One Year Later: Time for Nonprofits to Implement the Super Circular

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Upcoming Venable Nonprofit Events
Register Now

March 17, 2015 – Top Ten Legal Checklist: Keys to Strengthening Your Nonprofit Organization

April 15, 2015 – Structuring Innovative Revenue Models for Nonprofits: For-Profits, Joint Ventures, and Social Enterprises

May 13, 2015 - Managing Your Nonprofit's FACEBOOK, TWITTER, and LINKEDIN Presence: Avoiding the Legal Pitfalls

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Agenda

- One Year Highlights

- Subrecipient Monitoring: Assessing Risk

- Procurement: Establishing a Workable Procurement System

- Addressing New Ethical Requirements

- Hurdles to Implementation

One Year Highlights

One Year Highlights

- **December 26, 2013** – Super Circular issued
  - January 27, 2014, Council on Financial Assistance Reform (COFAR), conducted an informational webinar on the Super Circular
  - Shortly thereafter, COFAR issued FAQs on Super Circular (https://cfo.gov/wp-content/uploads/2013/01/2-C.F.R.-200-FAQs-2-12-2014.pdf)

- **May 9, 2014** – National Science Foundation (NSF) issues preliminary revisions to its Proposal and Award Policies and Procedures Guide to align NSF's grant procedures with the Super Circular

- **December 19, 2014** – OMB and 28 Federal agencies issued a joint interim final rule implementing the Super Circular

Subrecipient Monitoring:

Assessing Risk

Subrecipient Overview
Implications for pass-through entities

- One of the most significant changes is the more stringent requirements for subrecipient monitoring

- Examples of expanded pass-through entity responsibilities include:

  - Requirement for consistent practice to distinguish subrecipient from contractor
  - Identifying or negotiating an appropriate subrecipient indirect cost rate at the time of award
  - Ensuring "flow-down" of new requirements are included within sub agreements, as applicable
  - Evaluating subrecipient risk of noncompliance and determining necessary monitoring activities – including on-site reviews
  - Imposing remedies for subrecipient noncompliance, when necessary

Subrecipient Monitoring Activities
Risk Assessment

- Subrecipient monitoring plan must ensure that the subaward:
  - Is used only for authorized purposes
  - Is in compliance with Federal statutes/regulations and subaward Ts&Cs
  - Achieves its performance goals
  - Considers risk of subrecipient noncompliance
- Risk assessment is based on:
  - Prior/past experience with similar subawards
  - Previous audit results
  - Significant changes in personnel or systems
  - Extent and results of Federal awarding agency monitoring

Subrecipient Monitoring Activities
Monitoring Plan

- Minimum monitoring activities must include:
    - Reviewing financial and programmatic reports
    - Conducting on-site reviews/audits based on risk assessment
    - Conducting follow-up reviews to ensure timely completion of corrective actions required to address deficiencies – as identified through on-site reviews, audits or other means
    - Issuing a management decision for audit findings pertaining to the Federal award
    - Verifying that each subrecipient receive completed audits, as required

- Design of monitoring plan will vary based on subrecipient risk assessment:
    - e.g., more stringent monitoring plan is required for high risk subrecipients

Subrecipient Monitoring Activities
Additional Considerations

- Based on results of monitoring activities, pass-through entities should

  - Provide training and technical assistance to appropriate subrecipient staff
  - Determine if on-site reviews/audits necessitate adjustments to own records
  - Consider taking enforcement action against noncompliant subrecipients

- If subrecipient noncompliance is determined, pass-through entities may apply enforcement action through specific conditions (§200.207)

- If noncompliance cannot be remedied through specific conditions, more severe enforcement action may be taken (§200.338)

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Subrecipient Monitoring Activities
Additional Enforcement Action

- If noncompliance cannot be remedied through specific award conditions, consider more severe enforcement action, such as:
    - Applying temporary cash withholds
    - Disallowing all or part of the cost of the activity
    - Suspending or terminating the subaward
    - Recommending the Federal awarding agency initiate suspension or debarment proceedings
    - Withholding future awards to the subrecipient
    - Pursuing other remedies legally available

Subrecipient Monitoring Activities
General Best Practices

■ Subrecipient monitoring procedures should include:

– Informing your subrecipient of pertinent information

– Ensuring your subrecipients are receiving audits when necessary

– Reviewing financial and programmatic reports

• Reconcile the subrecipient's budgeted expenditures to actual expenditures

• Perform an on-site visit to the subrecipient to review financial and programmatic records and observe operations

• Desk review - review financial and program reports submitted by subrecipients for allowable use of the grant funds

– Establishing a tracking system to ensure timely submission of required reporting

– Having a second party within your organization periodically review the adequacy of subrecipient monitoring for all programs

– Document! Document! Document!

Procurement: Establishing a Workable Procurement System

Choosing a Contract vs. a Subgrant

- How does your organization determine whether to use a subrecipient or a contractor?
  - "Subrecipient" – a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program but does not include an individual that is a beneficiary of such program
  - "Contract" – a legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award
- Create guidance for your template agreements on how to choose an instrument
  - Understand the timeline required for competition
  - Consider ability of subawardee to run a program that meets all Federal requirements

Understanding the New Contract Procurement Standards

- Old regulations required full and open competition to the "maximum extent possible"

- Full and open competition now required for all procurement contracts issued above $150,000

- Consider ways to demonstrate "full and open competition"

  - Drafting your RFP to promote full and open competition
    - Clearly state all requirements
    - Do not limit competition to certain vendors (even those on retainer) or unnecessary requirements
  - Consider how to properly advertise each opportunity
    - Generally best practice to post opportunities online
    - How can you increase awareness for each proposal?

Establishing a Workable Procurement System

- Contracts can be sole-sourced when:
  - Item is available from a single source
  - There is a public exigency or emergency where delay is not an option
  - The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request
  - If after the solicitation of a number of sources, competition is determined inadequate
- Cost analysis is required where there is no price competition (profit must be separately analyzed)
  - Consider in advance how to analyze cost for your niche industries without competition

Establishing a Workable Procurement System

- All contract actions (e.g., solicitation, Q/A, evaluation, award decision) should be maintained in the contract file
  - Even documents related to unsuccessful offerors should be maintained
- Keep all modifications within the original scope
  - Failure to remain in scope compromises the integrity of the price competition

Threshold Organizational Issues

- Who in your organization is responsible for implementing the changes in the procurement system?

    - Does that person operationalize procurement?
    - If not, how are you training your procurement teams?

- How are you tracking the changes?

- Who should be contacted with procurement issues and questions?

Addressing New Ethical Requirements

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

Creating Ethical Infrastructure

- Organizations should consider:
    - Top-level attention
        - Policy directive
        - Letter to staff
    - Policy and procedural changes
        - Policy requirements
        - Agreement provisions
    - Education
        - Communication
        - Training
    - Ongoing examination, oversight and enforcement
        - Compliance/Ethics Officer
        - Internal audit

Creating Ethical Infrastructure

- No one-size-fits-all approach

- What an organization does can depend on
  - Organizational structure
  - Size of organization
  - Mission
  - Philosophy for effectuating mission

- Thoughtful, reasonable approach
  - Consider documenting major decisions
  - Remain open and nimble should circumstances change

Failure to Address Ethical Issues

- The failure to implement processes to account for these new rules could have damaging impacts
    - Disallowance of funds
    - Suspension of grant
    - Grant termination
    - Civil penalties
    - Criminal penalties
    - Administrative action (e.g., suspension, debarment)

Hurdles to Implementation
(or How Best to Jump)

Getting There

How Are You Organized to Manage This?

What Have You Already Been Doing?
- Governance
- Agreements
- Policies & Procedures
- Functional Processes
- Technical Process and Resources
- Staffing
- Training & Orientation

What's Missing?
What Can be Improved?
- Mandatory/ Desirable
- Disclosure Process
- COI Process
- Indirect Policy – Negotiated Rate Policy
- Subrecipient Monitoring
- Risk Metrics
- Systems

What are the Alternatives?
What Are the Best Alternatives, Now and Going Forward?
- Procurement Policy/ Now or Defer?
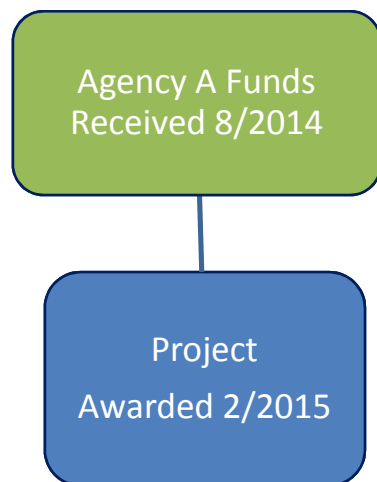- De Minimis or NICRA?
- Cut Over to Uniform Guidance

Implementation Plan
- Design and Development of Required Policies and Procedures
- Design and Development of Functional Processes
- Selection and Deployment of Technical Solutions
- Roll-out Schedule
- Orientation, Instruction Plan and Execution

The Roll-out Challenge

Funding Source Considerations
(for PTEs and Grantmakers)

Agency A Funds Received 8/2014

Project Awarded 2/2015

Agency A Funds Received 4/2014

Agency A Funds Received 1/2015

Project Initially Awarded 5/2014. Additional Funds Added 2/2015.

1. Should the PTE make all project awards after 12/26/14 fall under the Uniform Guidance rules in order to keep future award terms consistent?

2. If not, PTE could have to manage multiple agreement versions depending on when federal funding was received.
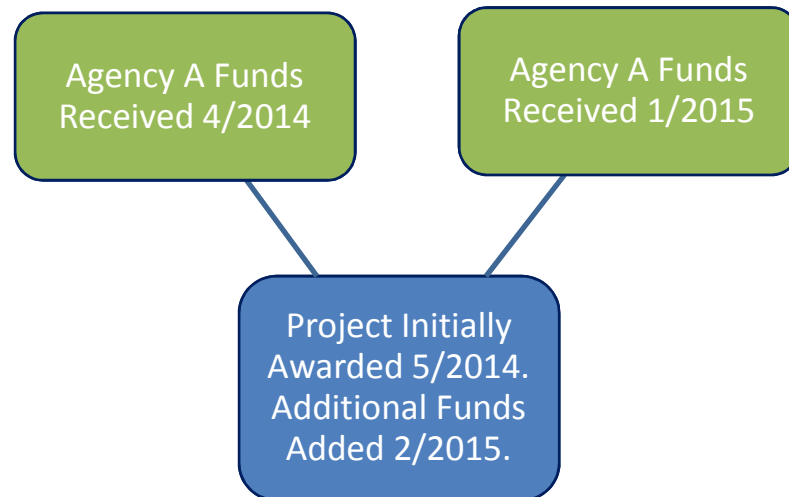
1. Should the PTE amend the terms and conditions of the project's grant agreement to reflect Uniform Guidance?

2. Should the PTE spend down funds from 4/2014, close the agreement, and then issue a new agreement for 1/2015 funds?

Other Process Considerations

Issue	Consideration
1. Pre-UG RFP/Post-UG Award	May require budgetary/indirect adjustments
2. COI & Mandatory Disclosure	Implementing reporting protocols
3. Performance Measurement (200.301)	Anticipating standards
4. Specific Conditions and SRM (200.207;331)	Implementing tracking mechanism
5. Impact of Indirect Policy	Focus on the rate problematic
6. Must v. Should	What's the cost/risk?

Questions?

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