

FEDERAL RESEARCH UPDATE

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New False Claims Act Amendments May Change the Way Research Institutions Respond to Discovery of Overpayments on Their Federal Grants and Contracts

On May 20, 2009, President Obama signed legislation containing a number of significant amendments to the federal civil False Claims Act (FCA) and its whistleblower or *qui tam* provisions, 31 U.S.C. §§ 3729, *et seq.* These amendments, which are part of the Fraud Enforcement and Recovery Act of 2009, increase the reach of the FCA in several important ways, including at least one that may materially change how research institutions deal with cost charging problems that they discover in connection with their federal grants or contracts.

The new amendments make a number of changes to the substantive liability provisions of the FCA. These changes may be summarized briefly as follows:

- (1) Creation of new FCA liability for knowingly concealing or knowingly and improperly avoiding an obligation to pay money to the government, including an obligation arising from “the retention of any overpayment.” This potentially important provision will be discussed in more detail below.
- (2) Providing that FCA liability may attach where a false statement is “material to” a government payment of the claim and eliminating the statutory requirement that the statement was made “to get” the claim paid. This change is intended to overrule the Supreme Court’s decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008), which held that in order to establish liability under former subsections (a)(2) and (a)(3) of the FCA, the government or relator had to show that the defendant submitted the false claim *specifically intending* that the U.S. government itself pay the claim. 128 S.Ct. at 2128. Now, the government or relator must show only that the false claim or statement had “a natural tendency to influence” or was “capable of influencing” the payment of the claim. This change applies retrospectively to conduct pre-dating the enactment of the amendments.
- (3) Elimination of the “presentment clause” under former subsection (a)(1), which required proof that the false claim be presented to an officer or employee of the U.S. government. The limitation on liability now exists in the expanded definition of claim, which includes not only those claims made to the U.S. government, but also those made to a recipient of federal funds if the money or property provided to the recipient will “be spent or used on the government’s behalf or to advance a government program or interest,” and if the



government has provided or will reimburse the recipient for any portion of the money or property requested or demanded.

- (4) Expansion of the anti-retaliation provision to include claims brought not only by employees, but also by contractors or agents of the federal recipient, for any manner of discrimination “in the terms and conditions of employment” in response to that person’s efforts “to stop” violations of the FCA.

The amendments also make several procedural changes to the FCA, including:

- A provision allowing the government’s intervention in a *qui tam* action—including the government’s addition of new claims—to “relate back” for statute of limitations purposes to the filing date of the relator’s original complaint. This provision overrules a decision in *United States v. Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006).
- Expansion of the Civil Investigative Demands (CID) provision, granting the Department of Justice broad discretion to share information obtained through the CID process with other federal, state, and local government agencies and their contractors, and with any *qui tam* relator and his or her counsel and removing procedural hurdles to authorizing use of CIDs in investigating *qui tam* allegations.
- A provision allowing the government or *qui tam* relator to serve the complaint, other pleadings, or any other written disclosures, while they remain under seal, on state or local government authorities charged with investigating and prosecuting such actions where the state or local government is named as a co-plaintiff with the United States.
- A provision making these three procedural amendments applicable to cases pending on the date of enactment.

Of particular interest to federal research institutions is the provision making it a violation of the FCA to avoid or conceal an obligation to pay or transmit money to the federal government. In full text, the new provision states that any person who

knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable under the damages and penalty provisions of the FCA.

It may take years and many court decisions to clarify fully the meaning of this provision. Some are interpreting it to impose heightened disclosure and repayment obligations on federal grantees and contractors who come across evidence of possible overcharging in connection with their federal awards. Although the provision is often referred to as the “overpayments” provision, the wording of the provision extends not just to overpayments, but to any “obligation to pay or transmit money or property” to the federal government. “Obligation” is defined as

an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

These provisions raise several important unanswered questions, including the following:

1. What is an “overpayment”? It seems clear enough that an overpayment occurs when a federal agency makes a payment to a grantee or contractor in an amount that exceeds what the grantee or contractor requested. For example, an inadvertent government payment of \$50,000 on an invoice of only \$40,000 would almost certainly be considered an overpayment of \$10,000. The term could be read more broadly, however, to cover any instance in which a grantee or contractor receives a payment in excess of what it was entitled to receive. For example, if a university receives \$100,000 under a federal grant as reimbursement for costs allocable to the grant, and later learns that \$25,000 of those costs were not allowable or not allocable to the grant, has the university received an “overpayment” in the amount of \$25,000?
2. Does the existence of a government overpayment, without more, give rise to an “obligation to pay or transmit money or property” to the government?
3. How much or how little knowledge of an obligation must an institution have in order to be deemed to have “knowingly” concealed or improperly avoided the obligation? Must the institution have investigated the facts and determined with some degree of certainty that an overpayment has been made, and its amount? Or is the provision triggered by general knowledge that an overpayment in some amount may have occurred, or has probably occurred?
4. What conduct constitutes “concealment” of an obligation? Is a failure to disclose the obligation in itself a concealment? Does a failure to investigate constitute concealment? Or must there be some affirmative “covering up”? If an overpayment is corrected without a disclosure to the government, can the obligation still be deemed to have been concealed?
5. Liability for avoiding or decreasing an obligation exists only where a person has acted “knowingly and improperly.” What does “improperly” mean in this context?

One aspect of the legislative history of the overpayments provision is positive from the perspective of research institutions that receive federal funding through sponsoring agency “letters of credit.” The letter of credit process allows recipients to take cash drawdowns as needed to cover their estimated expenditures, with periodic (usually quarterly) transaction reports based on actual expenditures recorded in the accounting system of the institution. If drawdowns exceed actual expenditures in one quarter, an adjustment is made to reduce drawdowns accordingly in the following quarter. Until that adjustment is made, the recipient has technically received and retained an overpayment. However, a floor statement by Rep. Dan Maffei (D-NY) during the U.S. House of Representatives’ consideration of the amendments made it clear that the overpayments provision was not designed to “impose liability on a research institution or hospital for holding on to

overpayments at a time when the applicable rules would allow them to do so pending repayment through the normal process,” including reconciliation processes established under the “statutes, regulations and rules that govern . . . various research grants and programs.” A similar statement by Sen. Jon Kyl (R-AZ) made it clear that the word “improperly” was inserted in the new obligation provision to recognize that some overpayments, including those held in due course during the period before a government proscribed reconciliation, are properly held and should not be subject to liability.

It remains to be seen whether and to what extent the overpayments provision will affect research institutions’ response to their discovery of possible overcharges to their federal grants and contracts. It seems certain, however, that the provision will cause careful institutions to consider whether a failure to investigate possible overcharges, or a failure to correct or disclose them, might be viewed as a concealment or avoidance of a federal obligation under the newly amended FCA.

About the Federal Research Update

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ROBERT J. KENNEY, JR.
rjkenney@hhlaw.com
202.637.5707
Washington, D.C.

JONATHAN L. DIESENHAUS
jlsdiesenhaus@hhlaw.com
202.637.5416
Washington, D.C.

DEBORAH A. RAVIV
daraviv@hhlaw.com
202.637.6451
Washington, D.C.

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