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Grants Intelligence

Federal Agency Regulations Shift Grantee Responsibilities

Ethical Failings Can Result in Organizational and Individual Liability

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There were a few actions recently that serve as important reminders to nonprofits and other nonfederal entities that noncompliance with ever-changing federal funding requirements, especially ethical requirements, such as conflict of interest (§200.112) and mandatory disclosures (§200.113), can result in liability not just to the organization, but to individuals personally as well.



On Feb. 16, 2016, several federal agencies finalized their implementation of the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, (Uniform Guidance) including the Office of the Chief Financial Officer, Farm Service Agency, Commodity Credit Corporation, National Institute of Food and Agriculture, Rural Utilities Service, Rural Business-



Cooperative Service, and Rural Housing Service.

While many agencies have been slow to officially adopt (and even slower to implement) the Uniform Guidance, the specific adoption and implementation of the Uniform Guidance for these agencies reminds us of the

importance of assessing each award with each agency for compliance.

Nonprofits and other recipients should establish a protocol for reviewing the requirements for each award. Consider the following actions:

- Designate a point person to oversee compliance with each requirement.
- Review each requirement. Ensure that you have reviewed each regulation or policy guidance incorporated by reference.
- Remember that while the Uniform Guidance is meant to provide consistency, each award and each agency is different, and must be treated individually.
- Determine how the organization will comply with each requirement. Consider drafting a compliance matrix that assigns responsibility for compliance with each requirement. Track the versions of this compliance matrix as the grant requirements are modified or otherwise clarified, and as the facts on the ground change compliance requirements. This compliance matrix can act as a tool to document your organization's rationale as to why it can certify confidently that it is compliant with all requirements.

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Failure to follow changing regulatory requirements can have a significant impact, not just for the organization, but for individuals within the organization as well.

Required Certification

Among many other obligations, the Uniform Guidance requires a certification on annual and final fiscal reports, and on vouchers requesting payment under the award agreement. The provision (§200.415) requires that an authorized organizational representative of the recipient entity must sign the certification acknowledging their personal understanding of the representations and certifications that the organization is making in its reports:

“By signing this report, I certify to the best of my knowledge and belief that the report is true, complete, and accurate, and the expenditures, disbursements and cash receipts are for the purposes and objectives set forth in the terms and conditions of the federal award. I am aware that any false, fictitious, or fraudulent information, or the omission of any material fact, may subject me to criminal, civil or administrative penalties for fraud, false statements, false claims or otherwise. (U.S. Code Title 18, Section 1001 and Title 31, Sections 3729–3730 and 3801–3812).”

This personal attestation is notable, and nonprofits and other nonfederal entities may want to consider having their legal representatives review the reports themselves, as well as the certification prior to execution and submission.

USAID

Following the above-mentioned theme regarding personal involvement in federal award matters, a sentence was recently imposed upon a contractor employee under a USAID contract. In the post-Yates Memorandum world, this is a real-world example of the government’s policy shift to individual liability. Specifically, according to the Department of Justice (DOJ), a former nonprofit contractor employee was sentenced to 46 months in prison for his role in a bribery scheme involving a federal program in Afghanistan and conspiracy to structure financial transactions to avoid certain reporting requirements.

The Yates Memorandum, a policy memorandum titled “*Individual Accountability for Corporate Wrongdoing*” and issued by Deputy U.S. Attorney General Sally Yates on September 9, 2015, signaled a policy shift by DOJ to the prosecution of more individuals in corporate fraud

cases. In doing so, the Yates Memorandum established six guidelines intended to “strengthen [DOJ’s] pursuit of corporate wrongdoing”:

- To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct;
- Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
- Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
- Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals;
- Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitation expires and declinations as to the individual in such cases must be memorialized; and
- Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual on considerations beyond that individual’s ability to pay.

Given the foregoing, and the clear interest of DOJ in pitting organizations against their employees, it is particularly important for nonprofits and other nonfederal entities to take the steps summarized above, among others, to ensure regulatory and ethical compliance.

As nonprofits and other nonfederal entities begin to live out policies and procedures that conform to the Uniform Guidance, compliance and legal departments are faced with an unprecedented number of real-world issues that arise from the implementation of those new policies. It is becoming increasingly important to foster trust, cooperation, and collaboration between grantees and their federal agencies through the creation of important internal controls and reporting mechanisms. Practical approaches to a culture of ethics and compliance add tangible value to grantees by strengthening an organization’s internal controls and safeguarding against the ever increasing consequences for noncompliance.

For More Information

The Yates Memorandum is available at <https://www.justice.gov/dag/file/769036/download>. ❖

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