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Federal Grant & Contract News for Nonprofits - May 2014

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As the end of fiscal year 2014 approaches and the beginning of fiscal year 2015 draws near, nonprofit organizations must begin to prepare for the implementation of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (commonly known as the "**Super Circular**"). As detailed in our prior newsletters, one of the Super Circular's seminal purposes is to curb waste, fraud, and abuse. To that end, the Super Circular seeks to strengthen oversight of federal awards by requiring that federal agencies and pass-through entities obtain disclosures of conflicts of interests from prospective recipients of federal funds. This guidance markedly differs from that of predecessor circulars, particular Circular A-110, in ways that have not been fully clarified.

Conflict of Interest Standards of Circular A-110

OMB Circular A-110 (Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations) requires organizations receiving federal funds to maintain a written code of conduct for its employees who engage in the performance of the work under a federal award. Within this code of conduct, the organization must include a proviso relating to conflicts of interest. Specifically, A-110 provides that:

No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved.

The A-110 Circular defines a conflict as arising when "the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award."

Further, with regard to competition, A-110 states:

The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements.

Notwithstanding this guidance, A-110 does not impose obligations on recipients of federal funds or contractors to affirmatively disclose the presence of potential conflicts of interest prior to receiving federal funds. Under the Super Circular, this standard will change. Similar to federal contracting requirements, recipients of federal awards and their contractors will be required to actively disclose potential conflicts of interest.

The Conflict of Interest Standards of the Super Circular

The Super Circular's conflicts of interest language imposes more stringent, yet more ambiguous, standards upon federal award recipients than A-110. In this regard, the Super Circular states:

The Federal awarding agency must establish conflict of interest policies for Federal awards. The non-Federal entity must disclose in writing any potential conflict of interest to the Federal awarding agency or pass-through entity in accordance with applicable Federal awarding agency policy.

2 C.F.R. § 200.112.

Unlike A-110, and despite the 99 definitions included in the Super Circular, the new law does not define a "conflict of interest." The law is unclear whether the definition from A-110 will persist, or if the definition of a conflict of interest will be up to the applicable agencies' determination. Moreover, the Super Circular does not state whether grantees must maintain a conflict of interest policy – again, leaving such requirements to agencies to determine. However, under the Super Circular, the law now requires grantees to make a risk assessment and provide written disclosure of potential conflicts of interest.

With this framework, the Super Circular fails to provide the uniformity that the OMB promised, and threatens increased costs to potential awardees with its ambiguity. A nonprofit grant recipient will be forced to adhere to the conflicts of interest policy requirements for each federal agency from which it receives funds, or, if such guidance is not given, will be subject to the whims of auditors and grant officers who will determine if grantees have met the amorphous legal requirements. Such a situation will undoubtedly create more confusion and inefficiencies, undermining the Super Circular's stated goal of transparency and efficiency in the federal grant market.

What Can Your Nonprofit Do to Prepare?

What can nonprofits do now to prepare for awards that will be subject to the Super Circular's new guidance?

- Examine your organization's code of conduct and policies with respect to conflicts of interest. Do you have a written policy? Does it cover both actual and potential conflicts of interest? Is your policy a personal conflicts of interest policy, or does it address organizational conflicts of interest as well? Are the policy's terms defined to avoid internal confusion? Are employees trained on the policy? Is the policy applicable beyond the organization's employees (e.g. board members, officers, committee members, agents, subrecipients, subcontractors)?
- Examine your awarding agencies' conflicts of interest policies. Do your policies conform to each agency's standards? Are there points of confusion with the agency's requirements? When agencies have more specific requirements or deviations from your policy, do you implement those requirements to the work under the award, or do you implement those changes organization-wide? Are your employees – particularly those in decision-making roles – trained to understand agency's requirements?
- Is the agency updating its conflicts of interest policies in light of the Super Circular? If so, at what stage in the process are the agency's new rules? Do you still have an opportunity to comment? If so, examine the proposed rule closely and seek further clarification where needed.

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