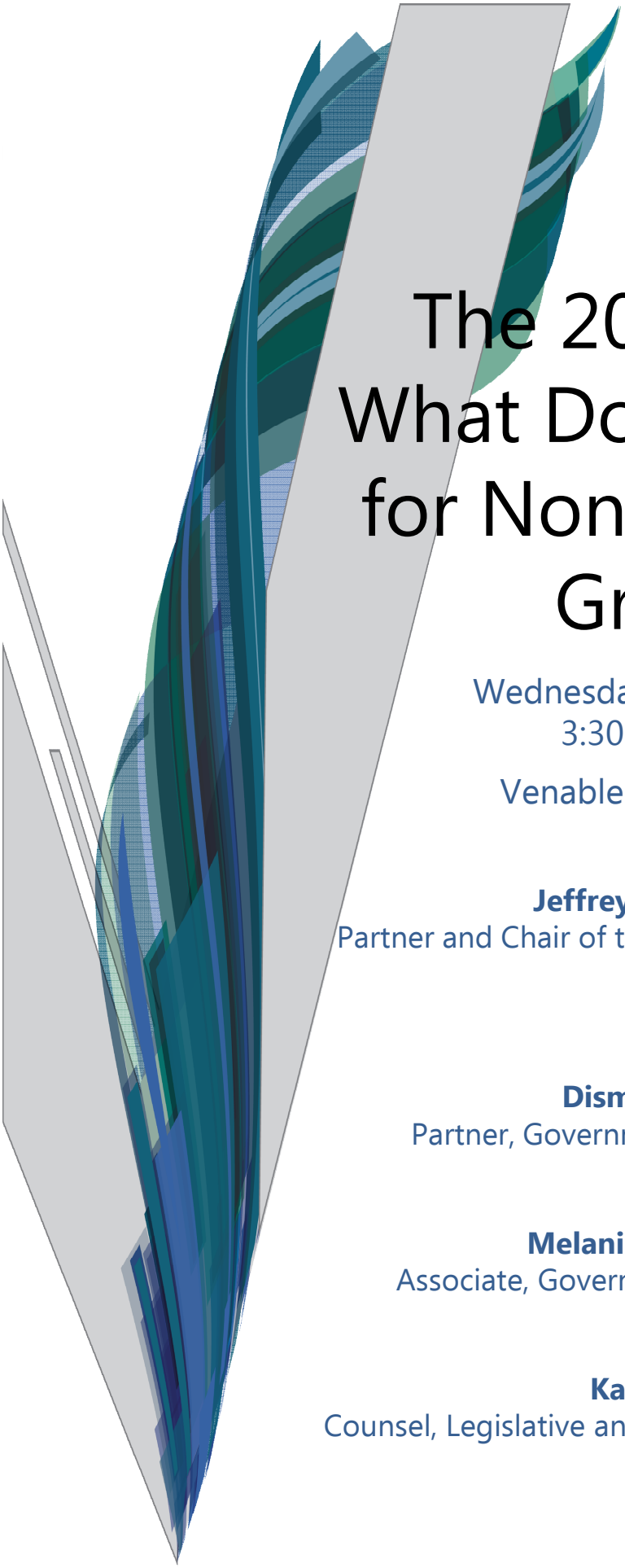


VENABLE® LLP

The 2016 Election: What Does It All Mean for Nonprofit Federal Grantees?

Wednesday, November 30, 2016,
3:30 pm – 5:00 pm ET

Venable LLP, Washington, DC

Moderator

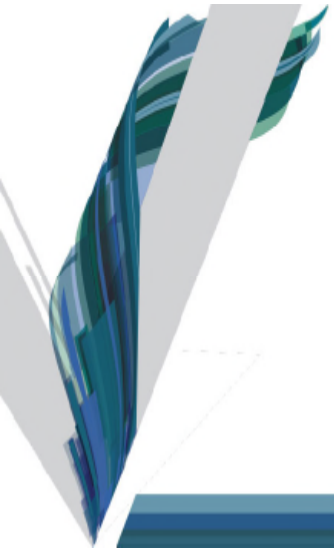
Jeffrey S. Tenenbaum, Esq.
Partner and Chair of the Nonprofit Organizations Practice,
Venable LLP

Speakers

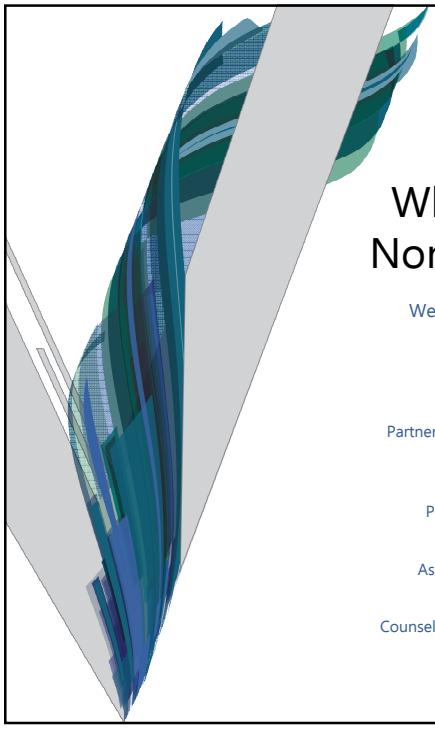
Dismas N. Locaria, Esq.
Partner, Government Contracts Practice Group,
Venable LLP

Melanie Jones Totman, Esq.
Associate, Government Contracts Practice Group,
Venable LLP

Kara M. Ward, Esq.
Counsel, Legislative and Government Affairs Practice Group,
Venable LLP



Presentation



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Upcoming Venable Nonprofit Events

Register Now

- **December 12, 2016:** Top Ten Risks Facing Nonprofits Operating Internationally, co-sponsored by Venable LLP and BDO
- **January 12, 2017:** Top Ten Hot-Button Insurance Issues Facing Nonprofits

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Introducing Venable's New Government Grants Resource Library

To view Venable's Government Grants Resource Library, visit www.grantslibrary.com.

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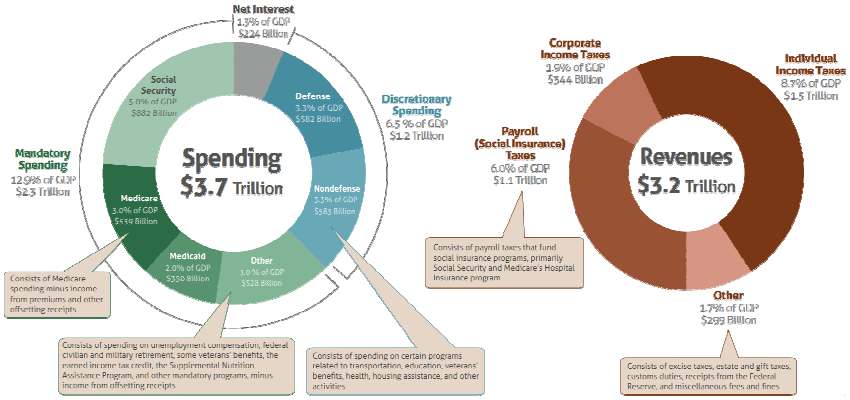
Agenda

- Overview
  - The landscape of what the next administration inherits
  - Transition and new leadership
  - New priorities
  - Timelines of note
- Administrative action: What is up for immediate change?
- What does the election mean for nonprofit recipients of federal grants and cooperative agreements?
- Your program may be defunded for current or future years – Now what?

What the Next President Inherits: The Debt

The State of the Federal Budget



Source: https://www.cbo.gov/publication/51110

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Discretionary Spending

Prepared by Maureen Costantino and Leigh Angres
Source: Congressional Budget Office, January 2016
Contact: CBO Projections Unit, Budget Analysis Division

All data are for federal fiscal years, which run from October 1 to September 30.

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Observations: The Debt Matters in the 115th Congress

- Need more money to cover projected growth in mandatory spending
- New revenue sources (tax)
  - Bipartisan lack of leadership and unwillingness to make difficult economic choices
  - Focus on least-understood provisions rather than most-understood
    - E.g., "carried interest" versus "mortgage interest"
- Spending cuts?
  - Federal government employment
  - U.S. Dept. of Education; EPA?

The Next Administration

New Leadership: Key Cabinet Secretaries

Education
Betsey DeVos

HUD
Dr. Ben Carson

HHS
Rep. Tom Price

Defense
General James Mattis

Transportation
Elaine Chao

Energy
Harold Hamm

Treasury
Steven Mnuchin

Commerce
Wilbur Ross

...Still evolving

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New Leadership: Regulators and Agency Positions

- Key regulators:
  - Will they serve out their terms? Resign?
  - Process for replacement governed by the Federal Vacancies Act

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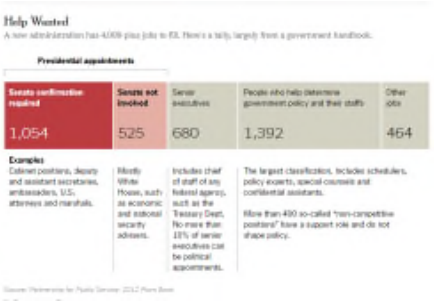
New Priorities

- 4,000 new positions take time to fill.



- The takeaway: Immediate, wholesale change is unlikely.

New Leadership: House and Senate Appropriations

- House:

Rodney Frelinghuysen, Chair

Nita Lowey, Ranking

- Senate:

Thad Cochran, Chair

Patty Murray, Ranking

or

Patrick Leahy, Ranking

…Still evolving

New Leadership: House and Senate Budget Committees

- House:

TBD, Chair
(Current Chair Tom Price was selected as HHS Secretary.)

John Yarmuth, Ranking

- Senate:

Mike Enzi, Chair

Bernie Sanders, Ranking

...Still evolving

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Timelines of Note

- Key Dates
  - May 30-31, 2016: CRA date for regulation publication
  - Dec 9, 2016: Current government funding expiration
  - March 2017: Debt ceiling
  - March 2017: CRA date for regulatory repeal
- Federal Budget Process
  - President's budget and agency request timelines
  - Congressional process (hearings, proposal, passage)
  - Reconciliation as a tool (exempt from filibuster)

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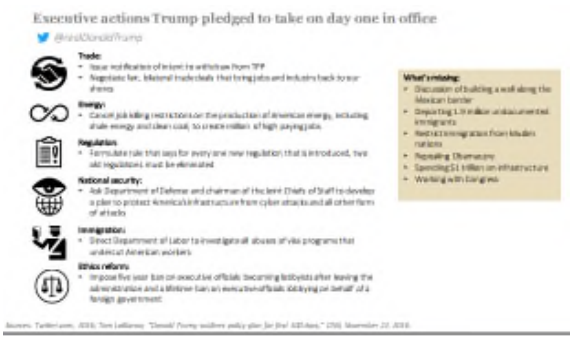
Priorities

- First 100 days
- Government budget fight
- Tax plan
- Affordable Care Act
- Financial services reform



Administrative Action: What Is up for Immediate Change?

- Revocation of Executive Orders
  - Cancel "illegal" and "overreaching" executive orders
  - Likely to be rescinded:
    - Executive Order 13706, Paid Sick Leave for Workers on Federal Contracts
    - Executive Order 13673, Fair Pay and Safe Workplaces
    - Executive Order 13658, Establishing a Minimum Wage for Contractors
  - May survive:
    - Executive Order 13672, Prohibiting Discrimination Based on Sexual Orientation and Gender Identity
    - Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts
- "Midnight Regulations"
- Congressional Review Act (CRA)

What Does the Election Mean for Nonprofit Award Recipients?

- Budgets
  - DoD, DHS, NASA, and DoT expected to increase
  - CFPB, EPA, HHS expected to decrease
- Changes in enforcement
  - Audit and fraud investigation and enforcement are unlikely to change
    - Preventing fraud is a bipartisan issue
    - *Qui tam* provision of the FCA will still entice third parties
  - May be more business friendly with regulatory interpretations
- Freeze on hiring of federal employees
  - Could further slow administrative processes
  - Lower morale

Your Program May Be Defunded for Current or Future Years – Now What?

- Know the terms of your agreement – what is required for termination?
  - Are there applicable cure periods related to a termination for cause?
  - What wind-up period is required for terminated funding?
  - How will costs that have been incurred but not submitted be reimbursed?
- Know your certifications across all agreements and donors.
- Ensure that you do not receive bad past performance ratings or are "terminated for cause," as this could impact your future ability to receive awards.
  - If terminated for material failure to comply,
    - The termination decision will be reported through SAM.
    - The termination decision will be available in the OMB-designated integrity and performance system for a period of five years from the date of the termination, then archived.
    - Federal awarding agencies that consider making an award during a five-year period must consider that information in judging whether the non-federal entity is qualified to receive an award.
- But organizations can and should comment on any termination reports in SAM.

Your Program May Be Defunded for Current or Future Years – Now What?

- Engage in dialogue with the agency early about options to:
  - Reduce costs by narrowing scope or substituting personnel,
  - Transfer funds to other critical needs, or
  - Reduce matching requirements
- Recipients must request prior approvals from federal awarding agencies for modifying, scope, key personnel, changes in cost share or matching, or certain costs that require prior approval (*see* 2 CFR § 200.308).
- If your organization has concerns regarding the long-term funding of your program:
  - Have a game plan mapped out and discussed prior to defunding.
  - Build a record of the successes, positive performance, and overall benefits.

Your Program May Be Defunded for Current or Future Years – Now What?

- Engage in dialogue with the agency early about broadening scope to capture repurposed program income.
- Know how you are required to treat program income under your agreement and what constitutes program income.
- Under 2 CFR § 200.307(e), there are three methods for treating program income:
  1. Deduction: "Ordinarily program income must be deducted from total allowable costs to determine the net allowable costs."
  2. Addition: "***With prior approval of the federal awarding agency*** . . . program income may be added to the federal award by the federal agency and the non-federal entity. The program income ***must be used for the purposes and under the conditions*** of the Federal award."
  3. Cost sharing or matching: "***With prior approval of the Federal awarding agency***, program income may be used to ***meet the cost sharing or matching requirement*** of the federal award. The amount of the federal award remains the same."
- Are there investments that you could make to generate program income?
- Can you clarify the scope and terms of your agreement to allow for program income to cover additional efforts or the matching requirement to free up other funds?

Your Program May Be Defunded for Current or Future Years – Now What?

- Clarify how program income will be treated after closeout, particularly if that closeout is accelerated because of defunding.
  - Consider whether moving through the process quickly may beneficially free up program income or more quickly get your organization's final requests to the front of the line.
  - §200.343(b): "Unless the federal awarding agency or pass-through entity authorizes an extension, a non-federal entity must liquidate all obligations incurred under the federal award not later than 90 calendar days after the end date of the period of performance as specified in the terms and conditions of the federal award."
- §200.307(f) allows for agencies to provide guidance on how program income will be treated after the period of performance.
  - *"Income after the period of performance.* There are no federal requirements governing the disposition of income earned after the end of the period of performance for the federal award, unless the federal awarding agency regulations or the terms and conditions of the federal award provide otherwise. ***The federal awarding agency may negotiate agreements with recipients regarding appropriate uses of income earned after the period of performance as part of the grant closeout process."***

Questions?

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To view recordings of Venable's nonprofit programs on our YouTube channel, see www.YouTube.com/VenableNonprofits or www.Venable.com/nonprofits/recordings.

To view Venable's Government Grants Resource Library, see www.grantslibrary.com.

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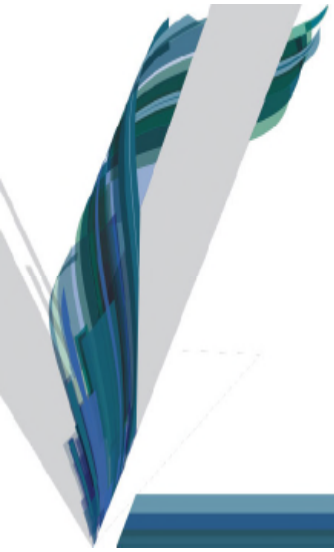

Speaker Biographies

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Jeffrey S. Tenenbaum

Partner

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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly 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 only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last four years (2012-15). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, 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 2012-17 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-16 editions 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.

AREAS OF PRACTICE

Tax and Wealth Planning
Antitrust
Political Law
Tax Controversies and Litigation
Tax Policy
Tax-Exempt Organizations
Regulatory

INDUSTRIES

Nonprofit Organizations

GOVERNMENT EXPERIENCE

Legislative Aide, United States House of Representatives

BAR ADMISSIONS

District of Columbia

EDUCATION

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

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

MEMBERSHIPS

REPRESENTATIVE CLIENTS

AARP
Academy of Television Arts & Sciences
Air Conditioning Contractors of America
Air Force Association
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Bar Association
American Cancer Society
American College of Cardiology
American College of Radiology

American Society of Association Executives

American Council of Education
American Institute of Architects
American Nurses Association
American Red Cross
American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
America's Health Insurance Plans
Anti-Defamation League
Association for Healthcare Philanthropy
Association for Talent Development
Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Association of Private Sector Colleges and Universities
Auto Care Association
Better Business Bureau Institute for Marketplace Trust
Biotechnology Innovation Organization
Brookings Institution
Carbon War Room
CFA Institute
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Cystic Fibrosis Foundation
Democratic Attorneys General Association
Design-Build Institute of America
Entertainment Industry Foundation
Erin Brockovich Foundation
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Good360
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
InsideNGO
Institute of International Education
International Association of Fire Chiefs
International Rescue Committee
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
The Leukemia & Lymphoma Society
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
National Air Traffic Controllers Association
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of College Auxiliary Services
National Association of County and City Health Officials
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners

National Coalition for Cancer Survivorship
National Coffee Association
National Council of Architectural Registration Boards
National Council of La Raza
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
New Venture Fund
NTCA - The Rural Broadband Association
Nuclear Energy Institute
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Romance Writers of America
Telecommunications Industry Association
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United States Tennis Association
Volunteers of America
Water Environment Federation
Water For People
WestEd
Whitman-Walker Health

HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-15

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-17

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-16

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

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 Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter and on the American Society of Association Executives' Public Policy Committee. He previously served as Chairman and as a member of the ASAE *Association Law & Policy* 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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Dismas Locaria

Partner — *Washington, DC Office*

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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:

AREAS OF PRACTICE

Government Contracts

Homeland Security

Investigations and White Collar Defense

Federal Grants and Contracts for Nonprofits

INDUSTRIES

Cybersecurity Risk Management Services

Government Contractors

Nonprofit Organizations

BAR ADMISSIONS

District of Columbia

Maryland

EDUCATION

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

Articles Editor, *Maryland Law Review*

B.A., *magna cum laude*, San Francisco State University, 1999

- 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.*

PUBLICATIONS

- "Frankel v. Board of Regents of the University of Maryland System - In the Name of Equality: The Proper Expansion of Maryland's Heightened Rational Basis Standard," 61 MD L. REV. 847 (2002).
- November 22, 2016, DOD Bars Contracts from Contractors That Prohibit Employees from Reporting Waste, Fraud, and Abuse, Government Contracts Update

- November 16, 2016, OFPP Directs Agencies to Halt Implementation of Fair Pay and Safe Workplaces Regulations, Government Contracts Update
- November 11, 2016, DoD Issues Slew of Proposed Rules Updating Grant and Cooperative Agreement Regulations, Nonprofit Alert
- October 2016, Federal Grant and Contract News for Nonprofits - October 2016
- October 11, 2016, DOL Publishes Final Rule Regarding Paid Sick Leave for Employees of Federal Contractors: What Nonprofits Need to Know, Nonprofit Alert
- October 3, 2016, Final FAR Rule Will Increase Suspension and Debarment Oversight and Activity – What Does it Mean for Contractors?, Government Contracts Update
- September 2016, Federal Grant and Contract News for Nonprofits – September 2016
- September 28, 2016, Problems In New General Services Administration OIG Memo, *Law360*
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- 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, assisting clients in developing and implementing corrective action plans, conducting training sessions, and recommending and making appropriate disclosures to government authorities. Ms. Totman has broad experience in representing clients in making mandatory disclosures and in suspension and debarment proceedings, including representing clients before the defense agencies (e.g., the U.S. Air Force and the U.S. Army), the Department of Veterans Affairs, the General Services Administration, the Small Business Administration, and the United States Agency for International Development.
- 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.
- Counseling and resolving contractor disputes with grant recipients of Affordable Care Act funds from the Department of Health and Human Services and Stafford Act emergency funding issued by the Federal Emergency Management Agency and the Department of Housing and Urban Development.
- Providing routine counseling to government contractors and grant recipients on a variety of compliance issues.

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.

AREAS OF PRACTICE

Government Contracts

Investigations and White Collar Defense

Federal Grants and Contracts for Nonprofits

INDUSTRIES

Nonprofit Organizations

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EDUCATION

J.D., Duke University School of Law, 2008

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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

PUBLICATIONS

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Kara Ward is a member of Venable's Legislative and Government Affairs Group focusing on financial services and the housing finance market. She has experience with issues related to housing finance reform, insurance, consumer financial services, payment systems, and community economic development.

Combining federal and private practice experience, Ms. Ward provides various financial service companies and trade group clients with policy analysis and strategic advice to advance their business objectives on Capitol Hill and in the Executive Branch. She frequently works on issues involving the House Financial Services Committee, Senate Banking Committee, Treasury Department, Consumer Financial Protection Bureau, Federal Housing Finance Agency, Department of Housing and Urban Development, and Federal Reserve.

Ms. Ward has worked extensively on efforts to reform the single-family residential housing system, representing a number of client interests in recent legislative proposals. Additionally, Ms. Ward has broad experience with consumer financial issues and helps clients provide input into rule-making by the Consumer Financial Protection Bureau.

Prior to entering private practice, Ms. Ward was an attorney at the U.S. Department of the Treasury during the economic crisis and focused on, among other topics, the creation of the Federal Insurance Office, the Financial Stability Oversight Council, funding for small business development, and other federal grant programs.

AREAS OF PRACTICE

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Banking and Financial Services Regulatory

Consumer Finance

Insurance

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PUBLICATIONS

- November 16, 2016, Post-Election Consumer Financial Services Regulatory Landscape FAQs, Consumer Financial Services Alert

SPEAKING ENGAGEMENTS

- November 30, 2016, The 2016 Election: What Does It All Mean for Nonprofit Federal Grantees?

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November 2016

FEDERAL GRANT AND CONTRACT NEWS FOR NONPROFITS - NOVEMBER 2016

Part 3 of 4: How Do I Do It? Preparing a Disclosure

This month's newsletter continues our four-part discussion of how a nonprofit organization might respond to an instance of potential noncompliance. The following case study is the basis of our continued analysis, which outlines basic steps for reviewing and investigating a reported noncompliance. Last month, we discussed steps one should consider taking when addressing a reported noncompliance. After having performed an inquiry or investigation and determining that a reportable incident occurred, we now focus our attention on the disclosure an organization might make.

Case Study Reminder

The in-house general counsel of a national educational nonprofit organization receives a report that several employees in its office in Central City, Middle State have allegedly been inflating and/or estimating their time cards on various educational programs. The report includes one name and indicates that several other persons were involved, but provides no specifics on the hours that may have been inflated and/or estimated, or on the number of affected programs. The Central City office has 20 employees who provide both direct and indirect support to four educational programs, of which two are funded exclusively by the U.S. Department of Education (DoEd); one is funded, in part, with DoEd funds and matching funds from the organization; and one is funded solely with private funds.

In last month's **newsletter**, we walked through the investigation, whereby we also learned that while timekeeping noncompliance occurred, it was limited to three individuals, but applied to all four programs. Perhaps most fortunate, it appears that these individuals were not purposefully inflating their time, but rather were routinely rounding up their time (against company policy) and sometimes estimating their time because they did not understand the importance of accurate timekeeping. Furthermore, because all three of the individuals at issue were relatively new to the organization, the noncompliance dated back only eight months. In response, the organization took immediate steps to train these individuals on the importance of timekeeping policies and reviewed and updated its new hiring training program to better emphasize accurate timekeeping. The organization has maintained all of the documents it collected in the course of the investigation.

With this information in hand, what should the general counsel do?

Assessing the Need to Disclose

When preparing to make a disclosure to a funding partner, it is critical to understand the requirements of any such disclosure, including whether there is an affirmative requirement to disclose a noncompliance. As discussed in the **first newsletter** of this series, federal awards (i.e., grants, cooperative agreements and/or contracts) have certain disclosure requirements and varying disclosure thresholds. This, however, may not be the case for state or privately funded arrangements. Nevertheless, even if an affirmative disclosure obligation does not exist, the noncompliance, if discovered, may result in a breach of contract claim or undermine the grantee's relationship with its agency. Therefore, as a general rule, it is typically a good idea to consider disclosing noncompliances to your funding partners, regardless of whether there is a specific, affirmative obligation.

In our hypothetical situation, the noncompliance implicates federal grant funds in three of the funding instruments, and a fourth does not include an affirmative disclosure obligation, but does include language that requires accurate timekeeping and billing. Accordingly, given that the investigation suggests that timekeeping and the corresponding invoices were not accurate, raising this issue with the private funding partner is advisable.

Before disclosing, the organization, with the guidance of legal counsel, should fully understand the issues and the potential consequences of a disclosure. Depending on the type of noncompliance and

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the harm to the funding entity, a disclosure can set off a chain reaction of events that may result in substantial exposure to the organization, as well as individuals. This can include both civil and criminal penalties, as well as potential administrative action (i.e., suspension or debarment). Part of the conversation, however, must acknowledge that, should the organization fail to disclose a known noncompliance, if it is later discovered, the decision not to disclose will significantly increase the likelihood of civil, criminal and/or administrative action, or, at the very least, decrease the federal government's confidence in the organization.

The Anatomy of a Disclosure

With the above considerations in mind, it is generally advisable to include the entire context that led to a noncompliance. This allows the disclosing party the ability to explain itself and demonstrate to the funding partner that the disclosing party 1) has truly diagnosed the problem; 2) has taken the appropriate steps to mitigate the problem; and 3) can still be trusted as a responsible steward of the funding partner's funds. While some federal agencies provide disclosure forms, these are typically the "check-the-box" type, which leads little room for detailed narratives, and we generally counsel against using them. For example, organizations should consider including background on the disclosing organization's business generally and its history with the funding partner (including their joint successes) and, of course, background on the specific project at issue, including any related challenges or difficulties experienced along the way (with reminders of those instances where the disclosing party previously apprised the funding partner of such challenges or difficulties). Similarly, it is critical that the disclosing party fully explain the particular facts and circumstances that led to the noncompliance. In this way, the organization is able to fully contextualize any noncompliance, placing it within the appropriate context of its relationship with the organization and its overall internal control structure.

Of equal importance to the explanation regarding the disclosure are the actions an organization takes after learning of the issue. The federal government is inevitably looking to determine how the organization responded to the noncompliance and whether those steps will be effective in minimizing or eliminating similar issues in the future. Key to this portion of the explanation is tying in the corrective actions to the actual noncompliance. If an agency feels the corrective actions are cosmetic or fail to address the root cause of an issue, the agency may not be satisfied with the response and may have continuing concerns. Furthermore, because not all actions can be or should be implemented immediately, taking a measured and methodical approach is usually acceptable, as long as the disclosure explains why a program or practice may take time to implement.

Additional Considerations

As explained in our **first newsletter** in this series, the requirement to disclose under a federal grant is very different form that under a federal contract (criminal violations versus credible evidence of a civil federal False Claims Act violation). Nevertheless, in our hypothetical scenario, it is clear that our organization has overcharged the federal government, and that it may be subject to civil False Claims Act scrutiny. Thus, while it may not be specifically required by the Uniform Guidance (because the overcharging alone may not be tantamount to a criminal violation), it is advisable that the matter be raised with the granting agency.

Here, DoEd is the federal funding entity under three affected programs. Although the funding agency is the same, it is not uncommon for each funding agreement to be administered by a different grants officer. Thus, the organization should ensure that it submits the disclosure to the correct individuals. When multiple disclosures are necessary, the disclosing party should consider whether to make a single disclosure to all officials (i.e., putting all officials on notice of the issues the organization has under other funding arrangements) or an agreement-specific disclosure to each cognizant official.

In presenting its disclosure, the organization also may consider providing back-up calculations so the federal government officials can review the calculation. Often, by being upfront about difficult issues, an organization can provide a sense of confidence that it has handled the matter appropriately and short-circuit greater inquiry and scrutiny from the agency, potentially avoiding a federal inspector general or U.S. Department of Justice investigation.

To Be Continued…

Having made the disclosure to DoEd , as explained above, next month we will discuss some of the follow-up questions and/or actions that may ensue and thoughts and strategies for addressing them.

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DoD First to Bar Contracts from Contractors that Prohibit Employees from Reporting Waste, Fraud, and Abuse

On November 14, 2016, the U.S. Department of Defense (DoD) issued a class deviation to the Federal Acquisition Regulation (FAR) that prohibits contracting officers from awarding contracts to contractors that prohibit their employees from reporting waste, fraud, and abuse to federal officials. This class deviation seeks to implement section 743 of Division E, Title VII of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and successor provisions in subsequent appropriations acts (and as extended in continuing resolutions). Section 743 prohibits the use of funds appropriated under or otherwise made available by Division E or any other Act for a contract, grant, or cooperative agreement with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a federal department or agency authorized to receive such information.

To date, the Uniform Guidance has yet to be amended to implement Section 743, but prohibitions of this sort appear to be forthcoming. For more information on the DoD class deviation, please **click here**.

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October 2016

FEDERAL GRANT AND CONTRACT NEWS FOR NONPROFITS - OCTOBER 2016

Part 2 of 4: What Do I Do? Addressing a Potentially Disclosable Issue

This month's newsletter resumes our four-part discussion on responsiveness to noncompliance issues as exemplified by specific case studies. The following case is the basis for our continuing analysis, which outlines basic steps for reviewing and investigating a report of noncompliance. In the end, investigators generally are seeking to determine 1) what truly happened, 2) whether what happened is compliant with the law or the terms of the grant agreement, and 3) what measures have been instituted to help ensure that the noncompliance does not recur in the future.

Case Study Reminder

This morning, the in-house general counsel of a national educational nonprofit organization received a report that several employees in its office in Central City, Middle State have allegedly been inflating and/or estimating their time cards on various educational programs. The report includes one name, but indicates that several other persons are involved and provides no specifics on the hours that may have been inflated and/or estimated, or on the number of affected programs. The Central City office of our client has 20 employees who provide both direct and indirect support to four educational programs, two of which are funded exclusively by the U.S. Department of Education (DoEd); one is funded, in part, with DoEd funds and matching funds from the organization; and one is funded solely with private funds.

What should the general counsel do?

What Do I Do? Addressing a Potentially Disclosable Issue

It is important to understand that every organization—no matter how small or sophisticated—will face compliance issues at some point. The mere fact that alleged noncompliance may have occurred is not unusual or worthy of embarrassment. Rather, it is the response of the organization in the face of such allegations that will set the tone regarding the organization's ethics and integrity. Knowing that some sort of noncompliance is a near certainty, the first step in resolving a report of noncompliance should happen well before the matter arises, by establishing a procedure for reviewing such allegations. To be clear, this is not merely a whistleblower policy that explains how to report an issue; rather, it is a procedure that clearly explains how the organization will respond. This type of procedure demonstrates the organization's commitment to effectively examining, correcting, and resolving a problem. Moreover, it will help to lay the groundwork for defending an organization against claims made by the U.S. Department of Justice (DOJ) and its Office of Inspectors General (OIG) that the organization is not a responsible steward of federal funds.

Prepare an Investigation Procedure

So what does an investigation procedure look like? As with almost all internal controls, it should be tailored to the needs and specific characteristics of the organization. However, there are hallmark traits that every responsible grantee should consider. The first is determining the right investigative team – deciding who will be the investigator of the issue, and who or what body of the organization will be responsible for particular decisions. Setting out these responsibilities promotes fairness over time and a consistent body of actions and decisions across the organization.

Assembling the Investigation Team

The lead investigator and any other investigator (if there are more than one) should have management's attention and respect, and be familiar with the day-to-day program operations of the organization. It is critical to choose a person of integrity and good judgment who is free from actual or even apparent bias. Investigators also should have autonomy from the program or business personnel, and have structural (either direct or dotted-line) reporting obligations to the board of directors, audit committee, and/or

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highest level of management (depending on the circumstances). Making sure that the board of directors is aware of high-risk compliance issues is important, not just in resolving the issue at hand, but in ensuring that the appropriate resources are devoted to reviewing and correcting the problem.

When deciding whether the federal government or outside legal counsel should be part of your team, you need to make an initial assessment of the allegations. Depending on the allegations, for example, you should consider when and how to reach out to the federal government and when to reach out to outside legal counsel. Although some federal government officials prefer to be notified immediately of any noncompliance, you are not legally obligated to do so until you are sure there is a reportable occurrence. However, there are times when the matter is sensitive enough in nature, such as if an employee has violated the Human Trafficking regulations or is discovered committing criminal fraud, to warrant involving the federal government earlier in the investigative process. In the event you contact the federal government, we recommend also contacting outside legal counsel.

Establishing and maintaining attorney-client privilege is also a major consideration in assembling an investigative team. Nonprofits with in-house counsel may be able to do this internally. However, outside counsel often is retained, and in many cases, it is advisable to solidify this protection. Outside counsel can have the advantage of acting as an impartial reviewer, and can provide important industry best practices in developing corrective action plans.

Regardless, it will be critical for any outside counsel that you do hire or use to have the support of the organization and easy, ready access to facts and information within the organization. Thus, if outside counsel is retained to investigate, the organization should assign an internal team leader who can help coordinate the effort and educate counsel on the ins and outs of the organization and its operations. Depending on the type of issue being reviewed, certain specialist team members (e.g., accountants) may be needed and considered.

Setting out the Scope of Review

Next, the lead investigator should define the scope of the review. Nonprofits do not have unlimited resources to spend on compliance issues; therefore, they should seek to develop an appropriate scope of review. Scattered and ill-defined investigations can cost organizations dearly, while failing to determine the real problem. Defining scope typically contributes to effective marshaling of resources, financial and otherwise.

Another aspect of defining scope is determining who within the organization is involved. Before running to ask the individuals involved about the allegations, it may be worth taking a moment to sketch out the individuals one anticipates as being involved. Nonprofit grantees should think more broadly than the specific individuals who are part of the allegation. For example, in our current case study, who is the potential timekeeper's supervisor—was the supervisor on notice about the inflated time? Did he/she sign off? In other cases, you may consider, who certified to compliance? Who in finance draws down on the funds? Who reviews performance, financial, or audit reports? Was there a basis for believing the certification or reports that formed the basis of the investigation were inaccurate? If no one was on notice, is there an error in the infrastructure that kept critical information from flowing across departments to the appropriate personnel? Again, as stated above, the objective is to determine what happened in the allegation. "What happened" may be broader than something a specific individual did incorrectly. Rather, it could be that an organizational gap or barrier prevented compliance.

Once individuals are identified as potential witnesses, it also is critical that the investigator give some thought to relationships between all of the witnesses and what conflicts of interest and/or perspectives might arise from such.

A third aspect of defining scope is understanding the color of the money involved. Federal funds versus private funds, and federal contract funds versus federal grant funds, as well as a myriad of other combinations, can all have an impact on how one might approach a review. For example, in this case study, two are funded exclusively by DoEd; one is funded, in part, with DoEd funds and matching funds from the organization; and one is funded solely with private funds. In these instances, it will be critical to review the funding agreements before moving on with your review. Are there statutory, regulatory, and agency rules that apply because of the nature of the funds? From where do the matching funds and private funds derive? Do they have additional requirements? In a situation of mixed funding, when you compare the applicable requirements, do any contradict? If so, determine which requirements take precedence.

Preparing for the Investigation

Having set out the scope of the review, the investigator should develop a preliminary outline that sets out

his or her initial thoughts on documents that should be collected for review and analysis. At a minimum, this will likely include most, if not all, of the funding agreement documents, including critical modifications and amendments. In this case the DoEd grant documents and the privately funded agreement should be collected for review.

Furthermore, relevant policies and procedures and other documents should be considered and examined. Again, in this particular case, the investigator should record timekeeping policies and procedures, the organization's code of conduct and employee handbook, as well as the time cards for all work under the four agreements. At times the amount of documents may be voluminous and cause organizations to shy away from the collection effort; however, in our experience, it is certainly preferred to collect and review all such documents internally in advance of the federal government seeking and reviewing such documents, so that the organization can proactively consider what corrective and prophylactic measures it should take immediately.

Typically, after reviewing the documents, the investigator may begin in-person interviews of personnel. Before getting started, a number of considerations should be taken into account, including, but not limited to:

- Who should be interviewed?
- What areas of inquiry should you have for this individual?
- Are there any interview constraints that should be factored into the order or timing? For example, are any witnesses leaving for an extended period of time or permanently? Can you follow up with an interviewee with a second or third interview if needed?
- Among all of the currently known interviewees and any scheduling realities, in what order should you interview them (i.e., are there some witnesses that will provide information to build toward other interviews)?
- Are there any other sensitivities with any of the interviewees or issues that need to be planned around?

While a good deal of planning should go into any investigation before conducting interviews, it is critical that the investigators remain open-minded and flexible as they prepare their outline, review documents, and certainly as they interview witnesses. Indeed, the investigation outline should be viewed as a living document that evolves with the investigation, and the inquiry itself should not be predisposed toward an outcome, but rather should follow the facts to the supported conclusion.

Interviewing Witnesses

Once meeting with individuals, ideally in person, the investigator (if an attorney) should begin with *Upjohn* warnings. If performed by an attorney, these warnings put the witness on notice that 1) they are being interviewed by an attorney; 2) the attorney represents the organization's interests and not that of the individual personally; 3) because an attorney is speaking with them, attorney-client privilege attaches to the conversation and that privilege is held by the organization; 4) since the organization holds the privilege, to ensure the preservation of attorney-client privilege and the integrity of the investigation, it is critical that the interviewee keep the conversation confidential; 5) the organization may choose to disclose the findings of the interview and/or the investigation to outside parties, including federal government officials; and 6) it is important that they understand these concepts, and, if they wish to speak to an attorney for themselves at any time, they must inform the interviewer.

After having delivered *Upjohn* warnings, investigators should select an interview style most comfortable for them, keeping in mind any sensitivies or characteristics of the interviewee. Typically, it may be most comfortable for the interviewee that the inquiry begin with simple factual items relating to the interviewee's background and experience. As the interviewee becomes more comfortable, the investigator can begin to build the foundation to the heart of the inquiry. Sometimes having copies of documents may be useful; at other times, you may want the interviewee to draw upon their memory. There are a host of tactics and styles one may employ, but at bottom, the investigator should not be untruthful or deceitful or cause the interviewee to feel as though they have been detained against their will.

Making Judgments

Following the investigation (and often as the investigation unfolds), it is crucial for the investigator to assemble all of the information learned and attempt to put together the most logical and credible story. Often certain pieces or recounts may not fit together. It will be the job of the investigator to determine whether this is happening because someone misremembered, forgot, or lied about key facts or information, or there is a loose end that needs to be examined further. Ultimately, every fact of the story may be difficult to surmise with certainty, but at the conclusion of an investigation, a good sense of what actually happened should arise.

In addition to developing the story of what occurred, the investigator must keep in mind steps that can be taken to ensure that noncompliance is not repeated (or at least is mitigated) and that the organization is able to learn and grow from the experience. In other words, what actions or procedures would have prevented the discovered misconduct from occurring again? Are the individuals involved deserving of discipline? Should policies and procedures be revised or new ones developed altogether? Would additional training for staff and others help?

Notwithstanding these considerations, the organization must be mindful that anything it does in advance of informing federal government officials, if warranted, should be done extremely carefully, to ensure that federal government officials do not view any action as destroying information, tainting witnesses, or otherwise interfering with what may ultimately become a federal government investigation.

Case Study: What Was Learned

Having applied the above principles and guidance, in our case study, it was determined that while timekeeping noncompliance occurred, it was limited to three individuals, but applied to all four funding instruments. Perhaps most fortunate, it appears that these individuals were not purposefully inflating their time, but rather were rounding it up and sometimes estimating their time because they did not understand the importance of accurate timekeeping. Furthermore, because all three of the individuals at issue were relatively new to the organization, the noncompliance dated back only eight months.

In response, the organization has taken immediate steps to train these individuals on the importance of timekeeping policies and has reviewed and updated its new hiring training program to better emphasize accurate timekeeping. The organization has maintained all of the documents it collected in the course of the investigation.

To Be Continued…

Notwithstanding the fact that these timekeeping infractions were not intentional, they did result in an overcharge to the federal government on three grants. Next month, given this information, we will discuss next steps.

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ARTICLES

September 2016

FEDERAL GRANT AND CONTRACT NEWS FOR NONPROFITS – SEPTEMBER 2016

Part 1 of 4: *Why* Would I Have to Disclose? Disclosure Obligations for Federal Aid Recipients

This fall, we are dedicating four issues to a hypothetical case study involving a nonprofit organization that receives federal funds (as well as private funding). We will discuss its response to noncompliance issues and determine if, when, and how it must disclose noncompliance to the federal government. This month's newsletter sets the stage by laying out the varying disclosure regimes. Subsequent issues will focus on the following topics:

- October – What Do I Do? Addressing a Potentially Disclosable Issue
- November – How Do I Do It? Preparing a Disclosure
- December – Now What? Liaising with the Federal Agency

Case Study

This morning, the in-house general counsel of a national educational nonprofit organization receives a report that several employees in its office in Central City, Middle State have allegedly been inflating and/or estimating their time cards on various educational programs. The report includes one name, but indicates that several other persons are involved and provides no specifics on the hours that may have been inflated and/or estimated, and the number of affected programs. The Central City office of our client has 20 employees who provide both direct and indirect support to four educational programs, of which two are funded exclusively by the U.S. Department of Education (DoEd); one is funded, in part, with DoEd funds and matching funds from the organization; and one is funded solely with private funds.

What should the general counsel do?

The Disclosure Basics—*FAR v. Uniform Guidance*

While there is no question that the allegations contained in the report are serious and require review, it is critical for the nonprofit to first determine the standards and obligations required under the impacted programs. For programs funded in part or wholly with federal funds, there are multiple and varied disclosure requirements.

Contracts and subcontracts financed with federal funds are subject to the Federal Acquisition Regulation (FAR), which provides at 3.1004(a) that contracts (and subcontracts) expected to exceed $5.5 million and require 120 days or more to perform shall include clause **52.203-13**. This clause, Contractor Code of Business Ethics and Conduct, requires the "timely" written disclosure, to a cognizant agency's Office of Inspector General (OIG), of "credible evidence" that a principal, employee, agent, or subcontractor of the contractor has committed a violation of federal criminal law under Title 18 U.S.C. (e.g., fraud, bribery, etc.) or a violation of the federal False Claims Act.

The FAR, however, does not apply to federal grants and cooperative agreements. Grants and cooperative agreements are subject to the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards (Uniform Guidance), which includes a disclosure obligation that varies substantially from the FAR. Under the Uniform Guidance, all grant recipients are required to "timely" disclose in writing to the awarding agency (or pass-through organization) "all violations of federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the federal award."

While both disclosure requirements mandate that the disclosure be "timely" and in writing, their

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similarity ends there. The most notable distinctions between the two reporting regimes include the following:

- The FAR disclosure requirement mandates disclosures based on "credible evidence," which, as the FAR Council explained in the guidance implementing 52.203-13, means that contractors had the opportunity to conduct a preliminary examination to determine whether credible evidence in fact existed. A FAR contractor needs to disclose prior to determining an actual violation has occurred. Conversely, the Uniform Guidance requires disclosure of "violations" of certain laws. Violations are legal conclusions rendered by a judge or jury. Certainly this bar is high and would exclude mere whistleblower reports, such as that presented above, until after a judge or jury deemed (beyond a reasonable doubt) the allegation(s) true. Yet, from a practical standpoint, OIGs have made clear that they read and apply the Uniform Guidance's reporting obligation in a manner that is equal to the "credible evidence" standard under the FAR. Some agencies include this higher standard in the terms of the grant agreement. Until a nonprofit challenges an OIG and/or agency in a lawsuit, this broad interpretation is likely to persist.

- The Uniform Guidance further limits its disclosure obligation to violations of "criminal" matters, leaving out civil violations of law, such as those claims and allegations that may be made under the federal False Claims Act. Again, while this distinction is great, OIGs generally appear to be narrowing the gap between these two standards by stretching criminality to include conduct that would typically be reserved for civil actions under the FCA.

- Finally, the Uniform Guidance requires disclosures to be submitted to the awarding agency or the pass-through organization. The FAR, on the other hand, requires submission to the cognizant OIG, with a copy to the contracting officer. Indeed, this distinction is great, as contracting and grant officers are far more likely to view matters in a contract administration context, whereas OIGs are more inclined to allege fraud. It is also worth noting that a subrecipient is not even obligated, per the terms of the rule, to notify the federal government, but rather must notify the pass-through organization. In reality, however, OIGs again have been asserting authority beyond the plain text, demanding that disclosures under the Uniform Guidance be submitted directly to them.

Why Would I Have to Disclose?

Given the foregoing, upon receiving the allegation, our hypothetical nonprofit should determine the funding streams at issue and the obligations thereunder. Here, the general counsel looks at the entire funding instrument for each of the four revenue sources, including provisions incorporated by reference and referenced regulatory requirements. Three of the four programs involve federal grant funds. They do not appear to include federal contract dollars and do not include 52.203-13. Thus, our nonprofit is subject to the less rigorous disclosure requirements of the Uniform Guidance. With respect to the privately funded program, the nonprofit should review the agreement itself to determine the obligations the agreement may include, and ensure (to the extent it can, based on the documents) that it does not include federal or state funds.[1]

While the disclosure obligations under the Uniform Guidance appear less rigorous than the FAR, as explained above, in practice, the nonprofit would likely be best served by treating the obligations in a manner similar to the disclosure requirements under the FAR. In our experience, OIGs are quick to assert fraud and question the present responsibility of an organization that strictly adheres to their minimum obligations under the regulatory requirements. Although an OIG's overreach would seem ripe for a successful federal lawsuit, most nonprofits prefer as smooth a relationship as possible with their federal funding partner, and treating potentially disclosable issues with the utmost attention, care, and cooperation will aid the nonprofit in avoiding and/or mitigating further disharmony with its federal partner.

To Be Continued…

Now that we have established the regulatory and practical backdrop of the obligations and expectations of potential misconduct, next month we will delve into the steps for reviewing these timekeeping allegations to determine whether there is in fact a disclosable issue (i.e., credible evidence of misconduct).

Webinar Recording Available

September 20, 2016: **How to Protect Nonprofits' Federally Funded Programs with Global Anti-Corruption Controls**

This program takes you beyond the four corners of the federal False Claims Act and Foreign Corrupt Practices Act to provide you with legal and practical solutions to protect your nonprofit's program integrity and revenue.

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[**1**] Few states have mandatory reporting obligations, but nonprofits should be careful with state funds, because sometimes they are commingled with federal funds and carry with them federal obligations, and in many instances states have enforcement statutes such as state-based false claims act statutes that include unique provisions that could trigger liability if not properly addressed. For example, some states have state-based false claims act statutes with omission liability, meaning that should a nonprofit omit certain information from a discussion, it could be exposing itself to a state false claims act allegation.