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DEBARMENT AND EXCLUSION: The Unintended Consequences of the "Defund ACORN Act"

Recently, in its effort to defund the Association of Community Organizations for Reform Now ("ACORN"), the House of Representatives moved toward creating a nightmare for government contractors, health care providers, pharmaceutical companies, and other grantees and recipients under government programs, as well as for the smooth functioning of both the federal and state governments. *See* H.R. 3221, § 602, 111th Cong. (2009). ACORN had been in the news for offering tax advice and other assistance to undercover individuals who clearly stated (on video tape) that they were in the business of importing under-age girls for illegal and immoral purposes, as well as other state and federal investigations of its funding and programs. Congress's response to the public outcry over federal funding of ACORN--through the Census Bureau, and indirectly through states and local organizations that get federal block grants--was swift and sure with respect to ACORN.

Unfortunately, the broad language in the bill would also have serious unintended consequences. Specifically, H.R. 3221 would completely defund a "covered organization" that had, among other things, "filed a fraudulent form with any Federal or State regulatory agency." While Congress is clearly trying to cut off federal funds to ACORN quickly and absolutely, this language could be read to cover not just ACORN, but all federal contractors, health care providers, pharmaceutical companies, and federal grantees of all types (local governments, colleges, and universities, etc.). The Senate has passed similar legislation without the specific troublesome language that is in the House bill. *See* S. Amdt. 2394, H.R. 2996, 111th Cong. (2009).

Broad Defunding Authority for Filing a Fraudulent Form

H.R. 3221's prohibitions are absolute and far reaching with respect to a "covered organization":

- No Federal contract, grant, or any other agreement may be awarded or entered into with the organization
- No Federal funds may be provided to the organization
- No Federal employee or contractor may promote the organization in any way

Under H.R. 3221, a "covered organization" is any organization that "has filed a fraudulent form with any Federal or State regulatory agency." Some have argued that the term "regulatory agency" limits the bill's impact to filings with "regulatory agencies" such as the SEC and EPA, as opposed to "nonregulatory agencies" such as the Departments of Defense and Health and Human

Services that widely distribute federal funds through contracts and programs. One commentator, Danielle Brian of the Project on Government Oversight ("POGO"), an organization that is wrong on almost every issue, believes the language could be read to cover all federal contractors and grantees. *See* POGO, *Majority of Top Contractors Could be Defunded by House Legislation* (Sept. 29, 2009), *available at* http://www.pogo.org/pogo-files/alerts/contract-oversight/co-ca-20090929-1.html#.

For perhaps the first time ever, the author believes Ms. Brian and POGO may have a point. The term "regulatory agency" is not defined in the bill. At a minimum, the concept extends to federal administrative agencies that create and enforce regulations in all areas of the economy, including the Environmental Protection Agency, the Securities and Exchange Commission, the Food and Drug Administration, and the Consumer Product Safety Commission, for example. State regulatory agencies are even more numerous, particularly for health care providers. Filing a fraudulent form with a "regulatory" agency--however the term is defined--apparently triggers defunding by *all* federal agencies, whether regulatory or nonregulatory, in absolute terms. The effect of this mandatory defunding is difficult to fathom or predict.

More importantly, the bill is unnecessary. Regulated entities, federal contractors, health care providers, and other grantees are already subject to orderly processes for evaluating federal funding decisions and awarding federal contracts and grants under such federal schemes as the procurement suspension and debarment process in the Federal Acquisition Regulation ("FAR"), the nonprocurement "Common Rule" on government-wide debarment and suspension, the exclusionary process under the Medicare and Medicaid programs, and other specific regulatory schemes. *See, e.g.,* FAR, Part 9.4 (procurement debarment, suspension, and ineligibility); Office of Management and Budget, 2 C.F.R. Parts 180 and 215.13 (nonprocurement debarment and suspension); 42 U.S.C. § 1320a-7(a) and (b) (2006) (implementing exclusion regulations at 42 C.F.R. §§ 1001 - 1003, 1005); Davis-Bacon Act, 40 U.S.C. §§ 3141-3147 (2006) (regulations at 29 C.F.R. Parts 1, 3, 5, 6, and 7). Even the Census Bureau was able to discontinue its association with ACORN without this legislation. Interfering with or circumventing these and other carefully crafted, specific federal regulatory processes would be an unnecessary, costly, and unintended consequence of the legislation that seeks to defund a group like ACORN that has become politically toxic.

The suspension, debarment, and exclusion processes are difficult and sometimes unfair. They provide, however, a sense of due process and fairness to companies, institutions, and individuals accused of defrauding the federal government or otherwise acting non-responsibly in conducting the government's affairs. The agencies, as part of this process, routinely negotiate and execute agreements (corporate integrity agreements in Medicare/Medicaid, nondebarment agreements in the procurement and grant world) which protect the government's interests, yet allow the company or institution to continue to operate.

Congress's interference with these well-established processes endangers both those who do the government's work (contractors and grantees), as well as the government itself. Beating up on ACORN is not worth it.

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