

The CARES Act, the Higher Education Emergency Relief Fund, and Guidance for Schools to Limit Litigation Exposure

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It seems no industry has been spared the effects of the COVID-19 pandemic. The educational sector is no exception. Classroom doors are closed, classes are being held remotely, federal work-study jobs may no longer be available, and dormitories and dining halls have been shut down. The Higher Education Emergency Relief Fund (“HEERF”) offers valuable financial assistance to schools and their students. But accepting a HEERF grant undoubtedly exposes the recipient to legal risks, including potential False Claims Act (“FCA”) liability. In these tumultuous times, it is easy for careful compliance and planning efforts to fall by the wayside. Yet such efforts are crucial if schools are to avoid legal liability in the years that follow. This update presents an overview of HEERF and its conditions, potential FCA pitfalls, and advice for ensuring compliance and avoiding litigation.

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I. The CARES Act and the Higher Education Emergency Relief Fund

By now, you are likely familiar with the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) and its inclusion of funds to help educational institutions and their students adapt and respond to the widespread effects of the COVID-19 pandemic. The CARES Act creates a \$14 billion higher education emergency relief fund (HEERF) for the Department of Education to distribute directly to institutions of higher education. Starting in April, HEERF grants became available to schools.

The grant money consists of two different types of aid. The first, the so-called “student portion” of the aid, is \$6.2 billion available to any Title IV postsecondary institution but restricted in that it must be distributed directly to the students most affected by the pandemic.^[1] This amounts to 50% of the aid distributed to each institution. The second type of aid, the so-called “institutional portion,” may be used to cover “any costs associated with significant changes to the delivery of instruction due to coronavirus.”^[2]

Ninety percent of the funds will be awarded to schools based on two formula factors: (1) 75% of the funds will be awarded to schools based on the school’s share of full-time equivalent (“FTE”) enrollment of Pell Grant recipients; and (2) 25% of the funds will be awarded to schools based on each school’s share of FTE enrollment of students who were not Pell Grant recipients. At institutions that provide both online and ground-based education, students who were enrolled exclusively in an online program on March 13, 2020 are not eligible for emergency financial aid grants. The formula used to calculate the distribution of funds to institutions excludes students who were exclusively enrolled in distance education courses.

The law also creates a \$3 billion Governor’s Emergency Education Relief Fund for the Department to make grants to applying states and, in turn, for states to make grants to institutions of higher education and local education agencies.

The *CARES Act* is also designed to ensure that students affected by COVID-19 are given certain relief from conditions of their Title IV financial aid. For example, if a student begins attendance in a payment period or period of enrollment that begins on or includes March 13, 2020, and subsequently withdraws from the period as a result of COVID-19-related circumstances, that student's institution is not required to return the student's Title IV funds.^[3]

II. A Fertile Opportunity for False Claims Act Lawsuits?

Although HEERF grants may be invaluable to schools affected by the pandemic, institutions should be aware that accepting a HEERF grant carries legal risks. In fact, a number of institutions have decided to refuse the grants. A spokesperson for one prominent university explained: "After careful review, we believe that accepting the funds, even as a pass-through entirely to students, would impose unacceptable legal and regulatory liabilities on [our institution] that could have a significant negative impact in the future. We continue to maintain our commitment to supporting students in distress through institutional and donated funds, and we will also continue to identify other sources of relief for the most vulnerable members of [our] community."^[4]

Among the risks created by HEERF grants is potential FCA litigation. The FCA, as many in the education sector know, is the government's primary means for combating fraud in connection with government payments and government programs.^[5] The FCA imposes liability for the knowing submission of a false claim for payment, or a false statement made in connection with a false claim for payment, to the government.^[6] The damages from FCA liability can be catastrophic—the FCA provides for virtually automatic trebling of damages, penalties of up to \$22,000 "per false claim," and attorneys' fees and costs.^[7] And perhaps worst of all, liability under the FCA can provide a basis for suspension and debarment from further government programs or payment.^[8] FCA claims may be brought by the government directly or by whistleblowers, who sue on the government's behalf, seeking a bounty of up to 30% of whatever is recovered on the government's behalf.^[9] More about the FCA can be found [here](#).

The Department of Justice has already said it will focus resources on COVID-19-related fraud. In a March 16 memorandum to all U.S. Attorneys and a March 20 press release, Attorney General William Barr announced that DOJ will prioritize the investigation and prosecution of coronavirus-related fraud schemes, which would include FCA-related claims.^[10] Attorney General Barr also directed U.S. Attorneys to appoint a "Coronavirus Fraud Coordinator" in each district (responsible for coordinating enforcement and conducting public outreach and awareness) and established a national system for whistleblowers to report suspected fraud.^[11] Additionally, the *CARES Act* itself creates an oversight committee—the Pandemic Response Accountability Committee ("PRAC")—to "prevent and detect fraud, waste, abuse, and mismanagement" in connection with *CARES Act* funds.^[12]

The education sector has not been immune from FCA liability in the past. Rather, it has been a high-profile target. For instance, much of the late 1990s and 2000s was filled with lawsuits filed by "whistleblowers" against educational institutions under the FCA, claiming that the institution received Title IV aid under false pretenses or while in violation of any one of the many rules or regulations schools agreed to as a condition for participating in Title IV programs. While none (or very few) of these cases resulted in jury verdicts for the whistleblowers or the government, the mere threat of potentially crippling liability and expense of litigating caused numerous schools to settle FCA claims for substantial amounts. These cases were not limited to the for-profit education sector. Our annual Year-End False Claims Act Updates include summaries of these settlements.^[13]

With the sheer amount of funding involved with HEERF grants, and the various conditions attached, it is not unreasonable to suspect another spree of potential FCA cases against schools coming out of the pandemic. Let's consider a few examples.

- As explained above, at least 50% of the grant funds must be allocated directly to students.[\[14\]](#) A school that previously refunded room and board to a student or disbursed grants to students struggling with economic hardships may be tempted to use HEERF funds to reimburse itself for those previous student-directed expenditures. But the Department has stated that such an allocation would not be permitted.[\[15\]](#) Although each institution has significant discretion to determine how to allocate the funds, the Department has stated the student portion of the aid may not be used by the school to reimburse itself for refunds or grants that it previously offered to students.[\[16\]](#)
- As for the institutional portion of the aid, despite the Act's broad language regarding permitted uses, the Department has stated the grants may not be used to cover payments to contractors for the provision of pre-enrollment recruitment activities, including marketing and advertising, endowments, or capital outlays associated with facilities related to athletics, sectarian instruction, or religious worship.[\[17\]](#)
- The *CARES Act* requires each institution that accepts funds from HEERF to continue to pay non-student employees and contractors to the greatest extent practicable based on the school's financial situation.[\[18\]](#) Institutions may not, however, use emergency financial aid grants to students to pay employees and contractors.[\[19\]](#)
- The law imposes extensive reporting requirements.[\[20\]](#) Each institution is required to report how grants were distributed to students, how the amount of each grant was calculated, and any instructions or directions that the institution gave to students about the grant.[\[21\]](#)

Any of these various rules could potentially provide the basis for the government, or a “whistleblower,” to at least try to assert FCA claims—and seek treble damages, penalties, and attorneys’ fees. The theory under any of them would basically be the same: the school, in knowing (or “reckless disregard”) violation of these rules, accepted and distributed HEERF grants. And whether or not such a claim had any merit, or viably did assert an FCA claim under the applicable law, litigation will be an expensive and burdensome process—even in light of compelling defenses.

III. Ensuring Compliance and Avoiding False Claims Act Liability

So, in light of the above, what can educational institutions do to mitigate risk of liability, including, particularly, FCA liability? As anyone who has worked from home since the COVID-19 crisis began can attest, it is harder than ever to stay organized and methodical at work. Yet for schools accepting HEERF grants and grappling with the accompanying requirements, careful planning and organization is essential. Here is some guidance:

Stay informed: Ensure you understand the government regulations detailing what you are required to do and when. Monitor announcements by the President, Congress, and the Department to ensure you remain informed of waivers, modifications, and other developments in regulatory requirements, or guidance for schools, which may change as the crisis continues to develop. Even unintentional or implied misrepresentations of regulatory compliance can lead to burdensome FCA lawsuits, even when meritless.

Document decisions: Institutions should carefully document institutional decision-making relating to student services, academic programs, and government aid. It is important to remember that while something may seem reasonable and obvious in the present, it may be questioned in the rearview mirror in the future. Thus, it is helpful to have contemporaneous documentation outlining a particular decision, and the rationale for making that decision at the time. Indeed, documentation may not only help defeat a later FCA lawsuit (by demonstrating the good faith basis for a decision), but such documentation can be powerful evidence before the government investigating any potential FCA issue. And much better to have documents telling your story than to have to

force your employees or executives to fill in the blanks for the government via witness interviews. Advice of counsel, in particular, can constitute strong evidence of a good faith decision (but could result in waiver of privilege as to the relevant subject matter to the extent it is relied upon by the institution in litigation or an investigation).

Follow reporting requirements and document communications: Institutions should be familiar with their obligations to report decisions to the appropriate departments and agencies. Institutions also can contact the Department to argue for alternative lawful approaches other than those stated in the Department's guidance. But do not assume that you are in the clear simply because the government is aware of your institution's actions. Rather, in line with the above, it is critical to document a communication from the government expressing approval. This is true not only because a later whistleblower will likely know nothing of your communications with the government, but also because FCA case law tends to be more favorable to those FCA defendants who not only sought government approval, but also received approval back from the government. Compile in real-time written evidence or documentation of communications with the government, including communications regarding any modifications or waivers and their purpose to meet government or public needs. You can also consider publicly announcing any government-approved waivers or modifications to existing requirements, as well as your reliance on such actions, as doing so may make public your decision and present additional hurdles under the FCA's public disclosure bar for any would-be FCA plaintiff.

Adopt best practices for ensuring compliance with government requirements: Continue to implement effective risk management and auditing procedures during the COVID-19 crisis. Keep in mind that while some risks of FCA liability are readily apparent even in a time of crisis, it can be easier to lose sight of other, less obvious pitfalls during an emergency. Further, what a school may believe it is doing in good faith now will be questioned later. For example, a company constructing urgently needed housing for first responders following Hurricane Katrina later settled FCA claims alleging it failed to abide by the specific requirements in its contract.^[22] Best practices with respect to risk management, auditing, and compliance may not only help prevent any potential FCA issues, but will also assist in addressing and remediating them.

Ensure that you have effective reporting systems in place and take reports seriously: Statistics show that most whistleblowers attempt to complain internally within a company or institution first, before reporting items to the government or filing an FCA lawsuit. It is therefore important to have robust reporting procedures in place for whistleblowers to be given the opportunity to report concerns, even (or particularly) in this time of "work from home." And it is just as important for those reports to be taken seriously, investigated and remedied. Further, one of the many tolls of the COVID-19 is increased furloughs and layoffs. This only creates additional opportunities for whistleblowers (or whistleblower lawyers) to attempt to bring claims. Make sure that your reporting processes are robust, and be vigilant about what is being said by both current employees and those whose employment may be ending in exit interviews—as that is often a telltale sign of whether FCA activity is afoot. And if you become aware of any claims of misconduct or fraud in connection with requests for or receipt of government funds, ensure that your response is handled by appropriate compliance or legal personnel and treat allegations seriously, including by conducting a thorough, well-documented investigation.

Approach the government: If you become aware of any issues with respect to government programs or potential FCA allegations, consult with counsel about disclosure obligations and outreach to the government. Your counsel will analyze whether disclosure may be required by law. And, if an FCA investigation is active, it is critical to engage the government. Each year, the vast majority (along the lines of 90%) of recoveries in FCA cases come from ones where the government intervened in the matter. As a result, it is absolutely critical to do your best to give the government the opportunity to consider all information available that might lead the government to choose to not intervene in your matter (and/or settle the matter on reasonable terms).

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Keep accreditors informed: Finally, institutions should also keep accreditors informed to ensure that changes in response to the COVID-19 pandemic comply with accreditor requirements. Among the spate of FCA litigation filed against institutions in the past were claims that a school violated the FCA by misleading *accreditors*. It is important to keep accreditors up to date as required as well.

We hope you found this guidance helpful. For a full listing of Gibson Dunn's alerts relating to the FCA, please visit the FCA practice group's [list](#) of publications. And the below Gibson Dunn attorneys are available to answer any questions you may have.

[1] H.R. 748 §§ 18004(a)(1), 18004(c).

[2] *Id.*, § 18004(c).

[3] *Id.*, § 3508.

[4] Douglas Belkin, *Joining Harvard, More Top Universities Pass Up Stimulus Funds*, Wall St. J., Apr. 23, 2020, available at <https://www.wsj.com/livecoverage/coronavirus-2020-04-23/card/i9lvX7ew5IO5ncDLok7j>

[5] Gibson Dunn 2019 Year-End False Claims Update (Jan. 31, 2020), available at <https://www.gibsondunn.com/2019-year-end-false-claims-act-update/>

[6] 31 U.S.C. § 3729(a)(1)(A) and (B).

[7] *Id.*, § 3729(a)(1)(G).

[8] 48 C.F.R. § 9.406-2.

[9] *Id.*, § 3730(d).

[10] U.S. Dep't of Justice, Memorandum from Attorney General William P. Barr (Mar. 16, 2020), <https://www.justice.gov/ag/page/file/1258676/download>;

Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>.

[11] U.S. Dep't of Justice, Memorandum from Attorney General William P. Barr (Mar. 16, 2020), <https://www.justice.gov/ag/page/file/1258676/download>;

Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>.

[12] Gibson, Dunn & Crutcher LLP, CARES Alert, Section IV, available at <https://www.gibsondunn.com/senate-advances-the-cares-act-to-stabilize-economic-sector-during-coronavirus-pandemic/>.

[13] <https://www.gibsondunn.com/?search=news&s=&practice%5B%5D=1935>.

[14] H.R. 748 § 18004(c).

[15] Higher Education Emergency Relief Fund, Frequently Asked Questions about the Emergency Financial Aid Grants to Students under Section 18004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, available at <https://www2.ed.gov/about/offices/list/ope/heerfstudentfaqs.pdf>

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[16] *Id.*

[17] Higher Education Emergency Relief Fund, Frequently Asked Questions about the Institutional Portion of the Higher Education Emergency Relief Fund under Section 18004(a)(1) and 18004(c) of the Coronavirus Aid, Relief, and Economic Security (CARES), available at <https://www2.ed.gov/about/offices/list/ope/heerfinstitutionalfaq.pdf>

[18] *Id.*

[19] *Id.*

[20] H.R. 748 § 3517.

[21] *Id.*

[22] Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Hurricane Katrina Contractor Accepts \$4 Million Judgment Under the False Claims Act (Apr. 24, 2009), <https://www.justice.gov/opa/pr/hurricane-katrina-contractor-accepts-4-million-judgment-under-false-claims-act>.

Gibson Dunn are available to address any questions you may have about the developments. Please feel free to contact the Gibson Dunn attorney with whom you usually work, any member of the firm's False Claims Act Group, or the following authors:

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