



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

March 20, 2014  
Venable LLP  
Washington, DC

*Moderator:*

Jeffrey S. Tenenbaum, Esq., Venable LLP

*Panelists:*

Dismas Locaria, Esq., Venable LLP

Susan Lauscher, Esq., The Nature Conservancy

Melanie Jones Totman, Esq., Venable LLP



# Presentation





## 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:  
Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:  
Dismas Locaria, Esq., Venable LLP  
Susan Lauscher, Esq., The Nature Conservancy  
Melanie Jones Totman, Esq., Venable LLP



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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](#)



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## 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

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## 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.”

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## 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

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## 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)

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## 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?

**Jeffrey S. Tenenbaum, Esq.**

[jstenenbaum@Venable.com](mailto:jstenenbaum@Venable.com)

t 202.344.8138

**Dismas Locaria, Esq.**

[dlocaria@Venable.com](mailto:dlocaria@Venable.com)

t 202.344.8013

**Susan Lauscher, Esq.**

[slauscher@tnc.org](mailto:slauscher@tnc.org)

**Melanie Jones Totman, Esq.**

[mjtotman@Venable.com](mailto:mjtotman@Venable.com)

t 202.344.4465

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To view recordings of Venable's nonprofit programs on our YouTube channel, please [click here](#).



# Speaker Biographies





## Jeffrey S. Tenenbaum

Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

[jstenenbaum@Venable.com](mailto:jstenenbaum@Venable.com)

### AREAS OF PRACTICE

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

### INDUSTRIES

Nonprofit Organizations and Associations  
 Credit Counseling and Debt Services  
 Financial Services  
 Consumer Financial Protection Bureau Task Force

### GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

### BAR ADMISSIONS

District of Columbia

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an 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 one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, and one of only eight in the 2013 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was 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 2012-14 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was named as one of Washington, DC's "Legal Elite" in 2011 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.

### REPRESENTATIVE CLIENTS

AARP  
 Air Conditioning Contractors of America  
 American Academy of Physician Assistants  
 American Alliance of Museums  
 American Association for the Advancement of Science  
 American Bar Association  
 American Bureau of Shipping  
 American Cancer Society  
 American College of Radiology  
 American Institute of Architects  
 American Society for Microbiology  
 American Society for Training and Development  
 American Society of Anesthesiologists  
 American Society of Association Executives

## EDUCATION

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

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

## MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

Association for Healthcare Philanthropy  
Association of Corporate Counsel  
Association of Private Sector Colleges and Universities  
Automotive Aftermarket Industry Association  
Biotechnology Industry Organization  
Brookings Institution  
Carbon War Room  
The College Board  
CompTIA  
Council on CyberSecurity  
Council on Foundations  
CropLife America  
Cruise Lines International Association  
Design-Build Institute of America  
Foundation for the Malcolm Baldrige National Quality Award  
Gerontological Society of America  
Goodwill Industries International  
Graduate Management Admission Council  
Homeownership Preservation Foundation  
Human Rights Campaign  
Independent Insurance Agents and Brokers of America  
Institute of International Education  
International Association of Fire Chiefs  
International Sleep Products Association  
Jazz at Lincoln Center  
LeadingAge  
Lincoln Center for the Performing Arts  
Lions Club International  
Money Management International  
National Association for the Education of Young Children  
National Association of Chain Drug Stores  
National Association of College and University Attorneys  
National Association of Music Merchants  
National Athletic Trainers' Association  
National Board of Medical Examiners  
National Coalition for Cancer Survivorship  
National Defense Industrial Association  
National Fallen Firefighters Foundation  
National Fish and Wildlife Foundation  
National Hot Rod Association  
National Propane Gas Association  
National Quality Forum  
National Retail Federation  
National Student Clearinghouse  
The Nature Conservancy  
NeighborWorks America  
Peterson Institute for International Economics  
Professional Liability Underwriting Society  
Project Management Institute  
Public Health Accreditation Board  
Public Relations Society of America  
Recording Industry Association of America  
Romance Writers of America  
Trust for Architectural Easements  
The Tyra Banks TZONE Foundation  
U.S. Chamber of Commerce  
United Nations High Commissioner for Refugees  
Volunteers of America

## HONORS

Recognized as "Leading Lawyer" in the 2012 and 2013 editions of *Legal 500*, Not-For-Profit

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC

(Woodward/White, Inc.), 2012-14

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 Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* 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 500 articles.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 500 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.



## Dismas Locaria

Partner

Washington, DC Office

T 202.344.8013 F 202.344.8300

[dlocaria@Venable.com](mailto:dlocaria@Venable.com)

### AREAS OF PRACTICE

Government Contracts  
Homeland Security  
Investigations and White Collar  
Defense

### INDUSTRIES

Cybersecurity  
Government Contractors  
Nonprofit Organizations and  
Associations

### 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

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:



- 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.





Protecting nature. Preserving life.™

**Susan Lauscher, Esq.**



Susan Lauscher has been a Senior Attorney at The Nature Conservancy for 20 years. She is responsible for providing legal services to TNC's Grants Service Network, a unique group of over 100 grants specialists and attorneys around the world that work with TNC's government funding. Susan also provides legal assistance to several programs within TNC as well as trademark and copyright advice to the entire organization. Susan's entire legal career has been in the area of government funding and non-profit entities, starting with the first federal efforts to provide funding to states for child abuse and neglect services and prevention. Susan's knowledge of the OMB Circulars stretches back to 1979 when she joined the U.S. Department of Health and Human Services Departmental Appeals Board as a staff attorney. She left the federal government in 1986 to become a Senior Associate at the law firm of Feldesman, Tucker, Leifer, Fidell, LLP, representing non-profits and associations of non-profits. She joined The Nature Conservancy in 1993.



## Melanie Jones Totman

Associate

Washington, DC Office

T 202.344.4465 F 202.344.8300

[mjtotman@Venable.com](mailto:mjtotman@Venable.com)

### AREAS OF PRACTICE

Government Contracts  
Investigations and White Collar  
Defense

### BAR ADMISSIONS

Georgia  
District of Columbia

### EDUCATION

J.D., Duke University School of  
Law, 2008  
B.A., *summa cum laude*, Furman  
University, 2005

### 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

Melanie Jones Totman is an associate with Venable's Government Contracts team where she provides clients with legal advice related to federal procurement law, including complex compliance matters under the Federal Acquisition Regulation, and small business, suspension and debarment, and mandatory disclosure issues. She represents clients in a variety of bid protests before the United States Government Accountability Office and the United States Court of Federal Claims. Ms. Totman has also litigated cases and resolved disputes before the Court of Federal Claims and United States Civilian Board of Contract Appeals. Ms. Totman has broad experience in the defense of audits by various Offices of Inspector General and the Defense Contract Audit Agency.

Some of Ms. Totman's work includes:

- Defending large contractors and nonprofit organizations awarded federal grant funds in audits by the Department of Homeland Security, Office of Inspector General; the Department of Transportation, Office of Inspector General; and the Department of Defense Inspector General.
- Successfully appealing a small business size determination before the United States Small Business Administration Office of Hearings & Appeals. *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307 (2011).
- Defending a pro bono client in a motion to dismiss a breach of contract claim for lack of jurisdiction before the Court of Federal Claims.

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.

# Additional Information



## AUTHORS

Dismas Locaria  
Elizabeth A. Buehler  
Jeffrey S. Tenenbaum

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## RELATED PRACTICES

Government Contracts

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## RELATED INDUSTRIES

Nonprofit Organizations  
and Associations  
Government Contractors

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## ARCHIVES

2014 2010 2006  
2013 2009 2005  
2012 2008 2004  
2011 2007

## Articles

December 2013

### Federal Grant & Contract News for Nonprofits - December 2013

#### Overview

As 2013 came to a close, on December 26, 2013, the Office of Management and Budget (OMB) issued the long-awaited final rule to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, more commonly known as the “Super Circular.” This rule finalizes OMB’s proposed guidance from February 1, 2013, and represents the culmination of an effort that was more than two years in the making. Among other things, this rule streamlines eight Federal regulations (including OMB Circulars A-110, A-122, and A-133) into a single, comprehensive policy guide and affords the Federal government the ability to better administer the \$600 billion awarded annually for grants, cooperative agreements, and other types of financial assistance. This will have important implications for all nonprofit recipients of, and applicants for, Federal grants and cooperative agreements (“awards”).

#### OMB’s Vision of the “Super Circular”

OMB’s reformulation of the various circulars “embodies principles set forth by the President, who directed OMB to work with key stakeholders to evaluate potential reforms to Federal grants policies in Executive Order 13520 on Reducing Improper Payments and in the Presidential Memorandum on Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments.” OMB further postulates that the guidance will improve upon current policies by:

- Eliminating duplicative and conflicting guidance;
- Focusing on performance over compliance for accountability;
- Encouraging efficient use of information technology and shared services;
- Providing for consistent and transparent treatment of costs;
- Limiting allowable costs to make the best use of Federal resources;
- Setting standard business processes using data definitions;
- Encouraging non-Federal entities to have family-friendly policies;
- Strengthening oversight; and
- Targeting audit requirements on risk of waste, fraud, and abuse.

In addition, OMB explains that it and its partners “are continuing complementary work to strengthen program outcomes through innovative and effective use of grant-making models, performance metrics, and evaluation, as described in OMB Memorandum M-13-17 on Next Steps in the Evidence and Innovation Agenda.”

#### Notable Aspects of the “Super Circular”

While the Super Circular does not entirely change the eight Federal regulations from which it is derived, it does include some noteworthy changes. For example:

- **Conflicts of Interest:** The guidance requires Federal agencies to establish conflict of interest policies for Federal awards and mandates that non-Federal entities disclose in writing any potential conflict of interest to the Federal awarding agency (or higher-tiered entity) in accordance with the awarding agency’s policy.
- **Mandatory Disclosure:** Much like the Federal Acquisition Regulation, the guidance requires organizations for a Federal award to disclose, “in a timely manner” and in writing to the Federal awarding agency or pass-through entity, “all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.” The guidance specifically adds that an organization’s failure to make required disclosures can result in a number of actions, including

suspension and/or debarment. While many nonprofit organizations may have already taken this approach, this is a significant development in the grant arena, signifying the sea-change that may be taking place with respect to the Federal government's grant compliance and enforcement efforts.

- **Indirect Costs:** The guidance explicitly requires pass-through entities (typically states and local governments receiving Federal funding) to either honor a nonprofit's negotiated indirect cost rate if one already exists or negotiate a rate in accordance with Federal guidelines. Nonprofits will be empowered to elect an automatic indirect cost rate of 10 percent of modified total direct costs – which can be used indefinitely if they so choose – or negotiate a higher rate. Without question, this is an important new provision for nonprofits, which had not been previously reimbursed by their higher-tiered grantors.
- **Direct Costs:** The guidance makes clear that, in certain circumstances, program administration costs (e.g., secretarial staff dedicated to a specific program) can be reported as direct costs applicable to a specific program. In the past, in some instances, grantees were required to pass these charges on via their indirect cost rates.
- **Audit Rules:** The new guidance raises the threshold for compliance audits of entities that receive Federal award money from \$500,000 per fiscal year to \$750,000 per fiscal year. This is another positive change for nonprofits – particularly smaller nonprofits and those that receive only small amounts of funding from the Federal government – as it should reduce costs for these nonprofits. OMB estimates that approximately 5,000 non-Federal organizations will be relieved from the audit requirement as a result of the higher threshold.

### Going Forward

The Super Circular technically is effective as of December 26, 2013 (the date it was issued in the *Federal Register*); however, in practice, Federal agencies have one year to implement the policies and procedures applicable to Federal awards by promulgating a regulation by December 26, 2014, unless otherwise required by statute. With respect to non-Federal agencies, the rule is effective immediately; however, the rule recognizes the problems that may arise if non-Federal entities implement policies and procedures to comply with the Super Circular, even though agency-specific guidance has not been issued. As a result, comments 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.”

To assist organizations in understanding the final rule, OMB will host an informational webcast. Parties interested in the webcast should visit [www.cfo.gov/cofar](http://www.cfo.gov/cofar).

To view the Super Circular, [click here](#).

In sum, while a true effective date of the Super Circular is a bit unclear, it will be imperative for nonprofit organizations to assess their current practices and policies and take appropriate steps to ensure that they conform with the final rule in a timely manner.

For more information, please contact [Dismas Locaria](#), [Elizabeth Buehler](#) or [Jeffrey Tenenbaum](#).

*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*

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***Special thanks to the National Council of Nonprofits for their assistance in and contributions to the preparation of this newsletter. For more information from the Council on the new Super Circular and its implications for nonprofits, [click here](#).***

### Related Information

[The Top Ten Federal Grant and Contract Pitfalls for Nonprofits](#) (recorded webinar)

[Goldmines and Landmines – Fundamentals of Federal Grants Compliance](#)

[Pitfalls for Nonprofits that Receive Federal Funds: Lessons Learned from ACORN](#) (presentation)

[Pitfalls for Nonprofits that Receive Federal Funds: Lessons Learned from ACORN](#) (article)

## Articles

January 2014

### Federal Grant & Contract News for Nonprofits - January 2014

#### AUTHORS

Dismas Locaria  
Melanie Jones Totman  
Elizabeth A. Buehler  
Jeffrey S. Tenenbaum

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As 2013 came to a close, the Office of Management and Budget (OMB) issued the long-awaited final rule to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, more commonly known as the "**Super Circular**." Our **December newsletter** detailed many of the noteworthy changes embodied in the new Super Circular. However, OMB, through the Council on Financial Assistance Reform (COFAR), conducted an informational webinar on the Super Circular on January 27, 2014 to assist organizations in understanding the final rule.

#### Effective Date

COFAR illuminated an issue we raised in our December newsletter, namely what was meant by the Super Circular being "effective as of December 26, 2013 (the date it was issued in the Federal Register); however, in practice, Federal agencies have one year to implement the policies and procedures applicable to Federal awards by promulgating a regulation by December 26, 2014." COFAR explained that while the Super Circular took effect on December 26, 2013, Federal agencies have six months to submit draft implementing regulations to OMB, and non-Federal entities have until December 26, 2014, to comply and conform fully to the Super Circular.

#### Applicability to Particular Funding Vehicles

COFAR acknowledged and recognized that it would take time to fully implement the Super Circular. To this end, while the predecessor OMB Circulars have already been removed from the U.S. Government Printing Office's Electronic Code of Federal Regulations, the Super Circular's administrative requirements and cost principles will only apply to new awards and to additional funding (funding increments) to existing awards made after December 26, 2014.

#### General Interpretation

COFAR indicated that where the Super Circular states that entities "must" perform a certain task, entities are required to perform that task, whereas use of the word "should" designates a best practice or recommended approach.

#### Fixed-Amount Awards

The Super Circular reduces the requirements for fixed-amount awards in favor of **performance milestone measurements**. In these circumstances, the Federal government would not review the actual cost of the project, with "payments based on meeting specific requirements of the Federal award." However, grantees must seek prior government approval for significant changes to a project.

#### Efforts to Strengthen Oversight

COFAR explained that there were two notable improvements to strengthen oversight:

- *Conflicts of Interest* – The Super Circular requires non-Federal entities not only to maintain conflicts of interest policies as previously required, but also to **maintain written policies** on organizational conflicts of interest.
- *Mandatory Disclosures* – Similar to the 2008 amendment to the Federal Acquisition Regulation, the Super Circular now requires organizations with a Federal award to disclose, "in a timely manner" and in writing to the Federal awarding agency or pass-through entity, "all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award." The guidance specifically adds that an organization's failure to make required disclosures can result in a number of actions, including suspension and/or debarment.

#### Competition in Grants

Several provisions of the Super Circular are designed to foster increased competition for Federal grant funds. For example, the following are all designed to improve agency transparency, available information



to interested parties, and therefore greater competition for grants:

- *Public Notice for Grants* – The Circular requires public notice for **Federal financial assistance** and other **funding opportunities**.
- *Merit-Based Review of Proposals* – "The Federal awarding agency must design and execute a **merit review process** for applications," and that review process must be "described or incorporated by reference in the applicable funding opportunity."
- *Risk Analysis of Potential Grantees* – Federal awarding agencies must consult certain databases not only to determine the eligibility of potential grantees, but also to utilize a framework for **evaluating the risks** posed by certain applicants. Certain factors that agencies can consider in a risk-based analysis include financial stability, quality of management systems, the history of performance, audit findings, and the applicants' effectiveness in implementing statutory and regulatory requirements. Regardless of the criteria used, it "must be described in the announcement of funding opportunity."
- *Standardization of Information* – The Super Circular aims to standardize the Federal awarding process. For example:
  - The Super Circular requires Federal awarding agencies to seek OMB approval to authorize the collection of additional information from the **standard application requirements** approved and published by the OMB on its website.
  - The Super Circular **requires** each Federal award to include 15 uniform data sets in an effort to minimize the huge variation between Federal agencies in what information may have previously been included in a Federal award.

### Internal Controls

COFAR highlighted the internal controls section of the Super Circular as "extremely important." The **streamlined requirements** were 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. COFAR noted that non-Federal entities would need to exercise judgment in crafting internal control mechanisms for their specific programs that were compliant.

### Audits

As is well-documented, the Super Circular raises the threshold for compliance audits of entities that receive Federal award money from \$500,000 per fiscal year to \$750,000 per fiscal year. But perhaps more importantly, the Super Circular expresses a preference for "**cooperative audit resolution**," meaning that Federal agencies should focus on "current conditions and corrective action going forward" rather than punishing grantees for noncompliant actions taken years ago.

There is no doubt the Super Circular, from an organizational standpoint alone, is a welcome change to the previous patchwork of Circulars; however, the new regulation contains a number of important changes and nuances. We recommend that current and would-be recipients of Federal grant funds closely review the Super Circular and its requirements against their practices, and begin the process of planning, creating, and, ultimately, implementing the practices and controls necessary for compliance with the Super Circular going forward.

\* \* \* \* \*

For more information, please contact **Dismas Locaria, Melanie Jones Totman, Elizabeth Buehler** or **Jeffrey Tenenbaum**.

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## Articles

February 2014

### Federal Grant & Contract News for Nonprofits - February 2014

In our ongoing coverage of the 2013 release of the Office of Management and Budget's (OMB) "**Super Circular**" (see our **December** and **January** newsletters), we provide further information and guidance from OMB, through the Council on Financial Assistance Reform (COFAR). COFAR conducted an informational webinar on the Super Circular on January 27, 2014, and more recently provided **Frequently Asked Questions** (FAQs).

As detailed in our prior newsletters, the effective date of the Super Circular has been an area of confusion. COFAR provides additional information on this point, including its application to existing awards.

#### Q II-1: When does the uniform guidance become effective?

- The effective date is covered in section 200.110, Effective/applicability date.
- Federal agencies must implement the requirements to be effective by December 26, 2014.
- Subpart F, Audit requirements, will apply to audits of non-Federal entity fiscal years beginning on or after December 26, 2014. The revised audit requirements are not applicable to fiscal years beginning prior to that date.
- Administrative requirements and cost principles will apply to new awards and to additional funding (funding increments) to existing awards made after Dec 26, 2014.
- Existing Federal awards will continue to be governed by the terms and conditions of the Federal award.

#### Q II-2: Will this apply only to awards made after the effective date, or does it apply to awards made earlier?

- Once the uniform guidance goes into effect for non-Federal entities, it will apply to awards or funding increments after that date. It will not retroactively change the terms and conditions for funds a non-Federal entity has already received.
- We would anticipate that for many of the changes, non-Federal entities with both old and new awards may make changes to their entity-wide policies (for example to payroll or procurement systems). Practically speaking, these changes would impact their existing/older awards. Non-Federal entities wishing to implement entity-wide system changes to comply with the uniform guidance after the effective date of December 26, 2014 will not be penalized for doing so.

#### Q II-3: Should we continue using 2 CFR 220, 225, and 230 until December 2014, even though these regulations have now been removed from the CFR?

- The terms and conditions of the Federal award always govern, and even once the uniform guidance goes into effect, Federal agencies will need to ensure that all non-Federal entities have full access to the terms and conditions of Federal awards made prior to the uniform guidance becoming effective.
- The original circulars are also at [http://www.whitehouse.gov/omb/grants\\_circulars](http://www.whitehouse.gov/omb/grants_circulars).
- Federal agencies may not impose the uniform guidance prior to the effective date.

COFAR also clarified some points with respect to the Super Circular's effort to reduce the risk of waste, fraud, and abuse (one of the primary goals of the effort to create the consolidated circular).

#### Q I-7: What is the impact of this reform? How does this reform reduce administrative burden and risk of waste, fraud, and abuse?

#### AUTHORS

Dismas Locaria  
Melanie Jones Totman  
Elizabeth A. Buehler  
Jeffrey S. Tenenbaum

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#### 4. Providing for consistent and transparent treatment of costs:

- Updated policies on indirect cost reduce administrative burden by providing more consistent and transparent treatment governmentwide.
- The provisions set conditions that make transparent agency decisions to use other than approved indirect cost rates, and provide for a *de minimis* indirect cost rate for those non-Federal entities that have never had a rate and for whom existing requirements to negotiate might be a burden that prevents them from receiving assistance at all or implementing it effectively.
- It also clarifies allowable direct charges for administrative expenses and contingency costs.

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#### 8. Strengthening oversight:

- New language requires Federal agencies and pass-through entities to review the risk associated with a potential recipient prior to making an award (including by making better use of available audit information where appropriate).
- It also requires disclosures of relevant conflict of interest or criminal violations, expressly prohibiting profit, requiring certifications by senior officials of the non-Federal entity, and providing Federal agencies with strong remedies to address situations of non-compliance.

#### 9. Targeting audit requirements on risk of waste, fraud, and abuse:

- The uniform guidance focuses audits where there is greatest risk of waste, fraud, and abuse of taxpayer dollars.
- It strengthens existing requirements for Federal agencies to rely to the extent possible on the work of the Single Audit before initiating additional audits.
- It improves transparency and accountability by making single audit reports available to the public online and encourages Federal agencies to take a more cooperative approach to audit resolution that will more conclusively resolve underlying weaknesses in internal controls.
- Targets Federal oversight resources where the most Federal dollars are at risk by raising the threshold for the single audit requirement from \$500,000 to \$750,000, covering over 99% of the funds currently covered while eliminating the requirement for about 5,000 entities and saving the government about \$250 million per year.

The FAQs also addressed a number of specific items, including the following.

- Additional clarification “regarding changes to the term contractor and the elimination of the term vendor;” for instance, COFAR stated:
  - In existing guidance, the COFAR has found that some confusion results from the fact that OMB Circular A-133 makes a distinction between subrecipients and “vendors” while other circulars describe either subawards or “subcontracts”.
  - For purposes of this guidance, when a non-Federal entity provides funds from a Federal award to a non-Federal entity, the non-Federal entity receiving these funds may be either be a subrecipient or a contractor. The term contractor is used for purposes of consistency and clarity to replace areas in the previous guidance that referred to vendors, though substantively in the previous guidance, these two terms have always had the same meaning.
  - Section 200.330 Subrecipient and Contractor Determinations, as well as section 200.22 Contract and 200.92 Subaward provide guidance on making subrecipient and contractor determinations. This language was largely taken from existing guidance in OMB Circular A-133 on subrecipient and vendor determinations.
  - As described in the uniform guidance in the sections noted above, it is the substance of the award that determines how it should be treated, even though the pass-through entity or non-Federal entity receiving the award may call it by a different name.

- So, if a pass-through entity makes an award that it calls a “contract”, but which meets the criteria under section 200.330 to be a subaward to a subrecipient, the non-Federal entity must comply with the provisions of the uniform guidance relevant to subawards, regardless of the name used by the pass-through entity to refer to the award agreement.
- Likewise, any Federal awards that meet the criteria under section 200.330 for the non-Federal entity to be considered a contractor, whether the non-Federal entity providing the funds calls it a “vendor agreement” or a “subcontract”, the non-Federal entity must comply with the provisions of the uniform guidance relevant to a contractor.
- A description of COFAR’s expectation about a non-Federal entity’s compliance with the guidance in the Green Book:

The requirement is that the non-Federal entity must establish and maintain effective internal controls over Federal awards that provide reasonable assurance that awards are being managed in compliance with Federal statutes, regulation and the terms and conditions of the Federal award. The uniform guidance also refers non-Federal entities to the following three documents for best practices:

- “Standards for Internal Control in the Federal Government” (Green Book) issued by the Comptroller General.
- “Internal Control Framework” issued by the Committee on Sponsoring Organizations (COSO).
- Appendix XI, Compliance Supplement – Part 6 Internal Control (which currently follows COSO but will consider both the Green Book and COSO in the 2015 update (200.514(c)(1)).

While non-Federal entities must have effective internal control, there is no expectation or requirement that the non-Federal entity document or evaluate internal controls prescriptively in accordance with these three documents or that the non-Federal entity or auditor reconcile technical differences between them. They are provided solely to alert the non-Federal entity to source documents for best practices. Non-Federal entities and their auditors will need to exercise judgment in determining the most appropriate and cost effective internal control in a given environment or circumstance to provide reasonable assurance for compliance with Federal program requirements.

- And that measures prefaced with the word “should” were considered best practices, whereas items prefaced with “must” were requirements (“The word ‘must’ is used throughout section 200 to indicate requirements. The word ‘should’ is used to indicate best practices or recommended approaches that the COFAR wanted non-Federal entities to be aware of, but not necessarily required to comply with.”).

Finally, with respect to the notion that this may be the last of changes or guidance to grant regulation for the foreseeable future, COFAR clearly provides that there is more related guidance and regulation on the horizon.

**Q I-3: How does this reform complement OMB’s work on the Evidence Agenda?**

- These reforms complement targeted efforts by OMB and a number of Federal agencies to reform overall approaches to grant-making by implementing innovative, outcome-focused grant-making designs and processes in collaboration with their non-Federal partners as described in OMB Memorandum 13-17, Next Steps in the *Evidence and Innovation Agenda*.
- The uniform guidance will provide a backbone for sound financial management as Federal agencies and their partners continue to develop and advance innovative and effective practices.
- OMB plans to work with agencies to examine ways these new flexibilities can be used to support innovative, outcome-focused grants.
- Specifically this reform focuses on performance over compliance for accountability by; (see Q I-7 #2 under **What is the Impact of this reform?**).

Moreover, COFAR explained that the “FAQ document will be updated periodically to reflect further

COFAR clarifications when needed.”

\* \* \* \* \*

For more information, please contact **Dismas Locaria**, **Melanie Jones Totman**, **Elizabeth Buehler** or **Jeffrey Tenenbaum**.

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