



# The Top Ten Federal Grant and Contract Pitfalls for Nonprofits

February 12, 2013

12:00 PM – 2:00 PM

Venable LLP

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Washington, DC 20004

**Moderator:**

Jeffrey S. Tenenbaum, Esq.

**Panelists:**

Dismas N. Locaria, Esq.

Steven Steigleder

# Presentation

## THE TOP TEN FEDERAL GRANT AND CONTRACT PITFALLS FOR NONPROFITS

Tuesday, February 12, 2013  
12:30 p.m. - 2:00 p.m. EST

Venable LLP  
Nonprofit Organizations Practice  
Washington, DC

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

Panelists:  
Steven Steigleder, Institute of International Education  
Dismas N. Locaria, Esq., Venable LLP



### Upcoming Venable Nonprofit Legal Events

March 13, 2013 - [Preparing an Online Social Media Policy: The Top Ten Legal Considerations for Your Nonprofit](#)

April 16, 2013 - Public Policy and Politics:  
Compliance Tips for Your Nonprofit's Advocacy and  
Electoral Efforts (Details Coming Soon)



## #1 - Failure to Understand the Difference between Acquisition and Assistance

- Acquisition = Contract
  - Federal Acquisition Regulations (FAR)
- Assistance = Grant or Cooperative Agreement
  - Code of Federal Regulations (CFR)
  - E.g., Title 2 of the CFR (government-wide); Title 22 CFR 226 (agency-specific regulation, US AID)



## #2 - Believing Grant Recipients Have Greater Compliance Latitude

- Contracts Misnomers
  - Greater regulation
  - More enforcement focus and resources
- Grants
  - Subject to DoJ and OIG investigations
  - Similarly subject to False Claims Act
  - NDAA FY13, Sec. 828 expands whistleblower protections to grant and contract programs alike



### #3 - Funding Issues

- Analysis of impact on organizational cash flow
  - Is the award operating under a Continuing Resolution?
- Understand the grant's payment provisions and their impact on cash flow
  - Cash advances
  - Reimbursement
- Understand the difference between estimated ceiling and funds obligated



### #4 - Understanding the Applicability and Scope of OMB Circular A-122 and Other OMB Circulars

- A-122 has limited applicability/scope
  - Applies to a nonprofit, cost-based arrangements at all tiers
  - Does not apply to fixed-price arrangements
  - Does not apply to profit
- A-21
  - Applies to an educational institution, cost-based arrangements at all tiers
  - Principles are a guide for fixed-price arrangements
  - Does not apply to profit
- A-110
  - Admin. requirements for grants to higher education, hospitals, and other nonprofits



## #5 - Failing to Maintain Accurate Time Cards and Other Records

- The accuracy of time cards, reports, and invoicing of paramount importance
- Estimates not allowed
- Should be kept contemporaneously
- System for maintaining accuracy
- Failures can give rise to civil, criminal and/or administrative action
  - E.g., suspension/debarment



## #6 - Not Taking Advantage of a Post-Award Conference

- Establish a good working relationship with Agreement Officer
- Seek Agreement Officer's interpretation of clauses you do not fully understand
- Establish expectations for the time required to obtain Agreement Officer action on selected items requiring advance approval



## #7 - Failure to Read Federal Award Thoroughly

- Imperative to review and understand all documents, including those incorporated by reference
- Misunderstanding the type of grant/contract issued by the government (i.e., is the grant cost-based, fixed-price, etc.)



## #8 - Misunderstanding Delegation of Authority

- Role and Responsibility of the Agreement Officer
- Role and Responsibility of the Agreement Officer's Technical Representative
- Role of other Federal officials involved in the program



## #9 - Other Important Requirements

- Foreign Corrupt Practices Act
- Gifts/gratuities
- Conflicts of interest
- Maintaining auditable records
- Failure to Comply with Fly America Act Restrictions
- Subcontracting/subgrant restrictions



## #10 - Misunderstanding the Case of Fraud

- Accusations of fraud need not be based on the affirmative knowledge of the defrauding individual
  - Knowledge includes actual knowledge and:
    - Deliberate ignorance of the truth or falsity of the information, or
    - Reckless disregard of the truth or falsity of the information
      - Failure to have adequate controls can be deemed reckless disregard
- Can be raised by disgruntled employees via the *qui tam* whistleblower provisions



## Questions

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# **Speaker Biographies**



## Jeffrey S. Tenenbaum

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### AREAS OF PRACTICE

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 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, credit and housing counseling agencies, 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.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was the 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 2012 *Legal 500* rankings, and 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 Best Lawyers in America 2012* and *2013* 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  
 American Academy of Physician Assistants  
 American Alliance of Museums  
 American Association for the Advancement of Science  
 American Association for Marriage and Family Therapy  
 American Bureau of Shipping  
 American College of Radiology  
 American Institute of Architects  
 Air Conditioning Contractors of America  
 American Society for Microbiology  
 American Society for Training and Development  
 American Society of Anesthesiologists  
 American Society of Association Executives  
 American Society of Civil Engineers  
 American Society of Clinical Oncology  
 American Staffing Association  
 Associated General Contractors of America  
 Association for Healthcare Philanthropy

## 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 of Corporate Counsel  
Association of Private Sector Colleges and Universities  
Automotive Aftermarket Industry Association  
Brookings Institution  
The College Board  
Council on Foundations  
CropLife America  
Cruise Lines International Association  
Foundation for the Malcolm Baldrige National Quality Award  
Goodwill Industries International  
Homeownership Preservation Foundation  
The Humane Society of the United States  
Independent Insurance Agents and Brokers of America  
Institute of International Education  
Jazz at Lincoln Center  
The Joint Commission  
LeadingAge  
Lincoln Center for the Performing Arts  
Lions Club International  
Money Management International  
National Association of Chain Drug Stores  
National Athletic Trainers' Association  
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  
National Telecommunications Cooperative Association  
The Nature Conservancy  
NeighborWorks America  
New York Blood Center  
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  
Texas Association of School Boards  
Trust for Architectural Easements  
United Nations High Commissioner for Refugees  
Volunteers of America

## HONORS

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

Listed in *The Best Lawyers in America 2012* and *2013* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.)

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*, published by the American Society of Association Executives, and 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. He also is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. In addition, he is a frequent author for ASAE and many of the other principal nonprofit industry organizations and publications, having written more than 400 articles on nonprofit legal topics.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE and many of the major nonprofit industry organizations, conducting over 40 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other federal and government officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *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 issues on Voice of America Business Radio and Nonprofit Spark Radio.



## Dismas Locaria

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### AREAS OF PRACTICE

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### BAR ADMISSIONS

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### 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, as well as representing and counseling clients with the peculiarities of the Homeland Security Act's SAFETY Act.

Mr. Locaria has represented clients before various Federal agencies, including the Department of Defense, General Services Administration, Department of Homeland Security, Small Business Administration, Environmental Protection Agency, and others. Mr. Locaria has developed several specialty areas, including representing clients in suspension and debarment proceedings, as well as performing internal investigations, which has included assistance and representation for such clients with disclosures to federal officials regarding the findings of such investigations and working with the client to determine and implement compliance enhancements and improvements. Mr. Locaria also has extensive experience in client counseling, including assisting clients with the nuances of becoming government contractors and implementing appropriate systems and methods to achieve and maintain regulatory and contractual compliance. 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.

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.

### PUBLICATIONS

"Frankel v. Board of Regents of the University of Maryland System - In the Name of Equality: The Proper Expansion of Maryland's Heightened Rational Basis Standard," 61 MD L. REV. 847 (2002).

- January 2013, What You Need to Know About the Proposed Maryland Investment Tax Credit for Cybersecurity, Cybersecurity Alert

- January 2013, Federal Grant & Contract News for Nonprofits - January 2013
- December 2012, Record Civil False Claims Act Recoveries: The Implications for Nonprofits
- December 2012, Record Civil False Claims Act Recoveries Point to Increased Whistleblower Cases in 2013, *Law360*
- November 9, 2012, Crucial Legal Issues in the Recovery from Hurricane Sandy
- August 7, 2012, Lessons from the *Agility Defense* Case: Severing Affiliation with a Suspended Contractor, Government Contracts Update
- July 13, 2012, Suspension & Debarment: New Trends and the Continuing Due Process Debate, Government Contracts Update
- April 2012, DoD Fast-Track Acquisition Process Promises New Opportunities for Contractors, Cybersecurity Alert
- April 2012, Housing Counseling Agencies: Tips to Avoid Government Scrutiny
- January 2012, The Public Disclosure of Contractor Information on FAPIIS is Here to Stay, Government Contracts Update
- January 18, 2012, New IT Security Requirements For GSA Contractors, *Law360*
- January 2012, GSA Requires IT Contractors to Create and Implement IT Security Plans: This May Only Be the Beginning, Government Contracts Update
- January 10, 2012, Pitfalls for Nonprofits that Receive Federal Funds: Lessons Learned from ACORN
- December 13, 2011, Pitfalls for Nonprofits that Receive Federal Funds: Lessons Learned from ACORN
- December 2011, House Intelligence Committee Announces Cybersecurity Legislation: Path Forward Uncertain, Cybersecurity Alert
- October 18, 2011, A Roadmap To The U.S. Government Contracts Market, *Law360*
- July 2011, Proposed DFARS Rule Would Impose New Protection and Reporting Requirements on Defense Contractors, Government Contracts Update
- October 26, 2010, "GTSI's Suspension Shows That Contractors Should Ensure Accurate Representations Concerning Small Business Matters", *Federal Contracts Report*
- October 2010, The Small Business Administration Flexes its Muscle: Contractors Should Ensure Accurate and Appropriate Representations and Teaming Arrangements, Government Contracts Update
- June 2010, Government Contractors Toolkit - Selling to the Federal Government
- March 2010, Contractors Can Challenge the Government's In-Sourcing Efforts
- December 2009, The GSA Schedules: How to "Get on Schedule" and Broaden Your Business, *Originally published in the December 2009 issue of Contract Management magazine, © 2009, the National Contract Management Association*
- November 18, 2009, Proposed Rules Issued For Prevention of Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, Government Contracts Update
- August 27, 2009, New OMB Guidance Further Signals the Sea Change in Government Contracting, Government Contracts Update
- July 13, 2009, The Federal False Claims Act - What Does It Mean for Nonprofit Organizations?
- May 29, 2009, The Federal Government Provides Significant Opportunities for Asset Managers Looking to Expand Their Business, Financial Services Alert
- March 2009, Suspension and Debarment: New Developments and Future Challenges, *Contract Management*
- February 24, 2009, Increased Oversight of Government Contracts, Government Contracts Update
- February 3, 2009, GSA Proposes Several Significant Changes to its Federal Supply Schedule Contracting Program, Government Contracts Update
- October 2008, The National Defense Authorization Act for FY09's Clean Contracting Act Mandates Significant Changes in Federal Acquisitions, Government Contracts

## Update

- August 8, 2008, 2007 Year in Review: Analysis of Significant Federal Circuit Government Contracts Decisions
- July 31, 2008, Department of Justice Updated Guidance on Seeking Waivers of Attorney-Client Privilege May Not Go Far Enough, Government Contracts Update
- July 23, 2008, GAO'S New Bid Protest Jurisdiction May Aim to Foster Competition but Leaves Many Questions Unanswered, Government Contracts Update
- March 2008, 2008 DoD Authorization Bill Adds Relief and Complexity to DoD's Procurement of Specialty Metals, Government Contracts Update
- October 2007, Court of Federal Claims Makes Unusual Request for FTC Opinion on OCI Issue, Government Contracts Update
- August 31, 2007, 2006 Year In Review: Analysis of Significant Federal Circuit Government Contracts Decisions, *Public Contract Law Journal*
- June 2007, The U.S. Supreme Court Narrows Relators' Ability to Pursue Qui Tam Claims, Government Contracts Update
- January 2007, New Department of Justice Guidance on Circumstances in Which Prosecutors Should Seek Access to Privileged Information Does Not Eliminate Many Concerns, Government Contracts Update
- September 7, 2006, Homeland Security Deskbook: Private Sector Impacts of the War Against Terrorism
- Fall 2006, Final SAFETY Act Rule Resolves Some Questions, Generates Others, and Creates Important Procurement Linkage to the SAFETY Act, *Procurement Lawyer*
- August 2006, Administrative Remedies: Contractors Should be Concerned With Losing More Than Just Dollars in a Civil Suit, Government Contracts Update
- May 12, 2006, Possible Changes on the Horizon for Berry Amendment, *Northern Virginia Technology Council B2G Committee Legal Updates*
- April 2006, Possible Changes on the Horizon for the Berry Amendment, Government Contracts Update
- April 2005, Former 8(A) Business Not Liable for Warranty and Upgrade Services, Government Contracts Update
- December 2004, SBA Issues Final Rules For Subcontracting Assistance Program, Government Contracts Update
- September 2004, Reliance on Government Estimates, Government Contracts Update
- May 2004, Critical Infrastructure Information Act, Government Contracts Update

## SPEAKING ENGAGEMENTS

- February 12, 2013, The Top Ten Federal Grant and Contract Pitfalls for Nonprofits
- October 11, 2012, "The New World of Debarment and Suspension Actions," WMACCA Government Contractors Forum
- September 30, 2012 - October 3, 2012, Association of Corporate Counsel (ACC) 2012 Annual Meeting
- September 13, 2012, "Ethics and Compliance for Federal Contractors in an Increasingly Scrutinizing World," NCMA Webinar
- August 9, 2012, "GSA Schedules: Federal Contracting Made Easy," NCMA Webinar
- March 19, 2012, "Ethics and Compliance for Small Businesses," Cyber Incubator at UMBC
- March 4, 2012 - March 6, 2012, International Restaurant and Foodservice Show of New York
- February 15, 2012, "What You Don't Know Can Hurt You – Compliance Basics in the New Age, and a Few Timeless Ideas" for the National Contract Management Association (NCMA)
- December 13, 2011, Legal Quick Hit: "Pitfalls for Nonprofits that Receive Federal Funds: Lessons Learned from ACORN" for the Association of Corporate Counsel's Nonprofit Organizations Committee

- June 7, 2011, "Ensuring Compliance with Small Business Set-Aside Requirements: Lessons for Small and Large Businesses" for SC&H Group
- December 7, 2010, "Ensuring Compliance in a Post-GTSA Environment: Lessons for Small and Large Businesses," hosted by Venable LLP
- July 14, 2009, Legal Quick Hit: "The Federal False Claims Act - What Does It Mean for Nonprofit Organizations?"
- September 4, 2008, National Contract Management Association, NOVA Chapter - Monthly Meeting
- January 17, 2008, National Contract Management Association: Greater Johnstown Chapter's Dinner Meeting
- November 1, 2007, Northern Virginia Chapter of the National Contract Management Association (NCMA)

Steven Steigleder has over 25 years' experience working in grants and contracts administration. He has served as Director of Grants & Contracts at the Institute of International Education since 2000 and was promoted to Deputy Vice President of Grants and Contracts in 2010 as the as the Institute grew in both size and complexity.

Prior to joining the Institute, Mr. Steigleder had over 14 years' experience serving in both financial management and grant management positions ensuring compliance with Federal regulations on a variety of large projects funded primarily by the United States Agency for International Development.

Mr. Steigleder holds an MBA in International Business from American University and a B.S in Business Administration from University of Richmond.

# **Additional Information**

## Articles

January 2013

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

Related Topic Area(s): Meeting, Vendor and Government Contracts, Miscellaneous

In January, there were some particularly important developments with respect to whistleblower protections in connection with federal grants and contracts, as well as Office of Management and Budget (“OMB”) information on the second fiscal cliff deadline and how executive agencies should begin preparing for the worst. Because of the importance of Foreign Corrupt Practices Act (“FCPA”) compliance, we also include information about FCPA compliance guidance issued late last year by the U.S. Department of Justice and Securities and Exchange Commission.

**New Whistleblower Protections** – Section 828 of the Fiscal Year 2013 National Defense Authorizations Act (“FY13 NDAA”) significantly expands employees’ protections from reprisal for disclosure of certain information relating to federal grants and contracts of all types (not just defense-related). Under this provision, an employee may not be discharged, demoted, or otherwise discriminated against for “disclosing information that the employee reasonably believes is evidence of gross mismanagement of a federal contract or grant, a gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to the public health or safety, or a violation of law, rule or regulation related to a federal contract (including competition for or negotiation of a contract) or grant.” Notably, these protections apply to grants as well as contracts, and the law is extremely broad and vague in what is considered information worthy of disclosure (e.g., what constitutes “gross mismanagement” or “gross waste”). The full text of the FY13 NDAA can be found by [clicking here](#).

**Fiscal Cliff Continued** – On January 14, 2013, the Deputy Director for Management at OMB issued a memorandum to all executive agency heads to take certain steps to plan for and manage the budgetary uncertainty that may ensue if the President and Congress do not prompt action to avoid sequestration. In particular, unless Congress acts to amend current law, the President is required to issue a sequestration order on March 1, 2013, canceling approximately \$85 billion in budgetary resources across the Federal Government. Further uncertainty is created by the expiration of the Continuing Appropriations Resolution, 2013 on March 27, 2013. Without a doubt, sequestration will affect federal grant and contract programs across the board. Some programs may feel significant belt tightening while others may be eliminated altogether. This memorandum can be found by [clicking here](#).

**FCPA Guidance** – In November 2012, the U.S. Department of Justice and Securities and Exchange Commission released “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” a detailed compilation of information about the FCPA, its provisions, and enforcement. This Guide provides information about a wide variety of topics, including who and what is covered by the FCPA’s anti-bribery and accounting provisions; the definition of a “foreign official;” what constitute proper and improper gifts; travel and entertainment expenses; the nature of facilitating payments; how successor liability applies in the merger and acquisition context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context. The Guide also provides unique insight into FCPA enforcement practices. The Guide can be found by [clicking here](#).

For more information, please contact [Dismas Locaria](#), [Melanie Jones Totman](#), [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.*

\* \* \* \* \*

**Related Information**

#### AUTHORS

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

#### RELATED PRACTICES

Government Contracts

#### RELATED INDUSTRIES

Nonprofit Organizations  
and Associations

#### ARCHIVES

2013 2009 2005  
2012 2008 2004  
2011 2007 2003  
2010 2006

**Federal Government Grants and Contracts: Key Requirements and Pitfalls for Nonprofit Recipients**

**Goldmines and Landmines – Fundamentals of Federal Grants Compliance**

**The Top Ten Federal Grant and Contract Pitfalls for Nonprofits** (event)

**Pitfalls for Nonprofits that Receive Federal Funds: Lessons Learned from ACORN** (presentation)

**Pitfalls for Nonprofits that Receive Federal Funds: Lessons Learned from ACORN** (article)

**Government Contractors Toolkit**

## Articles

January 10, 2012

### Pitfalls for Nonprofits that Receive Federal Funds: Lessons Learned from ACORN

Related Topic Area(s): Meeting, Vendor and Government Contracts

On the heels of an embezzlement scandal, in September 2009, allegations of voter registration fraud and other questionable behavior by employees of the Association of Community Organizations for Reform Now (“ACORN” or the “Organization”) surfaced following the release of several undercover videos. The alleged conduct of ACORN employees gained national attention, led to federal legislation prohibiting the distribution of federal funds to the Organization, and ultimately led to the Organization’s bankruptcy and dissolution in 2010. The downfall of ACORN serves as an important lesson to all nonprofit organizations.

#### ACORN and Its Downfall

Founded in 1970, ACORN, a tax-exempt nonprofit organization, was a collection of community-based organizations that advocated for low- and moderate-income families on issues ranging from affordable housing to neighborhood safety, as well as other social issues. At its peak, ACORN reportedly had over 500,000 members across more than 1,200 neighborhood chapters spread throughout more than 100 North and South American cities. As ACORN grew it was not without issues, especially in its later years, when its founder’s brother embezzled funds and allegations arose that the Organization allowed tax-deductible charitable contributions to be used for political purposes.

In the wake of the release of several videos in September 2009 that depicted conservative activists eliciting damaging responses from ACORN employees, a nationwide controversy erupted over, among other things, taxpayer funding of such an organization. Due to the groundswell of public sentiment and fueled by election-year politics, in a fiscal year 2010 appropriations bill, Congress prohibited the awarding of federal funds to ACORN and ACORN-related organizations. As it turned out, after Congress took action, the videos were discovered to have been “heavily edited,” and were ultimately discredited.

Not surprisingly, in the wake of the federal prohibition, grant money from state agencies and private donations dwindled. As a result, it took only a little more than year after the by-then discredited videos were made public for the Organization to file for bankruptcy, effectively shutting down the 40-year-old organization.

#### GAO’s Review of the Agency Response to the Defunding of ACORN

As part of the Consolidated Appropriations Act of 2010, Congress directed the Government Accountability Office (“GAO”) to conduct a review and issue a report on the federal funding to ACORN and related organizations. The GAO issued a preliminary report on June 14, 2010 that addressed three topics:

- . From fiscal years 2005 through 2009, how much funding did federal agencies award to ACORN or any potentially related organizations, and what was the purpose of the funding?
- . To what extent did federal agencies’ monitoring of ACORN or potentially related organizations’ use of federal funding detect issues identified by inspector general and internal audits?
- . What federal investigations or prosecutions were conducted of ACORN or potentially related organizations from fiscal years 2005 through 2009, and what were the nature and results of these investigations and prosecutions?

The GAO issued a final report in June 2011, which includes the final results of these objectives as well as results of a fourth objective, which Congress had subsequently requested – How have federal agencies subject to fiscal year 2010 provisions barring the distribution of appropriated funds to ACORN or its affiliates, subsidiaries, or allied organizations implemented those provisions?

#### AUTHORS

Jeffrey S. Tenenbaum  
Dismas Locaria

#### RELATED PRACTICES

Government Contracts

#### RELATED INDUSTRIES

Nonprofit Organizations and Associations

#### ARCHIVES

2013	2009	2005
2012	2008	2004
2011	2007	2003
2010	2006	

In sum, with respect to each topic, the GAO made the following findings:

Topic of Inquiry	Findings
From fiscal years 2005 through 2009, how much funding did federal agencies award to ACORN or any potentially related organizations, and what was the purpose of the funding?	During fiscal years 2005 through 2009, ACORN or potentially related organizations received more than \$44.6 million in federal grant funds, primarily for housing-related purposes. These funds were awarded by 17 federal agencies, most predominantly the U.S. Department of Housing and Urban Development, as well as the federally chartered nonprofit Neighborhood Reinvestment Corporation (a.k.a. NeighborWorks America). With respect to sub-awards during the fiscal years 2005 through 2009 time period, the GAO identified \$3.8 million awarded to ACORN or potentially related organizations. <sup>1</sup>
To what extent did federal agencies' monitoring of ACORN or potentially related organizations' use of federal funding detect issues identified by inspector general and internal audits?	The determination to monitor ACORN awards was primarily based on: 1) the award amount; and 2) the agency's available resources. The form of monitoring ranged from reviewing progress reports to conducting site visits. Agencies monitoring these awards generally did not detect issues identified by inspectors general or internal audits. <sup>2</sup>
What federal investigations or prosecutions were conducted of ACORN or potentially related organizations from fiscal years 2005 through 2009, and what were the nature and results of these investigations and prosecutions?	The allegations of voter registration fraud and wage violations resulted in 22 investigations carried out by three agencies – the U.S. Department of Justice (“DOJ”), the Federal Election Commission (“FEC”), and the U.S. Department of Labor (“DOL”). Most of the cases were closed without prosecution. The DOJ investigated eight matters and one case resulted in a guilty plea by eight defendants. The FEC investigated five matters and one case resulted in a conciliation agreement with a penalty. The DOL investigated eight wage and hour disputes and a delinquent reporting matter, all of which resulted in corrective action with applicable requirements.
How have federal agencies subject to fiscal year 2010 provisions barring the distribution of appropriated funds to ACORN or its affiliates, subsidiaries, or allied organizations implemented those provisions?	The fiscal year 2010 federal funding restriction of ACORN was applicable to 27 of the 31 federal agencies. Of the 27 agencies, each agency (all 27) took some measure of action to ensure compliance with the funding restriction. Most agencies alerted staff via email, written memoranda or oral communications. Some agencies alerted awardees of the restriction. Finally, two agencies – Housing and Urban Development and the National Science Foundation – provided employees with guidance on the restriction.

### Lessons Learned

While the ACORN matter involved just a few employees of a multi-national organization and a “sting” operation, the conduct of these individuals and the subsequent groundswell of public sentiment, coupled with the political climate, caused irreparable harm to the already embattled organization. Therefore, while a few employees do not speak for a nonprofit organization, in today’s around-the-clock news cycle environment, where each federal dollar is closely scrutinized, they can certainly lead to its demise. As a result, it is important for nonprofits funded, even in part, through taxpayer dollars to be mindful not only of inappropriate conduct and bad press, but the mechanisms available to the federal government to take action, and of course, the tools available to such organizations to mitigate such action.

In the past, the federal government primarily relied upon the Executive Branch’s prosecutorial powers to punish bad actors and unscrupulous organizations. However, the ACORN case is particularly telling as it shows Congress’s inclination to punish for perceived violations of law. This includes the severe action of imposing statutory funding restrictions, as well as consistent efforts to impose mandatory suspension/debarment actions for certain misconduct. As a result, nonprofit organizations need to prepare themselves for not only criminal and civil defense, as well as heightened congressional scrutiny.

No nonprofit is immune from individual employees making bad decisions. Organizations must prepare themselves to be able to address and mitigate governmental action on all fronts. Many nonprofits believe they are prepared or have adequately protected themselves after the fact by hiring well-known defense counsel. While experienced counsel can be useful, there is much an organization can do preemptively to curb misconduct and also assist and better enable the

organization's counsel to defend the organization should a situation arise.

Essential to every nonprofit organization should be an appropriate compliance and ethics program suitable to the size and sophistication of the organization. Often times, such programs may be viewed as cumbersome or burdensome, however, such programs can be creatively crafted to fit within existing practices or require only minor adjustments. At a minimum, these programs should include (to varying degrees of particularity and complexity depending on the organization):

- Documented policies and procedures, including codes of ethics and conduct, organizational conflict of interest policies, as well as appropriate program- and funding-specific policies and procedures;
- Training that educates and emphasizes employees on the organization's policies and procedures and to advise employees of who to contact with questions or concerns;
- Internal monitoring to ensure the organization's policies and procedures are effective in advising and assisting employees in conducting their business appropriately;
- Channels for employees and others to report potential issues;
- A crisis communication plan; and
- An individual appointed with overall responsibility for ensuring the adequacy of the compliance and ethics program, including ensuring that the policies, procedures, training and monitoring functions are adequate and to conduct and/or oversee investigations of potential issues.

Having a suitably tailored compliance and ethics program in place can help provide a nonprofit with a defense that it did as much as could reasonably be expected of the organization and that the organization itself, notwithstanding a few bad actors, is a reputable and responsible steward of taxpayer dollars.

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<sup>1</sup> While \$3.8 million is not insignificant, the GAO noted that the number was perhaps larger than that during the time period under review because agencies were not required to collect information on sub-awards until after October 1, 2010.

<sup>2</sup> In only one case was an issue discovered by an inspector general also detected by the agency's monitoring processes. In this case, the agency recommended ACORN for suspension and debarment.

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## Articles

December 2012

### Record Civil False Claims Act Recoveries: The Implications for Nonprofits

Related Topic Area(s): Antitrust and Trade Regulation, Miscellaneous

Nonprofit organizations featured prominently in cases leading to the U.S. Department of Justice's December 4, 2012 press conference announcing a record recovery in fiscal year 2012 of nearly \$5 billion in False Claims Act (FCA) settlements and judgments. The implications from this second straight year of "highest-ever" False Claims Act recapture of government money are clear: If you receive payments from the government, or make payments to it, you are subject to DOJ's greatly enhanced civil fraud recovery program.

In the four years ending September 30, 2012, Justice obtained \$13.3 billion through FCA cases, the largest four-year total in the Department's history. Acting Associate Attorney General Tony West emphasized that DOJ will continue to support the Civil Division's Fraud Unit and expand its partnerships with U.S. attorneys and other government agencies across the country. On this point, Principal Deputy Assistant Attorney General Stuart Delery underscored that civil fraud cases have a very human face; the Department is committed to protecting seniors, children, homeowners, parents, patients, and "our men and women in uniform."

With the government on the hunt for cost reductions, "fraud, waste and abuse" campaigns are standard. The two largest areas of recovery in FY 2012 – health care and housing and mortgage fraud – demonstrate this. For the first time in one year, health care fraud recoveries were over \$3 billion and housing fraud added \$1.4 billion to the total.

A large number of these recoveries involved nonprofit entities. These included organizations providing services to veterans' organizations, state-chartered development organizations, community and senior citizen service corporations, hospitals, and hospices.

Before turning to specific action items, two points jumped out at the press conference. The first is that \$3.3 billion of the \$5 billion in recoveries came from a record 647 whistleblower (or *qui tam*) suits brought by private citizens (with the whistleblower receiving up to 30% of the recovery). Every nonprofit engaged with the federal government should take this to heart. Repeated studies show that organizations that foster internal complaint resolution have fewer whistleblower cases. Rather than look at every employee as a possible agent of the U.S. Government, make sure that your organization's employees are comfortable raising questions, and particularly that they are protected from reprisals for reporting potentially improper actions.

The second is that both the number and size of Justice's False Claim Act cases continue to increase year after year. Fiscal year 2012 recoveries exceeded those for FY 2011 by \$1.7 billion. Announced recoveries through December 7, 2012 (the fiscal year started on October 1) exceed \$226 million. This does not include cases either still in the pipeline from last year or filed already this year.

In short, as the government's fiscal year begins and the calendar year winds down, now is the time to review your organization's internal controls to protect yourself from inquiries, particularly those that begin from within. These are the type of questions that your nonprofit should be asking:

. Does your organization have a well-structured program to ensure compliance with all grant or contract terms and conditions?

*Is the program in writing and reviewed annually?*

*Does your organization provide regular training to ensure that appropriate individuals know their responsibilities?*

*Depending on your size and number of agreements, does your internal and/or external audit include these internal controls in the audit programs?*

. Are you certain that all submissions and certifications made to the government (e.g., invoices, Byrd anti-lobbying certification, cost and pricing data, etc.) are correct?

. Is your code of conduct up to standard? Are reviews of the code and compliance with it part of an internal or

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external audit cycle?

Do your organization's policies and procedures encourage internal reporting of compliance concerns?

*Studies show that employees generally prefer to report concerns internally. However, if they fear reprisal or that their concerns are not taken seriously, they may be driven to seek whistleblower counsel or go directly to government investigators.*

*Employees want to be part of an organization that takes pride in doing the job right. Fostering effective internal communications encourages better compliance and pays dividends in every aspect of the organization's operations.*

As every grant holder or contractor knows, when a disaffected employee files a whistleblower action and an Inspector General representative or government auditor knocks on the door, it is too late to start asking these questions.

\* \* \* \* \*

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