

GRANT COMPLIANCE: SECURING THE GRANT IS THE EASY PART

FMA CONFERENCE

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Previously, Robert served as Chief Compliance Officer for Kaleida Health where he managed the internal Compliance team, litigation teams of outside counsel, litigated administrative and contractual actions, ensured regulatory and statutory compliance, and resolved matters involving accrediting and enforcement entities as well as individual matters.

Robert also served as Assistant United States Attorney from 1992-2012, where he prosecuted civil and criminal cases on behalf of the United States of America involving health care fraud, Department of Defense fraud, HUD fraud, grant fraud, VA fraud, ERISA violations, Tax fraud, Securities fraud, Customs violations, USDA violations, and all forms of procurement fraud.

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GRANT COMPLIANCE DISCUSSION POINTS

The 3 fundamentals of Grant Compliance:

- 1. A GRANT IS NOT A CONTRACT. (The New York Yankees part of the discussion)**
- 2. ACTIONABLE GRANT WRONGDOING INCLUDES RECKLESS CONDUCT IN ADDITION TO INTENTIONAL WRONGDOING. (The Cleveland Indians part of the discussion)**
- 3. CREATE GRANT QUALITY CONTROL MEASURES UPON RECEIPT OF THE GRANT AWARD AND NOT UPON RECEIPT OF THE AUDIT LETTER. (The St. Louis Cardinals part of the discussion)**

Grant or Contract?

New York Yankees

- **Grant Definition:** A government grant is a financial award given by a federal, state, or local government authority for a beneficial project. It is effectively a transfer payment. A grant does not include technical assistance or other financial assistance, such as a loan or loan guarantee, an interest rate subsidy, direct appropriation, or revenue sharing. The grantee is not expected to repay the money but is expected to use the funds from the grant for their stated purpose, which typically serves some larger good.
- **ZERO SUM Process: Grantee receives the grant; someone else did not receive the grant.**
- **Key Takeaways:**
 - A government grant is a financial award given by the federal, state, or local government to fund some type of beneficial project.
 - Because government grants are funded by tax dollars, they include stringent compliance and reporting measures to ensure the money is well-spent.
 - The Catalog of Federal Domestic Assistance (CFDA) and the website grants.gov list currently available grants.

Grant or Contract?

New York Yankees

- **Contract:**

- An agreement between parties creating mutual obligations enforceable by law. The basic elements required for the agreement to be a legally enforceable contract follow:

- mutual assent, expressed by a valid offer and acceptance;
- adequate consideration;
- capacity; and
- legality.

- **Contract Remedies:** general damages, consequential damages, reliance damages, and specific performance.

Why it matters to know the difference between a contract and a grant

- **Contract**

- The federal government executes a contract with a bridge builder to build a bridge from point A to point B for \$1,000,000.00.
- The contract has a minority set-aside.
- The bridge is built to perfection; however, the contractor violated the minority set-aside.
- Remedies and defense?

- **Grant**

- The federal government awards a grant to a bridge builder to build a bridge from point A to point B for \$1,000,000.00.
- The grant has a minority set-aside.
- The bridge is built to perfection; however, no minority set-aside.
- Remedies?

Types of Grants

- **Grant Sources:** federal government, state government(s), private entities
- **Types of Grants:**
 1. General Operating Grants – provides the greatest flexibility to the receiving organization
 2. Program and Project Grants
 3. Capacity Building Grants – awarded to non-profits to develop competencies, strategies, systems and structures in order to improve organizational effectiveness.
 4. Capital Grants
 5. Endowment Grants
 6. Matching Grants

Grant Fraud

Cleveland Indians

Types of Grant Fraud (and not just corrupt wrongdoing)

- Deception
- Bribery (for example, bribing someone to get a certain research result or protocol approved)
- Forgery (such as forging someone's signature on a grant proposal)
- Extortion
- Theft
- Conspiracy
- Embezzlement
- Redirecting grant funds to non-grant purposes
- Personnel disruption or inadequate quality controls creating recklessness

(See US DOJ publication "Grant Fraud Awareness" at (<https://oig.justice.gov/sites/default/files/2020-02/GrantFraudHandout.pdf>) for tips to avoid grant fraud.)

The Scripps Research Institute Settlement

- In September 2020, The Scripps Research Institute (TSRI) agreed to pay \$10 million to settle claims that it improperly charged NIH-funded research grants for time spent by researchers on non-grant related activities such as developing, preparing, and writing new grant applications, teaching, and engaging in other administrative activities.
- The settlement resolves allegations that between 2008 and 2016 [**status quo**], TSRI failed to have a system in place for its faculty to properly account for time spent on activities that cannot be charged directly to NIH-funded projects or are unrelated to the research activities of the NIH-funded project.
- The settlement resolves allegations originally brought in a lawsuit filed under the qui tam, or whistleblower, provisions of the False Claims Act by Thomas Burris, Ph.D, a former TSRI employee. The act permits private parties to sue on behalf of the government for false claims for government funds and to receive a share of any recovery. Dr. Burris will receive \$1.75 million.

<https://www.justice.gov/opa/pr/scripps-research-institute-pay-10-million-settle-false-claims-act-allegations-related>

Van Andel Research Institute Settlement

- In September 2021, Van Andel Research Institute (“VARI”) agreed to pay \$1.1 million to resolve allegations that it violated the False Claims Act by failing to disclose a foreign component of a National Institutes of Health (“NIH”) award and by failing to disclose foreign research support for two VARI researchers who served as principal investigators on NIH awards.
- In December 2019, VARI paid \$5.5 million to resolve allegations that it violated the False Claims Act by submitting grant applications and progress reports to NIH in which VARI failed to disclose Other Support, including Chinese government grants that funded two VARI researchers.
- In addition to the 2021 settlement—the second settlement with VARI in two years—NIH imposed Specific Award Conditions on all of VARI’s NIH grants, including requiring personal, executive-level certifications to the accuracy of NIH submissions, withdrawing certain of VARI’s expanded grant authorities, and removing all of VARI’s NIH grants from the Streamlined Non-Competing Award Process (“SNAP”). These conditions remain in place through September 30, 2022, or until NIH assesses and accepts VARI’s completed Corrective Action Plan and summary report.

https://www.justice.gov/usao-wdmi/pr/2021_0901_Van_Andel_Research_Institute_Settlement

Columbia University Settlement

- In July 2016, The Trustees of Columbia University in the City of New York (“Columbia”) agreed to pay \$9.5 million for improperly seeking and receiving excessive cost recoveries in connection with research grants funded by the National Institutes of Health (“NIH”). **From July 1, 2003, through June 30, 2015**, Columbia impermissibly applied its “on-campus” indirect cost rate – instead of the much lower “off-campus” indirect cost rate – when seeking federal reimbursement for 423 NIH grants where the research was primarily performed at off-campus facilities owned and operated by the State of New York and New York City.
- Columbia failed to disclose to NIH that it did not own or operate these facilities and that Columbia did not pay for use of the space for most of the relevant period.

<https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-95-million-settlement-columbia-university-improperly>

Grant Regulation and Guidance

1. Federal Uniform Grant Guidance (<https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200>) for statutory requirements
2. Office of Management and Budget website Grants.gov (<https://www.grants.gov/>) for a more user-friendly website. You can learn about grants, search available grants, get applicant information, and grantor information.
3. Tracking Accountability in Government Grants System (<https://taggs.hhs.gov>) for information on grants through HHS.
4. New York State website (<https://grantsmanagement.ny.gov>) that includes registration documents, prequalification documents and a vendor user manual.

How much grant money is available?

1. In FY 2020, HHS awarded over \$1.6 trillion
2. The NIH awards over \$32 billion each year in grants.
3. NEA (National Endowment for the Arts) awarded \$1.2 million in literature fellowships in 2021.

Getting Started

St Louis Cardinals

1. Develop a grant management administration process – will this be centralized within one department or decentralized? Coordination and collaboration are essential to success.
2. Identify internal controls such as segregation of duties, approvals and authorizations, program monitoring, appropriate IT access, documentation of grant timelines and milestones, timely and accurate financial reporting including reconciliations and budgets
3. Track the number of grants you have including funding source, who is responsible for managing each grant, any special grant requirements, do you have all the necessary and appropriate documentation?
4. Review and update your processes as you identify any weaknesses and/or control gaps.

Cyber Compliance

- Does the grant require compliance with specific Cybersecurity measures?
- See <https://www.congress.gov/bill/116th-congress/house-bill/7898>.
 - To amend the Health Information Technology for Economic and Clinical Health Act to require the Secretary of Health and Human Services to consider certain recognized security practices of covered entities and business associates when making certain determinations, and for other purposes, Pub. L. No. 116-321, 134 Stat. 5072 (2021).
 - See *BRIAN MARKUS, Plaintiff, vs AEROJET ROCKETDYNE HOLDINGS, INC. et al, Defendants*; Aerojet Rocketdyne and a whistleblower have reached **a \$9M settlement** to end a high-profile False Claims Act suit alleging the federal contractor misled the government about its compliance with certain cybersecurity requirements, bringing a trial in the case to an early end. <https://www.law360.com/articles/1488309/prominent-aerojet-cybersecurity-fca-suit-ends-in-settlement?copied=1>.

Documentation

- Do you have a copy of the grant application?
- Do you have a copy of the award letter?
- Have you identified activities allowed or unallowed?
- Have you identified allowable costs/cost principles?
- What are the unallowable costs?
- Are there any misallocation of costs?
- Are there administrative or clerical costs?
- What are the excessive cost transfers?

Budget

- Have you established what items or services that the grant covers?
- Is this a single lump sum award?
- If this grant issues funds periodically, do you have a schedule of anticipated receipts?
- Have you established a separate account or other internal accounting mechanism to track grant fund activities?
- Does that grant require equipment or real property management?
- Does this grant involve any subrecipients?
- Is there adequate monitoring of any subrecipients?

Reporting

- Have you established how frequently budget reports will be prepared?
- Does that grant require reports to the grantor?
- Have you mapped this grant's requirements to your internal controls and processes?
- Is there any inaccurate effort reporting?

Close-out Procedures

- Does this grant identify close-out procedures?
- If funds are not used within a specified time period, are you required to return these unused funds?
- Was there any delinquent close-out reporting?

More Compliance

- Do you have grants management policies and procedures in place?
- Do you provide training on grant compliance?
- Do you perform a risk assessment to make sure you meet current grant requirements?
- Has there been any noncompliance with assurances/special terms and conditions of an award?
- Do you have written contracting procedures in place to comply with Uniform Grant Guidance?
- Have you identified key contacts for the grantor and within your organization for grant management?

Be Prepared for an Audit

Any entity should prepare for audit the moment that they decide to apply for a grant. There are several things to do to prepare for audit.

- Have a written organizational chart and position descriptions or other written documents that outline employees' scope of authority and oversight within the organization with respect to grant funds.
- Have ethics and conflict-of-interest policies.
- Have a policy setting forth when overtime can be accrued and how compensation will be calculated.
- Have financial tracking processes in place that ensure that the organization can account for every penny of grant assistance from receipt to expenditure.

Preparing for Audit (continued)

- Have written contracting procedures in place that comply with Title 2 of the Code of Federal Regulations, Part 200. These procedures should be the same for one's federal and nonfederal purchases and should address such things as:
 - developing scopes of work;
 - estimating costs;
 - competitively sourcing vendors;
 - evaluating bids.
- Have financial systems in place for preventing and detecting inconsistencies, significant errors, or fraud.
- Have quality control systems in place to provide reasonable assurance that the organization and its employees are complying with professional standards and applicable legal and regulatory requirements.

Avoid Fraud or Any Appearance of Fraud

- When devising internal controls, pay particular attention to processes to identify and avoid corrupt influence and kickbacks, bid rigging, billing fraud, delivery fraud and issues regarding a lack of entitlement.
- Entities should be particularly careful to avoid any false or misleading statements to the awarding agency, pass-through entity or audit officials.
- The False Claims Act (“FCA”) prohibits and penalizes any individual or entity that “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” that makes, or causes to be made, false records or statement material to a false claim.
- Specific intent is not required for FCA liability. To avoid liability, one must never submit a claim to the federal government that one know for should know is false. This includes incorrectly indicating that one is in compliance with contractual, regulatory or grant requirements.

Internal Controls

Internal controls are like vaccinations – they help prevent bad things from happening. Let's unpack possible consequences of missing these internal controls.

1. **Segregation of duties:** Grant writer versus grant award recipient. There is the potential for inaccurate reporting, misallocation of funds, theft of funds, misappropriating funds for personal purposes, or embezzlement.
2. **Approvals and authorizations:** There is the potential for inaccurate reporting, bribery, forgery, misallocation of funds, theft of funds, misappropriation of funds for either personal purposes or non-approved purposes, or embezzlement.
3. **Program monitoring:** There is the potential for inaccurate reporting, failing to meet grant timelines, misallocation of funds, misappropriation of funds for personal purposes or non-approved purposes, or embezzlement.

Internal Controls (continued)

4. **Appropriate IT access:** there is the potential for falsifying grant requirements and timelines, inaccurate reporting, misallocation of funds, misappropriation of funds for personal purposes or non-approved purposes, conspiracy, theft, or embezzlement.
5. **Documentation of grant timelines and milestones:** there is a potential to fail to meet grant requirements including forfeiture of funds, negative publicity for failing to meet grant requirements, or inaccurate reporting.
6. **Timely and accurate financial reporting including reconciliations and budgets:** there is a potential to fail to meet grant requirements including forfeiture of funds, negative publicity for failing to meet grant requirements including possible exclusion for future grants, or inaccurate reporting.

Grant Name:
Auditor(s):
Review Date:

Funder or Grantor: Federal, State, County, Local or Private?

Federal State County Local Private

- 1 Grantor Type
- 2 Amount (Original amount and grant balance)
- 3 Risk based on grant amount (1. \$100K or more; 2. \$50K-\$99,999; 3. Less than \$50K)

Documentation

Yes No N/A

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Compliance

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- 3 Do you perform a risk assessment to make sure you meet current grant requirements?
- 4 Has there been any noncompliance with assurances/special terms and conditions of award
- 5 Do you have written contracting procedures in place that comply with title 2 CFR Part 200. These procedures should be the same for federal and nonfederal purchases and should address such things as developing scopes of wor; estimating costs; competitively sourcing vendors; and evaluating bides, required contract terms, and predrred and prohibited contract types,

2 CFR 200 See <https://www.govinfo.gov/app/details/CFR-2014-title2-vol1/CFR-2014-title2-vol1-part200>

Questions?

