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NEWSLETTER

Got Grants? Public and Private Sector Federal Grant Recipients Not Immune to False Claims Act Liability

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Government Contracts Issue Update

As Wiley Rein continues to cover in depth, recipients of federal grants are increasingly facing investigations and lawsuits under the federal False Claims Act (FCA), 31 U.S.C. §§ 3729 – 3733. A range of entities—including public and private research universities, private companies, and even municipalities—have recently been targeted with FCA claims alleging violations in connection with obtaining or performing federal grants. With the United States Department of Justice (DOJ) and agency Inspectors General using the FCA's heavy hammer to enforce compliance with terms and conditions of federal grants, grantees should ensure that their training and internal controls are strong enough to deter and address any concerns about potential FCA violations. This article addresses the FCA in the context of two recent FCA cases against federal grantees, and provides practical tips for improving compliance and avoiding FCA exposure.

Practice Areas

Government Contracts

The FCA's Hammer: Potential Damages Equaling *Triple all Grant Funding*

The FCA is the primary tool for combatting fraud against the federal government. In FY 2016, DOJ recovered over $4.7 billion under the statute. The FCA prohibits a wide range of false and fraudulent representations that lead to improper receipt or retention of federal money. Courts have taken a broad view of what constitutes a "claim" and what it means for a claim to be "false." They have held that submissions to the Government which merely seek payment constitute "claims," even absent evidence that the Government was formally

billed in connection with the submission. They have also held that the FCA prohibits not only claims for payment that are factually false, but also those that are "legally false" in that the presenter, either expressly or impliedly represents false compliance with an obligation on which payment is conditioned. For this reason, FCA liability can stem from noncompliance with a host of contractual and regulatory provisions, and may not require conduct that approaches traditional notions of fraud. Moreover, the FCA implicates not only entities that receive federal money, but also those that do business with federal contractors and grantees; notably, downstream recipients of federal funds have recently been targeted with FCA suits where they submit false claims to a grantee or cause the grantee to submit false claims.

FCA exposure can be crippling. The statute provides for treble damages—triple the Government's loss—plus a penalty of up to $21,563 for each false claim. Courts have generally taken a broad view of the Government's "loss" in FCA cases, creating the potential for staggering financial liability that may bear little relation to the Government's actual loss. For example, in cases where the Government receives primarily "intangible" benefits rather than goods or services—which may frequently be the case under grant programs—the Government can seek as damages triple *the entire amount of the grant or contract funding*, in addition to penalties for each alleged false statement submission. And because the statute incentivizes whistleblowers to bring forward FCA claims, permitting private citizens and companies with nonpublic information about FCA violations to bring a case on behalf of the Government and receive between 15 and 30 percent of the Government's recovery, insiders are effectively deputized to root out perceived fraud or to make difficult allegations for settlement purposes.

Recent FCA Cases against Federal Grant Recipients

Recent FCA lawsuits and settlements announced in the past six months give a glimpse of the variety of entities and factual circumstances that are implicated by the FCA. Research universities, in particular, have been targeted. For instance, in September 2016, a former employee of Duke University's pulmonary division filed a whistleblower suit alleging that the University and former colleagues falsified data in research funded by the National Institutes of Health (NIH) and the Environmental Protection Agency. The complaint alleged that the defendants ignored red flags concerning the validity of the research and withheld knowledge of potential fraud in applying for further grants. Because the whistleblower alleges that the research funds were "ill-gotten," in that the defendants procured them through fraudulent representations in grant applications and other submissions, he sought damages based on more than $200 million in total grant funding, trebled, plus penalties.

Private companies that receive federal grants can also be FCA targets. In July 2016, two medical device companies and their owner faced a $4.5 million judgment for purported false statements in applications for NIH grants worth millions of dollars over eight years, along with false statements in grant reports concerning compliance with requirements on how the grant funds could be spent. In announcing the judgment, DOJ emphasized the Government's commitment to prosecuting FCA violations, including by grant recipients, stating that the U.S. Attorney's Office "will continue to vigorously pursue fraud against the Government, and will work to ensure that companies and their leaders who receive taxpayer dollars are truthful and accurate in their dealings with federal agencies like NIH."

Practical Tips for Monitoring Grant Compliance and Avoiding FCA Exposure

The Government's increased scrutiny of compliance with federal grant requirements demands that grant recipients or entities that do business with grantees have robust controls for monitoring expenditures and ensuring compliance with all grant conditions. Employees should be thoroughly trained on the risks and importance of compliance. Grantees should consider conducting regular audits in order to get ahead of any issues. Given how the FCA incentivizes whistleblowers, grantees should have fulsome procedures for internal reporting, including a hotline, and fully investigating concerns that emerge. Training and compliance can make the difference in preventing noncompliance, while fulsome investigations and remedial measures can help prevent compliance problems from turning into potential FCA allegations.