CARLTON FIELDS

# Whistleblowers on Campus: DOJ Adds Research Universities to its False Claims Act Focus

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Federal funding is the grand prize for higher education research institutions. Each year, the federal government pumps hundreds of millions of dollars in research grants and awards into the university system. These funds are intended to help cure disease, develop technology, and advance the public good. They also attract the unscrupulous. While hard figures are difficult to obtain, publicly-announced settlements have demonstrated that whistleblower claims put hundreds of millions of university dollars at risk. Whistleblowers, whether right or wrong, seek their own cut of any award the government wins, and any penalties it imposes when clawing back fraudulent monies. The claims center on improprieties in the applications for the grant money and misuse after it is received. As discussed below, recent cases have awarded staggering amounts. **False Claims Act Overview** The False Claims Act, 31 U.S.C. §§ 3729-33, (FCA) prohibits the submission of false or fraudulent claims to the government. The statute imposes civil liability for knowingly (1) submitting a false or fraudulent claim for payment; (2) causing such a claim to be submitted for payment; (3) making, using, or causing to make or use a false record or statement material to a false or fraudulent claim; (4) conspiring to get such a claim paid or approved; or (5) making a false record or statement to conceal or avoid an obligation to pay

money to the government. The FCA allows an individual, known as a "relator," to bring a civil action on behalf of the United States under the Act's whistleblower, or *qui tam*, provisions. A relator files the complaint under seal in a federal district court and serves the government with a copy of the complaint, as well as a written statement of all material evidence supporting the allegations. The complaint may remain sealed for 60 days while the government investigates the allegations. This seal is frequently extended for months or years before the case proceeds. Prior to unsealing the complaint, the government notifies the relator and the court of whether it will become formally involved, or "intervene," in the case. If the government intervenes, the relator generally receives 15 to 25 percent of the government's recovery in the event of settlement or judgment in favor of the United States. If the government declines to intervene, the relator may independently proceed with the action and may receive 25 to 30 percent of any recovery. In addition, the relator is entitled to a separate award for reasonable attorney's fees and costs. **Recent Cases** FCA cases related to health care and defense contractor fraud commonly make news. The caselaw in these two areas is widely developed, and the Department of Justice (DOJ) has well-trained teams that police the public treasury. Meanwhile, research-university false claims are emerging as an area of interest for the DOJ, which is still finding its voice and mission on the FCA. These universities should understand the risk posed by this growing area of the law. Recent cases involve two general categories of claims: university liability based on a false certification of compliance with the applicable rules and restrictions placed on receiving taxpayer money; and misuse of federal funds. 1. False certification claims. Education Management Corp. – In 2015, the DOJ announced a $95.5 million settlement with EMC over allegations that it falsely certified compliance with Title IX of the Higher Education Act and related state statutes. The government claimed EMC pressured admissions personnel to violate the law by unlawfully compensating them based on the number of students they enrolled in the nationwide system of post-secondary schools operating under the EMC brand. Those schools included Art Institutes, South University, Argosy University and Brown-Mackie College. At its peak, EMC's system-wide enrollment surpassed 100,000. The government claimed EMC engaged in false certification as part of its effort to boost its main source of revenue — federal and state student aid dollars awarded to the school. Phoenix University – Similarly, a 2009 whistleblower action resulted in a $78.5 million settlement with Phoenix University to resolve FCA claims based on allegations that the university had provided false certifications of compliance with the Higher Education Act. Here again, the alleged motivation centered on financial incentives given to recruiters to drive up university enrollment. 2. Misuse of government funds. Duke University – In 2013, the university became the focus of government scrutiny after learning that a research professor had falsified research data as part of federally-funded studies. The whistleblower in the case, a former research colleague of the professor, brought the claims alleging that the university had been confronted with red flags concerning the integrity of the research results, but took no action to correct the situation. All the while, the whistleblower claims, research dollars surpassing $80 million continued to flow in. The university denies the claims and contends that it did not understand the scope of the professor's misconduct. When it did learn of the claims, it took corrective action, and provided its own notice to the government. Litigation continues. Regardless of the outcome, the university's efforts to

investigate and defend these claims will be costly. University of Florida – In 2015, the DOJ announced a $19.875 million settlement with the University of Florida following claims that the university improperly charged the U.S. Department of Health and Human Services for salary and administrative costs on federal grants. The claims centered on the process used to pay for university equipment and personnel, and whether the use of federal dollars for such expenses complied with grant purposes. **Compliance and Response** Maintaining a culture of compliance is key to minimizing FCA exposure. Effective compliance efforts may (1) reduce activity that could potentially be alleged in an FCA suit; and (2) hinder a relator's ability to prove the FCA's knowledge requirement. Effective compliance policies and procedures include processes that assist in the discovery, investigation, and remediation of improper activity. Upon discovery of a potential FCA violation, time is critical in responding to the issue and marshalling the facts so a complete investigation can be done and remedial actions taken. Additional compliance efforts include offering regular compliance training at all levels of the university, as well as instituting compliance audits and tracking the representations made to the government through certification statements. Finally, having a well-documented whistleblower policy, and a neutral, independent reporting line for investigations into such complaints can catch problems as they occur, rather than when federal investigators are at the door. Such a policy can also help insulate a university from the worst penalties and consequences of such false claims. **Conclusion** Federal awards to universities are critical to funding their missions. These mission-critical dollars, however, often come with many strings attached. The FCA is, and will remain, one of the government's most powerful tools for enforcing the myriad rules and regulations imposed on those who accept government funding. A robust compliance program that tracks certification and compliance, and plans for a response in the wake of an FCA violation, is critical for any university that accepts government dollars.

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