The State of Federal Grants in 2017: A Look at Federal Grants Under the Trump Administration

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Learning Objectives

1. Current understanding of the federal-grant compliance and enforcement environment
2. The Trump Administration & Grants Policy/Enforcement
3. The primary remedies government uses against grantees for grant fraud and misconduct
4. Key grant-performance areas of risk
5. Case studies offering lessons learned about how to recognize and avoid committing grants-related fraud
Compliance and Enforcement Environment for Federal Grants
Compliance & Enforcement Environment for Federal Grants

• Federal grants are highly regulated

• Key oversight players
  • Awarding agency personnel
  • Agency inspectors general
  • Department of Justice (DOJ)
  • Law enforcement and criminal investigative services
  • Whistleblowers
  • Congress
  • The President?
Compliance & Enforcement Environment for Federal Grants (cont’d)

• Federal grants facing increased scrutiny on multiple fronts, increasing compliance and enforcement risks for grantors and grantees:
  • **Regulatory** – Super Circular requirements impose more “contract-like” requirements on grantees
  • **Administrative** – Agencies facing increased pressure to manage grants and control costs
  • **Responsibility** – Efforts to increase suspension and debarment of contractors has increased actions against grantees as well
Compliance & Enforcement Environment for Federal Grants (cont’d)

• Federal grants facing increased scrutiny on multiple fronts, increasing compliance and enforcement risks for grantors and grantees (cont’d):
  • **Trump Administration** – focus on “draining the swamp” and cutting allegedly duplicative/unnecessary programs
  • **Other Government Oversight** – Recent focus on grants by Offices of Inspector General (OIG) and the Government Accountability Office (GAO)
  • **Law Enforcement** – Civil and criminal fraud actions against grantees (and individuals) on the rise
  • **Private Whistleblowers** – Increased focus on fraud in connection with federal and state grant programs
Recent Developments and the Trump Administration
Grants Under the Trump Administration & Other Recent Developments

- **Mick Mulvaney – New Head of the Office of Budget and Management**
  - February 27, unveiled Trump Administration Budget “Plan”
  - $50 billion increase in defense spending
  - Equal cuts to non-defense spending
    - Proponent of outsourcing and attrition

- **ARPA-E**
  - Advanced Research Projects Agency-Energy
    - $1.5 billion to 580+ projects since first funding in 2009
    - Has OTA authority
  - Department of Energy facing serious cuts
    - Trump Transition Team Member “It’s unclear to me what purpose ARPA-E actually plays.”

- **Freeze on EPA Grants – Jan. 2017**
  - President Trump temporarily suspended all EPA grant awards shortly after taking office.
    - On January 27, the Acting EPA Administrator announced the lifting of the freeze on all grants.
    - According to the EPA, “nothing has been delayed,” including environmental program grants and state revolving loan fund grants to states and tribes.
    - Allegedly key word searches run (e.g. “green”) to identify potential programs to cut
  - EPA allegedly facing having its budget slashed by nearly 25% and a 20% reduction in staff.
Grants Under the Trump Administration & Other Recent Developments

- President’s Tweet re Withdrawal of Federal Funding from UC Berkeley – Feb. 2, 2017
  - Violent on-campus protests re an upcoming speech by Breitbart senior editor.
  - The following day, President threatens (via Twitter) to pull federal funding from Berkeley.
  - According to its 2015-16 budget summary, the 10-campus UC system receives over $2 billion in federal research funding and another $1.6 billion in federal aid for students.

- Sanctuary Cities Not Eligible for Grants – Jan. 25, 2017
  - Executive Order No. 13768
  - Attorney General and Secretary of Homeland Security required to ensure that sanctuary jurisdictions are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes.

- Medicaid Block Grants – TBD
  - Repeal and replacement of the Affordable Care Act is one of the new Administration’s priorities.
  - Advisors have stated that repeal and replacement of the Affordable Care Act will include converting federal funds for Medicaid into block grants to states.
Infrastructure Spending—Possibly Good News?

- President continues to take the position that he wants to increase defense spending while drastically cutting non-defense spending.
- At the same time, President continues to stick to his pledge to spend $1 trillion on the Nation’s infrastructure—How?

DOD (2016)

DOT (2016)
# Infrastructure Spending—FY 2017 v. FY 2018?

## Top Grant Awarding Agencies in FY 2017

1. Department of Health and Human Services $301,462,071,056
2. Social Security Administration $244,195,233,158
3. Department of Veterans Affairs $39,328,754,093
4. Department of Education $33,462,710,122
5. Department of Defense $32,852,252,769
6. Department of Agriculture $22,620,878,468
7. Department of Housing and Urban Development $15,788,523,131
8. Department of Energy $12,568,585,597
9. National Aeronautics and Space Administration $6,953,645,553
10. Department of Homeland Security $6,806,018,690

**Others in the Crosshairs:** USAID; State; EPA
Pre-Trump Administration Developments Impacting Grantees

  - Makes permanent pilot program in FY13 NDAA to prevent employer retaliation against employees of grantees who report waste, fraud, or abuse involving federal funds
  - Extends same protection to employees of personal services subgrantees working on civilian contracts
  - Precludes reimbursement of legal fees incurred by grantees to defend against whistleblower retaliation claims

- Universal Health Services v. United States ex. rel. Escobar—SCOTUS 2016
  - Confirmed validity of “implied certification” theory of liability under False Claims Act
    - Will discuss FCA in greater detail below
  - Many cases now interpreting decision—bottom line, potentially much more room for whistleblower/Government to assert violation of FCA.
Pre-Trump Administration Developments: DoD’s Proposed Supplements to the Super Circular

- DoD recently issued a set of six proposed rules to update the DoD Grant and Agreement Regulations ("DoDGAR"):  
  - DoD proposes to add a new part to the Code of Federal Regulations that would direct users to various regulations.
  - Proposed rule provides a standard format for organizing the content of DoD grant and cooperative agreement awards and modifications to those awards.
  - DoD proposes to add seven new DoDGARs sections which would address the organization and content included in general terms and conditions of DoD grants and cooperative agreements.
  - Proposed rule would add a new DoDGARs part that would provide consistent formatting and standard wording for the general terms and conditions related to national policy requirements that DoD includes in its grant and cooperative agreement awards.
  - Proposes to add a new DoDGARs part that would centrally define certain terms in an effort to clarify the regulations for DoD personnel as well as award recipients and auditors.
  - Proposes removing two existing DoDGARs parts and revising four others to conform them to the newly proposed parts as well as applicable statutes, regulations, or policies that have been issued, revised, or repealed since the last round of relevant DoDGARs revisions.
Remedies for Grant Misconduct and Fraud
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• Administrative remedies
  • Special conditions
  • Payment withholds and cost disallowances
  • Suspension
  • Termination

• Civil and criminal remedies
  • Exclusion
Administrative Remedies

• **Special Conditions**
  • Can be imposed because of recipient’s actual, impending, or reasonably predictable failure to comply with federal statutes, regulations, or terms and conditions of award
  • Can be imposed for a variety of reasons
    • Noncompliance
    • Misapplication of funding
    • Nonperformance
  • Recipient must receive notice of the special conditions, including the reason for the requirements and conditions to remove them
Administrative Remedies (cont’d)

• **Types of Special Conditions**
  • Payment by reimbursement (as opposed to advance payment)
  • Withholding approval to proceed with the next increment of an award
  • Requiring additional or more detailed financial, performance, or other reports
  • Requesting the recipient to obtain technical or management assistance
  • Subjecting the recipient to additional levels of prior approval
Administrative Remedies (cont’d)

• **Payment Withholds and Cost Disallowances**
  • Agency can take either step for noncompliance
  • Payments can be withheld pending more severe enforcement action by the awarding agency or by another federal government entity
  • Cost disallowances not necessarily tied to misconduct or fraud

• **Suspension of Award Performance**
  • Temporary withdrawal of funding pending corrective action or a decision to terminate the award
  • Can affect entire award or just part
  • Limits costs that can be charged to the grant during suspension period
Termination

- Drastic remedy typically reserved for material noncompliance(s) after one or more opportunities for corrective action
- Agency must take certain procedural steps before termination
  - Notice of pending termination
  - Opportunity to object and provide support
  - Advise recipient on import of termination on future awards
  - Entry into federal databases (i.e., FFATA, FAPIIS)
Civil and Criminal Remedies

• The False Claims Act (FCA) is the Government’s primary civil tool for prosecuting perceived fraud
  • In the fiscal year ending September 30, 2014, DOJ recovered nearly $6 billion in settlements and judgments in civil cases involving fraud against the Government
    • $2.3 billion in recoveries related to health care fraud in FY2014
  • Grants (and grantees) increasingly becoming the target of FCA actions
• Violators can be prosecuted criminally as well
The False Claims Act Basics

• Prohibits (among other things):
  • Knowingly presenting or causing another to present a false or fraudulent claim for payment or approval; or
  • Knowingly making a false record or statement material to a false claim; or
  • Knowingly making a false record or statement material to an obligation to pay money to the Government, or knowingly concealing an obligation to pay money to the Government
• *Viability of implied certification theory pending before SCOTUS
The FCA does not require a specific intent to defraud
• “Knowledge” can be actual knowledge of the falsity or deliberate ignorance or reckless disregard of the truth or falsity of information
• Mistake v. gross negligence v. criminal fraud
• FCA amendments in 2009 significantly broadened scope of liability
  • False statement need only be “material to” government payment
  • Elimination of the “presentment clause”
  • Retention of overpayments
Qui Tam / Whistleblower FCA Actions

• A private person, known as a *qui tam* plaintiff, relator, or whistleblower, may bring a lawsuit alleging fraud on behalf of the Government
  • Allegations remain under seal while the Government investigates - no notice to defendant or public
  • Government has 60 days to decide whether to intervene and take over case, but routinely receives multiple extensions from courts
• Incentive to blow whistle - private person can receive up to 30% of Government’s recovery
• *Qui tam* relators are often employees or, increasingly, competitors
Potential Consequences of FCA Actions

- Administrative recoveries of funds
- Civil lawsuits
  - Government can recover three times actual damages, where damages equal up to the value of the grant
  - Government can seek penalties from $5,500 to $11,000 per false claim
- Criminal prosecution
- Exclusion (i.e., suspension/debarment)
- A combination of some or all of these remedies
Exclusion

- Agency can exclude recipient from all “covered transactions” for lack of “present responsibility”
  - Variety of specifically-identified causes, including a conviction or indictment for fraud/criminal offense
  - Also any “offense indicating a lack of business integrity or business honesty that seriously affects present responsibility”
- Suspension (temporary) v. debarment (permanent)
- Strict due process requirements that agencies must follow
- Pressure on agencies to increase exclusions of “bad actors”
Case Studies of Grant Fraud
Grant Fraud Case Studies

- Given the seemingly ever-growing amount of monies awarded by the Federal Government in the form of grants, there has recently been a significant increase in Federal oversight of the how grant monies are awarded and used.

- This uptick in oversight is driven by various OIGs (HHS for example), GAO, Suspension & Debarment Officials, and DOJ.

- Increased DOJ scrutiny is the most worrisome for grantees given the rise in prosecutions of grant related False Claims Act cases in recent years.

- **Attorney General Sessions has promised to keep FCA enforcement a top priority.**
Fraud Risk Areas Throughout the Grants Life Cycle

• False statements in grant applications and proposals
• Noncompliance with special terms and conditions
• Misuse/misallocation of funds
• Inaccurate reporting
• Inadequate sub-recipient monitoring
• Failure to accurately track time and costs
Recent Case Studies: False Statements in Grant Applications & Proposals

- In February 2016, an astrophysicist paid $180,000 and entered into a deferred criminal prosecution for failing to disclose on a grant application that, in addition to working at his private company, he was employed full-time at a university. The scientist also understated how many other grants and competing time commitments he had with other federal agencies.

- In the summer of 2015, a children’s hospital had to pay $12.9 million to settle allegations that it misreported its available bed count on an application for a grant from the U.S. Department of Health and Human Services (HHS) to fund pediatric residents training at the hospital. The misstatement was brought to the Government’s attention by a hospital employee whose responsibilities included regulatory analysis and compliance. The employee received almost $2 million from the settlement.
Recent Case Studies: False Statements in Grant Applications & Proposals (cont.)

• In 2015, Education Management Corp. (EDMC), which operates the Art Institutes, South University, Argosy University, and Brown-Mackie College, paid $95.5 million to settle FCA allegations that it falsely certified compliance with Title IV and parallel state statutes in order to be eligible to receive federal grant and loan dollars. EDMC was alleged to have unlawfully recruited students by paying admissions personnel solely based on the number of enrolled students in violation of HEA’s Incentive Compensation Ban, which prohibits schools from paying recruiters based on their success in securing enrollments.
Recent Case Studies: False Reporting

- Recently, an Ivy League university paid $9 million to resolve concerns that it had not verified whether salary and wage charges were based on an employee’s actual effort for that grant. To manage the multiple federal, state, and private grants funding the work it was doing, the university allegedly developed a system where its finance department created reports that allocated its employees’ time across the many grants. The principal investigators on the grant then allegedly certified large batches of the reports as correct without inquiring with the employees who performed the work whether the time reports were accurate. The batch timekeeping system led to mischarging among federal, state, and private grants.

- In October 2016, the Eight Circuit determined that Heritage College, a for-profit health care training college, made false statements to the government when it altered student grade and attendance records to influence the Department of Education’s decision to provide approximately $32.8 million in federal financial aid to Heritage students between 2009 to 2012.

- In February 2016, Jackson State University agreed to pay $1.17 million to settle allegations that it violated the FCA by submitting claims and expending funds under its NSF grants between June 2006 and September 2011, impliedly certifying that each claim was allowable and properly recorded. In reality, the university had made expenditures that were unallowable or lacked sufficient supporting documentation and some university employees fabricated time and effort reports in anticipation of an audit.
Other Recent Examples of Fraud in the News (and the Courts....)

**Misrepresenting a project’s status to continue receiving government funds**
- In November 2015, a former Duke University pulmonary division employee filed a FCA complaint against the university, alleging the university had falsified data in research funded by the National Institutes of Health and the Environmental Protection Agency. The falsifications were allegedly made to obtain 60 research grants totaling $200 million in government funding, according to the complaint.

**Misuse/Misallocation of Funds**
- In early 2016, a children’s charitable organization was forced to pay $1.6 million to settle a False Claims Act investigation after an audit by the Inspector General revealed the organization had commingled grant funds with its general operating funds.
- In July 2016, the chief financial officer of an Alabama nonprofit health clinic for the poor and homeless was sentenced to 17 years in prison and required to forfeit nearly $2 million for her role in committing fraud against the federal government by siphoning federal grant money awarded to participating clinics.

**Charging personal expenses as business expenses against the grant**
- In *U.S. ex rel. Theis v. Northwestern Univ. et al.*, No. 1:09-cv-01943 (N.D. Ill.), a university researcher allegedly billed federal grants awarded for cancer research for family trips, meals and hotels for himself and friends, and “consulting fees” for unqualified friends and family members, including his brother and cousin.
Other Recent Examples of Fraud in the News (and the Courts....) (cont.)

**Use of funds for unauthorized purposes**
- In *U.S. v. Tech. Research and Dev. Auth.*, No. 1:12-cv-00065-LG-JMR (S.D Miss.), the construction of an office building was outside the scope of NASA grants awarded to TRDA and contrary to the terms of the EDA grant awarded jointly to TRDA and the airport authority, which prohibited combining funds from more than one federal agency for the project.

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**Failure to accurately track time & costs**
- In November 2015, the University of Florida paid almost $20 million to settle allegations that it violated the False Claims Act. The Government alleged that the university did not have documentation to back up the level of effort claimed by hundreds of employees on the grants and that the university charged some of the grants for administrative costs for equipment and supplies that should not have been direct charges.
Risk Mitigation for Grant Misconduct and Fraud

• Implement robust training and compliance programs
• Create checks and balances between sales, operations, and billing
• Scrutinize billings, certifications, and other submissions
• Seek and document Government approval of actions
• Perform due diligence on employees and subcontractors
• Flow down requirements to subrecipients
• Maintain all records of all expenditures
• Undertake a reasonable investigation in the face of any billing concerns
• Identify a senior officer for compliance and internal investigations
• Get counsel involved early
• Promote internal reporting channels, including hotline
• Take internal complaints seriously and follow up
• Don’t take Government inquiries/investigations lightly
Questions

• To ask a question **online:**
  • Use the Q&A option in the chat box on the lower left side of your screen.

• To ask a question via **telephone:**
  • Press *1 on your touchtone phone.
  • If you are using a speaker phone, please lift the receiver and then press *1.
  • If you would like to withdraw your question, press *1.
Follow-Up Questions

If you have any remaining questions after the conclusion of today’s webinar please do not hesitate to get in touch.

Ask our webinar producer: mbarnes@columbiabooks.com

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