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Universities Are Prime Targets for False Claims Act Liability

By Thomas J. Finn and Paula Cruz Cedillo*

Institutions of higher education are increasingly susceptible to False Claims Act liability for misuse of federal funds or for having made misrepresentations to the government to obtain those funds in the first place. The authors of this article discuss the rise in these allegations and offer practical tips for colleges and universities.

Colleges and universities receive billions of dollars in federal funds, whether through research grants or student financial aid, or even by billing Medicare or Medicaid for services rendered at academic medical centers. As a result, institutions of higher education must be vigilant to ensure that their receipt of federal funding does not implicate the broad scope of the civil False Claims Act ("FCA"), a federal statute that seeks to combat fraud against the government. Those found liable of violating the FCA by submitting false claims to the government face treble damages and penalties ranging from $10,781 to $21,563 *per violation*. In recent years, there has been an unprecedented and steady rise in the number and types of cases brought under the FCA. In 2016, the U.S. Department of Justice ("DOJ") recovered more than $4.7 *billion* in settlements and judgments from civil cases involving fraud against the government under the FCA, a $1.2 billion increase over the $3.5 billion recouped last year in 2015.

RISE IN FCA ALLEGATIONS

Although the FCA's long history has primarily involved allegations concerning the government's payment of purportedly fraudulent health care claims or military expenditures, educational institutions are increasingly finding themselves on the receiving end of FCA complaints. The DOJ's targeting of colleges and universities seems to be largely the byproduct of the many billions of dollars in government spending associated with federal loan programs, federal research grants, and student financial aid vehicles such as Federal Pell Grants and other loans provided for under Title IV of the Higher Education Act of 1965 ("HEA"), all of which are critical to any institution's ability to attract and enroll students.

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A few recent examples of the FCA's potential impact on the higher education community are as follows:

- Last year, the University of Missouri-Columbia agreed to pay $2.2 million to settle allegations that it submitted false claims to Medicare for payment of radiology services in violation of the FCA. The university was alleged to have falsely certified that interpretive reports prepared by resident physicians were reviewed by attending physicians, which review was required in order to be eligible for Medicare payment.
- Just last year, the University of Florida agreed to pay the government nearly $20 million just to settle FCA allegations that it improperly charged the U.S. Department of Health and Human Services ("HHS") for salary and administrative costs in connection with hundreds of federal grants. The settlement resolved claims against the university for its alleged misuse of funds from 2005 through 2010 that, according to the university, resulted from a problem in its internal bookkeeping system used to track grant reimbursements.
- 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.
- In 2014, Duke University Health System, Inc., paid the government $1 million to settle an FCA suit alleging that Duke fraudulently billed Medicare, Medicaid, and TRICARE for certain services performed by physician assistants that were disallowed under the programs, and that it increased billing by improperly unbundling claims.
- In 2012, Cornell University Medical College was found to have violated the FCA, resulting in a multimillion-dollar judgment. In that case, Cornell applied for and obtained funding from the National Institutes of Health ("NIH") federal grant program for a research fellowship program to train doctoral fellows. Positions funded through the grant were not to be used for study leading to clinically oriented degrees, and an annual renewal application and progress report were required to be submitted to renew the grant and to provide notification of any developments of significant impact on the research program. A

jury determined that Cornell violated the FCA by making false statements in connection with its renewal applications based on evidence that Cornell's program focused on clinical work rather than research. As a result, Cornell was liable for damages in the full amount of grant money it was awarded based on its false statements.

INCREASED SUSCEPTIBILITY TO FCA CLAIMS

In addition to the foregoing, colleges and universities should be particularly concerned by the U.S. Supreme Court's recent decision in *Universal Health Services, Inc. v. U.S. ex rel. Escobar*—through which it confirmed the validity of the implied false certification theory of FCA liability. Under the Court's ruling in *Escobar*, it is now clear that a viable FCA claim exists if a college or university submits a claim for payment to the government without disclosing violations of statutory, regulatory, or contractual requirements affecting eligibility for payment while acting in a way that implies compliance with those requirements. This decision ensures that institutions of higher education will continue to be subject to FCA allegations for fraudulent claims made in connection with their receipt of federal funds, even when the purported misrepresentations do not concern an express condition of payment.

OBSERVATIONS AND PRACTICAL TIPS

Institutions of higher education are increasingly susceptible to FCA liability for misuse of federal funds or for having made misrepresentations to the government to obtain those funds in the first place. Colleges and universities should be cognizant of the potential for FCA violations and be vigilant about addressing, managing, and correcting any concerns should they arise.

Effective internal policies and self-imposed scrutiny by universities are critical to ensure proper oversight and use of federal funds. Reporting procedures, routine internal audits, and employee hotlines may all serve to flag potential improprieties or identify noncompliance with federal regulations.

Appropriately responding to suspected or possible FCA violations is of key importance. An internal investigation into potential issues is a critical step in proper protocol because it will help determine whether a problem exists and, if one does, it will help minimize and deal with the issue. A properly conducted internal investigation can also be interpreted favorably by the government, as it demonstrates that the college or university is taking the allegations seriously, and can be used to mitigate the potential damage and liability that could arise from a violation.