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OMB Circular A-110: Overcoming Post-Grant Challenges

Leveraging Key Cost Reimbursement Principles for Non-Profits Accepting Federal Grants

WEDNESDAY, JULY 25, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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OMB Circular A-110: Overcoming Post-Grant Challenges Seminar

July 25, 2012

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Today's Program

Pre-Award Activities

[Denes Tobie]

Slide 7 - Slide 15

Post-Award Activities

[Denes Tobie and Rachel Flanders]

Slide 16 - Slide 46

After-The-Award Activities

[Michael Vernick]

Slide 47 - Slide 55

Denes Tobie, Wipfli LLP

PRE-AWARD ACTIVITIES

Federal Requirements

Public laws

passed by Congress and signed by the President become part of the

United States Code.

Federal regulations

from federal departments to implement the laws (programs) are found in the

Code of Federal Regulations.

Administrative requirements

from the Office of Management and Budget

(OMB Circulars)

are incorporated (codified) into administrative regulations from each federal department.

Specific requirements

applicable to a recipient would be incorporated into a

grant condition.

Additional guidance from federal agencies could be

program instructions,

information memorandums,

technical assistance guides, etc.

List Of OMB Circulars

State and local governments

1. **Common rule:** - *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments*
2. **2 CFR 225 (A-87):** *Cost Principles for State and Local Governments*
3. **A-133:** *Audits of States, Local Governments, and Nonprofit Organizations*

List Of OMB Circulars (Cont.)

Non-profit grant-funded organizations

1. **2 CFR 215 (A-110)**: *Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations*
2. **2 CFR 230 (A-122)**: *Cost Principles for Nonprofit Organizations*
3. **A-133**: *Audits of States, Local Governments, and Nonprofit Organizations*

Codification Of Government-Wide Grants Requirements By Federal Departments

Department	Grants Management Common Rule (State and Local Governments)	OMB Circular A-110 (Universities & Nonprofit Organizations)
Agriculture	7 CFR 3016	7 CFR 3019
Commerce	15 CFR 24	15 CFR 14
Corporation for National & Community Service	45 CFR 2541	45 CFR 2543
Defense	32 CFR 33	32 CFR 32
Education	34 CFR 80	34 CFR 74
Environmental Protection Agency	40 CFR 31	40 CFR 30
Energy	10 CFR 600	10 CFR 600
Health and Human Services	45 CFR 92	45 CFR 74
Housing & Urban Development	24 CFR 85	24 CFR 84

Codification Of Government-Wide Grants Requirements By Federal Departments (Cont.)

Interior	43 CFR 12	43 CFR 12
Justice	28 CFR 66	28 CFR 70
Labor	29 CFR 97	29 CFR 95
National Aeronautics and Space Administration	14 CFR 1273	14 CFR 1260
National Archives and Records Administration	36 CFR 1207	36 CFR 1210
Office of Management & Budget		2 CFR 215
State	22 CFR 135	22 CFR 145
Transportation	49 CFR 18	49 CFR 19
U.S. Agency for International Development		22 CFR 226
U.S. Information Agency (now Broadcasting Board of Governors)		22 CFR 518

OMB Circular 2 CFR 215 (A-110)

Uniform administrative requirements for grants and agreements with institutions of higher education, hospitals and other non-profit organizations” (Outline)

I. Background

- A. Standards for obtaining consistency and uniformity among federal agencies in the administration of grants and agreements
- B. OMB Circular A-110 dated Nov. 19, 1993
- C. Small purchase threshold increased to \$100,000 Oct. 13, 1994
- D. Adopted (codified) by federal agencies
- E. Revised Aug. 29, 1997, to implement Single Audit Act of 1996 and revised, A-133

II. General (Subpart A)

§____.1 Purpose

- 1. Uniformity
- 2. Federal agencies shall not impose additional or inconsistent requirements (except statute, approved deviation or special award condition).
- 3. NPOs that implement federal programs for states are also subject to state requirements.

OMB Circular 2 CFR 215 (A-110), Cont.

§____.2 Definitions (51 different) highlights:

1. Accrued expenditures - “received,” “performed”
2. Award - “support or stimulation to accomplish a public purpose”
3. Equipment - “charged directly to the award,” “useful life of more than one year,” “acquisition cost of \$5,000 or more per unit”
4. Program income (does not include interest earned on advances)
5. Project costs - “accomplishing the objectives of the award during the contract period”

§____.3 Effect on other issuances – superseded, except required by statute or authorized deviation

§____.4 Deviations

1. OMB for classes of grants or recipients, only in unusual circumstances.
2. Federal awarding agencies may apply more restrictive requirements to a class of recipients, when approved by OMB.
3. Exceptions on a case-by-case basis, may also be made by federal awarding agencies

§____.5 Subawards - shall be applied by recipients to sub-recipients

OMB Circular 2 CFR 215 (A-110), Cont.

III. Pre-Award Requirements (Subpart B)

§____.10 Purpose - “form and instructions”

§____.11 Pre-award policies

§____.12 Forms for applying for federal assistance - SF-424 series

§____.13 Debarment and suspension

§____.14 Special conditions - “applicant or recipient”

- a. History of poor performance
- b. Not financially stable
- c. Management system does not meet standards
- d. Not conformed to terms and conditions of a previous award
- e. Not otherwise responsible

May impose additional requirements:

- a. In writing
- b. Reason why
- c. Nature of corrective action needed
- d. Time allowed for completing corrective action
- e. Method for requesting reconsideration

Any special condition shall be promptly removed, once corrected.

§____.15 Metric system of measurement

§____.16 Resource Conservation and Recovery Act - “preference to purchase of products containing recycled materials”

§____.17 Certifications and representations - submitted annually and signed by a responsible official

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POST-AWARD ACTIVITIES

OMB Circular 2 CFR 215 (A-110), Cont.

IV. Post-award requirements (Subpart C)

A. *Financial management standards*

§__.20 Purpose of financial and program management

§__.21 Standards for financial management systems

- a. Relate financial data to performance data and develop unit cost information whenever practical
- b. Systems shall provide the following:
 1. Accurate, current and complete disclosure of financial results
 2. Records that identify source and application of funds
 3. Effective control over and accountability for all funds, property and other assets
 4. Comparison of outlays with budget
 5. Written procedures to minimize time between transfer and disbursement of funds
 6. Written procedures for determining reasonableness, allocability and allowability of costs in accordance with cost principles
 7. Accounting records, including cost accounting records, that are supported by source documentation

OMB Circular 2 CFR 215 (A-110), Cont.

IV. Post-award requirements (Subpart C), Cont.

A. *Financial management standards*

§____.21 Standards for financial management systems

- c. When federal government guarantees or insures the repayment of money borrowed by the recipient, the awarding agency may require bonding and insurance, if requirements of the recipient are adequate.
- d. Awarding agency may require bond coverage, if recipient lacks sufficient coverage.
- e. When bonds are required as stated above, the bonds shall be obtained from companies holding certificated of authority as acceptable sureties as prescribed in 31CFR part 223 "Surety Companies Doing Business with the United States."

OMB Circular 2 CFR 215 (A-110), Cont.

§___.22 Payment

- a. Minimize time between transfer and disbursement
- b. Payment in advance, provided they maintain or demonstrate:
 1. Written procedures to minimize time between transfer and disbursement
 2. Financial management procedures in accordance with __.21 above. Advances shall be limited to minimum amounts needed and timed with the actual and immediate needs of the organization.
- c. When possible, advances should be consolidate by the federal awarding agency.
- d. Requests for advances shall be done on forms approved by OMB.
- e. Reimbursement is the preferred method.
 1. Awarding agencies shall make payment within 30 days of receipt of the billing.
 2. Recipients can request reimbursement at least monthly, when EFT are not used.
- f. Working capital advances if necessary, then on a reimbursement basis
- g. Use federal funds last

OMB Circular 2 CFR 215 (A-110), Cont.

§___.22 Payment

- h. Withholding of payments – can when failure to comply with program objectives or delinquent in debt to the U.S.
- i. Depositories
 - 1. Shall not require separate accounts
 - 2. Insured accounts whenever possible
- j. Encouraged to use minority- and women-owned banks
- k. Interest bearing accounts - keep \$250 unless:
 - 1. Recipient receives less than \$120,000 in federal awards per year, or
 - 2. The best reasonably available interest bearing account would not be expected to earn interest in excess of \$250 per year on federal cash balances, or
 - 3. The depository would require an average or minimum balance so high that it would not be feasible within the expected federal and non-federal cash resources.
- l. Interest in excess of \$250 annually is to be remitted to the DHHS PMS.
- m. List of approved forms (superseded by new reporting forms)

OMB Circular 2 CFR 215 (A-110), Cont.

§____.23 Cost sharing or matching

a. Criteria

1. Verifiable from recipient's records
2. Not included to another federally-assisted project
3. Necessary and reasonable
4. Allowable under cost principles
5. Not paid by federal government
6. In approved budget when required
7. Conform to other provisions in the circular

OMB Circular 2 CFR 215 (A-110), Cont.

§____.23 Cost sharing or matching (Cont.)

- b. Unrecovered indirect may be included as cost sharing or matching, with proper approval.
- c. Value in accordance with cost principles
- d. Volunteer services
 - 1. Integral and necessary
 - 2. Rates for similar work in the organization or labor market
 - 3. Fringe benefits
- e. Employer provided services - rate of pay plus paid fringe benefits
- f. Donated supplies - reasonable, fair market value

OMB Circular 2 CFR 215 (A-110), Cont.

§____.23 Cost sharing or matching (Cont.)

- g. Method to determine cost sharing or matching for donated equipment and buildings
 - 1. If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, then the total value of the donate property may be claimed.
 - 2. If the purpose is to support activities that require the use of equipment, buildings or land, then normally, only depreciation or use charges for equipment or buildings may be used. Full value may be used, with approval of the awarding agency.

OMB Circular 2 CFR 215 (A-110), Cont.

§____.23 Cost sharing or matching (Cont.)

h. Value of donated property shall be in accordance with policies of the recipient with the following qualifications:

1. Value of donated land and building shall not exceed fair market value at the time of donation, as established by an independent appraiser and certified by a responsible official of the recipient.
2. Equipment shall not exceed fair market value of similar equipment at the time of donation.
3. Donated space shall not exceed the fair rental value of comparable space, as established by an independent appraisal of comparable space in the same locality.
4. Value of loaned equipment shall not exceed fair rental value.

OMB Circular 2 CFR 215 (A-110), Cont.

§ ____ .23 Cost sharing or matching (Cont.)

h. Value of donated property shall be in accordance with policies of the recipient with the following qualifications:

5. Supporting records for in-kind contributions from third parties:

- i. Volunteer services shall be documented and supported by the same methods used by the recipient for its own employees.
- ii. The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

OMB Circular 2 CFR 215 (A-110), Cont.

§____.24 Program income

- a. Requires recipients to account for program income related to projects financed whole or in part with federal funds.
- b. Retained by recipient
 1. Added to funds committed
 2. Finance the non-federal share
 3. Deducted from project costs
- c. b.1. and b.2. require approval.
- d. b.3. is automatic without approval for 1 and 2.
- e. No obligation to federal government for program income earned after end of the project period
- f. Costs incident to generation of program income can be deducted, unless costs are charged to the award.

OMB Circular 2 CFR 215 (A-110), Cont.

§____.24 Program income

- g. Proceeds from the sale of property must follow the property standards.
- h. Unless stated in terms and conditions of an award, recipients have no obligation to the federal government with respect to program income earned from license fees and royalties for copyrighted material, patents, etc. produced under an award. However, patent and trademark amendments apply to invention made under experimental, developmental or research awards.

OMB Circular 2 CFR 215 (A-110), Cont.

§____.25 Revision of budget and program plans

- a. Budget is the financial expression of a project or program and may include federal and non-federal share, or only federal share, depending on the awarding agency.
- b. Recipients are required to report deviations and request revisions.
- c. Prior approval required for:
 1. Change in scope or objective
 2. Change key person specified in application or award (project director)
 3. Three-month absence or 25% reduction in time of approved project director
 4. Additional federal funding
 5. Transfer of amounts for indirect to direct, or vice versa, if required
 6. Items in cost principles requiring prior approval
 7. Transfer of funds allotted for training allowances
 8. Sub-contracting out of any work under an award (does not apply to supplies, equipment, general support, etc.)

OMB Circular 2 CFR 215 (A-110), Cont.

§____.25 Revision of budget and program plans (Cont.)

- d. No other prior approval can be imposed unless approved by OMB.
- e. Awarding agencies can waive some of the prior approval requirements with certain requirements of the recipients.
- f. Awarding agency may restrict the transfer of funds among direct cost categories, when the federal share exceeds \$100,000 and the cumulative amount of transfers exceeds 10% of the total award.
- g. All other changes to non-construction budgets except as stated in j. on the next slide
- h. For construction awards, written approval required when:
 - 1. Revision in scope or objective, or
 - 2. Need additional federal funds, or
 - 3. A revision is desired that involves specific costs for which the cost principles require prior approval.

OMB Circular 2 CFR 215 (A-110), Cont.)

§____.25 Revision of budget and program plans (Cont.)

- i. No other prior approval requirements can be imposed.
- j. When an award involves both construction and non-construction awards, awarding agency may require prior approval between the two projects.
- k. Notify federal government when funds expected to exceed needs by \$5,000 or 5% of federal award
- l. When requesting revisions, must use budget forms used in the application of the award, unless the awarding agency indicates a letter is sufficient
- m. Federal agency responds in 30 days or notifies when to expect decision

OMB Circular 2 CFR 215 (A-110), Cont.

§____.26 Non-federal audits (revised Aug. 29, 1997)

- a. Institutions of higher education and NPOs are subject to the Single Audit Act of 1996 and revised OMB Circular A-133.
- b. States and local governments are subject to the Single Audit Act of 1996 and revised OMB Circular A-133 .
- c. For-profit hospitals not covered by OMB Circular A-133 are subject to audit requirements of the awarding agency.
- d. Commercial organizations are subject to the audit requirements of the awarding agency.

§____.27 Allowable costs

1. A-87 - State and local governments
2. A-122 - NPOs
3. A-21 - Colleges and universities

OMB Circular 2 CFR 215 (A-110), Cont.

§____.28 Period of availability of funds

1. Allowable costs from obligations incurred during the funding period
2. Authorized pre-award costs

§____.29 Conditional exemptions

- a. OMB authorizes conditional exemptions from administrative requirements and cost principles for certain federal programs, with proper approval by the head of the executive department or establishments. The federal agency shall consult with OMB during its consideration of whether to approve such exemption.
- b. Certain state programs may be exempted.
- c. Specific requirements to be complied with when these programs are exempted

OMB Circular 2 CFR 215 (A-110), Cont.

B. Property standards

§____.30 Purpose

§____.31 Insurance coverage - same as for property owned by recipient

§____.32 Real property

a. Title vests in recipient and not encumber feds without prior approval

b. Prior approval to use in other federal projects

c. Disposition requirements

1. Retain title and reimburse the federal government for that % of the current fair market value attributable to % the government paid for

2. May be directed to sell it

3. May be directed to transfer the title

§____.33 Federally owned and exempt property

a. Federally owned property

1. Title vests in federal government, and submit annual inventory

2. Report to feds when no longer needed

OMB Circular 2 CFR 215 (A-110), (Cont.)

B. *Property standards* (Cont.)

§____.33 Federally owned and exempt property (Cont.)

b. Exempt property

1. Option to vest title in property acquired with federal funds with the recipient, without further obligation to the federal government when appropriate; it then becomes “exempt property”

OMB Circular 2 CFR 215 (A-110), Cont.

§___.34 Equipment

- a. Title vests in recipient
- b. Not use for services for a fee if less than equivalent, unless authorized by federal statute
- c. Use in project as long as needed
- d. Available on other projects if not interfere; user charges as program income
- e. Trade in, or sell and apply to replacement equipment with prior approval
- f. Property management standards
 1. Equipment records
 - i. Description
 - ii. Serial, model, etc. number
 - iii. Source, including award number
 - iv. Title-vesting
 - v. Acquisition date
 - vi. Federal percentage
 - vii. Location and condition
 - viii. Unit acquisition cost
 - ix. Ultimate disposition data
 2. Equipment owned by the federal government shall be identified to indicate federal ownership.
 3. Physical inventory reconciled with equipment records once every two years; verify existence, utilization, need

OMB Circular 2 CFR 215 (A-110), Cont.

§____.34 Equipment (Cont.)

4. Control system to prevent loss, damage or theft
 5. Adequate maintenance procedures in place
 6. Proper sales procedures
- g. Disposition - FMV over \$5,000, compensate feds and use in other projects
1. Sell with approval (120 days)
 - i. Reimburse feds
 - ii. Keep \$500 or 10%
 2. If instructed to ship elsewhere, the federal government will reimburse shipping costs related to their %s of ownership
 3. If instructed to dispose, the federal agency will reimburse for disposal costs.
 4. May be instructed to transfer to the federal government or a third party

OMB Circular 2 CFR 215 (A-110), Cont.

§____.35 Supplies and other expendable property

- a. Title vests in recipient and if residual inventory at termination of \$5,000 or more - reimburse federal government
- b. Shall not use to provide services to non-federal, outside organization for less than private organization would charge for similar services

§____.36 Intangible property

- a. May copyright
- b. Subject to patent and invention regulations
- c. Federal government may:
 1. Reproduce, publish or use
 2. Authorize others receive or use data
- d. May request research data with certain requirements
- e. Title vests with the recipient

§____.37 Property trust relationship

Real property, equipment, intangible property and debt instruments that are acquired with federal funds shall be held in trust by the recipient as trustee for the program. Agencies may require recipients to record liens, and use and disposition conditions apply.

Procurement Standards

- Sect. 40: Purpose of standards is to ensure that materials and services are obtained in an effective manner and in compliance with federal statutes and executive orders.
 - Amounts > \$25,000
- Sect. 41: Recipient is the responsible authority, for contract provisions.
- Sect. 42: The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.
- Sect. 43: Requires a bid process to be conducted, in order to provide open and free competition

Procurement Standards (Cont.)

- Sect. 44(a): Written procurement procedures should be developed, providing for:
 - Avoid purchasing unnecessary items
 - Analyze lease and purchase alternatives
 - Solicitations for goods and services provide for certain requirements
- Sect. 44(b): Positive efforts shall be made to utilize small businesses, minority owned firms, and women's business enterprises.

Procurement Standards (Cont.)

- Sect. 44(c): Use the contract that promotes the best interest of the program or project involved - fixed price, cost-reimbursable, purchase orders, incentive contracts, etc.
- Sect. 44(d): Contract with responsible contractors - “debarment and suspension”
- Sect. 44(e): Pre-award review is required when certain conditions apply.
- Sect. 45: Cost or price analysis should be done and documented (and retained).

Procurement Standards (Cont.)

- Sect.46: Procurement records must contain the basis for contractor selection, justification for lack of competition when bids or offers are not obtained, and basis for award cost or price.
- Sect.47: A contract administration system shall be maintained to ensure contractor conformance with the contract and evaluation of contractor performance.

Procurement Standards (Cont.)

- Sect. 48: Contract provisions required
 - Provisions for legal remedies for violation or breach of contract
 - Provisions for termination by recipient
 - Access to records of contractor by recipient, federal agency, comptroller general
 - Special provisions for construction contracts regarding guarantees/performance bonds
 - Appendix A to OMB Circular A-110 contains various provisions - Equal Opportunity, Copeland "Anti-Kickback" Act, Davis-Bacon Act, Clean Air Act, Debarment and Suspension, Anti-Lobbying, Rights to Inventions, Contract Work Hours and Safety Standards.

Procurement Standards (Cont.)

- Common findings to avoid:
 - Lack of procurement policy
 - No documentation of EPLS - check for suspended or debarred vendors
 - Lack of documentation on contractor selection in bid files
 - No bid process performed, and lack of documentation as to reason
 - Certain contract provisions not included

Reports And Records

- Sect. 50: Purposes of standards are to set forth the procedures for monitoring and reporting on financial and program performance, and to set record retention requirements.
- Sect. 51: Monitoring and reporting program performance
 - Monitor sub-awards to ensure sub-recipients have met audit requirements
 - Manage and monitor all projects, programs, functions and activities supported by award
 - Frequency of performance and other reports
 - Types of information required in performance reports
 - Notification to federal agency of developments that have significant impact on award-supported activities

Reports And Records (Cont.)

- Sect. 52: Financial reporting
 - Defines forms for obtaining financial information for direct awards
 - Defines procedures for when federal agency needs additional information
- Sect. 53: Retention and access requirements for records
 - Financial records, documents, statistical records - 3 years from date of submission of final expenditure report or submission of quarterly or annual report
 - Records for real property and equipment - retain for 3 years after final disposition
 - If any audit, claim, litigation under way - retain until complete
 - Right of federal agency and other parties to review records

Termination And Enforcement

- Sect. 61: Termination - awards may be terminated in whole or part if the following apply:
 - By the federal awarding agency, if a recipient materially fails to comply with terms and conditions of award
 - By the federal awarding agency with the consent of the recipient
 - By the recipient; however, if partial termination selected by recipient, federal agency has right to terminate grant in its entirety
- Sect. 62: Enforcement
 - Remedies for non-compliance are defined
 - Withhold cash payments until deficiency corrected
 - Disallowance of costs
 - Whole or partial suspension or termination
 - Withhold further awards
 - Process for hearings and appeals

Michael Vernick, Hogan Lovells

AFTER-THE-AWARD ACTIVITIES

Recent Audits

Date	Sponsor	Issues	Questioned Costs
November 2011	HHS/NIH	<ul style="list-style-type: none">• Administrative costs• Direct charging	\$5.8M questioned
March 2011	NSF	<ul style="list-style-type: none">• Cost sharing obligations• Sub-awardee costs	\$600K questioned
March 2011	NSF	<ul style="list-style-type: none">• Effort reporting• Cost sharing• Sub-awardee costs	\$1.7M questioned
August 2009	NSF	<ul style="list-style-type: none">• Effort reporting• Supporting documentation	\$1.6M questioned
January 2009	HHS/NIH	<ul style="list-style-type: none">• Administrative costs• Direct charging	\$1.7M questioned

Recent Enforcement Actions

Date	Sponsor	Issues	Settlement/Enforcement Actions
June 2011	Dep't of State	<ul style="list-style-type: none"> • Effort reporting • Cost transfers 	Agreed to pay \$1M
August 2010	HHS/NIH	<ul style="list-style-type: none"> • False statements in grant application and progress reports • Failure to report significant changes 	Ordered to pay \$888K in damages and penalties
January 2010	NSF	<ul style="list-style-type: none"> • Effort reporting • Cost sharing 	Agreed to pay \$500K Entered into a compliance agreement
March 2009	HHS/NIH, DoD	<ul style="list-style-type: none"> • Other support 	Agreed to pay \$2.6M
December 2008	HHS/NIH, NSF, DoD, DOE, NASA	<ul style="list-style-type: none"> • Effort reporting • Cost transfers 	Agreed to pay \$7.6M Voluntarily made significant research compliance improvements

Types Of Audits

- Administrative actions that can have monetary and/or other repercussions for the auditee
- Several different kinds of audits:
 - Programmatic audits
 - In response to a whistleblower/specific issue
 - A-133 audits
- Audits are often conducted by the cognizant Office of Inspector General.

Managing An Audit

- Surviving a federal audit is in part an exercise in organization and management.
- Advance planning, including the establishment of a robust audit response team, is an important first step.
- Remember that auditors are people, too.
 - Logistics can matter - e.g., parking, phone, Internet access
- Though there may be issues that the auditors identify, the overall outcome can be affected by the how the fieldwork process goes - e.g., is data available in a timely and organized manner, are questions answered, etc.

Overview Of Investigations

- Generally conducted under the auspices of the Civil False Claims Act (FCA)
- Causes of a FCA investigation may include :
 - Whistleblower
 - “Audit gone bad”
 - Voluntary disclosure
 - Sponsor-detected problems
- Institutions may learn of an investigation when employees are visited by law enforcement personnel.
- Generally involve broad subpoenas
- May cover a lengthy period of time (up to 10 years)

FCA Overview

- Broad coverage includes:
 - Knowingly presenting, or causing to be presented, a false or fraudulent claim
 - Knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim
 - Knowingly making, using or causing to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the government, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the government
 - Conspiring to do any of the above

FCA Overview (Cont.)

- Definition of “knowingly” is broad.
 - Actual knowledge
 - Reckless disregard for the truth
 - Deliberate ignorance
- Liability can be harsh.
 - Treble damages
 - Per-claim penalties
- *Qui tam* relators are entitled to a share of any recovery.
- Very favorable statute, from a prosecutor’s perspective
 - No need to prove specific intent or actual knowledge
 - No need to prove government was damaged
 - With recent amendments, prosecutors do not even have to show a claim was made. They can rely on retention of overpayments.

What Investigators Look For, And How They Find It ...

- What they look for:
 - Knowing misstatements
 - Intent to mislead the government
 - Management inattention to big problems
 - Potentially significant government damage
 - Substantial benefit to the institution
 - Simplicity and jury appeal
 - Low-hanging fruit
 - Obstruction of justice
- How they find it:
 - Whistleblowers
 - Internal audit reports
 - “Smoking gun” memos and e-mails
 - Inconsistencies in reports