

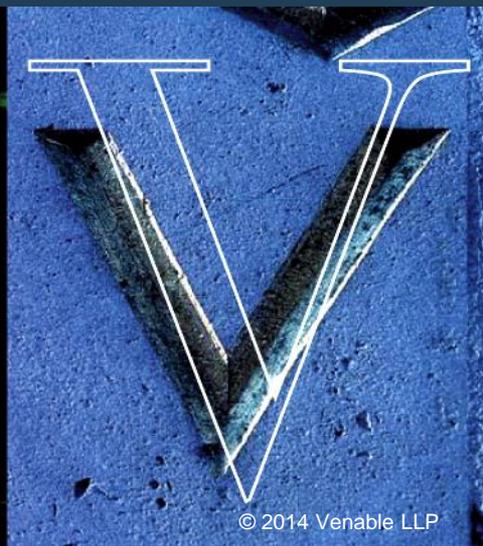
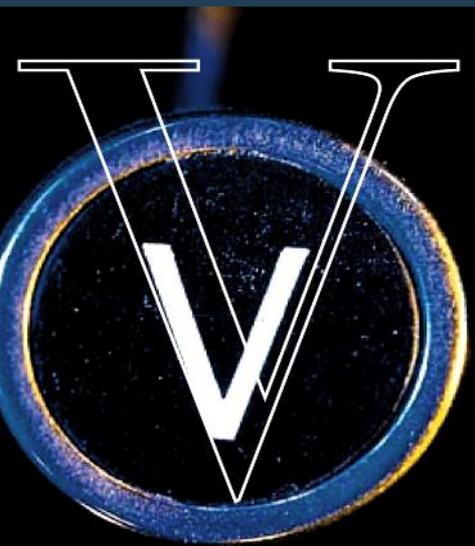
# Nonprofit Organizations Committee Legal Quick Hit: The OMB Super Circular: What the New Rules Mean for Nonprofit Recipients of Federal Awards

PRESENTERS: DISMAS LOCARIA, ESQ.

MELANIE JONES TOTMAN, ESQ.

TUESDAY, MARCH 11, 2014

3:00 p.m. ET



# Program Overview

- The Super Circular – What Is It?
- When Is the Super Circular Effective?
- New Pre-Award Processes
- Increase of Internal Controls
- Changes to Indirect Cost Rules
- Updates to the Time and Effort Rules
- Focusing and Improving Transparency of Single Audits
- More Stringent Integrity Rules
  - Conflicts of Interest
  - Mandatory Disclosure



# 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



# When Is the Super Circular Effective?

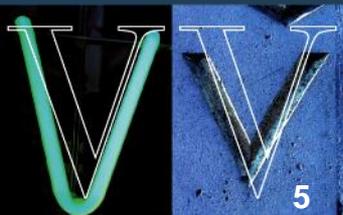
- Effective December 26, 2013?
- In practice:
  - Federal agencies have one year to implement
  - Thus, truly effective December 26, 2014
- To support this position, comments in the preamble to the rule provide that:

“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.”



# 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.



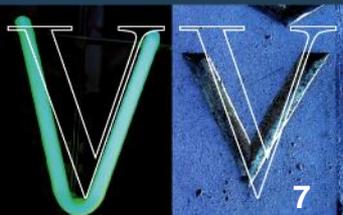
# Increase of Internal Controls

- 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



# Changes to Indirect Cost Rules

- Requires pass-through entities (e.g., states and local governments) to honor a nonprofit's negotiated indirect cost rates or negotiate a rate, *id.* § 200.414
  - Significant change because in the past, many state and local governments simply did not pay indirect costs
- 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 make 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



# 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 first hand 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
  - Allowed to charge budgeted amount for interim accounting
  - Potential for negative audit findings and *qui tam* suits



# 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

- 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



# More Stringent Integrity Rules (*cont'd.*)

- 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



# Contact Information

**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

**Melanie Jones Totman, Esq.**

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

t 202.344.4465

To view an index of Venable's articles and presentations or upcoming seminars on nonprofit legal topics, see [www.Venable.com/nonprofits/publications](http://www.Venable.com/nonprofits/publications) or [www.Venable.com/nonprofits/events](http://www.Venable.com/nonprofits/events).

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

