



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-7000

SEP 23 2010

ASSISTANT SECRETARY FOR
COMMUNITY PLANNING AND DEVELOPMENT

MEMORANDUM FOR: All CPD Grantees

FROM: Mercedes Márquez, Assistant Secretary for Community
Planning and Development, D

SUBJECT: *Implementation of Section 418 of Division A of the Consolidated
Appropriations Act, 2010, Pub. L. 111-117, title IV, 123 Stat. 3034,
3112 (Dec. 16, 2009) -- Restrictions on HUD Funding for ACORN
and related entities*

This memorandum explains how HUD has implemented the above-captioned statute (hereinafter, "Section 418"). Section 418 provides in full: "None of the funds made available under this Act or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations." This restriction applies to HUD **and to all HUD grantees** that receive funds under the above-captioned appropriations act or any previous act. We are sharing this guidance with you to assist you in understanding and complying with Congress' restrictions on HUD funding to ACORN and related entities.

Background

On October 7, 2009, the Office of Management and Budget provided guidance to all Federal agencies regarding a predecessor and almost identically worded statute, Section 163 of the Continuing Appropriations Resolution, 2010, Division B of Pub. L. 111-68 (hereinafter, "Section 163"). A copy of that guidance document is attached as Attachment A. On October 23, 2009, at HUD's request, the Office of Legal Counsel issued further guidance on this topic. A copy of that guidance document is attached as Attachment B. Although these documents refer to Section 163, the legal considerations regarding Section 418 are identical, and the guidance provided in these two documents continues to apply to that section.

Questions have arisen as to whether particular organizations should be regarded as "affiliates, subsidiaries or allied organizations" of ACORN for purposes of Section 418. The above guidance documents do not resolve this question. Determinations regarding organizations that receive funds from HUD grantees must be made by the HUD grantee, not by HUD. Grantees must ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulations. 24 C.F.R. § 85.37. Grantees are responsible for managing the day-to-day operations of grant- and subgrant-supported activities, including monitoring to assure compliance with applicable Federal requirements. 24 C.F.R. §§ 84.51(a) and 85.40(a).

For example, HUD recently determined that Affordable Housing Centers of America ("AHCOPA") is not a subsidiary, affiliate, or allied organization of ACORN. HUD made this determination at the request of the entity in question and on the basis of a factual record, including affidavits and documentation, that clearly evidenced that, at the time of the determination, no such

relationship existed. This memorandum refers to that determination to illustrate the process by which grantees should make such determinations regarding their subrecipients.

Legal Questions In the AHCOA Determination

On January 27, 2010, AHCOA requested HUD to determine that it was not a subsidiary, affiliate, or allied organization of ACORN. It attached to this request copies of amended articles of incorporation and bylaws by which it had changed its name from ACORN Housing Corporation and had made other corporate changes. A few days later, HUD received a letter from AHCOA's general counsel, providing further information about AHCOA and making legal arguments relating to its status under section 418. Both letters expressly requested HUD to determine that section 418 did not bar AHCOA from Federal funding.

Upon reviewing these letters, HUD determined that it would need to resolve two initial legal questions. First, it would have to determine the meaning of the terms "subsidiaries," "affiliates," and "allied organizations." Second, it would need to consider the time frame at which the statutory prohibition was to apply.

The terms "subsidiaries" and "affiliates" have relatively clear meanings in the law. The term "subsidiary" means a corporation or other entity that is owned by a parent entity. The term "affiliate" ordinarily refers to entities that are connected by some form of common control. OMB's Government-wide debarment and suspension regulations define "affiliate" as follows: "Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both." 2 C.F.R. § 180.905. The same regulation offers five non-exclusive tests of affiliation: a) interlocking management or ownership; b) identity of interests among family members; c) shared facilities and equipment; d) common use of employees; and e) a business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person. As used in subsection e), the term "exclusion" or "excluded" means a person who is prohibited from participation in a covered transaction. 2 C.F.R. § 180.940. Thus, where a determination of eligibility is being made in the first instance, subsection e) does not apply. Unlike "subsidiary" and "affiliate," the term "allied organization" has no clear meaning in law. However, as HUD argued in defending the litigation brought against the Government by ACORN and two other entities: "Here, the terms 'affiliates' and 'allied organizations' appear next to 'subsidiaries' in a funding statute, suggesting that Congress intended to reach only those entities financially or organizationally intertwined with ACORN with respect to federal grants." *ACORN et al. v. United States of America, et al.*, U.S. District Court for the Eastern District of New York, 09-CV-4888, Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, 28. Accordingly, HUD decided that to fall afoul of section 418 an entity must be either i) owned by ACORN; ii) connected to ACORN by common or interlocking ownership or control; or iii) financially or organizationally intertwined with ACORN with respect to federal grants or contracts.

Except in circumstances not present here, the rules governing conduct are those in effect when the conduct takes place. See *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). The only conduct governed by section 418 is the decision by HUD or some other grantee or agency either to provide or not to provide Federal funding to a particular recipient. Therefore, HUD concluded that it should look to the relations between AHCOA and ACORN at the time it decided this question, and not to relations that may have existed at some earlier time.

Adequate Record

Any determination of eligibility or ineligibility under Section 418 must be made on the basis of an adequate record. This record can include both documentation and written representations. Written representations should be made under oath or under penalty of perjury by an officer of the entity requesting Federal funds (hereinafter the "requesting entity"), who certifies his authority to act on behalf of the entity. HUD sought information from AHCOA on the following topics:

- a) Ownership and management of the entity requesting Federal funds.
- b) Identity of all officers and directors and a statement regarding any business, familial, or employment ties between any officer or director and ACORN.
- c) All current contractual agreements between the requesting entity and ACORN.
- d) Identification of all debts, including contingent debts, loan guarantees, etc. owed by the requesting entity to ACORN or by ACORN to the requesting entity.
- e) Identification of any corporate resolutions, bylaw changes, etc. relating to ACORN.
- f) Statement as to whether any full- or part-time employee of the requesting entity is an employee of ACORN.
- g) Any facilities (lawyers, accountants, physical facilities, payroll service companies, etc.) shared by the requesting entity and ACORN.
- h) Statement as to whether the requesting entity employs ACORN as a subcontractor or subgrantee.
- i) Office address of the requesting entity. Is there an ACORN office at that location?
- j) Requesting entity should certify that it possesses no other information suggesting a business, joint venture, or affiliate relationship between itself and ACORN.

As the documents then in HUD's possession did not provide all of the required information, HUD sought further information and documentation. After some additional exchanges, HUD received what we considered to be an adequate and complete submission regarding the above subject areas on May 26, 2010. This submission was signed under penalty of perjury by the Executive Director of AHCOA.

In addition to the information provided in AHCOA's submissions, we had by that time also considered information in our possession as a result of our previous grant relationship with AHCOA, as well as filings made by the plaintiffs in the ACORN litigation. None of that further information contradicted the information or documentation provided by AHCOA. Based on this factual record, we were able to determine that section 418 did not prohibit AHCOA from receiving Federal funds.

As previously stated, this guidance is illustrative and is provided to you to assist with complying with the Act. If you have any questions or concerns, please contact your local CPD office.

Attachments