



VENABLE

Post-Award Noncompliance Disclosures and Audit Resolution

Thursday, April 19, 2018, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Speakers

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Upcoming Venable Nonprofit Events

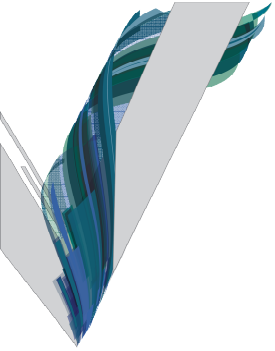
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- **May 17, 2018:** [Election-Year Opportunities for Nonprofits](#)
- **June 14, 2018 — Program/Reception:**
[Avoiding the Legal Pitfalls of Charitable Fundraising](#)



Agenda

- Background on Federal Disclosure Rules
- Addressing a Potentially Disclosable Issue
- Preparing a Disclosure
- Federal OIG Audits
- Liaising with the Federal Agency
- Questions



Background on Federal Disclosure Rules



What Kind of Money Is It?

- Before understanding your disclosure obligations, you must first understand the type of funds you are spending:
 - Federal funds?
 - State funds?
 - Are they federal funds given to the state?
 - Private funds?
 - Are they federal funds given to the private organization?
- This program focuses on disclosure obligations related to federal funds. Broadly there are two types of funds that the federal government conveys:
 1. Procurement or contract funds
 2. Nonprocurement or grant/cooperative agreement funds
 - This type of fund is dispositive on the treatment for disclosure purposes.



Mandatory Disclosure Under the Uniform Guidance (i.e., Grant Funds)

- Federal grant funds are governed principally by the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards (Uniform Guidance)
- Mandatory disclosure under the Uniform Guidance can be found at 2 C.F.R. § 200.113:
 - Requires organizations to disclose:
 - “[I]n a timely manner”
 - In writing
 - To the awarding agency (or pass-through entity)
 - “[A]ll violations of federal **criminal** law involving fraud, bribery, or gratuity violations potentially affecting the federal award”
 - This may include violations under both Titles 15 and 18 of the U.S.C.
 - An organization’s failure to make the required disclosures can result in a number of actions, including suspension and/or debarment



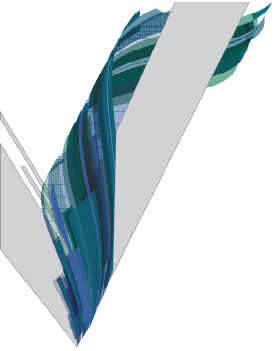
Mandatory Disclosure Under the FAR (i.e., Contract Funds)

- Federal contract dollars are governed principally by the Federal Acquisition Regulation (FAR)
- Mandatory Disclosure under the FAR can be found at 52-203-13:
 - “[T]imely”
 - In writing to the agency OIG, with a copy to the Contracting Officer
 - “[C]redible evidence” that a principal, employee, agent, or subcontractor of the contract has committed:
 - A violation of federal criminal law violations in Title 18 U.S.C. (e.g., fraud, bribery, etc.)
 - Violation of False Claims Act
- Preamble to the rule provides that the “credible evidence” standard is intended to allow contractors the opportunity to conduct a preliminary examination of the evidence before deciding to disclose



Uniform Guidance v. FAR Mandatory Disclosure Requirements

- Uniform Guidance is a clear move toward the FAR arena, which has a mandatory reporting requirement, **but does not:**
 - Require disclosure to the awarding agency's OIG
 - Include all crimes under Title 18 of the U.S.C.
 - Apply to **civil** acts of fraud, such as those that may be alleged under the False Claims Act (FCA)
- "All violations" of the Uniform Guidance versus the "Credible evidence" standard of the FAR
- What about meaning of "timely"?
 - No guidance provided by the Uniform Guidance



Addressing a Potentially Disclosable Issue



Conducting an Internal Investigation

- Critical to field internal reports, indeed, its required
 - Sarbanes-Oxley (SOX)
 - FAR (for businesses that are “other than small”)
 - Uniform Guidance?
- Handling internal reports
 - Investigate?
 - Required – SOX, FAR
 - Incentivized – SEC, FINRA, DOJ guidelines
 - Anti-retaliation
 - Confidentiality



Considerations

- **Stop suspected conduct**
- Avoid conflicts of interest
 - Who will “control” the investigation
 - Use of outside counsel
- **Maintain “privilege” and confidentiality**
- Scope of investigation
 - Goal of investigation
 - Topic(s)
 - Documents
 - Interviews
- Written findings
- What will be done with the results
- Disputes/appeals



Best Practices

- Clear and objective owner of investigation
- Investigator must also be objective
- Clearly define scope of investigation
- Develop an investigation plan
- Be willing to revisit plan and change course
- Stop continuing misconduct
- Preserve all potentially relevant documents (including emails)
- Be prepared before interviewing employees
- *Upjohn* warnings
- Anti-retaliation policy
- Confidentiality
- Examine corrective measures



Assessing Whether it is Required to be Disclosed

- Following the investigation – what did you learn?
 - Did it meet the threshold – “credible evidence” v. “violation”
 - Were there noncompliances that fell into the enumerated buckets of disclosable issues?
 - Bribery
 - Kickbacks
 - Gratuities
 - Embezzlement/theft
 - Collusion between arms’ length parties
 - Product substitution
 - False Claims Act
- What is a false claim?



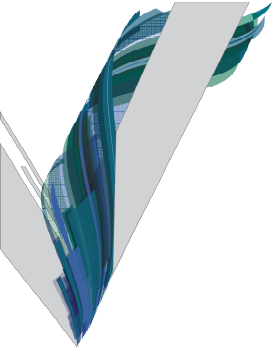
False Claims

- Two types of false claims:
 1. Criminal
 2. Civil
- Criminal False Claims
 - Intentional fraud
 - Personal criminal sanctions
- Civil False Claims
 - Claim – Broad definition
 - Falsity
 - Knowing submission
 - Deliberate ignorance of the falsity
 - Negligent or reckless disregard
 - Penalties – fines, treble damages, suspension and debarment



False Claims *cont'd*

- Other False Claims Issues
 - Implied certification
 - Material noncompliance
 - *Qui tam* actions
 - The Fraud Enforcement and Recovery Act (FERA)
 - Seeks to overturn *Allison Engine Co.*
 - Extends FCA claims to progress payments
 - Does not require direct presentment to the government
 - Alters intent requirement from “intended to defraud” to “false claim was ‘material’ to the decision to pay the claim”
 - Liability for the failure to return overpayments



Preparing a Disclosure



The Basics

- Follow the requirements
 - E.g., timely, in writing, etc.
 - If “timeliness” is an issue, consider a multi-disclosure, disclosure
- Consider whether to follow additional agency guidance
 - E.g., use agencies’ disclosure template?
- Basic anatomy of a disclosure
 - Determine and consider the audience
 - Lay out the facts and circumstances
 - Avoid categorical conclusions or definitive statements
 - Fully disclose – avoid the agency receiving surprises
 - Summarize the financial impact to the federal government
 - Detail personnel actions, if any



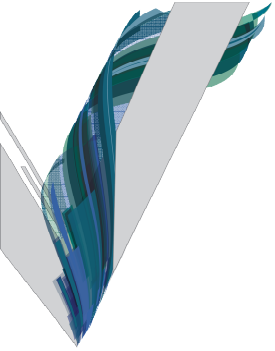
Establish Goals

- Consider your goals for the disclosure – What is most important outcome of this process for your organization?
 - A quick resolution?
 - A favorable resolution?
 - Maintaining a productive and positive relationship with your funders?
 - Establishing the goals of your organization early on will help shape how you approach discussions and negotiations with the Federal Agency.



Best Practices

- Consider going the extra mile:
 - Consider including your organization’s business history with the funding partner
 - Allows you to highlight the successes of your partnership and remind the funding partner of the importance of the work that is being conducted
 - Include the full context of the situation that led to the noncompliance
 - Shows that you have truly assessed the situation
 - Attempt to address all questions before they are asked
 - Develop creative corrective measures to ensure future compliance
 - Think outside the box
 - Implement measures that touch on other issues that can be an issue (shows your willingness to be pro-active)
 - Suggest the appropriate solution for resolution



Federal OIG Audits



Federal OIG Audits

Under the Inspector General Act of 1978, as amended, federal OIGs are authorized to carry out various reviews to "promote economy, efficiency, and effectiveness in the administration of, and ... prevent and detect fraud and abuse in ... [the Department's] programs and operations."

To that end, OIGs conduct reviews that involve employees, management officials, and affected departmental programs and operations.

The findings from OIG audits, evaluations, and inspections help their respective departments improve its programs and operations as well as prevent or detect fraud, waste, or abuse.



Federal OIG Audits *cont'd*

- What professional standards apply to OIG's audits and other reviews?
 - An audit conforms to the GAO's Government Auditing Standards (2011) (also known as *The Yellow Book*), which require that the OIG plan and perform the audit to obtain sufficient, appropriate evidence that will provide a reasonable basis for its findings and conclusions based on its audit objectives.
 - Inspections and evaluations conform to the Council of Inspectors General on Integrity and Efficiency's Quality Standards for Inspection and Evaluation (Jan. 2012), which defines inspections and evaluations simply as reviews that do not constitute an audit or a criminal investigation.
- What do OIG reviews accomplish?
 - Audit, inspection, and evaluation objectives may vary widely—a review might even have more than one objective. Objectives can include:
 - Assessments of program effectiveness, economy, and efficiency;
 - Internal control, which includes the plans, policies, methods, and procedures adopted by management to meet its missions, goals, and objectives;
 - Compliance with laws and regulations; or
 - Prospective analysis.



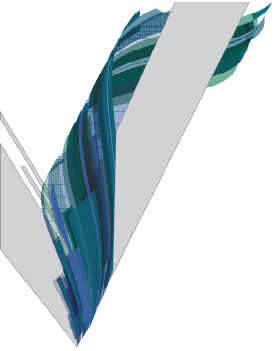
Federal OIG Audits *cont'd*

- How does an OIG decide what to audit or review?
 - Each year, OIGs conduct a risk assessment of their respective department's programs. Based on each year's risk assessment, the OIG will develop an audit plan outlining the work it intends to accomplish. The plan may be modified during the year as necessary to respond to unanticipated requests and issues. OIGs may decide to perform an audit based on a number of factors:
 - The audit may be required by law;
 - An issue or program is of interest to Congress, the Secretary of the respective department or the current administration;
 - Some audits are based on issues the OIG have determined to be high priority for the department; or
 - An OIG may initiate an audit to review and/or uncover significant issues previously found or if the OIG has determined that the program or office is of higher risk.



Federal OIG Audits *cont'd*

- **What is the audit process? What can an agency office expect?**
 - After deciding to perform an audit, an OIG will generally go through the following process:
 - Issue an announcement memo;
 - Hold an entrance meeting with relevant stakeholders;
 - Issue document requests;
 - Conduct fieldwork and analyze results, which may include a multitude of questions and inquiries;
 - Hold an exit conference with relevant stakeholders;
 - Prepare and issue a draft report; and
 - Prepare an issue a final report.
 - Upon receipt of the final report, the cognizant agency must submit an action plan outlining its plan for addressing the recommendations.
 - The OIG does not take action directly against grantees/contractors.

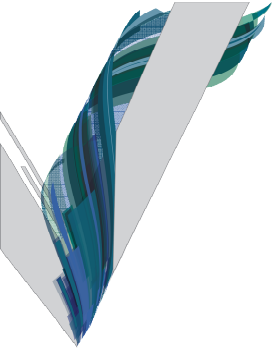


How to Prepare for an OIG Audit



Preparing for an OIG Audit

- Establish one centralized point of contact
 - Provides consistency and organization
 - Controls communication flow
- Pre-organize your documentation
 - Consider providing cover sheets/guiding documents for the documentation provided
 - Prepare additional information that might be helpful to the auditors such as information about your industry
- Be a step ahead of the auditor
 - Consider the types of information requested by the auditor and prepare follow-up documentation for associated transactions/support
- Audit the audit
 - Consider the types of information requested by the auditor and prepare follow-up documentation for associated transactions/support



Liaising with the Federal Agency and/or OIG



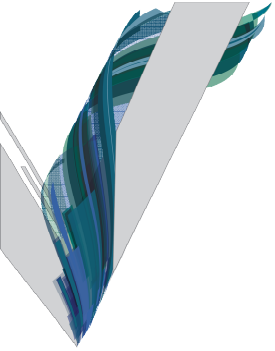
Liaising with the Federal Agency

- Cooperation and transparency
 - Make organization officials and representatives available
- Control information flow by being proactive
 - Consider offering ongoing, informal communications with agency officials
 - Become a partner, not an adversary
- Be creative
 - Proactively suggest various options of documents or data that can be provided to the Federal Agency that is both targeted and manageable to meet their needs
 - Shows that you are a partner in the audit
 - Saves time and expense to both the auditor and auditee



Liaising with the Federal Agency *cont'd*

- Collaborate with the agency toward resolution
 - Suggest a resolution
 - In cases that require a settlement, suggest alternatives approaches to resolution
 - Payment plans, increasing cost share, adding additional work to the program at no cost the agency
 - Solicit their thoughts and feedback
 - Considering adopting entirely or with tweaks
 - The more the agency has invested in your organization, the better off you will be
- Audit the audit
 - Log all correspondence and interactions, steps taken, and information provided



Questions?

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