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## Grants Intelligence

# Nonprofit Defends Against False Claims Act Accusation

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We are glad to start the year off on a positive note, with a case in which a nonprofit federal grantee successfully defended against an accusation made under the federal False Claims Act (FCA), partly on the basis that a false statement was not material to the alleged fraudulent claim. We note the importance of this case, because with the recent proliferation in FCA investigations and settlements, many cases never go to trial.

Yet, should a grantee be forced to go to trial, it is heartening to see that some courts are willing to hold the federal government (and its relators) to the materiality requirement of the False Claims Act.

### Potterf v. The Ohio State University

In *Potterf v. The Ohio State University, et al.*, the court emphasized that in order for a grantee to be found liable under the FCA for an alleged false statement made in order to receive grant funding, that false statement must be material to the government's decision to award the grant to the nonprofit. The materiality standard is an important threshold for the defendants under the FCA that can shield grantees from frivolous allegations.

In the *Potterf* case, the owner of a gym, Ohio Fit Club, LLC, brought an FCA lawsuit under the statute's qui tam provision against The Ohio State University and a researcher at the university, Steven T. Devor. Devor conducted a study focused on more than forty members of the plaintiff's gym and published his findings in an article plaintiff alleged helped Devor to bolster his reputation. The plaintiff further alleged that the university and Devor

falsified the results of a fitness study. The plaintiff asserted that the defendants' falsified results aided in their ability to obtain \$273 million in subsequent grants from the National Institutes of Health (NIH).

Importantly, the court in *Potterf* examined whether the alleged misstatement was material to the university's and Devor's receipt of grant funding, and determined that it ultimately was not. Specifically, the court noted that a "reputation, by definition, is not a statement, false or otherwise, made by its owner." Furthermore, even assuming that defendants owed their entire reputation to the disputed statement, the defendants did not receive grant funds in exchange for their reputations, but rather in exchange for promises to conduct research and publish findings.

Because the plaintiff made no allegations that NIH did not receive exactly what the defendants provided, namely scientific research and publication of their findings, the court held that the alleged false statement was not material to NIH awarding subsequent grant funds.

### Lessons Learned on the FCA's "Materiality" Requirement

In light of the highlighted case, we want to take the opportunity to remind nonprofits and other nonfederal entities of the importance of creating appropriate controls to ensure that incorrect (or false) statements material to claims for payment from the federal government are not actually submitted to the federal government. Some of these controls may include the following:

See *False Claims*, p. 2

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## **False Claims** (continued from p. 1)

- Performing a risk and compliance assessment of all federal awards to determine the most salient requirements of each and ensuring the organization is taking appropriate steps to comply with such requirements. This will enable organizations to more confidently execute award-specific representations and certifications that may accompany requests for funds, invoices, and other drawdown activities.
- Ensure the cross-pollination of various stakeholder departments. For example, the finance department often is responsible for requesting the reimbursement of funds, drawing down such funds, or invoicing the government. Yet we sometimes see that finance is not in communication with operations, which may know of potential noncompliance. Thus, the finance department could be drawing down funds, whereby it makes certain certifications, while material noncompliance may be known by another department.
- Authorize only certain personnel to make representations and certifications on behalf of the organization. These individuals should be at a sufficient level within the organization to discuss issues across departments (as noted above), as well as have the authority to halt the submission of requests for funding, representations, certifications, and the like until accuracy can be ensured.

When in doubt, do not permit a noncompliant status quo. In other words, if the organization becomes aware of noncompliance or an incorrect statement that is material, do not permit the submission of a request for reimbursement or invoice simply because that is the normal course of business. Should an issue arise, the organization should take action to curtail any noncompliance, investigate the matter, and, if necessary, disclose those issues to the proper authorities. Regardless of whether the concern is ultimately meritless, it is important that any issue not be compounded by the submission of subsequent false statements and potentially false claims. ❖

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