

# Trends & Updates in Higher Ed Investigations & Enforcement



SCOTT R. GRUBMAN, ESQ  
CHILIVIS COCHRAN LARKINS & BEVER LLP  
ATLANTA GA



1



## Civil Enforcement

2

## The False Claims Act (“FCA”)

3

- Prohibits, among other things:
  - Knowingly presenting, or causing to be presented, false or fraudulent claims for payment or approval
  - Knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim
  - Knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the government
  - Conspires to do these things
- *Qui tam* actions

3

## The False Claims Act (“FCA”)

4

- Consequences of violating: Treble damages, per-claim penalties (b/t \$11,463 and \$22,927), suspension/debarment.
- “Knowing” and “knowingly” includes actual knowledge, deliberate ignorance, or reckless disregard. **No proof of specific intent to defraud required.**

4

## The False Claims Act (“FCA”)

5

- **FY2018:** DOJ collected over **\$250M** in non-DOD/non-HHS FCA case.
  - This was down from over \$2B in 2016 and \$1B in 2017. Record high was \$3.6B in 2014.

5

6

## Student Loans

6

## Student Loans

7

- Most student loan-related FCA matters involve violations of the DOE's incentive compensation ban.
- By entering into a program participation agreement, an institution agrees that it will not provide any commission, bonus, or other incentive payment based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the award of federal financial aid.
- 34 CFR § 668.14(b)(22)

7

## Student Loans

8

- **Commission, bonus, or other incentive payment** means a sum of money or something of value, other than a fixed salary or wages, paid to or given to a person or an entity for services rendered.

8

## Student Loans

9

- **Securing enrollments or the award of financial aid** means activities that a person or entity engages in at any point in time through completion of an educational program for the purpose of the admission or matriculation of students for any period of time or the award of financial aid to students.
  - Does include contact with a prospective student
  - Does not include making a payment to third party for provision of student contact information for prospective students provided that such payment is not based on
    - (1) Any additional conduct or action by the third party or the prospective students, such as participation in preadmission or advising activities, scheduling an appointment to visit the enrollment office or any other office of the institution or attendance at such an appointment, or the signing, or being involved in the signing, of a prospective student's enrollment agreement or financial aid application; or
    - (2) The number of students (calculated at any point in time of an educational program) who apply for enrollment, are awarded financial aid, or are enrolled for any period of time, including through completion of an educational program.

9

## Student Loans

10

- Entity or person engaged in any student recruitment or admission activity or in making decisions about the award of financial aid** means—
- (1) With respect to an entity engaged in any student recruitment or admission activity or in making decisions about the award of financial aid, any institution or organization that undertakes the recruiting or the admitting of students or that makes decisions about and awards title IV, HEA program funds; and
  - (2) With respect to a person engaged in any student recruitment or admission activity or in making decisions about the award of financial aid, any employee who undertakes recruiting or admitting of students or who makes decisions about and awards title IV, HEA program funds, and any higher level employee with responsibility for recruitment or admission of students, or making decisions about awarding title IV, HEA program funds.

10

## Student Loans

11

- DOE's two-part test for determining if a payment or compensation is permissible:
  1. Whether it is a commission, bonus, or other incentive payment, defined as an award of a sum of money or something of value paid to or given to a person or entity for services rendered; and
  2. Whether the commission, bonus, or other incentive payment is provided to any person based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, which are defined as activities engaged in for the purpose of the admission or matriculation of students for any period of time or the award of financial aid.

If the answer to each of these questions is yes, the commission, bonus, or incentive payment is impermissible.

11

## Student Loans

12

- Ban does not apply to recruitment of foreign students residing in foreign countries who are not eligible to receive federal student assistance.
- An employee who receives multiple adjustments to compensation in a calendar year and is engaged in any student enrollment or admission activity or in making decisions regarding student financial aid is considered to have received such prohibited adjustments if they create compensation that is based in part, directly or indirectly, upon success in securing enrollments or the award of financial aid.

12

## Student Loans

13

- In 2015 (in response to *APSCU v. Duncan*), DOE issued guidance clarifying that it no longer interprets incentive compensation ban to proscribe compensation for recruiters based upon students' graduation from, or completion of, educational programs.
- In those regulations, DOE stated that, in assessing the legality of a compensation structure, it "will focus on the substance of the structure rather than on the label given the structure by an institution."
- "Thus, although compensation based on students' graduation from, or completion of, educational programs is not per se prohibited, the Department reserves the right to take enforcement action against institutions if compensation labeled by an institution as graduation-based or completion-based compensation **is merely a guise for enrollment-based compensation, which is prohibited.**"
- Pursuant to 2015 guidance, compensation that is based upon success in securing enrollments, even if one or more other permissible factors are also considered, remains prohibited.

13

## Student Loans

14

- Until 2002, DOE measured damages for violating the incentive compensation ban as the total amount of student aid provided to improperly-recruited students.
- In 2002, DOE issued the "Hansen Memo" indicating that the DOE suffered no monetary loss as a result of violations of the ban and, therefore, violations should result in a fine but that the DOE should not seek repayment.
- In 2015, DOE issued a new memo (the "Mitchell Memo") stating that the DOE *does* suffer such a monetary loss and that, in administrative enforcement actions, the DOE should calculate the amount of the institutional liability based on the cost to the DOE of the Title IV funds improperly received by the institution, including the cost to the DOE of *all* of the Title IV funds received by the institution over a particular time period if those funds were obtained through implementation of a policy or practice in which students were recruited in violation of the ban.
- 2015 Memo also made clear that, in addition to such liability, the DOE may also impose a fine, or take administrative action to limit, suspend, revoke, deny, or terminate the institution's eligibility to participate in the Title IV programs.

14

## Student Loans

15

- **February 2019:** North Greenville University (SC) agrees to pay **\$2.5M** to resolve allegations that it violated FCA by paying referral fees for recruitment of students whose education was paid for through federal govt. loans in violation of incentive compensation ban.
  - Allegations that NGU paid commissions, bonuses, and/or incentive payments to a college recruiting firm, in which NGU holds a 33% ownership and control over its BoD.
  - Contingent fee of 50% of gross tuition collected for each student recruited by firm was not disclosed to students, 95% of whom receive Title IV financial aid.

15

## Student Loans

16

- **NGU Settlement**
  - *Qui tam* complaint alleged that defendants violated incentive compensation ban by making direct payments to a for-profit recruiter with federal dollars earmarked for tuition.
  - Complaint alleged that these payments did not fall under the “bundled services” exception (that covers payment to an *unaffiliated* third party to provide a set of services that may include recruitment services) b/c NGU had a 33% ownership interest in the “third party” recruiting company.

16



## Research/Grant Fraud

17

## Research/Grant Fraud

- **PHS Grant Regulations:**

- “Research misconduct” is defined to include “fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.”
  - ✦ **Fabrication** = making up data or results and recording or reporting them
  - ✦ **Falsification** = manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.
  - ✦ **Plagiarism** = the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.
- Research misconduct does not include “honest error or differences of opinion.”

**42 CFR § 93.101**

18

## Research/Grant Fraud

19

### • PHS Grant Regulations:

- Applies to any institute that applies for or receives Public Health Service support for research.
- Applies to research misconduct “regardless of whether an application or proposal for PHS funds resulted in a grant, contract, cooperative agreement, or other form of PHS support.”

19

## Research/Grant Fraud

20

### • PHS Grant Regulations:

- A finding of “research misconduct” requires that
  - (a) There be a **significant departure from accepted practices** of the relevant research community;
  - (b) The misconduct be committed **intentionally, knowingly, or recklessly**; and
  - (c) The allegation be proven by a **preponderance of the evidence**
- Generally a **six-year SOL** unless:
  - ✦ Respondent “continues or renews any incident of alleged research misconduct that occurred before the 6-year SOL through citation, republication, or other use.
  - ✦ There is a determination that alleged misconduct would possibly have a “substantial adverse effect on the health or safety of the public.”

20

## Research/Grant Fraud

21

### • PHS Grant Regulations:

- Responsibilities of institutions obtaining PHS funds:
  - ✦ Institutions have “an affirmative duty to protect PHS funds from misuse” and “primary responsibility for responding to **and reporting** allegations of research misconduct.”
  - ✦ “Institutions must foster a research environment that discourages misconduct in all research and that deals forthrightly with possible misconduct associated with PHS supported research.”

21

## Research/Grant Fraud

22

### • PHS Grant Regulations:

- Institutions must:
  - ✦ Have written policies and procedures for addressing allegations of research misconduct;
  - ✦ Respond to each allegation of research misconduct in a “thorough, competent, objective and fair manner”
  - ✦ Foster a research environment that promotes the responsible conduct of research and research training
  - ✦ Take all reasonable and practical steps to protect the positions and reputations of good faith complainants, witnesses and committee members and protect them from retaliation

22

## Research/Grant Fraud

23

- **PHS Grant Regulations:**

- Institutions must:
  - ✦ Provide confidentiality to all respondents, complainants, and research subjects
  - ✦ Take all reasonable and practical steps to ensure cooperation
  - ✦ Cooperate with HHS during any research misconduct proceeding or compliance review
  - ✦ Assist in administering and enforcing any HHS administrative actions imposed on institutional members; and
  - ✦ Have an active assurance of compliance

23

## Research/Grant Fraud

24

- **March 2019:** Duke University agrees to pay **\$112.5M** to settle FCA allegations related to scientific research misconduct.

- Allegations include submission of applications and progress reports that contained falsified research on 30 federal grants to the NIH and EPA.
- Result of a *qui tam* whistleblower lawsuit.

24

## Research/Grant Fraud

25

### • **Duke University Settlement:**

- *Qui tam* complaint alleges that Duke and two individuals:
  - ✦ Used NIH and EPA grant funds to generate false and/or fabricated research results
  - ✦ Made numerous certifications – including related to the accuracy and completeness of the grant documents and certifications of compliance with their own policies and federal regulations governing research misconduct – to obtain & maintain grant funding
  - ✦ Published numerous scientific publications based on fraudulent research funded by public grants, and used these publications to justify future grant awards

25

## Research/Grant Fraud

26

### • **Duke University Settlement:**

- *Qui tam* complaint alleges that Duke and two individuals:
  - ✦ Received warnings & allegations that the research results at issue were the result of research misconduct, but nothing was done to address the situation.
  - ✦ After Duke finally conducted an internal review, allegations that they then intentionally concealed the full extent of the research fraud and withheld the information from the government as well as from other researchers and scientific journals, but continued to submit grant applications and progress reports that include false research results.

26

## Research/Grant Fraud

27

### • **Duke University Settlement:**

- Takeaways:
  - ✦ Increased oversight of employees
  - ✦ Increased knowledge & awareness of certification obligations
  - ✦ Prompt and thorough investigations of allegations of misconduct
  - ✦ Evaluate & mitigate FCA exposure

27

## Research/Grant Fraud

28

### • ***US ex rel. Feldman v. Van Gorp*** (2d Cir. 2012):

- *Qui tam* suit involving NIH research grants under T32 program, which was designed to “help ensure that a diverse and highly trained workforce is available to assume leadership roles related to the Nation’s biomedical and behavioral research agenda.”
- Suit alleged that Cornell University Medical Center and one of its professors submitted an initial grant application and follow up progress reports that contained false information about the program. Specifically information related to the curriculum, resources, faculty members and training that the program was to offer.
- Jury found defendants not liable for the initial application and first renewal application, but found liability for follow-up renewal applications, awarding a total of approx. **\$1.5M**.

28

## Research/Grant Fraud

29

- ***US ex rel. Feldman v. Van Gorp*** (2d Cir. 2012):
  - On appeal, defendants argued that the award should have been limited to the “benefit of the bargain” (i.e., the difference b/t the value of the training promised and that actually involved).
  - Court of Appeals rejected this argument, holding that the government received “no tangible benefit” from the grant. Court concludes that damages should be calculated as the full amount of the grant payments made by the govt. after the material false statements were made.

29

30

## Criminal Enforcement

30

## The College Admissions Scandal

31

- **That's against the law?**

- RICO/Racketeering
- Mail & Wire Fraud
- Honest Services Fraud
- Money Laundering

31

## Questions?

32

SCOTT R. GRUBMAN, ESQ  
CHILIVIS COCHRAN LARKINS & BEVER LLP  
ATLANTA GA

(404) 262-6505  
sgrubman@cclblaw.com

**CCLB** CHILIVIS COCHRAN  
LARKINS & BEVER<sup>LLP</sup>

32