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Corporate Counsel

Establishing a Compliance System to  
Address the New Ethics Requirements:  
Common Pitfalls for Nonprofit Grant Recipients

**Association of Corporate Counsel  
Nonprofit Organizations Committee  
Legal Quick Hit**

Tuesday, November 10, 2015

3:00 pm ET

**Moderator**

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Organizations Practice, Venable LLP

**Speakers**

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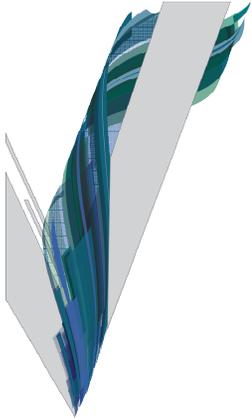
# Agenda

- New Federal Tone with Compliance
- New Federal Ethics Requirements That Change Your Compliance Strategy
- Identifying Areas of Exposure
- Mitigating Exposure



# The New Federal Tone of Compliance

- Move to more contract-like compliance structure: Grantees should stay up to date on important enforcement trends in the contract community.
- Emphasize proactive risk assessment to discover noncompliance before it is reported.
  - Understand the required milestones.
  - Develop systems of assessing performance.
- Significant uptick in suspension and debarment proceedings.
  - Take proactive corrective action measures.
  - Consider proactively approaching the SDOs.



# Game Changing Requirement #1: Internal Controls



# Internal Controls

- Internal controls are the way in which a company demonstrates its ethics program.
- Internal controls often establish a company's defense in a False Claims Act case or a suspension and debarment proceeding.
- New standards apply broad guidelines similar to FAR requirements.
- "Internal control over compliance requirements for federal awards" is a process designed to provide "reasonable assurance" that:
  - Transactions are properly recorded and accounted for, in order to
    - Permit the preparation of reliable financial statements and federal reports;
    - Maintain accountability over assets; and
    - Demonstrate compliance with federal statutes, regulations, and the terms and conditions of the federal award.
  - Transactions are executed in compliance with:
    - Federal statutes, regulations, and the terms and conditions of the federal award that could have a direct and material effect on a federal program;
    - Any other federal statutes and regulations that are identified in the Compliance Supplement; and
    - Funds, property, and other assets are safeguarded against loss from unauthorized use or disposition.



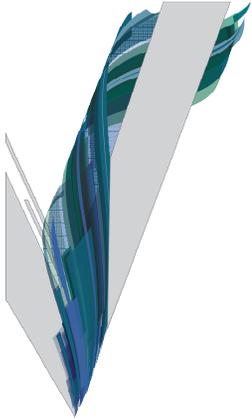
# Establishing Workable Internal Controls

- Establish a system that tracks compliance with each or condition.
- Test internal controls for effectiveness.
  - Set a routine schedule to test internal controls.
  - Consider when to use a third party to assess potential noncompliance for discovered or reported issues.
- Make changes to policies and procedures to adjust for negative findings.
- Individual, appropriate communication of policies and procedures.
- Establish a routine schedule for training.
- Communicate how to report issues to both personnel and subawardees.
- Establish a process for investigation and development of appropriate corrective action plans.



# Internal Controls: Risk Areas

- Performance-based review
  - Give consideration to how you will demonstrate performance.
  - Understand the scope of work.
- Subrecipient monitoring
  - Consider reporting obligations to determine compliance and systematic.
- Certifications
  - Make sure all relevant parties (including program, legal and financial personnel) agree with a certification.
  - Flow down certification to subawardees that information they provide you is accurate.



# Game Changing Requirement #2: Mandatory Disclosure



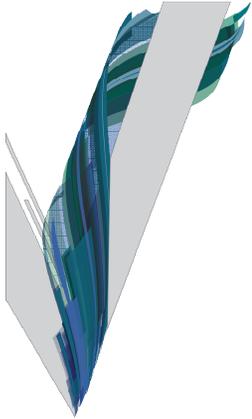
# Mandatory Disclosure Rule – What is required for federal grantees?

- Mandatory disclosure
  - 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”).
  - Suspension and debarment is still a potential consequence of nondisclosure.

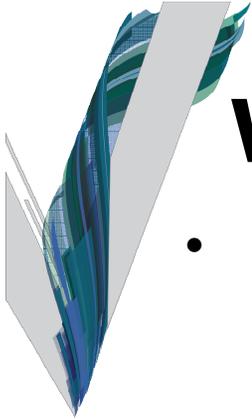


# Mandatory Disclosure

- Risks:
  - Failure to disclose a noncompliance could lead to suspension or debarment.
  - Congressional scrutiny of federal grantees can be severe – e.g., defunding.
  - Collateral consequences of suspension/debarment/congressional scrutiny can be severe.
    - State blacklisting/defunding
    - Adverse impact on third-party (nongovernment) donors
    - Financiers may call loans, etc.
- Best practices:
  - Periodic top-level communication on the importance of ethical conduct and conducting business with integrity.
    - Emphasize that ethical concerns should be raised internally.
    - Provide multiple reporting avenues.
      - If your organization does not have an anonymous hotline, consider adopting one or a similar process.
  - Training should include the need to report concerns and cooperate with internal investigations.
  - Adopt policies to implement, including an anti-retaliation policy.
  - Disclose early and often, with follow-up information that comprises a thorough package.



# Game Changing Requirement #3: The Application of FAPIIS



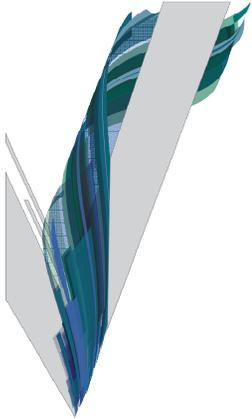
# What Is FAPIIS?

- On January 1, 2016, federal grantees will become part of the federal government's Federal Awardee Performance and Integrity Information System (FAPIIS), an integrity and performance system that includes (and provides publicly) data related to the integrity and performance of entities receiving federal grants and cooperative agreements.
- Integrates information from:
  - Past Performance Information Retrieval System
  - Contractor Performance Assessment Reporting System
  - System for Award Management (SAM) (formerly the Central Contractor Registration and the Excluded Parties List System)
- Requires awarding agency to report:
  - any termination of an award due to a material noncompliance;
  - any administrative agreement with a recipient to resolve a suspension or debarment proceeding; and
  - any finding that a recipient is not qualified to receive a given award, if the finding is based on criteria related to the recipient's integrity or prior performance under federal awards.



# FAPIIS Risk Areas

- Risk areas:
  - **Reporting:** Understand reporting obligations and have mechanisms in place so the nonprofit can be certain it is providing complete, accurate, and timely information.
  - **Failure to perform:** Ensure that the grant or cooperative agreement includes a well-defined scope of work and appropriate performance milestones to avoid negative performance evaluations.
  - **Unanticipated events:** Establish a communications plan for communicating to the federal government unanticipated factors that affect performance and document the government's response.
  - **Subrecipient performance:** Carefully monitor and address subrecipients' failure to perform.
- Plan ahead to respond to negative findings:
  - Take prompt action to respond to the agency over any negative comments/information.
  - Plan ahead how to respond to inquiries from nonfederal entities (e.g., donors, competitors, watchdog groups, other current or potential grant-making agencies or foundations).



# Questions?

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