Congress Amends the False Claims Act

On May 20, 2009 President Barack Obama signed the "Fraud Enforcement and Recovery Act of 2009." Section Four of this Act amended the civil False Claims Act, 31 U.S.C. § 3729. This amendment significantly expands the reach and scope of the False Claims Act and may have important negative implications for colleges and universities.

The original False Claim Act criminalized the "knowing" submission of false or fraudulent claims to the United States government. "Knowing" is broadly defined in the False Claims Act to include not only actual knowledge of the falsity of a claim but also "reckless disregard" of the truth in the matter or "deliberate ignorance" of the truth. Penalties for violations of the False Claims Act are significant. The court can assess treble ("triple") damages and civil penalties up to $11,000 for each false claim. The False Claims Act also allows private citizens to file False Claims lawsuits on behalf of the federal government. These private lawsuits are known as "*qui tam*" or "whistleblower" lawsuits. Successful plaintiffs are allowed by statute to share in a portion of any recovery made by the federal government and to have their attorney's fees paid by the defendant. Obviously, these monetary gains give plaintiffs a strong incentive to pursue "whistleblower" claims. Defendants found guilty of violations of the False Claims Act may also face administrative sanctions such as debarment from federally funded projects.

The "Fraud Enforcement and Recovery Act of 2009" expanded the scope of the False Claims Act in at least three ways that are potentially troublesome for colleges and universities. First, the new amendment expanded the reach of the so-called "reverse false claim." The new amendments make keeping a federal overpayment a false claim. In other words, if the costs associated with a federal contract or grant turn out to be less than anticipated, it may now be a federal false claim to simply keep the federal government's overpayment. The cost accounting principles applicable to federal contracts and grants require that all overpayments be refunded to the federal government.

Second, the new amendments have expanded the definition of a "claim." The new definition now includes claims made by subcontractors and subgrantees. So, if a University subcontractor submits an inaccurate invoice or certification of progress, and the University knows of the inaccuracy or could have discovered the inaccuracy through reasonable processes, but the University submits the subcontractor's claim anyway to be paid by the federal government, the University could now be subjected to False Claims Act liability.

Third, the new amendments expressly allow the federal government to share information between other federal and state agencies and the whistleblower. This should make it easier for the federal government and whistleblowers to prove their False Claims Act cases.

A recent case involving Yale University illustrates the potential False Claims Act liability of colleges and universities. On December 23, 2008 the United States Justice Department announced that Yale University had agreed to pay $7.6 million to settle two different types of False Claims Act allegations. The Justice Department public announcement described the claims in the following way:

The investigation focused on allegations involving two types of mischarges to federal grants. Both types of mischarges arose as violations of the basic principle that recipients of federal grants are allowed to charge to each grant account only "allocable" costs, which are costs that relate to the specific objectives of that grant project. The first allegation involved cost transfers and the requirement that costs transferred to a federal grant account must be allocable to that particular grant account. The settlement resolves allegations that some Yale University researchers at times improperly transferred charges to a federal grant account to which those charges were not allocable. Researchers allegedly were motivated to carry out these wrongful transfers when the federal grant was near its expiration date and they needed to spend down the remaining grant funds. Federal regulations require that unspent grant funds be returned to the Government.

The second allegation involved salary charges and the requirement that charges to federal grant accounts for researcher time and effort must reflect actual time and effort spent on a particular grant. The Government alleges that some researchers at Yale University at times submitted time and effort reports, for summer salary paid from federal grants, that wrongfully charged 100 percent of their summer effort to federal grants when, in fact, the researchers expended significant effort on unrelated work. Researchers allegedly were motivated to carry out these wrongful salary charges by the fact that they are not paid their academic-year salary by Yale University during the summer. The only salary received by these researchers during the summer was the result of the effort they charged to federal grants. Absent the alleged grant mischarges, the researchers would not have been paid. *See* "Yale University to Pay $7.6 Million to Resolve False Claims Act and Common Law Allegations," United States Attorney Press Release, http://newhaven.fbi.gov/dojpressrel/2008/nh122308.htm.

The pressure to "spend" unused contract and grant funds and the desire to "save" contract and grant effort reporting so that a summer salary will be paid are common to all colleges and universities and are not unique to Yale University. It should also be noted that the Yale settlement came *before* the recent amendments that have *expanded* the reach and scope of the False Claim Act. All colleges and universities, including the University of Alabama in Huntsville, need to be extra vigilant to insure compliance with federal cost accounting principles when working on federally funded contracts or grants.