



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.

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Speakers

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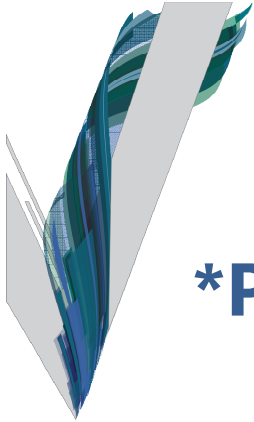
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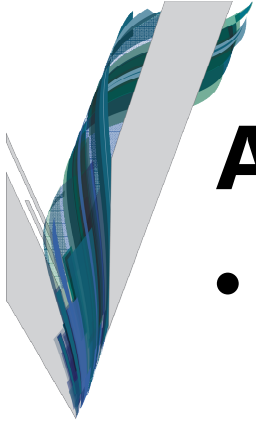
- **December 12, 2016:** [Top Ten Risks Facing Nonprofits Operating Internationally, co-sponsored by Venable LLP and BDO](#)
- **January 12, 2017:** [Top Ten Hot-Button Insurance Issues Facing Nonprofits](#)



Introducing Venable's New Government Grants Resource Library

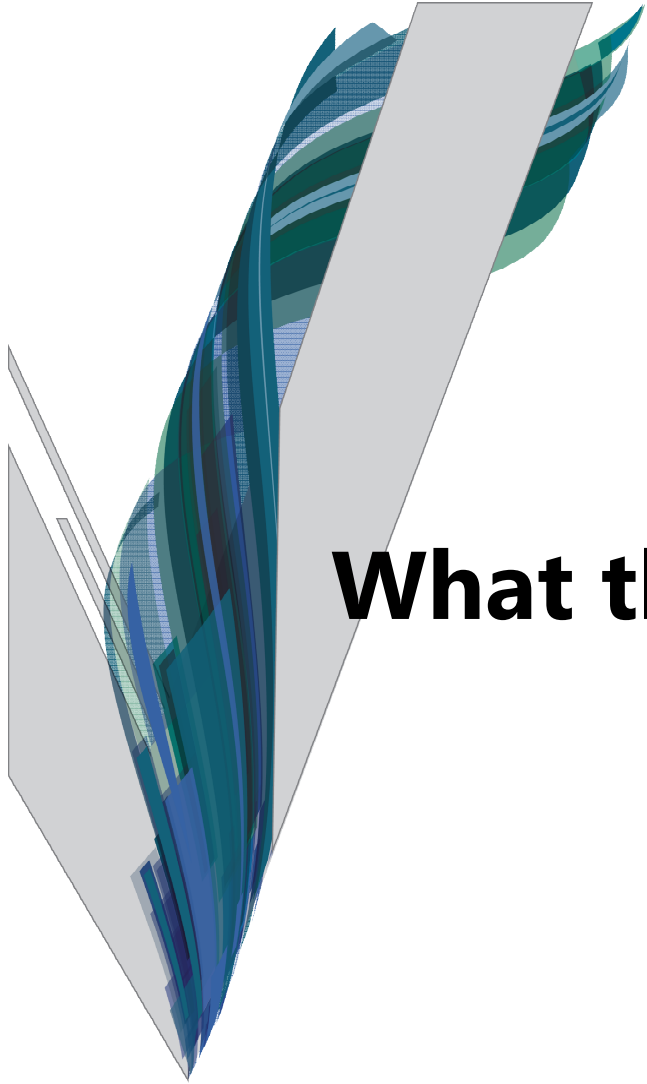


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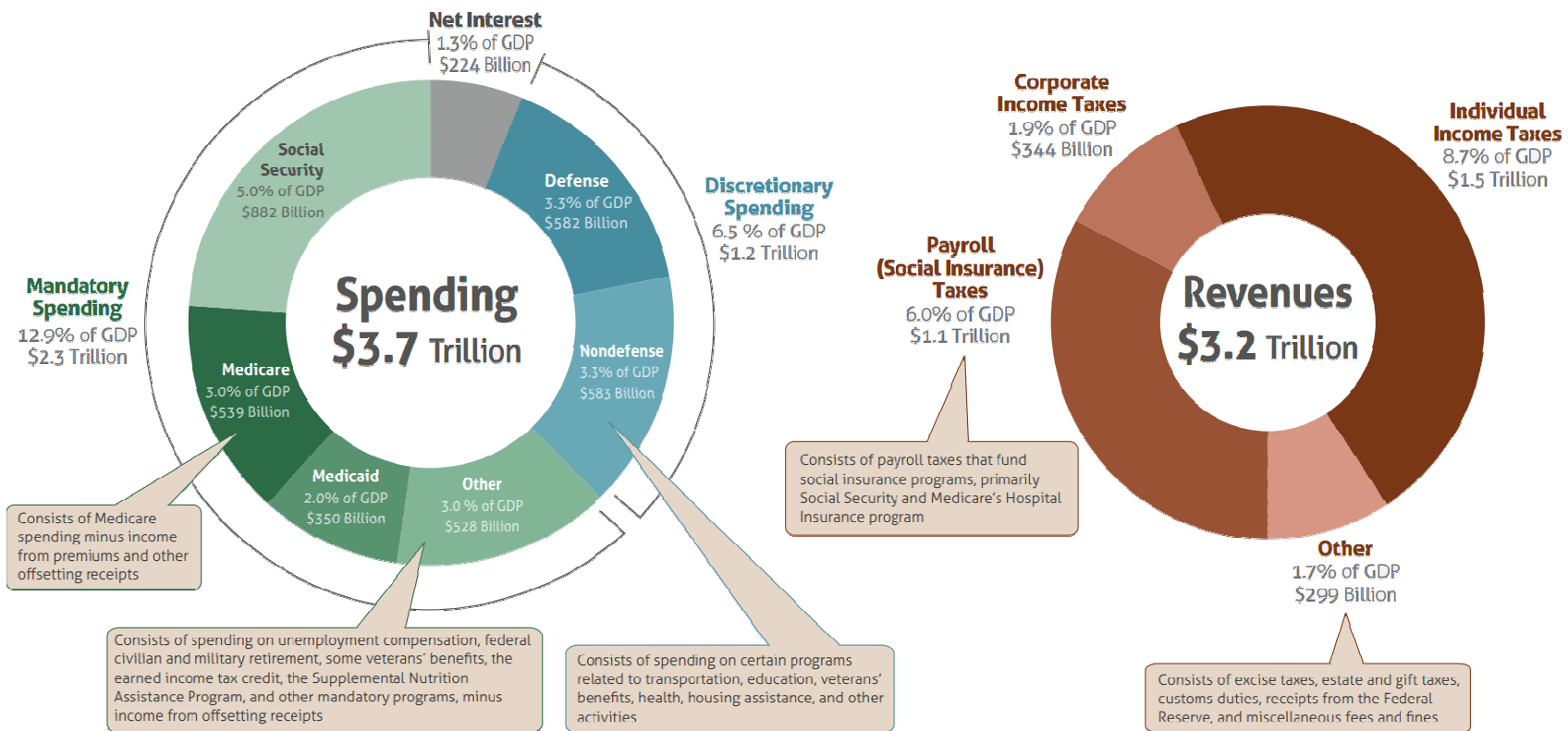
Agenda

- 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

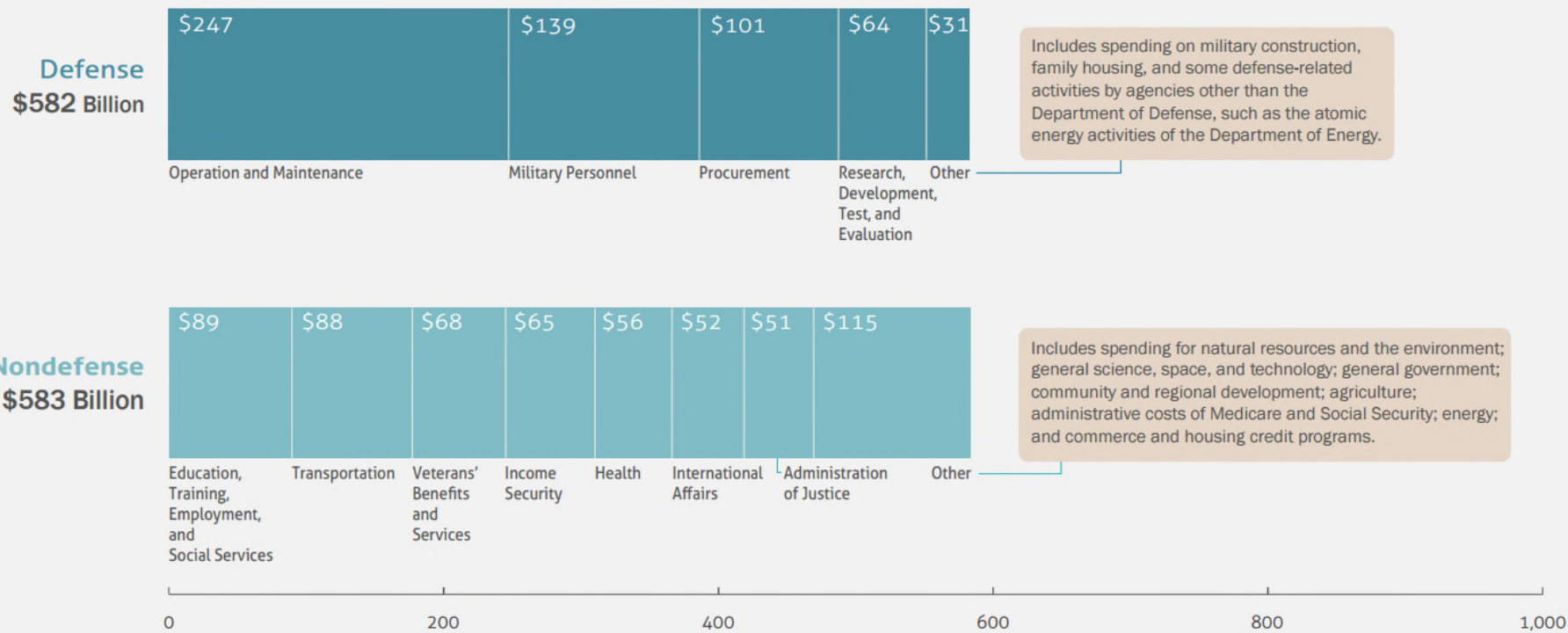
The State of the Federal Budget



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

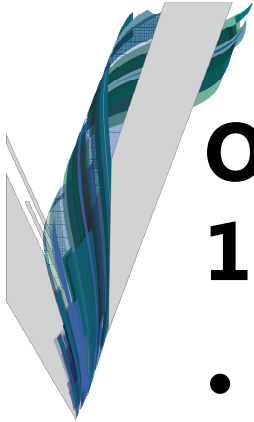
Discretionary Spending

Billions of Dollars



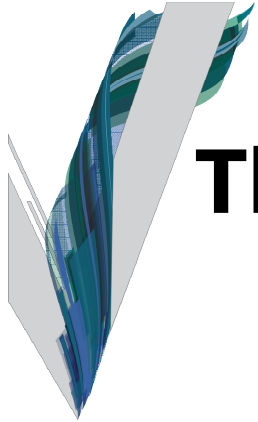
Prepared by Maureen Costantino and Leigh Angres
 Source: Congressional Budget Office, January 2016
 Contact: CBO Projections Unit, Budget Analysis Division

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



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?



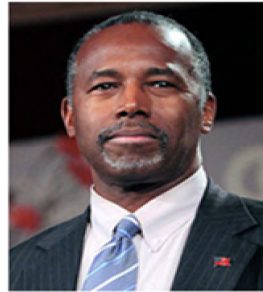
The Next Administration



New Leadership: Key Confirmed Cabinet Secretaries



Education
Betsey DeVos



HUD
Dr. Ben Carson



HHS
Rep. Tom Price



Defense
General James Mattis



Transportation
Elaine Chao



Energy
Harold Hamm

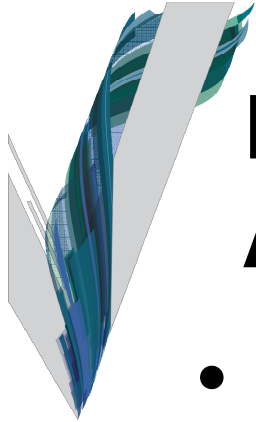


Treasury
Steven Mnuchin



Commerce
Wilbur Ross

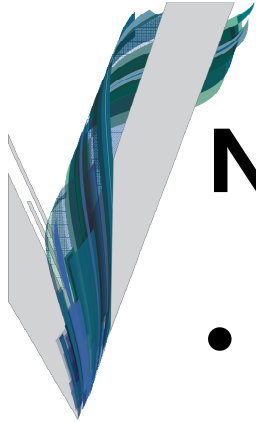
...Still evolving



New Leadership: Regulators and Agency Positions

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





New Priorities

- 4,000 new positions take time to fill.

Help Wanted

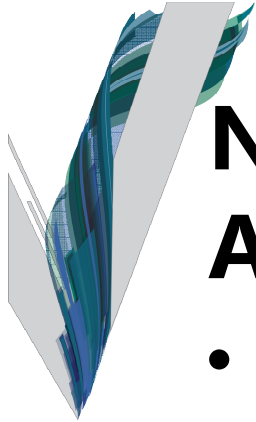
A new administration has 4,000-plus jobs to fill. Here's a tally, largely from a government handbook.

Presidential appointments

Senate confirmation required	Senate not involved	Senior executives	People who help determine government policy and their staffs	Other jobs
1,054	525	680	1,392	464
Examples Cabinet positions, deputy and assistant secretaries, ambassadors, U.S. attorneys and marshals.	Mostly White House, such as economic and national security advisers.	Includes chief of staff of any federal agency, such as the Treasury Dept. No more than 10% of senior executives can be political appointments.	The largest classification. Includes schedulers, policy experts, special counsels and confidential assistants. More than 400 so-called "non-competitive positions" have a support role and do not shape policy.	

Source: Partnership for Public Service; 2012 Plum Book

- The takeaway: Immediate, wholesale change is unlikely.



New Leadership: House and Senate Appropriations

- House:



Rodney Frelinghuysen,
Chair



Nita Lowey,
Ranking

- Senate:



Thad Cochran,
Chair



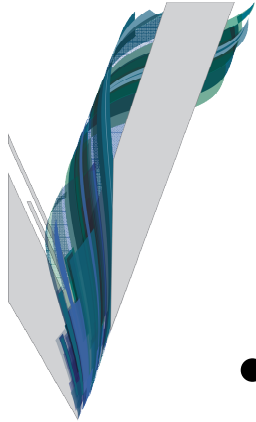
Patty Murray,
Ranking

or



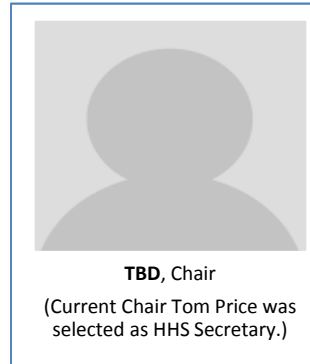
Patrick Leahy,
Ranking

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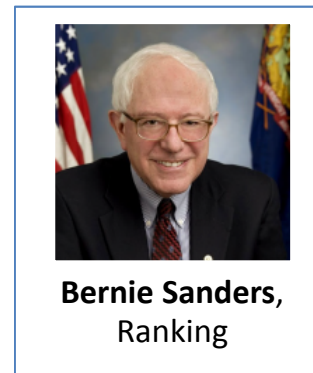
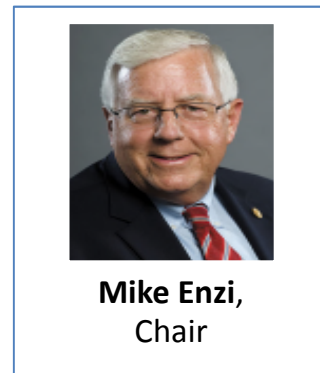


New Leadership: House and Senate Budget Committees

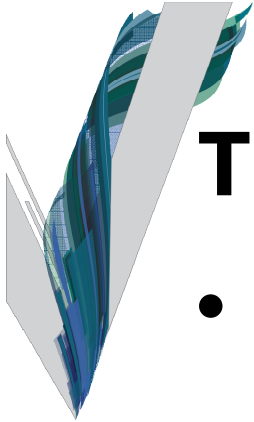
- House:



- Senate:

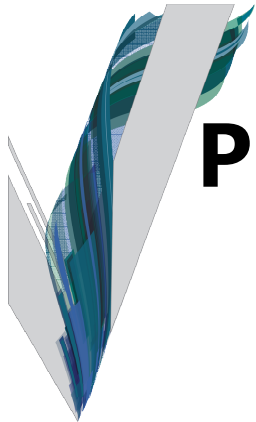


...Still evolving



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)



Priorities

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

Executive actions Trump pledged to take on day one in office

 @realDonaldTrump



Trade:

- Issue notification of intent to withdraw from TPP
- Negotiate fair, bilateral trade deals that bring jobs and industry back to our shores



Energy:

- Cancel job killing restrictions on the production of American energy, including shale energy and clean coal, to create million of high paying jobs



Regulation:

- Formulate rule that says for every one new regulation that is introduced, two old regulations must be eliminated



National security:

- Ask Department of Defense and chairman of the Joint Chiefs of Staff to develop a plan to protect America's infrastructure from cyber attacks and all other form of attacks



Immigration:

- Direct Department of Labor to investigate all abuses of visa programs that undercut American workers



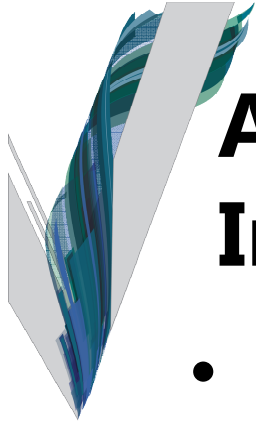
Ethics reform:

- Impose five-year ban on executive officials becoming lobbyists after leaving the administration and a lifetime ban on executive officials lobbying on behalf of a foreign government

What's missing:

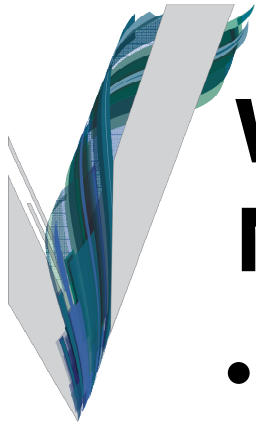
- Discussion of building a wall along the Mexican border
- Deporting 1.9 million undocumented immigrants
- Restrict immigration from Muslim nations
- Repealing Obamacare
- Spending \$1 trillion on infrastructure
- Working with Congress

Sources: Twitter.com, 2016; Tom LoBianco, "Donald Trump outlines policy plan for first 100 days," CNN, November 22, 2016.



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)



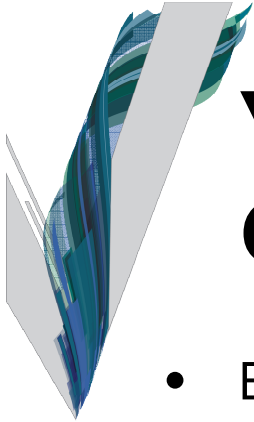
What Does the Election Mean for Nonprofit Award Recipients?

- 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



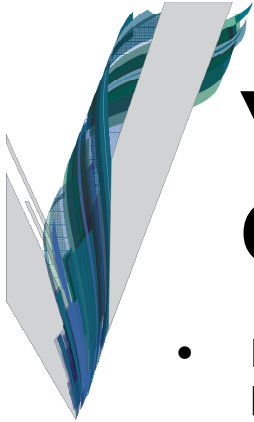
Your Program May Be Defunded for Current or Future Years – Now What?

- 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.



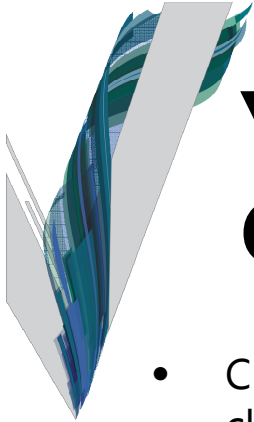
Your Program May Be Defunded for Current or Future Years – Now What?

- 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.



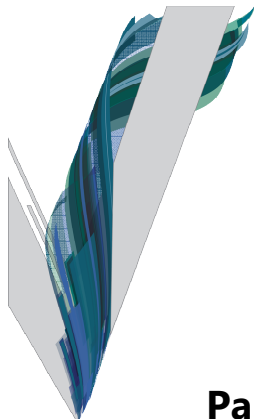
Your Program May Be Defunded for Current or Future Years – Now What?

- 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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