

# Fraud and Federal Grants: Enforcement Update

**Kathy S. Ghiladi**

**Mindy B. Pava**

**FELDESMAN TUCKER LEIFER FIDELL LLP**

November 18, 2022

# PRESENTER: KATHY S. GHILADI



## Contact Information

[KGhiladi@ftlf.com](mailto:KGhiladi@ftlf.com)

(202) 466-8960

- Kathy Ghiladi handles such matters as Federal and State bid protests on behalf of prospective Government grantees and contractors and advises grant recipients of a wide variety of Federal and State grant funds concerning compliance with grant requirements, cost accounting issues, and cost disallowances.
- She also assists clients with matters concerning grant/contract interpretation, negotiation, and subrecipient monitoring.
- She represents federal grant recipients in Government investigations and audits as well as in debarment and suspension proceedings.
- Her practice also focuses on nonprofit Board governance issues and advising nonprofits during sensitive times such as CEO transitions, investigations, and audits.

# PRESENTER: MINDY B. PAVA



## Contact Information:

[MPava@ftlf.com](mailto:MPava@ftlf.com)

(202) 466-8960

- Counsel in the firm's Litigation and Investigations, Federal Grants and Health Care and Education practice groups.
- Mindy's practice focuses on helping federal grantees as they navigate all facets of agency and/or judicial review. She is a seasoned litigator who represents federal grant recipients, including health centers and research institutions, when dispute resolution needs arise.
- In addition to Mindy's work in federal and state courts, she represents organizations in responding to civil investigative demands and subpoenas. Mindy also advises clients on how to mitigate compliance risk through internal investigations.
- Mindy is well-versed in complex litigation defense (including class actions), e-discovery, and trial work. Prior to joining Feldesman Tucker, she served as a senior associate at a large national law firm in its litigation practice group.
- Mindy enjoys sifting through relevant facts and preparing witnesses for depositions and/or interviews. Prior to attending law school, she worked as a newspaper reporter where she covered education issues at the local and statewide level.

# DISCLAIMER

---

These materials have been prepared by the attorneys of Feldesman Tucker Leifer Fidell LLP. The opinions expressed in these materials are solely their views and not necessarily the views of Feldesman Tucker Leifer Fidell LLP.

The materials are being issued with the understanding that the authors are not engaged in rendering legal or other professional services. If legal assistance or other expert assistance is required, the services of a competent professional with knowledge of your specific circumstances should be sought.

# COPYRIGHT NOTICE OF ORIGINAL MATERIALS

---

- These slides are being made available to you and your organization as a participant of an FTLF training program. You are ONLY permitted to duplicate, reproduce and/or distribute these materials within your organization.
- Note: a membership organization may not consider its members to be “within the organization” for purposes of sharing materials.
- These slides may not be otherwise photocopied, reproduced, duplicated, and/or distributed outside your organization and/or posted on a website without prior written permission from the authors.
- Any other use or disclosure is a violation of federal copyright law and is punishable by the imposition of substantial fines.
- Copyright is claimed in all original material, including but not limited to these slides and other resources or handouts provided in connection to this training, exclusive of any materials from federal laws and regulations and any documents published by the federal government.

# AGENDA: OUR ROADMAP FOR TODAY

---

## **1. The Cast of Characters: Who's Who in Federal Grant Fraud Enforcement**

## **2. Stories of Grantee Compliance and Noncompliance**

- Enforcement Actions in the Academic Research World
- Enforcement Actions Involving Cities, States, and other Recipients

## **3. Questions**

# The Cast of Characters

## Who's Who in Federal Grants Enforcement



# BACKGROUND: THE LEGAL FRAMEWORK APPLICABLE TO FEDERAL GRANTS



# WHAT DOES YOUR GRANT SAY?: GOVERNMENT RIGHTS – UNIFORM GUIDANCE

---

**§ 200.337(a) Records of non-Federal entities.** The Federal awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, **must have the right of access to any documents, papers, or other records** of the non-Federal entity which are pertinent to the Federal award, in order to make **audits, examinations, excerpts, and transcripts**. The right also includes timely and reasonable access to the non-Federal entity's personnel for the purpose of interview and discussion related to such documents.

# AUDITS

---

- Annual Single Audit Act Audits
  - Financial Statement Audit
  - Schedule of Expenditures and Federal Awards (SEFA) Audit
  - Compliance Review of “Major Programs”
- Agency Site Visits (not technically “audits”)

# GOVERNMENT RIGHTS – OIG

Under the Inspector General Act of 1978 and the Inspector General Reform Act of 2008, OIGs are generally to have access to all “records, reports, audits, reviews, documents, papers, recommendations, or other material relevant to” programs and operations within that OIG’s purview of responsibilities.

- To enforce such power with respect to non-federal entities, OIGs may “require by subpoena the production of all [such information], as well as any tangible thing and documentary evidence necessary in the performance of [their functions].”
- Subpoenas, however, are hallmarks of “investigations.” Subpoenas are not used in audits.

# OFFICE OF INSPECTOR GENERAL

---

- Activities include the detection and prevention of fraud, waste, abuse, and mismanagement of the government programs and operations within their parent organizations.
- Investigations may be internal, targeting government employees, or external, targeting grant recipients, contractors, or recipients of the various loans and subsidies offered through the thousands of federal domestic and foreign assistance programs.

# FRAUD AND ABUSE – DEFINITIONS

---

## **Fraud**

- When someone intentionally deceives or makes misrepresentations to obtain federal grants funds in the form of money or property

## **Abuse**

- When health care grantees perform actions that directly or indirectly result in unnecessary costs to a grant program program

**Intention** is the primary difference.

# EXAMPLE: HHS OIG

Conducts its work through a nationwide network of audits, investigations, and inspections conducted by the following components:

**Office of Audit Services:** Provides auditing services for HHS either by conducting audits using its own resources or overseeing audit work done by others

**Office of Evaluation and Inspections:** Conducts national evaluations to provide HHS, Congress, and the public with timely, useful and reliable information on significant issues

**Office of Investigations:** Conducts criminal, civil and administrative investigations of fraud and misconduct related to HHS programs, operations, and beneficiaries. Investigators work in all 50 states and DC and actively coordinate with DOJ and other federal state, and local law enforcement authorities.

**Office of Counsel to the IG:** Provides general legal services to OIG, rendering advice and opinions on HHS programs and operations and providing all legal support for OIG's internal operations.

# OIG AUDITS STEMMING FROM WORKPLANS

---

OIGs typically develop Workplans that indicate particular focus areas in any given year – useful source of information to guide your compliance efforts (including self audits)

Typically focused on a specific program or aspect of a program

Large funding legislation (such as infrastructure bills) almost always include additional funding for OIG work

# U.S. ATTORNEYS' OFFICES

Part of the U.S. Department of Justice – attorneys for the federal government – charged with enforcing federal civil and criminal laws.

Offices in all federal districts across the country.

Active role in investigation and enforcement.

# OTHER GOVERNMENT ENTITIES

---

Office of Management and Budget (OMB) – exercises oversight of executive agencies' performance, procurement, financial management and information technology

- Uniform Grants Guidance

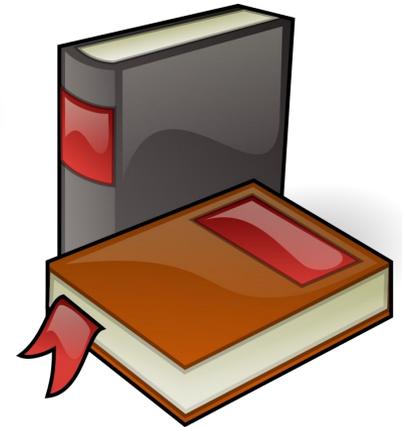
Government Accountability Office (GAO) and the Comptroller General – examine how taxpayer dollars are spent and provides Congress and federal agencies with objective, non-partisan, fact-based information to help the government save money and work more efficiently

# FALSE CLAIMS ACT

- **Federal Civil False Claims Act – 31 U.S.C. § 3729-3733**
  - Also known as the “Lincoln Law”
    - Federal law designed to combat fraud on the United States government
    - Originally passed by Congress during the Civil War to combat allegations of fraud committed on the Union Army
    - Law is designed to penalize those who submit false claims to the government for payment
  - Today, key weapon for combating fraud involving federal funds across numerous industries, including health care, defense, energy, education, research, and more

# FREQUENTLY-USED BASES OF FCA LIABILITY FOR GRANTEES

- Federal Civil False Claims Act
- 31 U.S.C. §3729(a)(1)
  - (A) Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
  - (B) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.



# WHISTLEBLOWER/QUI TAM LAWSUITS

- Qui Tam: Private person (relator) can bring an action in name of government (not necessarily injured by defendant's conduct)
  - If government does not intervene, relator may proceed on his/her own (and pays litigation costs)
    - If successful, relator receives 25-30% of proceeds
  - If government does intervene, then the government pays litigation costs (and makes litigation decisions)
    - If successful, relator receives 15-25% of proceeds

# WHY IS THE FCA SUCH A POWERFUL ANTI-FRAUD WEAPON?

- ***Who can be the relator?***
  - Almost anyone with original knowledge of the allegations (assuming there has not been a previous *public disclosure* of such information)
  - Because almost anyone can be a relator, the FCA's *qui tam* provisions greatly aid the government's anti-fraud efforts
  - Examples:
    - Employees
    - Former employees
    - State/local governments
    - Competitors

# OVERSIGHT AND ENFORCEMENT

---

2 CFR § 200.338:

- Impose special award conditions
- Disallow cost of activity/action
- Suspend or terminate award
- Withhold further awards in project/program
- Refer for suspension/debarment
- “Take any other remedies that may be legally available”...

# WHAT WILL THESE STORIES SHOW US?

---

Recipients of federal grants have been awarded funds to carry out the goals and objectives identified in the grant. These funds are subject to certain regulations, oversight, and audit.

- Grant recipients are stewards of federal funds.
- Grant dollars must be used for their intended purpose.
- Grant recipients must account for costs and justify expenditures.

Using federal grant dollars for unjust enrichment, personal gain, or other than their intended use is a form of theft, subject to criminal and civil prosecution under the laws of the United States.

Source:

<https://www.grants.gov/learn-grants/grant-fraud/grant-fraud-responsibilities.html>

---

# Grantee Stories: Enforcement Actions in the Academic Research World



# RESEARCH INSTITUTIONS: COMPLIANCE CHALLENGES

---

- Size and diversity of funding – many different grants with different requirements.
- Researchers focused on scientific goals and projects – may be unaware that inaccurate accounting and reporting can lead to serious allegations of fraud.
- Some research institutions not focused on full scope of potential jeopardy under False Claims Act.

---

# Story # 1 – Lehigh University and NASA Fraud

# PROFESSOR'S FRAUD IMPLICATES UNIVERSITY

---

- In 2009 and 2010, Professor Yujie Ding (electrical engineering professor) and his wife submitted grant proposals to NASA.
- NASA awarded a Small Business Innovation Research grant to develop a sensor to detect atmospheric gases in space.
- Large entities such as universities are ineligible for SBIR grants (must be entities with fewer than 500 workers).
- The proposal claimed that most of the work would be done at their business, ArkLight, but that some would be subcontracted at Lehigh.

# PROFESSOR'S FRAUD IMPLICATES UNIVERSITY

- ArkLight received \$2.74 million in SBIR grants, with Lehigh paid more than \$1 million as a subcontractor.
- Prosecutors alleged that none of the work to develop the sensor was completed by ArkLight – all was done by graduate students in Ding's lab. Ding sent reports to NASA asserting that program was proceeding as described in the proposals.
- Federal investigators concluded they violated the grant's terms and charged Ding with 10 counts of wire fraud for submitting false documents.
- **Even though the grant money was used to develop the sensor, to the government, it was highly material who would perform the work – and where.**
- In 2015, Ding and his wife were found guilty of six counts of wire fraud – and ordered to pay \$72,000 in restitution. Ding was sentenced to one year in jail.

# PROFESSOR'S FRAUD IMPLICATES UNIVERSITY

---

- Prosecutors (NASA OIG and E.D. Pa. US Attorneys) also alleged Lehigh had an inadequate compliance program to detect and prevent Ding's fraud.
- The school cooperated in the criminal investigation and trial involving Ding and his wife, but still had to account for its own conduct.
- Settlement - \$200,000 in July 2020 to resolve allegations it violated the False Claims Act.
- In addition to the settlement money, Lehigh had to follow strict compliance requirements for two years with any application seeking federal grant funds or cooperative agreements with any federal agency.

---

# **Story # 2 – Jackson State University and Time and Effort Fraud**

# AUDIT IDENTIFIES FABRICATED REPORTS

---

- From 2006 to 2011, Jackson State submitted claims and expended funds under National Science Foundation grants and certified that every claim/expenditure was supportable and allowable.
- In 2012, an audit by the NSF OIG identified expenditures that were unallowable and had insufficient or no supporting documentation.
- A later NSF OIG investigation determined that, in response to preliminary audit findings, JSU employees fabricated time and effort reports and, in some instances, presented no supporting documentation.

# AUDIT IDENTIFIES FABRICATED REPORTS

---

- In 2017, JSU agreed to pay \$1.17 million to settle the allegations that it “mismanaged” the NSF grant funding.
- JSU also agreed take specific steps to institute a compliance program, including a training program on time and effort reporting and other aspects of federal grant management, for a 5-year period.
- Demonstrates that significant sanctions can occur even when the problem is not completing timecards while working on grants – even if the research work was done in a satisfactory manner.

---

# Story # 3 – Scripps Research Institute and Mischarging NIH-Sponsored Grants

# IMPROPER CHARGING OF TIME

---

- Former Scripps Research Institute whistleblower employee files qui tam lawsuit alleging that Scripps failed to have a system in place for faculty to properly account for time spent on activities that cannot be charged directly to NIH-funded projects.
  - Problem – “soft money” policy which required researchers to cover 100% of salary with grants. Whistleblower alleged he spent 20 to 50% of his time applying for new grants, but 100% of his salary was paid by current NIH grant funds.
- Federal grant recipients must use grant funds for tasks that specifically related to their funded project.

# IMPROPER CHARGING OF TIME

---

- HHS OIG, DOJ and U.S. Attorney's Office for District of Maryland investigate and coordinate.
- Investigation reveals Scripps, from 2008 to 2016, improperly charged time spent by faculty on developing and writing new grant applications directly to existing NIH-funded projects, rather than allocating such charges as indirect costs.
- The U.S. also alleged that Scripps improperly charged NIH-funded projects for time spent by faculty on other activities unrelated to funded projects, such as teaching, committee work and other administrative tasks.

# IMPROPER CHARGING OF TIME

---

- Settlement – \$10 million in September 2020.
- Whistleblower receives \$1.75 million as part of the settlement.
- The settlement is modest compared with the money Scripps receives from the NIH. From 2008 to 2014, Scripps received over \$1.5 billion in research grant funding – totaling about \$250 million each year.

# BEST PRACTICES

---

- Implement internal compliance and ethics programs.
- Pre-emptive internal investigation and disclosure of any problems can protect the institution when faced with individual misconduct.
- Implement systematic, random audits to ensure accurate disclosures on grant-related documents.
- Continuing responsibility to ensure proper submissions:
  - Update institutional policies in connection with latest guidance.
  - Focus on trainings relating to reporting forms and use.

# Grantee Stories: Enforcement Actions Involving Counties, States, and Other Recipients of Federal Funding



# Story # 1 – Louisiana and the HHS OIG



# LOUISIANA AND OPIOID RESPONSE GRANT PROGRAMS – APRIL 2022 OIG REPORT

---

HHS SAMHSA awarded a series of grants to States and Tribal governments to combat opioid use disorder. Grants included:

- Opioid State Targeted Response (STR) grants
  - State Opioid Response (SOR) grants

# WHAT SPURRED THE AUDIT OF LOUISIANA?

---

- “ . . . we selected for audit the STR and SOR grants awarded to the Louisiana Dep’t of Health” based on various risk factors, including *the rate of drug overdose deaths* in 2017 and *the total amount of funding* to Louisiana’s Office of Behavioral Health (OBH)

# WHAT WERE THE KEY FINDINGS?

- OBH and its subrecipients faced challenges in complying with Federal regulations related to **reporting and oversight**
  - OBH was unable to support the number of individuals it reported as having received treatment and recovery services and could not ensure that naloxone kits provided to privately owned Opioid Treatment Programs (OTPs) were distributed to target populations
  - OBH did not have a process in place for reviewing the treatment and recovery services data on the Annual Progress Report to verify accuracy, did not require the OTPs to maintain or provide documentation to support the naloxone kits were distributed and did not ensure that patients had adequate transportation to get to recovery and treatment locations
  - Without a review process in place, OBH was unable to detect errors on the Annual Progress Reports submitted to SAMHSA

# ADDITIONAL FINDINGS STEMMING FROM CONTRACTUAL DELAYS

---

Contractual delays between OBH and its subrecipients prevented OBH to meet some of its first-year program goals

- Lengthy contracting process between the State and local governing entities (LGEs) contributed to the delay in implementing program services
- OBH allowed each LGE to tailor its prevention outreach and crisis mobile teams to specific community needs which exacerbated delays due to staffing and contracting delays at the LGEs

# WHAT FEDERAL REQUIREMENTS CAME INTO PLAY?

Grantees must establish and maintain **effective internal controls** over grant funds and provide reasonable assurance that grantees are managing the program in compliance with Federal statutes, regulations, and the terms and conditions of the Federal grant.

45 CFR 75.302(a) and .303(a).

Grantees are responsible for **oversight** of the operations of Federal award-supported activities. Grantees must **monitor** their activities under Federal awards to ensure that they comply with applicable Federal requirements and achieve performance expectations.

**Monitoring by the grantee must cover each program, function, or activity.** 45 CFR 75.324(a).

Grantees must submit **performance reports** using OMB-approved government-wide standard information collections when providing performance information. These reports will contain, for each Federal award, information demonstrating a comparison of actual accomplishments with the objectives of the Federal award established for the period.

45 CFR 75.342(2)(i).

Pass through entities must **monitor the activities of the subrecipient** as necessary to ensure that the subaward is used for authorized purposes in compliance with Federal statutes and the terms and conditions of the subaward, and that **subaward performance goals are achieved.** 45 CFR 75.352.

# OIG'S RECOMMENDATIONS

---

OBH should:

- Develop a process to ensure accurate reporting on Annual Progress Reports
- Improve monitoring of subrecipients to ensure distribution of naloxone kits is tracked and distribution requirements are met
- Review the contracting process to determine if there are ways to expedite the process to provide funds to subrecipients and outside organizations in a timely manner

## SOME MORALS OF THE STORY

---

- Look at the promises you're making in grant application. How can you keep them? How can you document that you kept them?
- Monitor your subrecipients. Review their progress and annual reports. Test for accuracy.
- Common excuses won't help (staffing changes, subs' failure to file timely reports causes you to not timely file).

---

# STORY #2 – Cook County and the Whistleblower



# NOREEN LANAHAN V. COUNTY OF COOK

---

- Noreen Lanahan served as Cook County Dept. of Public Health's director of financial control from 1994-2017 and was responsible for managing federal grants, overseeing the county's claim and reimbursement policies for hundreds of federal grants.
- During this period, the county received approximately \$20 million annually from the federal government for services related to federal public health priorities.
- Between 2008-2017, she repeatedly warned Cook County it was seeking federal reimbursement for unincurred expenses.
- After her retirement, she filed a *qui tam* suit against Cook County, alleging various False Claims Act violations arising out of the use of federal grants.

# WHAT DID THE RELATOR CLAIM?

---

## **2009–11 H1N1 Influenza Grant**

In September 2009, the Centers for Disease Control and Prevention (“CDC”) awarded Cook County \$2.5 million in federal grant funds to distribute the H1N1 vaccine. Prior to performing under the grant, Cook County prepared an anticipated budget. By regulation, Cook County could only be reimbursed for costs associated with work actually performed under the grant.

Instead, Relator asserted Cook County estimated the time dedicated to federal service after the fact and pinned the salary allocations submitted for reimbursement to the CDC to pre-performance budget estimates.

# ANOTHER CLAIM

**WIC grant** – The Supplemental Nutrition Assistance Program (“SNAP”) for Women, Infants and Children (“WIC”) provides supplemental nutrition, education, and healthcare to low-income citizens. Individual WIC grant business units occasionally retain positive balances at the end of the fiscal year as a product of deferred personnel costs.

By July 2014, Cook County had accumulated approximately \$6.8 million in deferred WIC credits. Relator asserted the \$6.8 million “provides funding for Salaries and Fringe Benefits of grant employees should current grants not be renewed” and the “deferred revenue rolls forward from the previous grant year and is adjusted at grant closing.”

To avoid distorting current period grant expenses,” Relator opined the “funds need[ed] to be segregated by the use of a unique Cost Center.” Instead, the county opted to move the \$6.8 million in deferred revenue into a general health fund for the county’s department of health as, according to Cook County’s Chief Budget Officer, these were expenses that were absorbed by the general/health fund when they occurred.

Relator asserted the county health department did not itself incur any expense in connection with the WIC grants.

# WHY DID THE COURT DISMISS RELATOR'S APPEAL?

1. Fraud has to be pled with particularity. Relator didn't offer sufficient details.
2. Federal law imposes civil liability where a person “**knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval**” to the government.
3. This means Relator must plead Cook County: (a) made a statement in order to receive money from the government, (b) the statement was false, (c) the county knew the statement was false at the time it made the statement, and (d) the statement was material to the government's decision to give Cook County money.
4. Relator has not alleged any false claim or statement for payment with the degree of granularity required when alleging fraud.

# ANY LESSONS TO LEARN HERE?



Even though the Relator was ultimately unsuccessful, she retired in 2017 and the court dismissed her appeal in July of 2022. This means potentially 5 year of litigation for Cook County.



Her allegations on their face made sense in some respects. If she had been able to prove them, there would have been potential significant exposure to the county.



Listen to employee complaints in real time to address concerns as they arise. Have complaints feed into your compliance programs and self audit efforts.

# STORY # 3 – The Syracuse City School District Teachers and the False Timecards



# SYRACUSE CITY SCHOOL DISTRICT (SCSD)

SCSD received federal grant funds administered by the U.S. Department of Education to operate a program to prevent students from dropping out of high school: the "Twilight Program."

The program was offered at various high schools after regular school hours from 3:00 to 7:00 pm. Students enrolled in the program were given the opportunity to make up classes to accumulate enough credits to earn their diplomas.

SCSD teachers staffed the Twilight Program and received extra pay for teaching classes to program participants.

# WHAT WENT WRONG?

---

The Program Coordinator controlled the Twilight teaching schedule and instructed certain staff members to claim hours on their timecard **based on the amount of money that was available in the Twilight budget, not on the number of hours they worked.**

Another teacher habitually left the program early and submitted timecards that overreported the hours worked.

Both the Program Coordinator and the teacher signed their timecards and submitted them for payment falsely attesting to their accuracy.

A whistleblower filed a lawsuit.

# U.S. ATTORNEY'S OFFICE INVOLVEMENT

---

Investigation and settlement were overseen by the U.S. Attorney's Office for the Northern District of New York.

As part of a settlement, the teachers had to return the funds and entered into plea agreements while agreeing to resign from their employment with the SCDS.

# WHAT CAN WE LEARN FROM THESE TEACHERS?

Time and effort reporting is one of the biggest sources of exposure for federal grant recipients.

Charge actual time to the grant (NOT the budgeted amount).

Signatures required.

# QUESTIONS?

---

**Kathy S. Ghiladi**  
**[KGhiladi@FTLF.com](mailto:KGhiladi@FTLF.com)**

**Mindy B. Pava**  
**[MPava@FTLF.com](mailto:MPava@FTLF.com)**

**Feldesman Tucker Leifer Fidell LLP**

(202) 466-8960 (Reception)

(855) 200-3822 (Training Team)

**[www.ftlf.com](http://www.ftlf.com)**

**[Learning.ftlf.com](http://Learning.ftlf.com)**