

The OMB Super Circular: What the New Rules Mean for Nonprofit Recipients of Federal Awards

Thursday, March 20, 2014, 12:30 p.m. – 2:00 p.m. ET

Venable LLP, Washington, DC

Moderator:

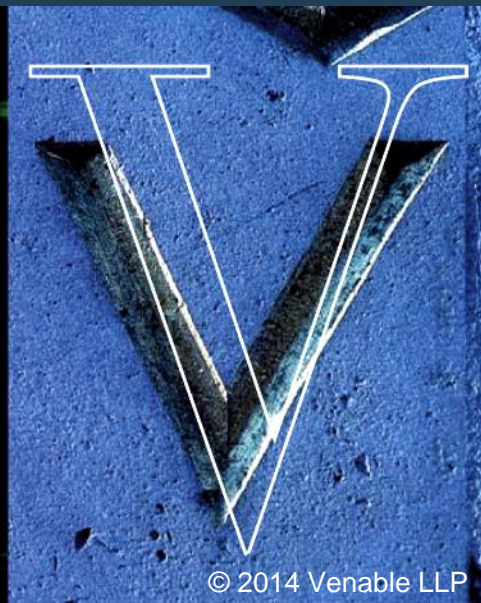
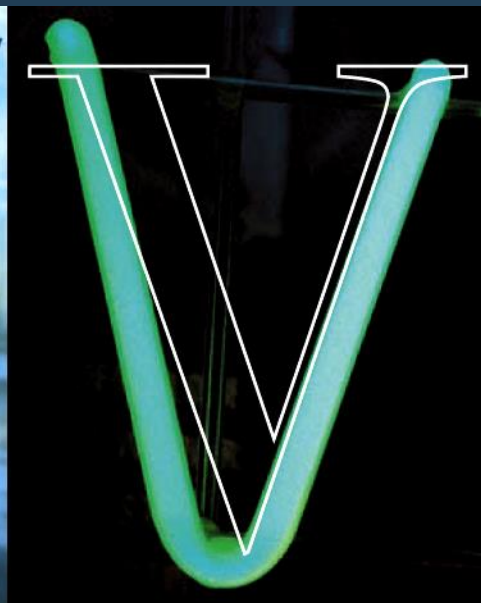
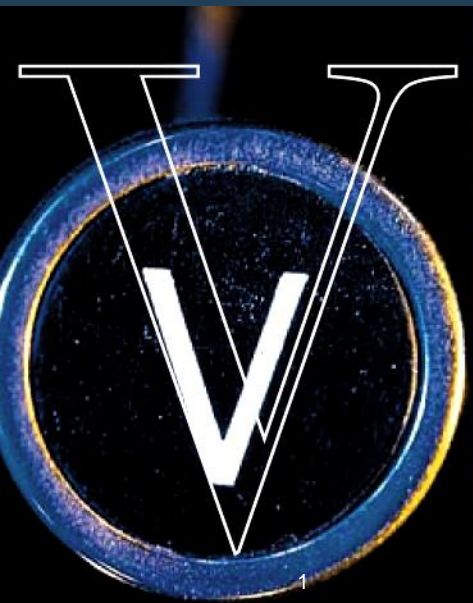
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Upcoming Venable Nonprofit Legal Events

April 29, 2014 - [Election-Year Advocacy: Maintaining Your Nonprofit's Clear Message in Cloudy Legal Seas](#)



Agenda

- What Is It and When Is It Effective?
- New Pre-Award Processes
- Fixed-Price Awards
- Revisions to the Procurement Rules
- Changes to the Indirect Cost Rules
- Increase of Internal Controls
- Updates to the Time and Effort Rules
- Focusing and Improving Transparency of Single Audits
- More Stringent Integrity Rules
 - Conflicts of Interest
 - Mandatory Disclosure





What Is It and When Is It Effective?

The Super Circular – What Is It?

- The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards – more commonly known as the “Super Circular” (codified at 2 CFR Part 200)
- The Super Circular consolidates and streamlines eight Federal regulations (including OMB Circulars A-110, A-122, and A-133) into a single, comprehensive policy guide
- Among other things, the Super Circular aims to:
 - Eliminate duplicative and conflicting guidance
 - Focus on performance over compliance for accountability
 - Provide for consistent and transparent treatment of costs
 - Strengthen oversight
 - Reduce waste, fraud, and abuse
- What this equates to is a more formal, contract-like set of rules



When Is the Super Circular Effective?

- Effective December 26, 2013?
- In practice:
 - Federal agencies have one year to implement
 - Thus, truly effective December 26, 2014
- To support this position, comments in the preamble to the rule provide that:

“Non-Federal entities wishing to implement entity-wide system changes to comply with the guidance after the effective date will not be penalized for doing so.”





New Pre-Award Processes

New Pre-Award Processes

- Increased uniformity aimed at standardization in awarding process
- 99 Standard Definitions
 - Example: “Contractor” is used rather than “Vendor”
 - Standard definitions provide potential for standardization, but may also create uncertainty if the terms are interpreted differently in different settings
- Standard application requirements
 - Federal awarding agencies must not impose additional or inconsistent requirements, unless
 - Based on Federal statute, regulation, or Executive Order;
 - OMB permits an exception in accordance with 2 CFR § 200.102; or
 - OMB approves information in the Federal award in accordance with *id.* § 200.210.
- 15 standard data sets once awarded. *See id.* § 200.210.





Fixed-Price Awards

Fixed-Price Awards

- Super Circular citations – 200.45, 200.201 and 200.332
- Considered a “grant” where funder provides specific level of support without regard to actual costs
- Option in addition to grant, cooperative agreement, and contract – either by government or pass-through entity
- Accountability based on performance and results
- Award amount negotiated using cost principles or “other pricing information”
- No government review of actual costs



Fixed-Price Awards (cont'd.)

- Cannot be used if there is mandatory cost sharing/match
- Can only be used if adequate cost or unit pricing data to assure that non-Federal entity will realize no profit
- At end of project, non-Federal entity must provide written assurance that project was completed or level of effort expended
 - Periodic reports may also be required



Fixed-Price Subawards

- Require prior written approval from Federal awarding agency
- Cannot be more than Simplified Acquisition Threshold (currently \$150,000)
- Must otherwise meet requirements in 200.201





Revisions to the Procurement Rules

Procurement

- Super Circular citation: 200.318 through 200.326
- Greatly expanded from A-110 (and generally more onerous)
- Major changes
 - New provision covering conflict of interests with parent, affiliate, or subsidiary organizations
 - Procurement records must be maintained sufficiently to detail the history of procurement (used to be only procurements over small purchase threshold)
 - New provision on time and material contracts
 - Competition!
 - The words “to the maximum extent practical” are GONE



Procurement (cont'd.)

- Five methods prescribed in great detail
 - Procurement by micro-purchase
 - Procurement by small purchase
 - Procurement by sealed bids (formal advertising)
 - Procurement by competitive proposal
 - Procurement by noncompetitive proposal
- Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms
 - “Positive efforts. . .whenever possible” changed to “must take all necessary affirmative steps to assure”



Procurement (cont'd.)

- Cost or price analysis required only when purchase in excess of Simplified Acquisition Threshold (good news)
- Profit must be negotiated as a separate element of price when
 - 1) No price competition, or
 - 2) Contract in excess of Simplified Acquisition Threshold.
- Process for pre-procurement review by awarding agency or pass-through entity





Changes to the Indirect Cost Rules

Changes to the Indirect Cost Rules

- Federal agencies must accept negotiated indirect cost rates, *id.* § 200.414
 - Allows deviation from negotiated rates in limited circumstances:
 - Pursuant to statute or regulation
 - When approved by the Federal awarding agency head based on a written justification
 - Must be pursuant to a publicly established policy and criteria for using other than negotiated rates
 - Must provide notice in the grant announcement
 - Requires notice to OMB
- Requires pass-through entities (e.g., states and local governments) to honor a nonprofit's negotiated indirect cost rates or negotiate a rate
 - Significant change because in the past, many state and local governments simply did not pay indirect costs



Changes to the Indirect Cost Rules (cont'd.)

- Nonprofits
 - Empowered to elect an automatic indirect cost rate of 10%, which can be used indefinitely
 - Alternatively, can negotiate a higher rate
 - Allows nonprofits to choose a course that makes the most business sense for the organization

- Indirect or direct?
 - In certain circumstances, program administration costs (e.g., secretarial staff dedicated to a specific program) can be counted as direct costs
 - In the past, in some instances, grantees were required to pass these charges on via their indirect cost rates





Increase of Internal Controls

Increase of Internal Controls

- Internal Controls, *id.* § 200.303
 - OMB highlighted the internal control requirements of the Super Circular as “extremely important”
 - Requirements moved from A-133, and include a broad direction to comply with Federal and state law, the “Standards for Internal Control in the Federal Government” issued by the Comptroller General (the “Green Book”), and the “Internal Control Integration Framework” issued by the Committee of Sponsoring Organizations of the Treadway Commissions
 - Non-Federal entities must exercise judgment in crafting internal control mechanisms for their specific programs that were compliant
- Suggested Guidance
 - Develop a plan for monitoring spending: Did you spend the money the way you said you would?
 - Develop a plan of action for when irregularities occur





Updates to the Time and Effort Rules

Updates to the Time and Effort Rules

- A-122 previously required grantee to maintain written records of employees' activities used to document an employee's time as an allowable cost
- Specific support for salaries and wages included:
 - After-the-fact determination of actual activity for each employee, not the budgeted amount;
 - Total activity for which employees were compensated;
 - Signed by individual employees or responsible supervisor with firsthand knowledge; and
 - Prepared at least monthly to coincide with one or more pay periods.
- Now, grantee must meet broad objectives for allowability; specific time and effort documentation is not required. See *id.* § 200.430.
 - Must conform to non-Federal entity's written policies, be reasonable, and meet Standards for Documentation of Personnel Expenses. See § 200.430(i).
 - Emphasis on system for internal control
 - Potential for negative audit findings and *qui tam* suits



Updates to the Time and Effort Rules (cont'd.)

- TNC's system
 - Every employee from CEO to preserve assistant
 - Actual time worked every day
 - No estimates except in very limited circumstances
 - Vacation time
 - Planned medical leave
 - Needs of payroll (timing of submission of reports)
- Change for nonprofits from A-122
 - Budget estimates (estimates determined before services performed) may be used for charges to awards, BUT... (see next slide)



Updates to the Time and Effort Rules (cont'd.)

- System for estimating must produce “reasonable approximations” of activity actually performed;
 - Significant changes in work activity (as defined in written policies) are identified and entered into records timely (one- or two- month fluctuations between workload categories are okay as long as distribution is reasonable over longer term); and
 - Must be a process to review the charges made based on budget and adjustments after the fact so that “the final amount charged to the Federal award is accurate, allowable, and properly allocated.”
- TNC decision not to change its system
 - Colleges and universities





Focusing and Improving Transparency of Single Audits

Focusing and Improving Transparency of Single Audits

- Raises the threshold for compliance audits from \$500,000 per fiscal year to \$750,000 per fiscal year, *id.* § 200.501
 - Right-sizing of threshold to focus government's attention where it is most needed to prevent waste, fraud and abuse
 - Another positive change for nonprofits, particularly smaller nonprofits and those that receive only small amounts of funding from the Federal government
 - Should reduce costs for these nonprofits
 - OMB estimates that approximately 5,000 organizations will be relieved from the audit requirement as a result of the higher threshold
- Single audit reports will be available to the public online, *id.* § 200.512





More Stringent Integrity Rules

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



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



Questions?

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