and advising contractors and grantees on intellectual property issues and contract modifications, among many other issues.

Mr. Locaria also assists clients with their efforts to remain compliant with the myriad of applicable regulations and requirements. This includes providing training on relevant regulations and contract and grant terms, as well as federal ethics laws and practices, conducting internal audits and investigations, making improvement and/or remedial recommendations, implementing such recommendations, making appropriate disclosures to cognizant federal and state agencies, and defending clients during federal and state audits and investigations.

As a result of Mr. Locaria's deep understanding of government contractor/grant compliance matters, Mr. Locaria is often involved in business formation, merger and acquisition and related business matters to provide expertise and advice on the implication of such activity on a client's existing and future contracts/grants.

Suspension and Debarment: Mr. Locaria represents clients in suspension and debarment matters, as well as other eligibility and responsibility issues raised by federal and state agencies. In this capacity, Mr. Locaria has represented clients before all the various defense agencies (*e.g.*, Army, Navy, Air Force, Defense Logistics Agency (DLA)), as well as various civilian agencies, such as the General Services Administration, the Department of Homeland Security, as well as DHS's sub-agency, Immigration and Customs Enforcement (ICE), the Environmental Protection Agency (EPA), Health and Human Services, Housing and Urban Development, as well as several others.

Some of the suspension- and debarment-related matters Mr. Locaria and the Venable team successfully resolved included:

- Representing a national manufacturing company with a host of Clean Air Act, Clean Water Act, OSHA, and civil and criminal violations to avoid discretionary suspension or debarment. Mr. Locaria and his Venable colleagues were able to secure a voluntary exclusion for certain segments of the company while the matter was under review. Ultimately, Venable was able to reinstate those facilities subject to a statutory ineligibility, the entities under the voluntary exclusion were reinstated and the entire company entered into a compliance agreement with EPA. The company recently completed its time under the compliance agreement without incident and has maintained full contracting authority.
- Assisting a nonprofit, quasi-governmental mass-transit entity with resolving a statutory ineligibility with EPA and restoring the entity to full grant eligibility within a matter of days following its conviction.
- Representing an international company convicted on several counts of fraud and false statements before DLA regarding its present responsibility and contracting future with DoD. Ultimately, Mr. Locaria and his Venable colleagues were able to secure a compliance agreement for the company, which allowed it to continue to contract with the DoD and other federal agencies. This also required liaising with other agencies, such as GSA, which issued a show cause letter to the company for the same bases of debarment as DLA.
- Representing a multi-national company before the Maritime Administration to demonstrate that despite various criminal violations implicating the company's integrity and ethical business practices, such company was in fact presently responsible. Ultimately, Mr. Locaria and his Venable colleagues were able to secure a compliance agreement for the company to allow it to fully contract with and received subsidies and other assistance from the federal government. This matter also involved a statutory ineligibility issue related to a Clean Water Act violation that was handled before EPA.
- Representing several entities, individuals, small businesses and non-profits before ICE for immigration-related convictions. In each instance, Mr. Locaria and his Venable colleagues were able to convince ICE that no action was necessary to protect the public interest.

Small Business Matters: Mr. Locaria has extensive experience working with small businesses to determine their size status, 8(a) and other socio-economic statuses, including analyzing affiliation issues. Mr. Locaria represents clients in both the prosecution and defense of small business size protests before the Small Business Administration and the Office of Hearing and Appeals.

GSA Federal Supply Schedule Contracting: Mr. Locaria is also well-versed in assisting clients with GSA Federal Supply Schedule matters, in particular advising clients on how best to structure proposals to avoid price reduction clause (PRC) issues, and addressing PRC, Trade Agreements Act and other compliance matters post-award.

Homeland Security and the SAFETY Act: Mr. Locaria represents a number of clients in homeland security-related matters including drafting guidelines for various companies' information handling, such as Sensitive Security Information, or in harnessing all the benefits of the SAFETY Act. In fact, Mr. Locaria has assisted several clients in receiving SAFETY Act Certification, the highest level of protection afforded under the Act. Mr. Locaria has published on the topic of the SAFETY Act and is a co-author and contributor to Venable's Homeland Security Desk Book.

ACTIVITIES

Mr. Locaria actively participates in the American Bar Association as a vice chair of the Section of Public Contract Law Committee on



Debarment and Suspension. He is also on the Board of Editors and a regular columnist for *The Government Contracting Law Report*.



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BAR ADMISSIONS

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EDUCATION

J.D., Duke University School of
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B.A., *summa cum laude*, Furman
University, 2005

JUDICIAL CLERKSHIPS

Honorable Christine O.C. Miller,
U.S. Court of Federal Claims
Honorable Joyce Bihary, U.S.
Bankruptcy Court for the Northern
District of Georgia

Melanie Jones Totman is an associate with Venable's Government Contracts team where she provides clients with legal advice related to both federal and state procurement law, including complex compliance matters under the Federal Acquisition Regulation, the Office of Management and Budget Circulars, and various state procurement laws and grant regulations. She generally advises clients on small business, False Claims Act, and mandatory disclosure issues. Ms. Totman has broad experience in the defense of audits by various Offices of Inspector General, federal agencies, and the Defense Contract Audit Agency. She represents clients in a variety of bid protests before the United States Government Accountability Office and the United States Court of Federal Claims. Some of Ms. Totman's work includes:

- Representing clients in responding to *qui tam* and other whistleblower allegations of civil and criminal False Claims Act violations.
- Investigating internal allegations of false claims related to complex contractual relationships and cost data.
- Defending large contractors, nonprofit organizations, and state agencies awarded federal grant funds in audits before the Offices of Inspectors General for the Department of Homeland Security and the Department of Housing and Urban Development.
- Successfully challenging and defending small business size determinations before the United States Small Business Administration, Office of Hearings & Appeals. *Size Appeals of BA Urban Solutions, et al.*, SBA No. SIZ-5521 (2013); *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307 (2011).

Immediately prior to joining Venable, Ms. Totman served as the judicial law clerk to Judge Christine O.C. Miller of the United States Court of Federal Claims. She also served as the judicial law clerk to Chief Judge Joyce Bihary of the United States Bankruptcy Court in the Northern District of Georgia.

Gerry C. Vans, Vice President of Compliance and Risk Management for the National Fish and Wildlife Foundation



Gerry C. Vans is the Vice President of Compliance and Risk Management for the National Fish and Wildlife Foundation (NFWF) in Washington D.C. (www.nfwf.org). He joined NFWF in 2006 following a 25 year career with the U.S. House of Representatives where he held various senior management positions dealing with overall House operations. He retired after having served three years as Deputy Clerk of the House. Previously at NFWF, he served as Chief Operating Officer and as Vice President of Operations, overseeing grant administration, information technology, and facilities operations. Other experience has included managing operations for a real estate private equity firm. A native of Milwaukee, WI, he attended St. Louis University, has a B.A. from Marquette University and an M.A. in Legislative Affairs from The George Washington University. He and his spouse Peggy reside in McLean, VA and have three grown children.



Biography



Andrea Espinola Wilson

Managing Director
Grants Management Advisory Services

EXPERIENCE SUMMARY

Andrea Wilson provides advisory services to government awardees and contractors on a wide range of organizational issues including compliance matters, cost allowability and recovery issues, cost accounting, procurement, and project management. Andrea has assisted organizations respond to changing regulatory requirements and governmental audit inquiries in complex global operating environments.

Andrea is an accomplished finance and operations advisor with more than 15 years of experience providing leadership and improving compliance, financial, procurement, logistics, operations, human resource, budgeting and project management systems. Her expertise is achieving superior performance by designing and implementing new operational systems and internal controls to reduce costs, increase information efficiencies, accuracy and compliance with USG policies and regulations.

Prior to consulting, Andrea held various senior level positions with international non-governmental and higher education institutions as well as an auditor with an international auditing firm. Andrea's vast industry knowledge ensures that solutions are grounded in practical, operational experience.

PROFESSIONAL AFFILIATIONS

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January 29, 2015

FEDERAL GRANT AND CONTRACT NEWS FOR NONPROFITS - JANUARY 2015

On December 19, 2014, the U.S. Office of Management and Budget (OMB) and 28 Federal agencies issued a joint interim **final rule** implementing the guidance for the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (colloquially referred to as the "Super Circular"). The rule also sets out individual agency-specific regulations, to the extent OMB has approved specific agency requests to supplement or vary agency requirements from the standard Super Circular guidance. These agency-specific requirements are located in the subsequent parts to Part 200 of Title 2 of the Code of Federal Regulations (CFR).

Given the size and specificity of the implementing guidance across 28 Federal agencies, we are unable to efficiently comment on each agency's regulations here. However, over the coming months, we expect our newsletters to highlight some of these deviations and their interplay with the Super Circular. In the near term, a nonprofit wishing to comment on the December 19, 2014 rule must do so by February 17, 2015.

Agency-Specific Regulations Do Not Represent New Policy

Despite the fact that OMB has issued individual agency exceptions to the Super Circular's overall regulatory scheme, OMB has explicitly commented that the agency-specific regulations "do not represent new policy." Rather, OMB only approved agency-specific regulations where authorized by statute or by a long-standing agency policy, or where an agency sought to include additional guidance as to how the agency would interpret a specific Super Circular provision. Thus, OMB asserts that agency-specific regulations are meant to be read in harmony with the policies of the Super Circular. In reading these regulations, grantees must first reference Part 200 of Title 2 of the CFR (which sets forth the Super Circular requirements), and then review the agency-specific regulations. Agency-specific regulations or augmentations to the Super Circular are located in the subsequent parts of Title 2. For example, the U.S. Department of Health and Human Service's regulations are located at Part 300 of Title 2 of the CFR, and the U.S. Department of Agriculture's regulations are located at Part 400.

The regulations for each agency have not recreated the entire Super Circular, but rather generally incorporate 2 CFR part 200 (the Super Circular) by reference, and then incorporate guidance specific to that agency. Thus, nonprofits must be careful in determining whether agency-specific regulations suggest *exceptions* to the Super Circular or are meant to *supplement* the Super Circular. Nonprofits should read the agency-specific regulations in harmony with the Super Circular, but if necessary, seek clarification from an awarding agency if agency-specific regulations appear to conflict with or represent an exception to the Super Circular's guidance. The Federal government has issued a crosswalk of the agency-specific regulations [here](#).

Nonprofits Must Design a Process for Identifying the Requirements of Each Award

Although grantees have always been required to implement varying regulatory requirements (an inefficiency that OMB sought to rectify with the issuance of a global Super Circular), grantees may be lulled into a false sense of security that each agency and award applies identical regulations. In reality, grantees must pay close attention to the specific requirements of each funding agency and each award – even small differences from or clarifications to the Super Circular could significantly impact a grantee's reimbursement of a particular grant cost.

For example, 2 CFR 700.12, applicable to awards from the U.S. Agency for International Development (USAID), explicitly requires all negotiated contracts above the simplified acquisition threshold (currently \$150,000) to include a provision requiring pass-through entities, USAID, and the Comptroller General to have access to certain contract-related records. Although this is a recommended best practice for all contracts, due to this specific requirement, grantees working with USAID risk disallowance for such contract costs if these provisions do not exist contractually.

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The U.S. Environmental Protection Agency (EPA) has augmented its General Procurement Standards by "limit[ing] its participation in the salary rate (excluding overhead) paid to individual consultants retained by recipients or by the recipient's contractors or subcontractors to the maximum daily rate for level 4 of the Executive Schedule unless a greater amount is authorized by law" for subawards that do not comply with the Super Circular's general procurement standards. Thus, grantees that do not follow the procurement procedures cannot pay for a greater amount through an EPA grant, presumably even if the costs appear allowable and reasonable. This is especially important for nonprofits with lower-tiered subawardees, as such lower-tiered subawardees, depending on their size and familiarity with Federal grants, may not be as careful or adept in adhering to the Super Circular's procurement standards.

In another example, the U.S. Department of Transportation received an exception to continue using specific financial reports for certain awards, irrespective of the fact that the Super Circular requirements state that the Federal awarding agency may only solicit the OMB-approved data elements for financial information.

These seemingly minor agency-specific deviations from the general principles of the Super Circular could have a significant impact on how a nonprofit operationalizes a specific award, and could materially impact a nonprofit's bottom line by limiting the amount of reimbursable costs.

Tips for Addressing Agency-Specific Regulations at Your Nonprofit

Grantees should implement a process for (1) identifying agency-specific and award-specific deviations from the Super Circular, and (2) tracking their compliance with these requirements. For example, nonprofits may utilize the following methods to operationalize each Federal award:

- Identify and task individuals within your organization to be specifically responsible for understanding and implementing the guidance of the Super Circular and the relevant agency-specific regulations, including the notable differences between such;
- Identify the agencies from which your nonprofit receives significant financial support and create template compliance matrices for those agencies, incorporating both Super Circular requirements and agency-specific regulations;
- Read each Federal award and create a compliance matrix that identifies and tracks the Super Circular requirements and the agency-specific regulations of that award;
- Inform, train, and periodically retrain employees responsible for operationalizing these regulations (e.g., those responsible for financial reporting or procurements contracts for a specific award) to ensure they understand the differences between the general requirements of the Super Circular and the applicable agency-specific regulations; and
- Following performance of each award, debrief relevant personnel on the operational process – noting what worked and what did not – and develop lessons learned for future projects generally and for that funding agency specifically.

ARTICLES

November 2014

FEDERAL GRANT AND CONTRACT NEWS FOR NONPROFITS - NOVEMBER 2014

Two major developments affecting nonprofits this year have been the Office of Management and Budget's (OMB) adoption of large-scale changes to the uniform rules governing Federal grants, known as the "Super Circular," and President Obama's use of Executive Orders to impose new requirements on Federal contractors, including nonprofits. In this month's update, we focus on examples of how two agencies are responding to these developments.

Agencies Begin Issuing New Guidance Prompted by the Super Circular

Even though the December 2014 effective date approaches, agencies still have not issued corresponding regulations. However, the National Science Foundation (NSF) has issued **preliminary revisions to its Proposal and Award Policies and Procedures Guide** (PAPPG) to align NSF's grant procedures with the Super Circular. The revised PAPPG provides some insight into how agencies may address the changes prompted by the Super Circular.

The first and most notable aspect of the revised PAPPG is that it is not a regulatory revision, as we will expect to see from several Federal agencies, but rather a policy revision. In the ***Federal Register notice announcing the revisions***, NSF noted its "longstanding practice of implementing [grant requirements] via use of a policy rather than regulation." Thus, grantees should recognize that not all Federal grant making entities will issue new regulations to effectuate the Super Circular's requirements. Accordingly, grantees should keep an eye on their grantor entities – not just for regulatory revisions, but also for any revised policy documents or directives that might affect grant proposal and administration requirements.

While the revisions to the PAPPG are not a wholesale redrafting of that guidance, they are too numerous to summarize here, and NSF grantees should review the revised PAPPG to understand the new requirements. The following are just a few examples of the changes in the revised document:

- Salaries of administrative and clerical staff are treated as indirect costs and may be treated as direct costs only under circumstances outlined in the Super Circular that are now incorporated into the PAPPG.
- Proposers will be assessed for risk in accordance with procedures that conform to those set forth in the Super Circular. Among other criteria, these risk assessments will include pre-award financial and administrative reviews for all new proposers (or proposers who have not received NSF funding in the previous 5 years) who are recommended for funding and stand to receive \$200,000 or more.
- Various definitions and terms are brought into line with the Super Circular, such as the definitions of "grant agreement" and "cooperative agreement," and the use of the terms "start date" and "end date" rather than "effective date" and "expiration date" to describe the term of an award.
- Cash and in-kind contributions are subject to Super Circular-prescribed recordkeeping and audit requirements.
- NSF grantees must have financial management systems that meet the requirements of the Super Circular, set forth at 2 C.F.R. § 200.302.

NSF has helpfully highlighted the changes to the PAPPG that were driven by the Super Circular. These changes are highlighted in yellow in the revised document. (There are further changes, unrelated to the Super Circular, that are highlighted in blue.) Even better, NSF has annotated the changes with comments that cite the specific Super Circular provision that prompted each change. Thus, the revised PAPPG is extremely useful to NSF grantees, who need to understand the new and revised requirements. Hopefully, other agencies' revised policies and regulatory documents will follow NSF's

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lead. Grantees should remember to track changing requirements that are both related and unrelated to the Super Circular. Should a grantee find any inconsistencies between the Super Circular and non-Super Circular regulations, grantees should raise this issue immediately with their Grants & Agreements officer and request written guidance on how to interpret those requirements.

Update on Pay Equality

In our **April 2014 update**, we focused on President Obama's **Executive Order** and **Presidential Memorandum** advancing pay equality for women and minorities employed by Federal contractors, including nonprofits. The U.S. Department of Labor recently **extended the deadline for comments** on the proposed rules to implement the president's directive.

The **proposed rules** create an equal pay reporting requirement for prime contractors and subcontractors who (1) are required to file an EEO-1 report (generally, those contractors with 50 or more employees and a contract worth \$50,000 or more), (2) have more than 100 employees, and (3) have a contract, subcontract, or purchase order of \$50,000 or more that covers a period of at least 30 days. Affected contractors will be required to submit summary data on compensation by sex, race, ethnicity, specified job categories, and other relevant data points on a form to be promulgated by the Office of Federal Contract Compliance Programs (OFCCP). OFCCP in turn will use the data to focus its enforcement efforts.

The new deadline for comments on the proposed rules is January 5, 2015.

* * * * *

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September 2014

FEDERAL GRANT & CONTRACT NEWS FOR NONPROFITS - SEPTEMBER 2014

As the implementation of the Super Circular nears, federal grantees will be obligated to meet certain new procurement standards not previously required. Indeed, many of these standards may be familiar to nonprofits with federal contracts, as they closely resemble those set out in the Federal Acquisition Regulation (FAR). When implementing their new procurement policies and procedures, nonprofit federal grantees should be mindful of various pitfalls, including the following:

- **Grantees must engage in full and open competition.** The old regulations required full and open competition to the "maximum extent possible." Adopting a more FAR-like standard, the Super Circular requires *all* procurement contracts issued above \$150,000 to be subject to full and open competition, unless the regulations' articulated exceptions apply. The regulations do not define "full and open competition," but grantees should assume that the previous unofficial rule of obtaining three bids to ensure price reasonableness will no longer be the standard. Thus, we recommend that grantees routinely post their procurement opportunities to a designated location on their websites. Grantees should further train their contractors that all procurement opportunities will be posted on the grantees' websites.
- **A cost and price reasonableness analysis is still necessary where a sole-source contract is required.** If a procurement contract is competed and more than two offerors respond, the contract is subject to price reasonableness and does not require an additional cost or price reasonableness analysis. However, if a procurement cannot be competed, grantees should write a sole-source justification that contains a cost analysis examining each element of cost, including profit. Contractors, therefore, may need to provide a breakdown of their costs, including overhead markup, to ensure grantees only charge costs that are reasonable and necessary against the grant. In order to receive contractors' confidential pricing information, grantees should prepare nondisclosure agreement templates (that they are prepared to sign) and must take all appropriate measures to ensure that contractors' confidential information is not released.
- **Grantees must ask for representations regarding actual or potential conflicts of interest.** The new regulations prohibit conflicts of interest, including organizational conflicts of interest. Grantees must request that offerors disclose any and all potential conflicts of interest, including those of their affiliates, in their proposals. Grantees should include language in the RFP stating that by submitting an offer, offerors are acknowledging they and their affiliates have no undisclosed conflicts of interest. For more information on the new conflicts of interest requirements of the Super Circular, see our [May 2014 newsletter](#).
- **Grantees must train evaluation teams to provide adequate procurement documentation that clearly explains a grantee's reasoned decision for making an award.** Grantees will need to consider whether and under what conditions a procurement award can be protested. These protest rights should be provided in the terms of the grant itself. Even if express protest rights are not granted, adequate procurement documentation is necessary to ensure (i) that grantees have complied with the terms of the competition, and (ii) that enough offerors have provided comparable prices, demonstrating that an appropriate market exists to determine price reasonableness.

For additional information regarding the Super Circular's new procurement regulations, please contact the authors of this newsletter.

Related Information

To read any of Venable's previous *Federal Grant & Contract News for Nonprofits* newsletters or other related publications, please [click here](#).

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July 31, 2014

FEDERAL GRANT AND CONTRACT NEWS FOR NONPROFITS - JULY 2014

This month's newsletter focuses on one of the more important and scrutinized aspects of being a federal grant recipient: monitoring project performance efforts, and the project performance efforts of subrecipients.¹ While the drafters of the Super Circular do not believe it vastly differs from prior guidance [78 Fed. Reg. 78590, 78598 (Dec. 26, 2013)], it certainly opens up room for interpretation, misunderstanding, and disagreement. Accordingly, we attempt to shed some light on these requirements and provide practical considerations for addressing them.

Super Circular Guidance

Section 200.303 of the Super Circular requires that grant recipients establish and maintain effective internal controls over their federal awards that provide reasonable assurances the grant recipient is managing the grant in compliance with law and the terms of the grant. Moreover, grant recipients must "evaluate and monitor" such compliance and take "prompt action when instances of noncompliance are identified including noncompliance identified in audit findings."

Section 200.328, *Monitoring and Reporting Program Performance*, provides that at least annually, but no more than quarterly, grant recipients will submit performance reports that:

- Compare actual accomplishments to the objectives of the grant;
- If applicable, describe the reasons why established goals were not met; and
- Provide additional relevant information, such as analysis and explanation of cost overruns or high unit costs.

Further, grant recipients are required to notify the awarding agency of "significant developments" that arise during the performance of a grant, specifically:

- Problems, delays, or adverse conditions that will impair the ability of the grant recipient to meet the grant objective; or
- Favorable developments that will enable the grant recipient to meet time schedules and objectives sooner than anticipated, at costs less than expected, and/or produce more or different beneficial results than originally planned.

Of course, to meet these requirements, grant recipients must have processes in place to track their performance against the budget and objectives of the grant.

In Section 200.331, the Super Circular imposes specific monitoring requirements on grant recipients regarding their evaluation and review of subrecipients, including evaluating each subrecipient's risk of noncompliance with applicable laws and terms of the subgrant. The Super Circular provides that grant recipients should determine subrecipient risk of noncompliance through past performance information, audit results, knowledge of new personnel, systems, or results of the awarding federal agency's monitoring efforts. Depending on the circumstances, the Super Circular suggests a number of additional monitoring tools, including:

- Providing subrecipients with training and technical assistance;
- Performing on-site reviews of the subrecipient's operations; or

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- Arranging for specific audit procedures.

However, the Super Circular also provides guidance that is far more ambiguous:

- "Consider imposing specific subaward conditions upon a subrecipient if appropriate as described in § 200.207 Specific conditions;" and
- "Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with [law] and the terms and conditions of the subaward..."

Monitoring Considerations

In light of the above guidance, nonprofits must implement monitoring programs that address the specifics of each grant they receive and each grant they pass down to others, but must do so in an effective manner, so as to make efficient use of federal funds. Accordingly, grant recipients can implement general monitoring concepts, but, pursuant to the Super Circular, they must consider grant-specific measures as well. As a result, organizations will have a myriad of measures in place both generally and specifically that must be documented and enforced. For instance, the following are a handful of measures nonprofits can take both generally and specifically to help ensure compliance:

General Compliance Measures	Grant-Specific Compliance Measures	Additional Efforts Due to Grant-Specific Measures
<ul style="list-style-type: none"> ■ General policies and procedures applicable to grant recipient's standard operations and subrecipients 	<ul style="list-style-type: none"> ■ Policies and procedures specific to each grant and/or subgrant 	<ul style="list-style-type: none"> ■ Requires in-depth analysis of grant/subgrant to determine appropriate and practical monitoring policies and procedures ■ Implementation of grant-specific policies and procedures, perhaps at the outset when all risk factors are not known ■ Could require continuous consideration and analysis to determine appropriate monitoring policies and procedures
<ul style="list-style-type: none"> ■ General reporting requirements mandated by prior Circulars and the Super Circular 	<ul style="list-style-type: none"> ■ Impose grant-specific reporting requirements to ensure grant recipient is aware of adverse (or positive) developments, etc. 	<ul style="list-style-type: none"> ■ Must adequately define "adverse" or positive developments for program office/subrecipient ■ Must ensure sufficient resources to perform and address audit and subsequent results
<ul style="list-style-type: none"> ■ Communications and meetings between grant administration and operations, internally and externally with subrecipient 	<ul style="list-style-type: none"> ■ Devise communication plan for scheduled/appropriate discussions and meetings in context of specific grant/subgrant requirements 	<ul style="list-style-type: none"> ■ Requires in-depth analysis of grant/subgrant to determine appropriate communication plan ■ May require costly travel to varying locations ■ Could require continuous refinement to ensure discussions and meeting are focused on the appropriate aspect and issues of the program
<ul style="list-style-type: none"> ■ General training internally and requirement that 	<ul style="list-style-type: none"> ■ Impose grant-specific training, which could include training for 	<ul style="list-style-type: none"> ■ May require additional time, resources, etc. to meet with and

<p>subrecipients properly train employees to meet appropriate standards</p>	<p>subrecipient by grant recipient</p>	<p>train subrecipient(s) on terms and conditions of subrecipient agreement, applicable law, etc.</p> <ul style="list-style-type: none"> ■ Could require continuous refinement as risk factors and issues arise over the course of the program
<ul style="list-style-type: none"> ■ Audit requirements, both federally mandated and as required for business reasons 	<ul style="list-style-type: none"> ■ Impose additional audit requirements, such as added elements to required audits, requiring additional audits, etc. 	<ul style="list-style-type: none"> ■ Could require continuous consideration and analysis to determine appropriate audit elements or audits in order to focus on proper risk factors ■ Must ensure sufficient resources to perform and address audit and subsequent results

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¹In this newsletter, we focus solely on monitoring and reporting as it relates to legal compliance and performance matters; this newsletter does not discuss financial monitoring or reporting requirements.

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June 2014

FEDERAL GRANT & CONTRACT NEWS FOR NONPROFITS - JUNE 2014

As part of our ongoing effort to prepare nonprofit organizations for the implementation of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (commonly known as the "**Super Circular**"), we devote this month's newsletter to short discussions of various aspects of the Super Circular. Specifically, we take a close look at several of the Super Circular's definitions, as well as issues to keep in mind while preparing for the Super Circular's implementation.

Background

One of the Super Circular's notable benefits is its consolidation of eight U.S. Office of Management and Budget ("OMB") Circulars—including eight separate sets of definitions, which, over time, had begun to separately evolve and deviate from each other. These gradual definitional changes of identical terms caused conflict and confusion for nonprofits with multiple applicable Circulars. Under the Super Circular, the Federal government has harmonized these definitions and incorporated key policy decisions. Thus, the definitions, which are now truly "uniform," also represent key substantive elements to the Circular's guidance. The uniform definitions are provided at 2 CFR Subsection 200.1 through 200.99.

Cognizant Agency for Audit (200.18) and Oversight Agency for Audit (200.73)

"*Cognizant agency for audit* means the Federal agency designated to carry out the [audit] responsibilities described at § 200.513," but such agency may not be the same agency responsible for determining a nonprofit's indirect cost rate.

"*Oversight agency for audit* means the Federal awarding agency that provides the predominant amount of funding directly to a non-Federal entity not assigned a cognizant agency for audit."

Comments to the Super Circular suggested that the government should have defined cognizant or oversight agency for audit as the agency that provides the most total funding (in order to eliminate a potentially burdensome process of changing cognizant agencies when direct funding is minimal and constantly fluctuating, even though indirect funding is much larger and static). The Council on Financial Assistance Reform ("COFAR") ultimately rejected this suggestion because the Federal government only maintains a direct relationship with the direct grantee, not the lower-tiered grant recipients. Indeed, establishing such links could be problematic for the Federal government from a liability or sovereign immunity standpoint. Thus, nonprofits must keep in mind that the cognizant agency may not be its largest customer. Moreover, for those nonprofits who work with the Federal government only through intermediaries, it is unclear how COFAR would assign the cognizant agency. Accordingly, nonprofits may be subject to varying involvement based on agency discretion.

We recommend that you document your negotiations and interactions with each agency—particularly regarding interpretation of grant provisions and requirements, as well as the negotiation of an indirect cost rate—so that if questioned by either your cognizant or oversight agency in an audit, your organization will have the proper supporting audit trail for each significant decision.

Contractor (200.23)

"*Contractor* means an entity that receives a contract as defined in § 200.22 Contract." Contract means "a legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award," but does not include subawards (*i.e.*, subgrants). Nevertheless, the term would include contracts issued by higher-tiered contractors (*i.e.*, subcontracts).

The debate between the term "contractor" and "vendor" is considerable, and some commenters suggested using the term "vendor" because it was more in line with the Federal Acquisition Regulation. COFAR considered, but rejected, the use of the term "vendor"—which is broader—in favor of the narrower term "contractor." Typically, the term "contractor" limits the application of certain requirements

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to those entities that are retained in direct performance of a grant, subgrant, or higher-tiered contract. However, COFAR failed to use the specific limiting language of a "direct" engagement, thereby leaving open to interpretation whether a party providing products or services indirectly (such as a utility provider) would be subject to the conditions placed on contractors. Notably, COFAR did not include a definition for "vendor," which has been removed altogether from the Super Circular.

We recommend that, if in doubt, you interpret the term "contractor" broadly to ensure compliance. If such an interpretation would be impractical, we recommend that you seek written guidance from your agency's grants officer as to whether a lower-tiered entity is the type of contractor to which the regulatory requirements attach.

Cooperative Agreement (200.24) v. Grant Agreement (200.51)

The difference between cooperative agreements and grants can be confusing and misunderstood. The Super Circular attempts to clarify this distinction as follows:

"*Cooperative agreement* means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that" aims to carry out a public purpose and not to acquire goods or services, and provides for "substantial involvement" by the Federal awarding agency or pass-through entity.

Alternatively, "[g]rant agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that" aims to carry out a public purpose and not to acquire goods or services, and **does not** provide for "substantial involvement" by the Federal awarding agency or pass-through entity.

Therefore, the distinction between a cooperative agreement and grant is whether the legal instrument accounts for the "substantial involvement" of the Federal government or pass-through entity. Interestingly, the Super Circular fails to define or explain what constitutes "substantial involvement."

Program Income (200.80)

"*Program income* means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance." The Super Circular provides examples of program income, which include but are not limited to income from:

- Fees for services performed, or fees from the use or rental of real or personal property acquired under Federal awards;
- The sale of commodities or items fabricated under a Federal award, and license fees and royalties on patents and copyrights; and
- Principal and interest on loans made with Federal award funds.

Interest earned on advances of Federal funds, however, is not program income, except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award. Program income also does not include rebates, credits, discounts, for which the Federal government must get the benefit of the bargain, and interest earned on any of such amounts.

We recommend that your internal control system closely track any potential program income to ensure compliance with the Cost Principles articulated in the Super Circular.

Supplies (200.94)

"*Supplies* means all tangible personal property other than those described in § 200.33 Equipment." With respect to "computing devices," however, such devices are "a supply if the acquisition cost is less than the lesser of the capitalization level established by the non-Federal entity for financial statement purposes or \$5,000, regardless of the length of its useful life."

Previously, the definition for supplies included all tangible personal property that fell below \$5,000, including technology equipment. However, COFAR recognized that since computing devices increasingly fall below the threshold, the Super Circular would make explicit that when they do, they shall be treated consistently with all other items below the threshold, notwithstanding the useful life consideration.

* * * * *

As the authors of this newsletter have consistently commented, the consolidation and creation of the Super Circular—especially with respect to the creation of uniform definitions—is a positive development. Yet many of these definitions are vague or silent on key issues. As a result, nonprofits must be mindful

of gaps and may consider seeking legal guidance and/or authoritative interpretations from their Federal agencies before proceeding in these uncharted waters.

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May 2014

FEDERAL GRANT & CONTRACT NEWS FOR NONPROFITS - MAY 2014

As the end of fiscal year 2014 approaches and the beginning of fiscal year 2015 draws near, nonprofit organizations must begin to prepare for the implementation of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (commonly known as the "**Super Circular**"). As detailed in our prior newsletters, one of the Super Circular's seminal purposes is to curb waste, fraud, and abuse. To that end, the Super Circular seeks to strengthen oversight of federal awards by requiring that federal agencies and pass-through entities obtain disclosures of conflicts of interests from prospective recipients of federal funds. This guidance markedly differs from that of predecessor circulars, particular Circular A-110, in ways that have not been fully clarified.

Conflict of Interest Standards of Circular A-110

OMB Circular A-110 (Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations) requires organizations receiving federal funds to maintain a written code of conduct for its employees who engage in the performance of the work under a federal award. Within this code of conduct, the organization must include a proviso relating to conflicts of interest. Specifically, A-110 provides that:

No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved.

The A-110 Circular defines a conflict as arising when "the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award."

Further, with regard to competition, A-110 states:

The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements.

Notwithstanding this guidance, A-110 does not impose obligations on recipients of federal funds or contractors to affirmatively disclose the presence of potential conflicts of interest prior to receiving federal funds. Under the Super Circular, this standard will change. Similar to federal contracting requirements, recipients of federal awards and their contractors will be required to actively disclose potential conflicts of interest.

The Conflict of Interest Standards of the Super Circular

The Super Circular's conflicts of interest language imposes more stringent, yet more ambiguous, standards upon federal award recipients than A-110. In this regard, the Super Circular states:

The Federal awarding agency must establish conflict of interest policies for Federal awards. The non-Federal entity must disclose in writing any potential conflict of interest to the Federal awarding agency or pass-through entity in accordance with applicable Federal awarding agency policy.

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2 C.F.R. § 200.112.

Unlike A-110, and despite the 99 definitions included in the Super Circular, the new law does not define a "conflict of interest." The law is unclear whether the definition from A-110 will persist, or if the definition of a conflict of interest will be up to the applicable agencies' determination. Moreover, the Super Circular does not state whether grantees must maintain a conflict of interest policy – again, leaving such requirements to agencies to determine. However, under the Super Circular, the law now requires grantees to make a risk assessment and provide written disclosure of potential conflicts of interest.

With this framework, the Super Circular fails to provide the uniformity that the OMB promised, and threatens increased costs to potential awardees with its ambiguity. A nonprofit grant recipient will be forced to adhere to the conflicts of interest policy requirements for each federal agency from which it receives funds, or, if such guidance is not given, will be subject to the whims of auditors and grant officers who will determine if grantees have met the amorphous legal requirements. Such a situation will undoubtedly create more confusion and inefficiencies, undermining the Super Circular's stated goal of transparency and efficiency in the federal grant market.

What Can Your Nonprofit Do to Prepare?

What can nonprofits do now to prepare for awards that will be subject to the Super Circular's new guidance?

- Examine your organization's code of conduct and policies with respect to conflicts of interest. Do you have a written policy? Does it cover both actual and potential conflicts of interest? Is your policy a personal conflicts of interest policy, or does it address organizational conflicts of interest as well? Are the policy's terms defined to avoid internal confusion? Are employees trained on the policy? Is the policy applicable beyond the organization's employees (e.g. board members, officers, committee members, agents, subrecipients, subcontractors)?
- Examine your awarding agencies' conflicts of interest policies. Do your policies conform to each agency's standards? Are there points of confusion with the agency's requirements? When agencies have more specific requirements or deviations from your policy, do you implement those requirements to the work under the award, or do you implement those changes organization-wide? Are your employees – particularly those in decision-making roles – trained to understand agency's requirements?
- Is the agency updating its conflicts of interest policies in light of the Super Circular? If so, at what stage in the process are the agency's new rules? Do you still have an opportunity to comment? If so, examine the proposed rule closely and seek further clarification where needed.

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