What Is a Certification Regarding Debarment and Why Am I Signing It?

By Anita Lichtblau, Esq., CAPLAW

Applicants for direct federal grants and subgrants are required to sign a document entitled "Certification Regarding Debarment ...." The federal government imposes this requirement in order to ensure that only "responsible" organizations and individuals do business with the government and receive and spend government grant funds. The certification may seem like just another one of the annoying, but relatively simple, requirements for receiving federal grant funds. But more may be required than simply signing the form, and because of the potentially serious consequences – disallowance of costs, termination of the grant, or debarment, for example – a closer look at what is actually required is warranted.

The principal rules are found in the Interim Final Guidance issued by the Office of Management and Budget in August 2005 (the OMB Guidance).[1] Individual federal agencies were required to implement these guidelines through regulations that adopt, and may expand upon, the OMB Guidance. For example, the U.S. Department of Health and Human Services issued its Final Rule on June 28, 2007.[2] Although the new HHS rules replaced the old suspension and debarment rules, which were found at 2 C.F.R. Part 76, only a few substantive changes appear to have been made, discussed below.[3]

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should determine whether the new member is independent and make appropriate adjustments to a master list.

Governance

The redesigned Form 990 places far greater emphasis on corporate governance than did its predecessor, as is evidenced by the questions regarding conflicts-of-interest, whistleblower, and document retention policies. Although these policies are not required, many organizations are likely to take the not-so-subtle hint that such policies should be put in place. Of particular note is one question that asks whether the board has reviewed the Form 990.

Compensation

Part VI of the Core Form asks whether an independent body determined compensation of key officials and whether comparables (data on compensation paid for similar services by comparable organizations under similar circumstances) were used. Part VII then provides a schedule where reportable compensation for officers, directors, key employees, and the five highest compensated employees (defined as employees who do not fall into one of the other categories, but who receive over $100,000 in reportable compensation) is to be reported. The proposed instructions, in defining who is a key employee, focus on an employee's control over a segment of the organization's operations. The proposed definition provides that someone must earn over $150,000 before they are considered a key employee.

As noted, Schedule J is also devoted to compensation, asking for additional details. This schedule will only be required of organizations that meet certain conditions. For example, Schedule J will be required of any organization that pays its executive director, or any officer, key employee, or highest compensated employee in excess of $150,000 per annum. That will mean providing more detailed information regarding compensation, as well as answering a series of questions regarding perquisites.

Program Accomplishments

The IRS has provided organizations with the opportunity to tell their story. The first question in Part I of the Core Form asks the CAA to briefly describe its mission and most significant activities. Page 2 requests the CAA to then describe what are termed exempt purpose achievements for its three largest program services. It is no coincidence that this information was placed toward the front of what will be a lengthy document. The IRS received comments urging it to give organizations the opportunity to tell their stories to the public and the media in a meaningful and positive way. Any organization that answers with a just a sentence or two will be ignoring an opportunity for positive self-promotion.

The Reality

Many have and will continue to complain that the redesigned Form 990 imposes unnecessary, but costly compliance burdens on tax-exempt organizations. No matter what side of this debate you are on, there is nothing anyone can do about it now. There is, however, one certainty: If a Head Start or an energy-assistance program in your state or community becomes embroiled in a scandal, some investigative reporter is going to pull your CAA's Form 990 once it is available. You need to start thinking now about what that form is going to say about your organization and whether you want what it says splashed across the front page of the newspaper for state officials, members of congressional appropriation committees, and grantmakers to read. Although the new form was designed to disclose information (and lots of it) without judgment, people will pass their own judgments based on what the form discloses. This is your organization's new public face.

Obtaining a Copy of the Revised Form

The redesigned Form 990 and the proposed instructions are available at **http://www.irs.gov/charities/index.html**. Make sure your printer has plenty of paper and ink before printing the form and instructions.

1 Jack Siegel is an attorney and CPA. He holds an LLM(Tax) from New York University and a Masters of Management from Northwestern University's Kellogg Graduate School of Business. He provides consulting services to nonprofits and boards, focusing on board and officer training, financial and governance issues, and special projects. Jack is the author of a Desktop Guide for Nonprofit Directors, Officers, and Advisors: Avoiding Trouble While Doing Good (Wiley 2006). He authors the Charity Governance blog (**http://www.charitygovernance.com**).

2 The intermediate sanctions are a comprehensive set of tax rules designed to assure that compensation paid to key employees and other insiders reflects a market rate of compensation. If the IRS determines that the compensation is excessive, it can force the recipient to return the excess to the organization and assess an excise tax equal to 25% of the excess on the recipient. Under these rules, there is a rebuttable presumption that the compensation is reasonable if certain procedures were followed in determining the amount and approving it. These rules apply to section 501(c)(3) and (c)(4) organizations.

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Certification Submitted by Federal Grantee or Applicant to Federal Agency

An applicant for a federal grant must include in its proposal package a certification that the applicant organization and its principals have not been excluded from doing business with the federal government, convicted of, or have charges pending against them for, certain crimes, or had a government grant or contract terminated for cause. Specifically, the applicant must certify that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding the proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in item (b) above; and

(d) Have not within the preceding three (3) years had one or more public transactions (Federal, State, or local) terminated for cause or default.

If the organization cannot certify to these statements, it must attach an explanation to the proposal.[4] The funding agency will then consider the explanation in determining whether to go forward with the grant.[5] The organization must also notify the funding agency if it subsequently learns of information inconsistent with the certification.[6]

Don't forget that the certification applies not only to the organization, but also to its "principals," which includes officers, members of the board of directors, owner(s), or other person(s) with management or supervisory responsibilities relating to the transaction. So, how can an organization assure itself that the certification is accurate? Presumably, the organization will know whether it has been excluded from doing business with the federal government. It can also search the website for the federal government's Excluded Party List System: **www.epls.gov**, to check whether either the organization or its principals have been excluded. Printing out and retaining the copy of the screen indicating that there are "no records" for the names searched is also recommended, although not required. The more difficult information to check is the answers to items (b), (c), and (d) above, in connection with criminal charges and terminations of transactions. An organization could ask board members and officers to sign a certification mirroring the certification signed by the organization and to notify the organization if information has become known or circumstances have changed between certifications so as to make any of the statements no longer true. The OMB Guidance leaves it up to the organization to determine the frequency by which it checks whether its principals are excluded or disqualified.[7] However, for an organization applying on an annual basis for numerous federal grants, a yearly certification is a good way to ensure compliance.

Lower Tier Requirements

Some of these requirements "flow down" from the direct federal grantee to individuals or organizations to whom the grantee awards subgrants or with whom the grantee does business under the federal grant; the resulting transactions are known as lower tier transactions. However, the requirements do not necessarily flow down to all lower tier transactions; only to those that are considered "covered transactions" as defined by the regulations. A federal grantee and each entity down the line that is involved in a "covered transaction" must verify that the individual or entity with whom it intends to do business, and its principals, are not excluded or disqualified.[8] Note that this requirement is narrower than the certification the grantee itself signs, which also addresses criminal convictions and terminations for cause of contracts with all levels of government.

Under the OMB Guidance, "covered transactions" include all subgrants awarded under the federal grant and all procurement transactions awarded under the federal grant itself, subgrants, and procurement contracts and subcontracts where the amount of the procurement transaction contract is expected to equal or exceed $25,000. All contracts under the grant for federally-required audit services are also covered, regardless of amount. However, some federal agencies, such as HHS, have chosen to expand the certification requirement by applying it to *all* procurement transactions under the grant and subgrants, not just those equaling or exceeding $25,000.[9] This is a change from the previous HHS regulations, which only applied to procurement contracts over $25,000 and to subcontracts over $100,000.[10] As a practical matter, although you could implement different policies for when you require certifications for subcontracts depending on the rules of the original federal funding agency, it may be easier to just go with the most stringent rules, i.e. require for all subcontracts or subgrants under the grant.

Federal grantees and subgrantees, as well as covered contractors under the grant, must include in all of their subgrants or covered procurement contracts a term or condition requiring compliance with the suspension and debarment rules (2 C.F.R. Part 180, as adopted by the federal funding agency), including a requirement that they include such language in all of the contracts for their lower tier covered transactions and verification that participants in those transactions are similarly not debarred or excluded. Many federal agencies, such as the Administration for Children and Families (ACF) within HHS, include language in the certification signed by the grantees that must be included in the contracts and solicitations for lower tier covered transactions. See **http://www.acf.hhs.gov/programs/ofs/grants/debar.htm**.

Recommended Compliance Steps

So, how does a federal grantee or subgrantee comply with the requirements? The most practical approach to ensure compliance is to take the following steps:

1. Collect copies of all debarment certifications that your organization has recently signed or will be required to submit with proposals.
2. Review these certifications to determine which federal agency's rules must be followed and to better understand what you are being asked to do.
3. If you have not already done so, search **www.epls.gov** for the names of all members of your board of directors, officers, and other persons with management or supervisory responsibilities relating to the grant. Retain copies of screens showing "no records" in records and, if necessary, investigate situations and notify federal agency where the website indicates there is an exclusion or disqualification.
4. If you have not already done so, ask the people identified in step number 3, above to sign certifications as to items (a) through (d) above. If they cannot so certify, ask for a written explanation.

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Retain the records for at least three years after close-out of the grant or termination of any ongoing investigation, audit, or proceedings in connection with the grant.

5. If any of the principals are unable to sign the certification, notify the funding agency.
6. In all subgrant agreements and procurement contracts under the federal grant, include language requiring compliance with the federal funding source's suspension and debarment regulations adopting the OMB Guidance. Also include in all solicitations, RFPs, etc., as well as agreements entered into in connection with those transactions, the appropriate certification for "Lower-tier Covered Transactions." Although the ACF certification does not require a signature separate from the proposal itself, in order to encourage reading of the document and its requirements, it is recommended that either a signature line be added, or that the certification be specifically referenced in the signed proposal or agreement.

1 *See* 2 C.F.R. Part 180.
2 *See* 2 C.F.R. Part 376 and 72 Fed. Reg. 35349 (June 28, 2007).
3 *See* 72 Fed. Reg. 9233-9235 (March 1, 2007).
4 2 C.F.R. § 180.335.
5 2 C.F.R. § 180.340.
6 2 C.F.R. § 180.350.
7 2 C.F.R. § 180.320.
8 2 C.F.R. § 180.300.
9 *See* 2 C.F.R. § 376.220.
10 *See* 45 C.F.R. § 76.220.

Community Action Program Legal Services, Inc.
CAPLAW
178 Tremont Street
10th Floor
Boston, MA 02111