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Federal Grant & Contract News for Nonprofits - January 2014

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As 2013 came to a close, the Office of Management and Budget (OMB) issued the long-awaited final rule to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, more commonly known as the "**Super Circular**." Our **December newsletter** detailed many of the noteworthy changes embodied in the new Super Circular. However, OMB, through the Council on Financial Assistance Reform (COFAR), conducted an informational webinar on the Super Circular on January 27, 2014 to assist organizations in understanding the final rule.

Effective Date

COFAR illuminated an issue we raised in our December newsletter, namely what was meant by the Super Circular being "effective as of December 26, 2013 (the date it was issued in the Federal Register); however, in practice, Federal agencies have one year to implement the policies and procedures applicable to Federal awards by promulgating a regulation by December 26, 2014." COFAR explained that while the Super Circular took effect on December 26, 2013, Federal agencies have six months to submit draft implementing regulations to OMB, and non-Federal entities have until December 26, 2014, to comply and conform fully to the Super Circular.

Applicability to Particular Funding Vehicles

COFAR acknowledged and recognized that it would take time to fully implement the Super Circular. To this end, while the predecessor OMB Circulars have already been removed from the U.S. Government Printing Office's Electronic Code of Federal Regulations, the Super Circular's administrative requirements and cost principles will only apply to new awards and to additional funding (funding increments) to existing awards made after December 26, 2014.

General Interpretation

COFAR indicated that where the Super Circular states that entities "must" perform a certain task, entities are required to perform that task, whereas use of the word "should" designates a best practice or recommended approach.

Fixed-Amount Awards

The Super Circular reduces the requirements for fixed-amount awards in favor of **performance milestone measurements**. In these circumstances, the Federal government would not review the actual cost of the project, with "payments based on meeting specific requirements of the Federal award." However, grantees must seek prior government approval for significant changes to a project.

Efforts to Strengthen Oversight

COFAR explained that there were two notable improvements to strengthen oversight:

- *Conflicts of Interest* – The Super Circular requires non-Federal entities not only to maintain conflicts of interest policies as previously required, but also to **maintain written policies** on organizational conflicts of interest.
- *Mandatory Disclosures* – Similar to the 2008 amendment to the Federal Acquisition Regulation, the Super Circular now requires organizations with a Federal award to disclose, "in a timely manner" and in writing to the Federal awarding agency or pass-through entity, "all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award." The guidance specifically adds that an organization's failure to make required disclosures can result in a number of actions, including suspension and/or debarment.

Competition in Grants

Several provisions of the Super Circular are designed to foster increased competition for Federal grant funds. For example, the following are all designed to improve agency transparency, available information

to interested parties, and therefore greater competition for grants:

- *Public Notice for Grants* – The Circular requires public notice for **Federal financial assistance** and other **funding opportunities**.
- *Merit-Based Review of Proposals* – "The Federal awarding agency must design and execute a **merit review process** for applications," and that review process must be "described or incorporated by reference in the applicable funding opportunity."
- *Risk Analysis of Potential Grantees* – Federal awarding agencies must consult certain databases not only to determine the eligibility of potential grantees, but also to utilize a framework for **evaluating the risks** posed by certain applicants. Certain factors that agencies can consider in a risk-based analysis include financial stability, quality of management systems, the history of performance, audit findings, and the applicants' effectiveness in implementing statutory and regulatory requirements. Regardless of the criteria used, it "must be described in the announcement of funding opportunity."
- *Standardization of Information* – The Super Circular aims to standardize the Federal awarding process. For example:
 - The Super Circular requires Federal awarding agencies to seek OMB approval to authorize the collection of additional information from the **standard application requirements** approved and published by the OMB on its website.
 - The Super Circular **requires** each Federal award to include 15 uniform data sets in an effort to minimize the huge variation between Federal agencies in what information may have previously been included in a Federal award.

Internal Controls

COFAR highlighted the internal controls section of the Super Circular as "extremely important." The **streamlined requirements** were 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. COFAR noted that non-Federal entities would need to exercise judgment in crafting internal control mechanisms for their specific programs that were compliant.

Audits

As is well-documented, the Super Circular raises the threshold for compliance audits of entities that receive Federal award money from \$500,000 per fiscal year to \$750,000 per fiscal year. But perhaps more importantly, the Super Circular expresses a preference for "**cooperative audit resolution**," meaning that Federal agencies should focus on "current conditions and corrective action going forward" rather than punishing grantees for noncompliant actions taken years ago.

There is no doubt the Super Circular, from an organizational standpoint alone, is a welcome change to the previous patchwork of Circulars; however, the new regulation contains a number of important changes and nuances. We recommend that current and would-be recipients of Federal grant funds closely review the Super Circular and its requirements against their practices, and begin the process of planning, creating, and, ultimately, implementing the practices and controls necessary for compliance with the Super Circular going forward.

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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.