National Association of College and University Attorneys
Presents:

Executive Branch Updates:
A New World of Federal Fun(?)ding

Webinar

June 4, 2025

12:00 PM – 2 :00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

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Bill Ferreira is a Partner with Hogan Lovells and heads the firm's Global Government Contracts and Education Practice. Bill advises universities on international programs, government grants and contracts, and research compliance. Bill works on federal award compliance and investigations, domestically and internationally. He guides organizations across the compliance landscape, advising on foreign influence, cost accounting, research misconduct, conflicts of interest, human subjects, and compliance with the OMB Uniform Guidance and Federal Acquisition Regulation. Drawing on deep experience with global operations, Bill's team has guided campuses in Asia, research in Africa, and degree programs in the Middle East. His work extends to online education and telemedicine programs around the world. Bill serves on the firm's Africa leadership team and speaks regularly about strategic issues at the forefront of globalization of higher education, scientific research, and government grants.

Michelle Gluck is Associate General Counsel at The Pennsylvania State University. She joined the Office of the General Counsel in 2021. Previously, she served 6+ years as Associate General Counsel at The George Washington University and 8 years as Special Counsel to the University System of New Hampshire. Her practice focuses on research administration and compliance, and she also has extensive experience in the management of intellectual property and copyrights. She has served as Senior Litigation Counsel in the Civil Division of the U.S. Department of Justice and as a Deputy Attorney General in the Government Section of the State of California Department of Justice.

Upon graduation from the University of California, Berkeley School of Law, Michelle clerked for U.S. District Judge Lawrence T. Lydick and for the Ninth U.S. Circuit Court of Appeals. She is admitted to practice in California, the District of Columbia, Pennsylvania, and before the United States Supreme Court and other federal district and circuit courts. Michelle is also a past vice president of the Montgomery County Council of Parent-Teacher Associations and a long-time advocate for quality K-12 public education.

Aleks Sverdlov is a counsel in the Hogan Lovells Appellate Practice. He previously spent 15 years at the Department of Justice, where he litigated a wide range of constitutional and administrative law matters across numerous subject areas and agencies.

Throughout the course of numerous administrations, Aleks led government teams defending major programs and priorities ranging from the conduct of the 2020 census to HHS's implementation of a new drug price negotiation program under the Inflation Reduction Act. Much of Aleks's work has involved disputes concerning Congress's and the Executive's authority to control federal spending and provide financial assistance directly to individuals or institutions. Earlier in his career, Aleks spent years litigating disputes involving government procurement and national security programs as well as tariffs and trade remedies.

Aleks has extensive experience advising policymakers on developing robust rulemaking, minimizing litigation risk, and implementing policies in the face of anticipated or emergent challenges. Aleks has handled all stages of trial and appellate proceedings, and has argued 10 cases before the U.S. Court of Appeals for the Federal Circuit.

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I. Executive Branch Actions and Related Judicial Developments (Current as of June 4, 2025)

National Institutes of Health (NIH)

Supplemental Guidance to the 2024 NIH Grants Policy Statement: Indirect Cost Rates (Feb. 7, 2025)
The U.S. National Institutes of Health (NIH) issued supplemental Guidance to the 2024 Grants Policy Statement: "Indirect Cost Rates." The Guidance discusses updated policy deviating from the negotiated indirect cost rate for new grant awards and existing grant awards, effective immediately. There will now be a standard indirect rate of 15% across all NIH grants for indirect costs in lieu of a separately negotiated rate for indirect costs in each grant. The change in rate is made to steward grant awards to ensure taxpayer dollars are used in ways that benefit the American people and improve their quality of life, and indirect costs are "not readily assignable to the cost objectives specifically benefitted" and are more difficult for NIH to parse. The Guidance further rationalizes the change in rate by citing many private foundations having a maximum indirect rate of 10-15%. For any new grant issued, and for all existing grants to institutions of higher education retroactive to the date of the Guidance, award recipients are subject to a 15% indirect cost rate. The policy will also be applied to all current grants for go-forward expenses from February 10, 2025, as well as for all new grants issues and will not be applied retroactively to the initial date of issuance of current grants to postsecondary institutions.

Notice of Civil Rights Term and Condition Award (Apr. 21, 2025)
The National Institutes of Health (NIH) published a Notice to the research community of a new Civil Rights term and condition that modifies the current terms and conditions for all NIH grants, cooperative agreements, and other transaction (OT) awards. The term applies prospectively to new, renewal, supplement, or continuation awards issued on or after the date of the Notice. The new term requires recipients to comply with all applicable Federal anti-discrimination laws material to the government's payment decisions for purposes of 31 U.S.C. §372(b)(4). Specifically, recipients must certify that they do not and will not during the term of the financial assistance award, operate any programs that advance or promote "diversity, equity, and inclusion" (DEI), "diversity, equity, inclusion, and accessibility" (DEIA), or discriminatory equity ideology in violation of Federal anti-discrimination laws; and that they will do not and will not for the duration of the term of the award, engage in a discriminatory prohibited boycott (discriminatory equity ideology has the meaning set forth in Section 2(b) of Executive Order 14190 of January 29, 2025; discriminatory prohibited boycott means refusing to deal, cutting commercial relations, or otherwise limiting commercial relations specifically with Israeli companies or with companies doing business in or with Israel or authorized by, licensed by, or organized under the laws of Israel to do business.) Finally, the Notice states that NIH reserves the right to terminate financial assistance awards and recover all funds if recipients, during the term of the award, operate any program in violation of Federal anti-discrimination laws or engage in a prohibited boycott.

Department of Energy (DOE)

Department of Energy Overhauls Policy for College and University Research, Saving $405 Million Annual for American Taxpayers (Apr. 11, 2025)

The Department of Energy (DOE) shared a policy memorandum with grant recipients at colleges and universities announcing a limit on "indirect costs" of research funding—which include facilities and administrative costs—at 15%. This change marks a departure from the current practice of using a negotiated indirect cost rate for grants awarded to Institutions of Higher Education. According to DOE data, grant recipients at colleges and universities currently incur an average indirect cost rate exceeding 30%, which is significantly higher than other profit, non-profit, and government grant recipients. The Department notes that this cap is intended to refocus its funding on supporting scientific research, rather than subsidizing administrative and facility expenditures.

National Science Foundation (NSF)

Policy Notice: Implementation of Standard 15% Indirect Cost Rate (May 2, 2025)

The National Science Foundation (NSF) published a Policy Notice on the adoption of a standard 15% Indirect Cost Rate (ICR) for NSF Grants and Cooperative Agreements awarded to institutions of higher education. The ICR applies to all NSF financial assistance awards and subawards and is intended to streamline funding practices, increase transparency, and ensure that resources are applied to direct scientific engineering research activities. The ICR is effective beginning May 5, 2025, applies to new awards, and does not apply retroactively to existing awards. The policy notice states that the new policy allows NSF and its awardees to focus more on scientific progress and less on administrative overhead by aligning with common federal benchmarks and improving government efficiency by eliminating the need for individualized indirect cost negotiations.

Department of Defense

Implementation of a 15% Indirect Cost Cap on Assistance Awards to Institutions of Higher Education (May 14, 2025)

U.S. Department of Defense (DoD) sent a memorandum to Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DoD Field Activity Directors on the implementation of a 15% indirect cost cap on assistance awards to institutions of higher education (IHEs). The memo states that DoD will pursue a lower cap on indirect cost rates for all new financial assistance awards to IHEs, consistent with federal regulation, which is intended to save up to $900 million annually. It also explains that the objective, in addition to saving money, is to repurpose the funds toward applied innovation, operational capacity, and strategic deterrence. The memo directs Under Secretary of Defense for Research and Engineering (USD(R&E)) to (1) notify the Office of Management and Budget of the intent to cap indirect cost rates; (2) develop and publish formal policy guidance that will govern DoD deviations from negotiated rates; (3) ensure the guidance is public and integrated into all upcoming grant solicitations, including Notices of Funding Opportunity; and (4) ensure new awards to IHEs contain the newly established standard cap. The memo directs that within the next 180 days

USD(R&E) and DoD Components that manage DOD-funded financial assistance awards must initiate a department-wide effort to negotiate indirect cost rates on existing financial assistance awards to IHEs, wherever cooperative bilateral modification is possible; and that where bilateral agreement is not achieved, to identify and recommend lawful paths to terminate and reissue the award under revised terms.

Department of Justice

U.S. Department of Justice Civil Rights Fraud Initiative (May 19, 2025)

U.S. Department of Justice (the Department) issued a memorandum from the Deputy Attorney General on the "Civil Rights Fraud Initiative," which will utilize the False Claims Act (FCA) to investigate and pursue claims against any recipients of federal funds that knowingly violate federal civil rights laws. The Initiative will be co-led by the Civil Division's Fraud Section and the Civil Rights Division and assigns each of the 93 United States Attorney's Offices to identify an Assistant United States Attorney to advance the Initiative. In addition to engaging with other federal agencies such as the Departments of Education, Health and Human Services, Housing and Urban Development, and Labor, the memo encourages anyone with knowledge of discrimination by federal-funding recipients to report the information and highlights the potential for monetary benefit as a whistleblower. It provides a hypothetical example of violation of the FCA by postsecondary institutions, stating "a university that accepts federal funds could violate the False Claims Act when it encourages antisemitism, refuses to protect Jewish students, allows men to intrude into women's bathrooms, or requires women to compete against men in athletic competitions. Colleges and universities cannot accept federal funds while discriminating against other students." The memo goes on to state that the FCA is implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in race-based preferences, mandates, policies, programs, and activities, including through DEI programs.

II. Related Judicial Decisions and Developments

National Institutes of Health (NIH)

Commonwealth of Massachusetts v. National Institutes of Health, Association of American Medical Colleges v. National Institutes of Health, Association of American Universities v. Department of Health and Human Services

Final Judgment and Permanent Injunction (D. Mass. Apr. 4, 2025)
Following the issuance of a nationwide preliminary injunction on the Supplemental Guidance (Notice) from the National Institutes of Health (NIH) and the U.S. Department of Health and Human Services (HHS), the Court entered a permanent injunction, finding that plaintiffs demonstrated success on the merits of their Administrative Procedure Act (APA) claims that the issuance of the Notice: (1) violated C.F.R. § 75.414 and Section 224 of the Further Consolidated Appropriations Act; (2) was arbitrary and capricious; (3) failed to follow notice-and-comment procedures; and (4) was impermissibly retroactive. Further, the Court ruled that the Court of Federal Claims does not have exclusive jurisdiction over plaintiffs' claims under the Tucker Act, and defendants are thus enjoined from taking any steps to implement, apply, or enforce the February 7, 2025, Notice, which is effectively vacated.

Nationwide Preliminary Injunction (D. Mass. Mar. 5, 2025)
Plaintiffs, the states of Massachusetts, Michigan, Illinois, Arizona, California, Connecticut, Colorado, Delaware, Hawai'i, Maine, Maryland, Minnesota, New Jersey, New York, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin seek injunctive relief against the National Institutes of Health (NIH) and the U.S. Department of Health and Human Services (HHS) following the issuance of supplemental Guidance (Rate Change Notice), which lowered previously negotiated indirect cost rates to a flat 15% for all institutions receiving funding from NIH, including institutions of higher education, and that applied to both new and existing grants. Following the issuance of a Temporary Restraining Order (TRO) on February 10, 2025, a hearing was conducted regarding the request for a preliminary injunction. The Court, in coming to its conclusion, relied on the immeasurable and irreparable harm from loss in research, as well as the consequences of such research on participants in clinical trials, deeming the loss as "catastrophic" due to concerns for both patient care and trial validity. Additionally, the Court relied upon Defendants' failure to follow notice and comment procedures, as well as additional regulatory mandates, such as failing to provide any requisite documented justification. Considering irreparable harm likely to befall similarly situated nonparties, the Court reasoned that "the chaos that would result both from institutions and NIH from a patchwork of injunctions, the diffuse nature of the plaintiffs, and the nature of the suit, a nationwide preliminary injunction is the appropriate and reasonable remedy."

Temporary Restraining Order (Association of American Medical Colleges v. National Institutes of Health) (D. Mass. Feb. 10, 2025)
Plaintiffs, the Association of American Medical Colleges, the American Association of Colleges of Pharmacy, the Association for Schools and Programs of Public Health, the Conference of Boston Teaching Hospitals, Inc., and the Greater New York Hospital Association filed a complaint against the National Institutes of Health (NIH) and the U.S. Department of Health and Human Services (HHS)

regarding the supplemental Guidance (Rate Change Notice) that was issued February 7, 2025, which lowered previously negotiated indirect cost rates to a flat 15% for all institutions receiving funding from NIH, including institutions of higher education, and that purported to apply to both new and existing grants. In their complaint, plaintiffs contend that the Rate Change Notice is invalid under the Administrative Procedure Act ("APA"), contrary to HHS's existing regulations, which require NIH to accept the previously negotiated F&A rates and permit NIH to depart from those rates only with justification and only for a limited and defined group of recipients. Plaintiffs further allege the Guidance is contrary to the 2024 Further Consolidated Appropriations Act and arbitrary and capricious as NIH failed to adequately account for reliance interests, failed to justify the switch, to explain the factual basis for the 15% determination, and further failed to undergo required notice and comment rulemaking, therefore depriving research institutions of receiving the negotiated F&A rates the agencies committed to provide. In addition to their request for a temporary restraining order, plaintiffs' ask that the court declare the Guidance an abuse of discretion, contrary to constitutional rights, power, privilege, and immunity, order defendants to file a status report with the court within 24 hours of a temporary restraining order, and at regular intervals thereafter, to confirm the regular disbursement and obligation of federal financial assistance funds and issue a preliminary and permanent injunction barring defendants from taking any steps to otherwise implement the Guidance. The Court found that plaintiffs made a sufficient showing that unless their Emergency Motion for Temporary Restraining Order is granted, they will sustain immediate and irreparable injury before there is an opportunity to hear from all parties. The Court enjoined defendants from taking any steps to implement, apply, or enforce the Rate Change Notice within plaintiff states until further order is issued by the Court, and ordered that defendants file a status report with the court within 24 hours of the temporary restraining order and at regular intervals thereafter. The restraining order is effective immediately and will remain in effect until further order of the Court. A hearing is set for February 21, 2025.

Temporary Restraining Order (Commonwealth of Massachusetts v. National Institutes of Health (D. Mass. Feb. 10, 2025)

Plaintiffs, the states of Massachusetts, Michigan, Illinois, Arizona, California, Connecticut, Colorado, Delaware, Hawai'i, Maine, Maryland, Minnesota, New Jersey, New York, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin filed a complaint seeking injunctive relief against the National Institutes of Health (NIH) and the U.S. Department of Health and Human Services following the issuance of supplemental Guidance (Rate Change Notice), which lowered previously negotiated indirect cost rates to a flat 15% for all institutions receiving funding from NIH, including institutions of higher education, and that applied to new and existing grants. In their complaint, plaintiffs stated that "without relief from NIH's action, these institutions' cutting-edge work to cure and treat human disease will grind to a halt." Plaintiffs also alleged the Rate Change Notice represents a substantive violation of the Administrative Procedure Act, and the action by the NIH is arbitrary, capricious, an abuse of discretion, and not in accordance with the Further Consolidated Appropriations Act, and in excess of statutory authority and Ultra Vires. In granting plaintiffs' temporary restraining order, the Court enjoined defendants from taking any steps to implement, apply, or enforce the Rate Change Notice within plaintiff states until further order is issued by the Court. The Temporary restraining order is effective immediately and will remain in effect until further order of the Court. A hearing is set for February 21, 2025.

Complaint (Commonwealth of Massachusetts v. National Institutes of Health) (D. Mass. Feb. 10, 2025)
Plaintiffs, the Commonwealth of Massachusetts, Attorney General Dana Nessel on behalf of the People of the State of Michigan, State of Illinois, State of Arizona, State of California, State of Connecticut, State of Colorado, State of Delaware, State of Hawai'i, State of Maine, State of Maryland, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington and State of Wisconsin challenged the guidance document issued by the National Institutes of Health (NIH) capping indirect cost rates for NIH grants to 15% (the "Rate Change Notice"). The new NIH policy applies to all new institutional and pre-existing grants. The plaintiffs argue that the Rate Change Notice violates the Administrative Procedure Act in several ways: (1) it is arbitrary, capricious; (2) it contradicts congressional appropriative acts prohibiting the NIH and HHS from making these types of changes to indirect costs; and (3) it exceeds the NIH's statutory authority and failed to use the comment and rulemaking process. The plaintiffs asked the Court to declare that the Rate Change Notice is unlawful and grant a temporary restraining order and preliminary injunction barring the enactment and enforcement of the rate change within all plaintiff states. The plaintiffs further request that the Court orders defendants to file a status report with the Court within 24 hours of entry of the temporary restraining order, and at regular intervals thereafter, to confirm the regular disbursement of federal funds and report all steps that the NIH and HHS have taken to comply with the temporary restraining order. Finally, the plaintiffs asked the court to grant a permanent injunction barring the enactment and utilization of the Rate Change Notice within plaintiff states

Complaint (Association of American Medical Colleges v. National Institutes of Health) (D. Mass. Feb. 10, 2025)
Plaintiffs, the Association of American Medical Colleges, the American Association of Colleges of Pharmacy, the Association for Schools and Programs of Public Health, the Conference of Boston Teaching Hospitals, Inc., and the Greater New York Hospital Association challenged the "Rate Change Notice" issued by the National Institutes of Health (NIH) that implemented a cap of 15% for indirect costs that applies to both new and existing grants. Plaintiffs allege that the Rate Change Notice violated the Administrative Procedure Act, the Further Consolidated Appropriations Act, and exceeded the statutory authority of both HHS and NIH. Plaintiffs request that the Court declare the Rate Policy Notice as unlawful and set aside the policy as arbitrary, capricious, an abuse of discretion, or otherwise contrary to constitutional rights, outside the scope of statutory authority, and adopted without observance of procedure required by law. Plaintiffs seek a temporary restraining order to prevent NIH and HHS from implementing and enforcing the Rate Change Notice in plaintiff states and request a preliminary injunction barring the enforcement of the Rate Change Notice within plaintiff states. The plaintiffs additionally request that the Court order defendants to file a status report with the Court within 24 hours of entry of the temporary restraining order, and at regular intervals thereafter, to confirm the regular disbursement of federal funds and report all steps of NIH and HHS to comply with the temporary restraining order. Finally, the plaintiffs request a permanent injunction barring the NIH and HHS from implementing and enforcing the Rate Change Notice.

Complaint (Association of American Universities v. Department of Health and Human Services) (D. Mass. Feb. 10, 2025)

Plaintiffs, the Association of American Universities, the American Council on Education, the Association of Public and Land-Grant Universities, Brandeis University, Brown University, The Regents of the University of California, the California Institute of Technology, Carnegie Mellon University, the University of Chicago, Cornell University, the George Washington University, Johns Hopkins University, Massachusetts Institute of Technology, Trustees of the University of Pennsylvania, University of Rochester, and the Trustees of Tufts College challenged the U.S. Department of Health and Human Services and the National Institutes of Health (NIH) in response to Guidance issued on February 7, 2025, which reduced previously negotiated indirect cost rates to 15% across the board for all institutions receiving funding from NIH, including institutions of higher education, and that purports to apply to new and existing grants alike. Plaintiffs contend the Guidance violates the Administrative Procedure Act (APA) and congressionally imposed limitations on deviations from negotiated rates for indirect costs that were previously set to remain in force through the Further Continuing Appropriations Act, 2025. Plaintiffs allege the Guidance is arbitrary, capricious, and an illegal departure from cost recovery regulations and policy guidance, as well as a violation of the Public Health Services Act, in excess of statutory authority, and an affront to the separation of powers. Plaintiffs further allege that if allowed to proceed with the Guidance, many institutions would have to reduce or halt a significant portion of their research operations and would be unable to continue to operate cutting-edge equipment and may also be required to close facilities and reduce the number of graduate students and research faculty. In response to the rationale for the Guidance, plaintiffs argue that differences in indirect cost rates do not reflect undeserved government subsidies; rather, institutions have different indirect cost rates because they engage in different types of research and have unique mixes of fixed and variable institutional costs that are appropriately allocated across multiple research projects or other cost objectives, and as such, a flat 15% rate is insufficient. Plaintiffs ask the court for vacatur of guidance; declaratory judgment finding the Guidance procedurally invalid, arbitrary, and capricious, and contrary to law; grant an injunction preliminarily and permanently prohibiting defendants, their agents, and anyone acting in concert or participation with defendants from implementing, instituting, maintaining, or giving effect to the Guidance in any form; from otherwise modifying negotiated indirect cost rates except as permitted by statute and by the regulations of OMB and HHS; and from expending appropriated funds in any manner contrary to Section 224. Plaintiffs' complaint was accompanied by a motion for a temporary restraining order that Judge Angel Kelley confirmed on Tuesday, February 11, 2025, need not be separately granted since her prior temporary restraining order in favor of the Association of American Medical Colleges applies to all institutions and states nationwide.

American Public Health Association v. National Institutes of Health

Complaint (D. Mass. Apr. 2, 2025)

Plaintiffs, the American Public Health Association, IBIS Reproductive Health, International Union, United Automobile, Aerospace, and Agricultural Implement Workers along with several researchers from Harvard allege that the National Institutes of Health (NIH) Directives that were drafted to terminate a large number of grants and refuse to consider certain categories of pending grant applications is in conflict with constitutional, statutory, and regulatory requirements. Plaintiffs allege

that NIH has failed to state any proper ground for termination under governing law, and as a result, plaintiffs have suffered extensive harm, including loss of research, jobs, staff, and income. Plaintiffs allege over $2.4 billion is at stake from recent grant purges, $1.3 billion wasted from projects that were stopped midstream, and $1.1 billion plaintiffs and others have acted in reliance on that has now been revoked. Plaintiffs allege that defendants' actions violate the Administrative Procedure Act (APA) as their actions are arbitrary and capricious as the termination letters failed to explain how any specific study failed to meet agency priorities and was merely boilerplate and conclusory language. Plaintiffs allege defendants are in further violation of the APA as they are not in accordance with the law, as NIH's termination are not based on any evidence regarding the specific grants, and pursuant to OMB Uniform Guidelines, fail to clearly and unambiguously specify all termination provisions in the terms and conditions of the Federal award. Plaintiffs also allege that defendants' actions are violation of separation of powers and exceed statutory authority and are contrary to Constitutional Right as the directives are unlawfully vague. Plaintiffs allege that defendants have unlawfully withheld funding and created unreasonable delay by failing to oblige by NIH policy requirements or considering the risks if funding is abruptly halted for participating research patients. Plaintiffs request the Court to declare the Directives as unlawful, declare the termination of grants in this manner as unlawful, order defendants to end their arbitrary and capricious, unconstitutional, and unlawful actions, and finally, order defendants to restore funding to the terminated NIH grants.

Commonwealth of Massachusetts v. Robert F. Kennedy, Jr.

Complaint (D. Mass. Apr. 4, 2025)

Plaintiffs, the Commonwealth of Massachusetts and the States of California, Maryland, Washington, Arizona, Colorado, Delaware, Hawai'i, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Wisconsin allege that the federal administration defendants "have engaged in a concerted, and multi-pronged effort to disrupt [National Institutes of Health]'s grants." Specifically, plaintiffs challenge delays in the review and approval of otherwise-fundable grant applications and widespread terminations of already-issued grants. Plaintiffs allege that defendants have violated the Administrative Procedure Act (APA) by unlawfully withholding and/or creating an unreasonable delay of agency action as to study sections and advisory councils and delayed both applications and renewals. Plaintiffs further allege that defendants violated the APA as their agency action is contrary to regulation and statute and are arbitrary and capricious in relation to terminated grants. Plaintiffs also allege that defendants have violated separation of powers due to the delayed applications, renewals, and terminated grants. Finally, plaintiffs allege that defendants violated the spending clause by terminating grants, without fair notice, and the delays and termination are not related to the federal interest in NIH research, and instead, are related to "policies and political factors." Plaintiffs (1) seek preliminary and permanent injunctions, compelling defendants to undertake the activities of NIH's advisory councils and study sections that defendants have unlawfully withhold and/or unreasonably delayed with respect to the delayed applications; (2) demand a prompt review of, and issuance of a final decision on, the delayed applications and delayed renewals; and (3) ask the court to hold unlawful, set aside, and issue a preliminary and permanent injunction barring defendants from carrying out, their withdrawal of notices of funding opportunity, bar defendants from carrying out their purported terminations of the grants, and finally, issue a declaration that defendants' treatment of the

delayed applications, renewals, notices of funding opportunity, and terminated grants is unconstitutional.

Department of Energy (DOE)

Association of American Universities v. Department of Energy

Preliminary Injunction (D. Mass. May 15, 2025)
Memorandum and Order Granting Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs, the Association of American Universities, American Council on Education, Association of Public and Land-Grant Universities, Brown University, California Institute of Technology, Cornell University, Board of Trustees of the University of Illinois, Massachusetts Institute of Technology, Regents of the University of Michigan, Board of Trustees of Michigan State University, Trustees of Princeton University, and University of Rochester challenged the Department of Energy (DOE) and its Secretary Chris Wright for the Department's cut on indirect cost rates for government-funded research. Plaintiffs sought a Temporary Restraining Order (TRO) to prevent immediate and irreparable injury, which was granted on April 16, 2025, and followed by a hearing on April 28, 2025. Finding that the balance of equities and the public interest favor plaintiffs, the Court noted immense concern with "funding disruptions [that] would compromise crucial safety protocols for handling hazardous materials, high-voltage equipment, and radiation sources, potentially leading to accidents." The Court subsequently denied defendants' request for a stay pending appeal, reasoning that defendants offered no argument as to their basis for the stay, nor did they articulate what irreparable harm will result from the Court's refusal to grant one. In finding a nationwide injunction a reasonable and appropriate remedy, the Court enjoined defendants from implementing, instituting, maintaining, or giving effect to the so-called "Rate Cap Policy" in any form with respect to postsecondary institutions nationwide until a further order is issued by the Court.

Temporary Restraining Order (D. Mass. Apr. 16, 2025)
Order Granting Plaintiffs' Motion for a Temporary Restraining Order. Plaintiffs, the Association of American Universities, American Council on Education, Association of Public and Land-Grant Universities, Brown University, California Institute of Technology, Cornell University, Board of Trustees of the University of Illinois, Massachusetts Institute of Technology, Regents of the University of Michigan, Board of Trustees of Michigan State University, Trustees of Princeton University, and University of Rochester challenged the Department of Energy (DOE) and its Secretary Chris Wright for the Department's cut on indirect cost rates for government-funded research. Plaintiffs sought a Temporary Restraining Order (TRO) to prevent immediate and irreparable injury following defendants' announcement that the DOE will no longer use negotiated indirect cost rates and will instead default to a 15% indirect cost rate for all grant awards to postsecondary institutions. Plaintiffs alleged that the DOE policy violates the Administrative Procedure Act (APA) by way of deviating from the Congressionally approved negotiated cost rates, terminates existing grants, defies cost recovery regulations, and violates authorizing statutes. The Court found that plaintiffs made a sufficient showing that absent issuance of a TRO, they would sustain immediate and irreparable injury. It enjoined defendants and their officers, employees, servants, agents, appointees, and successors from

implementing, instituting, maintaining, or giving effect to the DOE Policy Flash: Adjusting Department of Energy Grant Policy for Institutions of Higher Education (the "Rate Cap Policy") in any form; from otherwise modifying negotiated indirect cost rates except as permitted by statute and by the regulations of the Office of Management and Budget; and from terminating any grants pursuant to the Rate Cap Policy or based on a grantee's refusal to accept an indirect cost rate less than their negotiated rate. The Court also ordered defendants to provide written notice of the Order to all funding recipients affected by the Rate Cap Policy and to file a biweekly status report to confirm regular disbursement and obligation of federal financial assistance funds until the TRO expires. A hearing is set for April 28, 2025.

Complaint (D. Mass. Apr. 14, 2025)

Plaintiffs, the Association of American Universities, American Council on Education, Association of Public and Land-Grant Universities, Brown University, California Institute of Technology, Cornell University, Board of Trustees of the University of Illinois, Massachusetts Institute of Technology, Regents of the University of Michigan, Board of Trustees of Michigan State University, Trustees of Princeton University, and University of Rochester challenged the Department of Energy (DOE) cut on indirect cost rates for government-funded research. The DOE will no longer use negotiated indirect cost rates and instead default to a 15% indirect cost rate for all grants awarded to Institutions of Higher Education (IHE). Indirect costs include both administrative and facilities costs. The Rate Cap Policy ("Policy") also states that the DOE will terminate all grant awards to IHEs that do not conform with the updated policy. Plaintiffs argue that the Policy violates the indirect-cost regulations created by the OMB and defies the Administrative Procedure Act's reasoned-decisionmaking requirements. Plaintiffs request that the Court grant vacatur of the Policy and declaratory judgment that the policy is invalid, arbitrary and capricious, and contrary to law. Further, plaintiffs seek a preliminary and permanent injunction prohibiting the defendants from implementing the Policy, modifying the negotiated indirect cost rates except as permitted by statute and by the regulation of OMB, and terminating any grants pursuant to this Policy or based on a grantee's refusal to accept an indirect cost rate less than their negotiated rate.

National Science Foundation (NSF)

Association of American Universities v. National Science Foundation

Complaint (D. Mass. May 5, 2025)

Plaintiffs, the Association of American Universities (AAU), the American Council on Education (ACE), the Association of Public and Land-Grant Universities, The Arizona Board of Regents on behalf of Arizona State University, Brown University, California Institute of Technology, the Regents of the University of California, Carnegie Mellon University, the University of Chicago, Cornell University, Board of Trustees of the University of Illinois, Massachusetts Institute of Technology, Regents of the University of Michigan, Regents of the University of Minnesota, the University of Pennsylvania, and the Trustees of Princeton University allege that defendants, the National Science Foundation (NSF) and Brian Stone's decision to slash indirect cost rates to government-funded research is unlawful. Defendants issued a new policy on May 2, 2025, imposing a categorical cap on all new grant and

cooperative agreement awards to universities not to exceed 15%. Plaintiffs allege that if allowed to stand, NSF's policy "will badly undermine scientific research at America's universities and erode our Nation's enviable status as a global leader in scientific research and innovation." Plaintiffs contend that defendants' new policy violated the Administrative Procedure Act (APA) as it is (1) contrary to law; (2) an illegal departure from Negotiated Cost Rates in violation of 2 C.F.R. 200.414; (3) an illegal departure from cost recovery regulations; and (4) arbitrary and capricious. Plaintiffs ask that the Court issue a vacatur of the policy; issue declaratory judgment finding the rate cap invalid, arbitrary and capricious, and contrary to law; issue an injunction permanently prohibiting defendants, their agents, and anyone acting in concert or participation with defendants from implementing, instituting, maintaining, or giving effect to the rate cap policy in any form; from otherwise modifying negotiated indirect cost rates except as permitted by statute and by the regulations of OMB; and from rejecting or otherwise treating adversely proposals for NSF funding submitted at universities' negotiated rates rather than the policy's proposed 15% rate cap.

State of New York v. National Science Foundation

Complaint (S.D.N.Y. May 28, 2025)

Complaint for Declaratory and Injunctive Relief. Plaintiffs, the State of New York, State of Hawai'i, State of California, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Maryland, Commonwealth of Massachusetts, State of Nevada, State of New Jersey, State of New Mexico, State of Oregon, State of Rhode Island, State of Washington, and State of Wisconsin allege that defendants, the National Science Foundation (NSF) and Brian Stone in his official capacity as Acting Director of the NSF acted unlawfully in announcing that NSF adopted new priorities and that "research projects with more narrow impact limited to subgroups of people based on protected class or characteristics do not effectuate NSF priorities." Additionally, NSF issued termination notices to projects in plaintiff states that (1) seek to increase STEM participation by women, minorities, and people with disabilities; (2) study misinformation; and (3) address environmental justice. Finally, NSF announced that it would not cover indirect costs at a rate higher than "15% of modified total direct costs" for grants and cooperative agreements awarded to postsecondary institutions. Plaintiffs contend that if allowed to proceed, defendants' actions will devastate critical STEM research at institutions of higher education. Plaintiffs also maintain that no termination notice alleged that projects operated in a way that violated any law, and NSF has explicitly disclaimed any basis to terminate the grants other than its decision to depart from Congressionally mandated priorities. Plaintiffs claim defendants failed to consider several important aspects of the issues before them, including plaintiff States' reliance interests in the Congressionally mandated NSF policy that NSF has followed for decades, and if defendants could have adopted less extreme measures to effectuate their new "priorities." Plaintiffs further contend that no law permits NSF to categorically refuse to sponsor broad areas of research pursuant to shifts in agency priorities when they contradict Congressionally mandated priorities. Plaintiffs allege that defendants' actions violate the APA as they are arbitrary and capricious and contrary to law; violate Separation of Powers and the Take Care Clause; and are *ultra vires* Executive Action. Plaintiffs ask that the court find defendants' actions unlawful and vacate the "Priority Directive" and the "Indirect Cost Directive;" enter a declaratory judgment finding that both directives and their implementation are invalid, arbitrary and capricious, contrary to law, *ultra vires*, and violative of the Constitution; issue preliminary and permanent injunctive relief barring

implementation of the directives, or otherwise modifying negotiated indirect cost rates except as expressly permitted by statute and regulation.

Other Related Cases

President and Fellows of Harvard College v. U.S. Department of Health and Human Services

Complaint (D. Mass. Apr. 21, 2025)
Plaintiff, the President and Fellows of Harvard College allege that defendants, the U.S. Department of Health and Human services, the National Institutes of Health, Robert F. Kennedy, Jr., U.S. Department of Justice, Pamela J. Bondi, U.S. Department of Education, Linda M. McMahon, U.S. General Services Administration, Stephen Ehikian, U.S. Department of Energy, Christopher A. Wright, U.S. National Science Foundation, Sethuraman Panchanathan, U.S Department of Defense, Peter B. Hegseth, National Aeronautics and Space Administration, and Janet E. Petro have acted unlawfully by way of "withholding federal funding as leverage to gain control of academic decision making at Harvard." Defendants announced that they were freezing $2.2 billion in multiyear grants and $60 million in multiyear contract value to plaintiff after plaintiff refused to comply with defendants' conditions outlined in letters sent on April 3 and 11, 2025. Plaintiff alleges that defendants' intentions are to "allow the Government to micromanage your academic institution or jeopardize the institution's ability to pursue medical breakthroughs, scientific discoveries, and innovative solutions." Plaintiff contends that defendants' action in withholding funding is a violation of the Administrative Procedure Act (APA) and defendants have violated the First Amendment, are acting in excess of their statutory and constitutional authority, are arbitrary and capricious, and failed to follow their own regulatory procedures, which required defendants to provide notice, attempt to secure compliance by voluntary means, provide an opportunity for hearing, make express findings on the record, and file with the Committees of the House and Senate that have legislative jurisdiction over the program(s) involved — none of which were done prior to Federal financial assistance being frozen. Plaintiff asked the court to declare defendants' actions unconstitutional, postpone the effectiveness of the "Freeze Order" and any unconstitutional conditions in the April 3 and 11 letters, and finally, permanently enjoin defendants from violating plaintiff's First Amendment rights, as well as from terminating, freezing, or refusing to grant or continue any Federal funding at issue without first complying with Federal law.

American Association of University Professors - Harvard Faculty Chapter v. U.S. Department of Justice

Complaint (D. Mass. Apr. 11, 2025)
Plaintiffs, the Harvard Faculty Chapter of the American Association of University Professors, as well as the American Association of University Professors allege that defendants, the United States Department of Justice, Pamela Bondi, Leo Terrell, U.S. Department of Education, Linda McMahon, Craig Trainor, Thomas Wheeler, U.S. Department of Health and Human Services, Robert F. Kennedy Jr., Sean R. Keveney, National Institutes of Health, Jayanta Bhattacharya, U.S. General Services Administration, Stephen Ehikian, and Josh Gruenbaum have acted unlawfully and misused federal funding and civil rights enforcement authority to undermine academic freedom and free speech on a university campus. Plaintiffs sued after defendants announced an investigation of Harvard University for alleged failures to address Antisemitism and demanded that the University adopt a list of

programmatic and structural changes to university management, operations, and curriculum. Plaintiffs allege that defendants described these changes as "non-exhaustive" preconditions for Harvard "to remain a responsible recipient of federal taxpayer dollars" valued at approximately $9 billion. Plaintiffs allege that defendants violated the Administrative Procedure Act (APA) by acting contrary to law and being arbitrary and capricious, violating the Fifth Amendment Due Process Clause, violating Separation of Powers and the Spending Clause, and violating the First Amendment Freedom of Speech protection. Plaintiffs ask the court to (1) declare unlawful and set aside the pending investigation and review of the University's federal funds; (2) preliminarily and permanently enjoin any further investigation or review of the University's federal funding, using the withdrawal of federal funds or the threat of withdrawal of federal funds to coerce the University to suppress viewpoints or speech of plaintiffs and their members; and (3) preliminarily and permanently enjoin defendants from using the power of the government to target and punish the University for the viewpoints and speech of plaintiffs and their members.

State of Colorado v. U.S. Department of Health and Human Services

Preliminary Injunction (D.R.I. May 16, 2025)
Plaintiffs, a coalition of 23 States and the District of Columbia, allege that the U.S. Department of Health and Human Services (HHS) terminated $11 billion of public health funding on March 24, 2025 (referred to as the "Public Health Terminations"). The plaintiffs sought a Preliminary Injunction requiring HHS to reinstate the public health funding while their case is pending, and the injunction was granted by the Court. Defendants are enjoined from implementing and enforcing the Public Health Terminations in all plaintiff states and must immediately cease any actions taken in furtherance of the Public Health Terminations. Further, defendants' counsel must provide written notice of the Order to all defendants by May 20, 2025, and defendants must also file a status report documenting the actions they have taken to comply with the Order by May 20, 2025.

Temporary Restraining Order (D.R.I. Apr. 5, 2025)
Plaintiffs, the States of Colorado, Rhode Island, California, Minnesota, Washington, Arizona, Connecticut, Delaware, Hawai'i, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, and Wisconsin, and the District of Columbia requested an emergency temporary restraining order (TRO) following the U.S. Department of Health and Human Services (HHS) terminating $11 billion of public health funding on March 24, 2025. Plaintiffs allege that if funding is not restored, key public health programs and initiatives that address ongoing and emerging public health needs within the plaintiff jurisdictions will have to be dissolved or disbanded, resulting in serious harm to public health. Plaintiffs allege that defendants' abrupt termination of funding was a violation of the Administrative Procedure Act (APA) and contrary to law as defendants unlawfully applied "for cause" provision to terminate the grants since the American Rescue Plan Act of 2021 (ARPA) does not authorize the end of the pandemic as a ground for termination and none of the appropriations at issue were scheduled to terminate at the conclusion of the pandemic. Plaintiffs allege all public health terminations are in violation of APA as they are arbitrary and capricious by way of failing to undertake any individualized assessments of the grants and ignoring the substantial reliance interests of plaintiff states and the harmful impact of immediately terminating without any advance warning, as well as having departed significantly from

the normal procedures for issuance of the public health terminations. Finding favor of plaintiffs, the Court granted the TRO and restrained defendants from implementing or enforcing funding terminations that were issued to plaintiffs on or after March 24, 2025.

Complaint (D.R.I. Apr. 1, 2025)
Plaintiffs, State of Colorado, State of Rhode Island, State of California, State of Minnesota, State of Washington, State of Arizona, State of Connecticut, State of Delaware, District of Columbia, State of Hawai'i, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Nevada, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Wisconsin, Pennsylvania Governor Josh Shapiro, and Kentucky Governor Andy Beshear sued the U.S. Department of Health and Human Services (HHS) for terminating $11 billion of public health funding on March 24, 2025 (referred to as the "Public Health Terminations"). The complaint states that HHS justified this action as a "for cause" termination, citing the end of the COVID-19 pandemic as evidence that the funding had served its limited purpose. Plaintiffs contend that this funding termination exceeds the defendants' statutory and regulatory authority and violates the Administrative Procedure Act (APA). The plaintiffs request that the Court vacate and set aside the Public Health Terminations and issue a judicial declaration that these acts violated the APA. The plaintiffs also request a preliminary and permanent injunction enjoining the defendants from enacting or enforcing the Public Health Terminations or reinstituting the terminations for the same or similar reasons without following the required statutory or regulatory process.

American Association of University Professors v. U.S. Department of Justice

Complaint (S.D.N.Y. Mar. 25, 2025)
Plaintiffs, the American Association of University Professors and the American Federation of Teachers allege that the Trump Administration's actions in (1) commencing an investigation of Columbia University for its asserted but unspecified failure to address antisemitism on campus, (2) canceling approximately $400 million in critical federal research funding without prior notice, explanation, or any form of due process, and (3) demanding that the University adopt a list of sweeping programmatic and structural changes within one week as "a precondition" for the University's "continued financial relationship with the United States government," valued at approximately $5 billion are "an existential gun to the head for a university." Plaintiffs allege that these actions violate First Amendment Freedom of Speech as the First Amendment prohibits the government from using threats of legal sanction and other means of coercion to achieve the suppression of disfavored speech or academic freedom. Plaintiffs allege that the administration is implementing unconstitutional conditions on federal funding and "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." Plaintiffs allege procedural and substantive violations of the Administrative Procedure Act (APA) with respect to the March 7, 2025, funding withdrawal and the March 13th letter as defendants did not provide an opportunity for a hearing or make an express finding on record as to the University's alleged noncompliance with Title VI, and such actions were both arbitrary and capricious as the withdrawal was either reasonable nor reasonably explained. Plaintiffs allege that the March 13th letter was contrary to law and exceeded defendants' statutory authority, as no law grants defendants the authority to demand expulsion or multi-year suspension of

particular students or to dictate a fundamental restructuring of a university's disciplinary system or require unspecified comprehensive admissions reform or academic receivership. They further alleged that such actions violate separation of powers, *ultra vires*. Finally, plaintiffs allege the lack of fair notice or a reasonable opportunity to be heard before the termination of $400 million in federal funding is a violation of due process. Plaintiffs request that the court declare unlawful and set aside defendants' termination of federal financial assistance to Columbia University announced on March 7, 2025; the demands set forth in defendants' March 13th letter; declare that defendants' cancelation of federal grants without observance of Title VI's statutory and regulatory requirements and imposition of demands upon threat of withholding future federal funding violate the First, Fifth, and Tenth Amendments to the U.S. Constitution, violate the separation of powers, are *ultra vires*, and constitute an unconstitutional condition on federal financial assistance; and enter a preliminary and permanent injunction requiring defendants to immediately reinstate or restore all grants and contracts to Columbia University and plaintiffs' members that were unlawfully terminated, canceled, or paused, and prohibiting defendants from: (i) terminating, canceling, pausing, issuing stop-work orders, or otherwise interfering with grants or contracts purportedly in response to Title VI violations, (ii) engaging in any purported Title VI investigation involving grants or contracts except in compliance with Title VI, its implementing regulations, the APA, and the Constitution, or (iii) enforcing the demands made in defendants' March 13th letter, or from insisting on the fulfillment of any or all of those demands or any other demands as a precondition for providing any benefit or avoiding any sanction under Title VI, except upon findings required by, and pursuant to the processes required by, Title VI and its implementing regulations.

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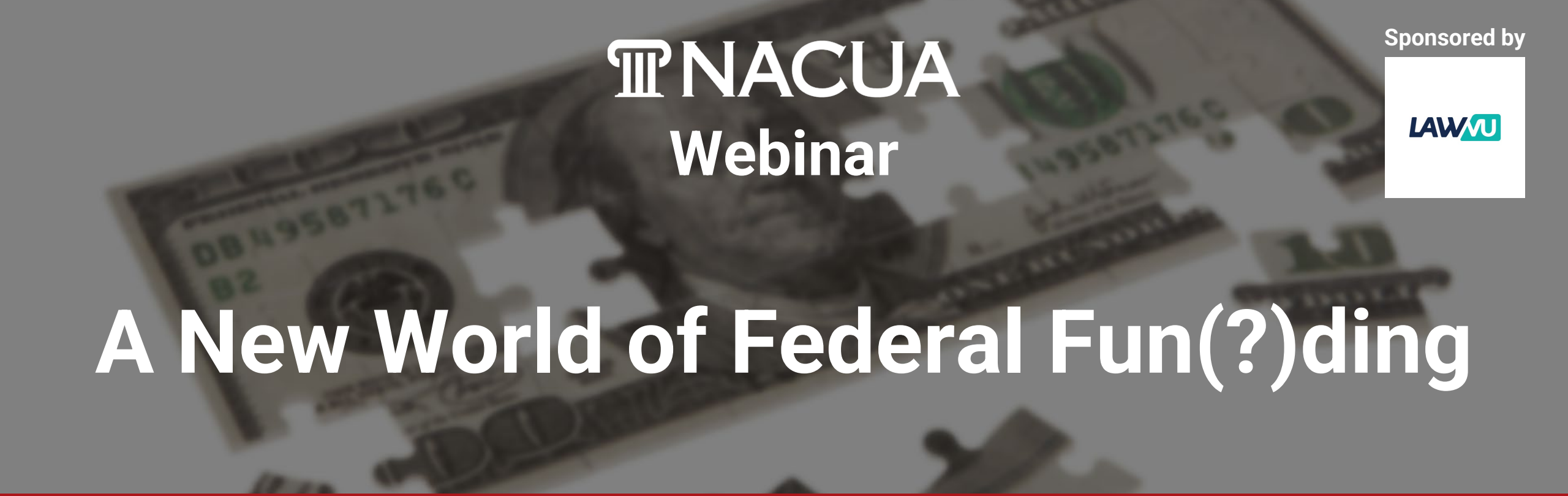

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A New World of Federal Fun(?)ding

William Ferreira, Partner, Hogan Lovells
Michelle Gluck, Associate General Counsel, The Pennsylvania State University
Aleks Sverdlov, Counsel, Hogan Lovells

Agenda

- Introduction
- Federal grants vs. contracts
- Award termination
- Termination costs
- Considerations and strategies for appeals
- Q&A
- Litigation considerations
- Overview and strategies for certifications
- Q&A
- Closing remarks

Grants versus Contracts

Federal Grants vs. Contracts

- Federal Grant and Cooperative Agreement Act (1977)
  - Agency shall use a **grant** when
    - the principal purpose of the relationship is the transfer of resources to the recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute
  - Agency shall use a **procurement contract** when
    - the principal purpose of the instrument is acquisition of property or services for the direct benefit or use of the Federal Government.

Federal Grants vs. Contracts

- Grants & Cooperative Agreements:
  - 2 CFR 200 (OMB Uniform Guidance)
  - Agency implementations of OMB Uniform Guidance
  - Agency grant terms, policies, and guidance
- Procurement contracts:
  - Federal Acquisition Regulation (FAR)
  - Agency supplements to FAR
  - Agency contract terms, policies, and guidance

Award Terminations

Grant Terminations

- Key sources of recipient rights and obligations
  - Award termination notice, memorandum
  - Agency regulations, including implementation of OMB UG
  - Agency grant policies, procedures, and standard terms
  - Award instrument (notice of award, etc.)

Grant Terminations

- Award termination notice
  - EPA Example:
    - *Termination notice*: “The recipient demonstrates its commitment to carry out this award by either: 1) drawing down funds within 21 days after the EPA award or amendment mailing date; or 2) not filing a notice of disagreement with the award terms and conditions within 21 days after the EPA award or amendment mailing date.”
    - *Termination memo*: “If you wish to dispute this termination decision, the Disputes Decision Official (DDO) must receive the Dispute no later than 30 calendar days from the date this termination notice is electronically sent to you.”
  - DOD Example:
    - *Termination notice*: “You are asked to reply by [Date], with proposed termination conditions, including effective date, for consideration and discussions, as necessary, to reach an agreement quickly.”

Grant Terminations

- OMB Uniform Guidance (2 CFR 200.340)

  (a) The Federal award may be terminated in part or its entirety as follows...

  (4) By the Federal agency or pass-through entity pursuant to the terms and conditions of the Federal award, including, to the extent authorized by law, **if an award no longer effectuates the program goals or agency priorities**.

  (b) The Federal agency or pass-through entity must clearly and unambiguously specify all termination provisions in the terms and conditions of the Federal award.

- Note agency implementation of this provision.

Grant Terminations

- Agency grant and cooperative agreement policies:
  - NSF PAPPG and General Grant Conditions
  - NIH GPS
  - DoD R&D General Terms and Conditions
- Closeout and termination costs
- Other considerations

Grant Terminations

2 CFR 200.344

- The recipient must liquidate all financial obligations incurred under the award no later than 120 calendar days after the conclusion of the period of performance.
- A subrecipient must liquidate all financial obligations incurred under a subaward no later than 90 calendar days after the conclusion of the period of performance of the subaward (or an earlier date as agreed).
- When justified, the Federal agency or pass-through entity may approve extensions for the recipient or subrecipient."

How does pending litigation factor in?

Contract Terminations

- Government has broad right to terminate a contractor's performance of work under a contract when it is in the government's interest to do so
  - Not a breach of contract
  - Termination for convenience must be in good faith
  - Contractor eligible for certain cost recovery

Awardee Right to Costs in Termination

Termination Costs in Grants

- Governed by 2 CFR 200.343
- “Properly incurred . . . before the effective date of suspension or termination, and not in anticipation of it.”
- Can also include
  - Non-cancelable obligations
  - Costs of publication or sharing of research results
  - Administrative closeout costs

Allowed Non-Cancelable Obligations

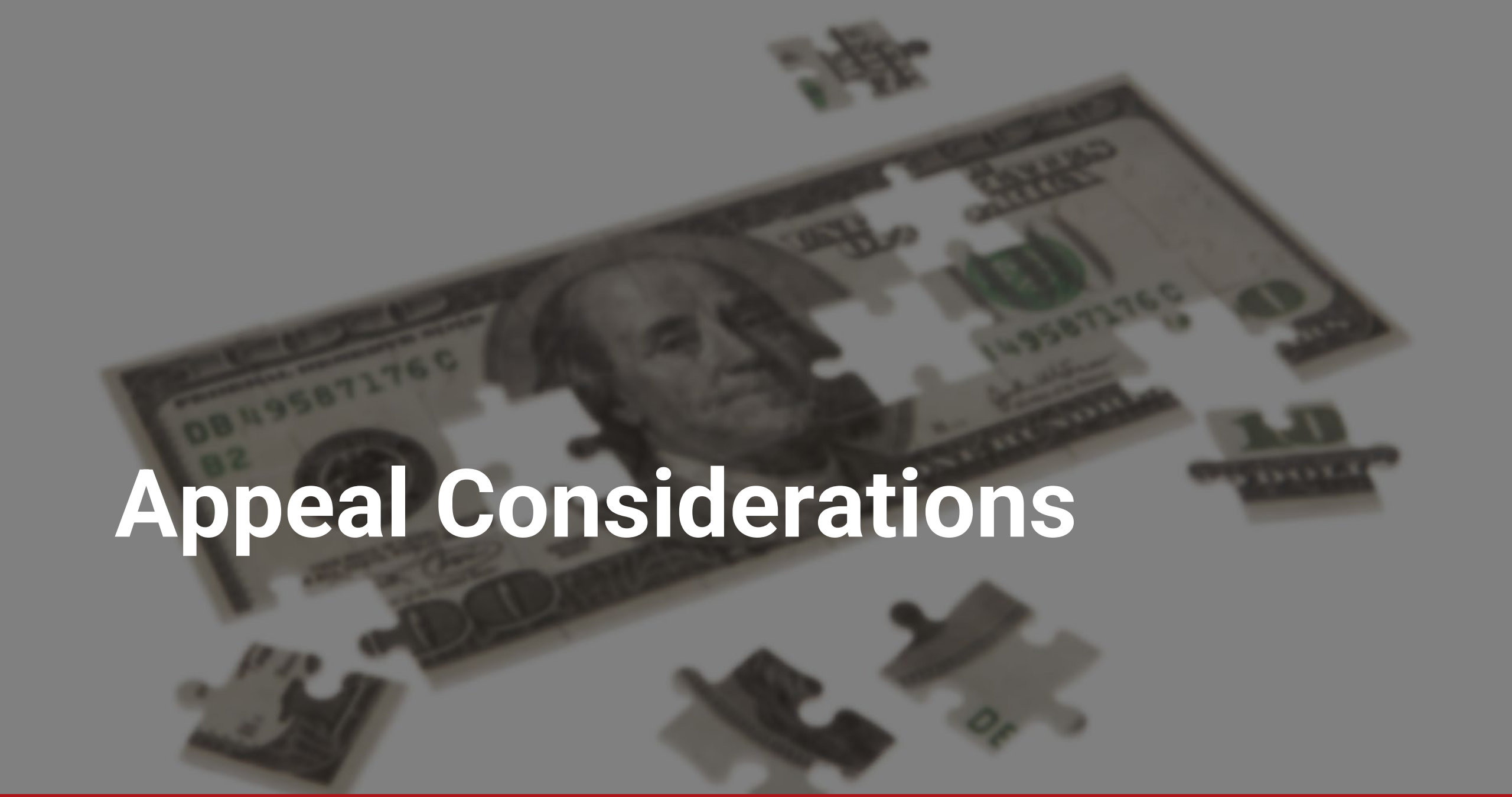
- Some salaries
  - Postdocs, fixed-term faculty, staff hired for terminated grant.
- Graduate students through the end of the current academic period.
- Custom equipment and supplies.
- Human/Animal subject research orderly closeout.
- Non-cancelable deposits
  - Travel
  - Conference planning
  - Administrative closeout costs

Cancelable Costs

- Regular faculty/staff salaries
- Graduate student support in future academic periods.
- Hourly wages
- Not yet delivered standard equipment/supplies
- Future planned travel costs
- Subcontracts and purchased services
  - Subrecipients/vendors can also claim noncancelable costs

Costs Under Contracts

- Contractor shall “promptly” comply with a notice of a Termination for Convenience, including:
  - Stop work immediately and stop placing subcontracts
  - Terminate all subcontracts
  - Immediately advise Termination Contracting Officer (“TCO”) of any special circumstances precluding stoppage of work
  - Perform continuing portion of contract and submit request for an equitable adjustment of price supported by evidence
  - Promptly notify TCO in writing of any legal proceedings
  - Settle outstanding liabilities arising out of termination of subcontracts, obtaining any approvals or ratifications required by TCO
  - Promptly submit a settlement proposal, with support
  - Dispose of termination inventory, as directed by TCO



Appeal Considerations

Right to Appeal?

- "The Federal agency must maintain written procedures for processing objections, hearings, and appeals." - 2 CFR 200.342
- But see NSF FAQs (updated May 23, 2025):
  - " Terminations of awards on the basis that they no longer effectuate program goals or agency priorities **are the final agency decision and are not appealable to NSF**…Because there are no allegations of deficiencies by the awardee to dispute, there are no grounds for agency appeal."
- Note discrepancies with NSF PAPPG and NSF Grant General Conditions

Appeal Considerations

- Competing considerations
  - Opaque and disparate process across agencies
  - Rarely a favorable venue for the grantee
  - Financial considerations
  - Litigation considerations
  - Public relations
  - Faculty support and perceptions
  - Cost recovery
  - What is the end goal?

Appeal Content

- Note the deadlines and extensions
- This is a formal process
- What are we appealing, exactly?
- Details matter
- Faculty involvement crucial
- Use emotional restraint
- What are we asking for, exactly?
- Set expectations with researchers/faculty

Appeals Under Contracts

- Contracts Disputes Act
  - "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1).
- Receive a CO's Final Decision
  - Even if the CO's termination for convenience was styled as a final decision.
- Jurisdiction at the appropriate board of contract appeals or the U.S. Court of Federal Claims.

Appeals and Litigation

- Do we need to appeal if we're thinking about suing?
  - APA review available for "final agency action." 5 U.S.C. § 704
  - Tucker Act review available after CO decision on a "claim." 41 U.S.C. § 7103
- What does appeal do to "final agency action"?
- Do we want the agency to revise its reasoning?

What if Others are Suing?

- Potential to benefit from other lawsuits
  - Especially if suit is brought by (home) states or associations
  - Ask faculty if they are association members
- May want to buy time while litigation plays out
- But important to not fall out of relief
- What happens if an injunction is vacated?

Ways to Preserve Rights

- Avoid unintentionally consenting to termination
  - Check specific agency rules and procedures
  - Don’t unconditionally accept modifications
- Consider submissions “under protest”
- But cannot delay forever

Institutional Strategy -- Communication

- PIs whose grants are terminated understandably feel some combination of:
  - Angry
  - Offended by the termination language
  - Bewildered by the “reasoning”
  - Worried about their future viability and funding options
  - Sad about the loss of the project.
  - All of the above
- Institutional response needs to communicate:
  - Empathy
  - Options for response
  - **Who gets to decide**

Institutional Strategy -- Communication

- Difference between administrative appeals and judicial actions
  - Merits of the decision

    vs.
  - Legitimacy of the process
- Manage expectations
  - Most administrative appeals are doomed to failure
  - Beware the lay press
- Decision process
  - Researcher makes the case; but
  - Institutional decision

Institutional Strategy – Appeal, Or Not?

- Who decides?
  - Institutional decision; ideally taken (and owned) by senior leadership.
- Why not appeal everything?
  - Cost (staff time/effort) of preparing appeal
  - Risk of lost closing costs
  - Uncertainty in light of near-certain denial (or worse)

Institutional Strategy – Appeal, Or Not?

- Factors in favor
  - Clear factual error in basis for termination
  - Grant can be tied to administration priorities
  - Significant danger to human or animal subjects can be mitigated by extension of grant termination date.
- Factors against
  - Clearly disfavored subject matter
  - Grant near completion
  - Significant closing costs at risk


Q&A

Litigation Considerations

Why Sue?

- Keep the money flowing
- Delay adverse action, such as new conditions
- Limit agency overreach

- Recover money damages after the fact

What Cause of Action?

- Administrative Procedure Act (APA): the "wonky workhorse of American law." NYT, May 5, 2025
  - Requires reviewing courts to "hold unlawful and set aside" final agency action that is "arbitrary, capricious, an abuse of discretion," or otherwise not in accordance with law. 5 U.S.C. § 706(2).
  - Vehicle to secure prospective equitable relief—*i.e.* an injunction—against discrete decision
  - Tool to manage "complex ongoing relationship between the parties." *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988).
- APA benefits
  - One lawsuit can seek reinstatement of many separate grants
  - Gives access to many different legal theories
  - Gives plaintiff a choice of forum
  - Speed!

APA Limits

- APA vs. Tucker Act
  - **APA allows for** "relief *other* than money damages." 5 USC § 702.
  - Courts have traditionally understood this to allow injunctive and declaratory relief—even if that relief involves paying money. *Bowen*, 487 U.S. at 893.
  - But "[T]he Tucker Act ... 'impliedly forbid[s]' an APA action . . . if that action is a 'disguised' breach-of-contract claim." *United Aeronautical Corp. v. U.S. Air Force*, 80 F.4th 1017, 1026 (9th Cir. 2023).
- With grants, this distinction can get elusive.
- Courts look "beyond the form of the pleadings to the substance:"
  - (1) the source of rights claimed and
  - (2) the type of relief sought

APA, in Practice

- The Just Security blog Litigation Tracker lists 38 major lawsuits related to grants, loans, and assistance.
- Lower courts have been entering broad, expeditious relief
  - Challenge to indirect rate changes across agencies
  - Challenges to funding of specifically-appropriated funding, such as for clean energy
  - Challenges to dismantling of agencies and associated grant terminations
- Relief often flows to non-parties

The Pushback

- Scope of relief
  - Question about availability of “universal” injunctions
- *Department of Education v. California*, 145 S. Ct. 966 (2025)
  - District court entered an order “enjoining the Government from terminating various education-related grants” and to “pay out past-due grant obligations.” *Id.* at 968.
  - Supreme Court enters a stay.

The Current Landscape

- APA probably still good for challenging “upstream” decisions
  - Even this is receiving some pushback.
- Past obligations may not be recoverable
- Relief may be increasingly limited to parties
- Important to focus on statutory and/or constitutional claims

What Makes a Good Case?

- Statutory violation
  - *E.g.*, NIH indirect rate; Title VI procedures, etc.
  - Disregard of clear Congressional appropriation
  - Attaching conditions beyond scope of statutory authority
- Constitutional violation
  - Retaliation for First Amendment activity. *NRA v. Vullo*, 602 U.S. 175 (2024)
  - Other improper leveraging of constitutional rights.
  - Conditions that extend beyond the federal program. *USAID v. All. for Open Soc'y*, 570 U.S. 205 (2013)

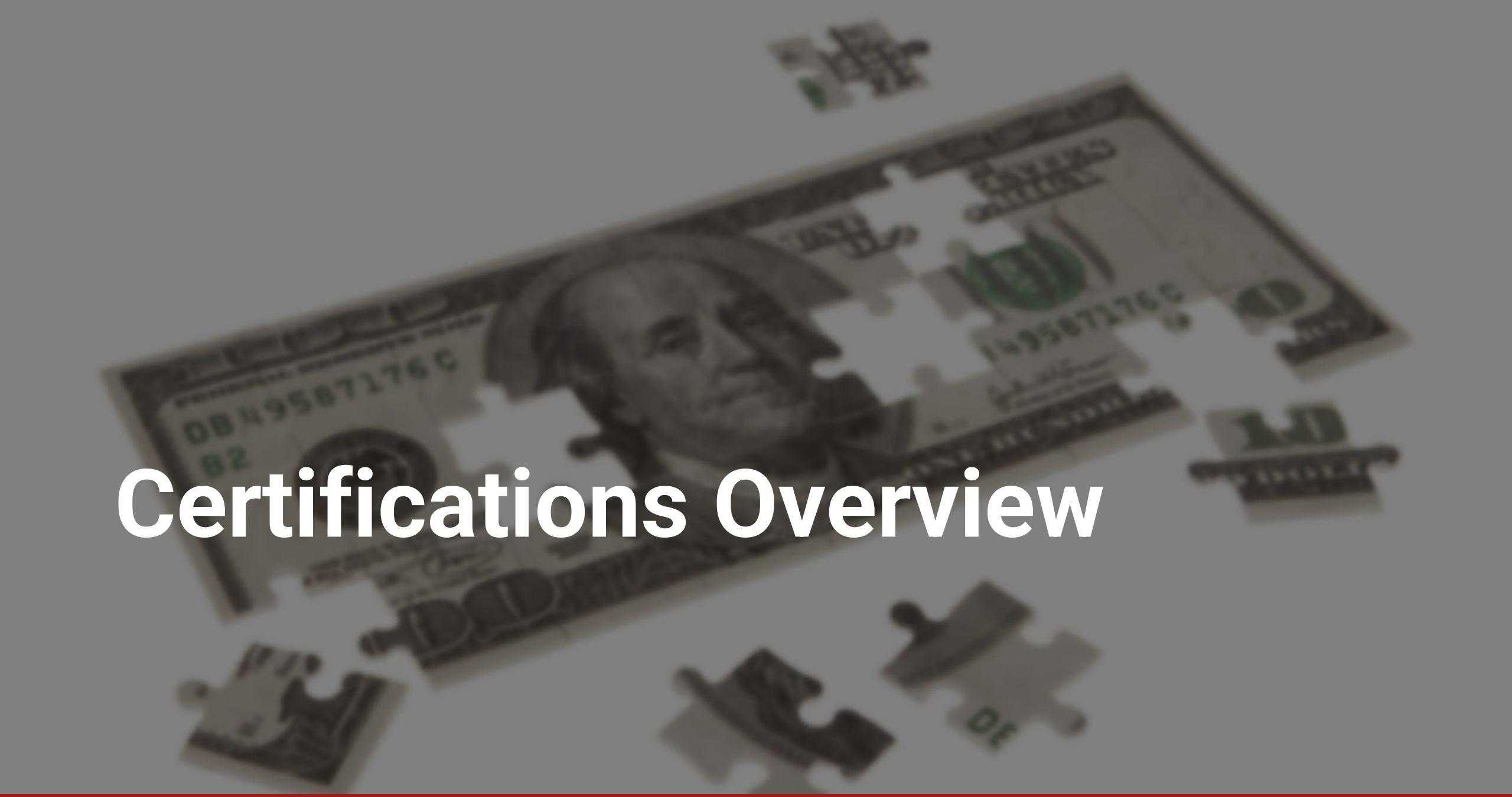
Emerging Problems

- Are grants really like contracts?
  - *Compare Nat'l Ctr. for Mfg. Sci. v. United States*, 114 F.3d 196, 201 (Fed. Cir. 1997) *with Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1338–40 (Fed. Cir. 2021)
- What claims are available under the Tucker Act? What recovery?

The Big Question

- What to do about 2 C.F.R. 200.340(a)(4)?

> The Federal award may be terminated . . . pursuant to the terms and conditions of the Federal award, **including**, to the extent authorized by law, if an award no longer effectuates the program goals or **agency priorities**.



Certifications Overview

New Certifications

- Executive Order 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
  - Directs each agency to include terms in every contract or grant making clear that the contractor/grantee:
    - (A) agrees that compliance with “all applicable Federal anti-discrimination laws is material to the government’s payment decisions” for FCA purposes; and
    - (B) certifies that it does “not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”
- Bondi Memorandum (Feb 5)
- Blanche Memorandum (May 19)

NIH Certification

https://grants.nih.gov/grants/guide/notice-files/NOT-OD-25-090.html

- *Recipients must comply with all applicable Federal anti-discrimination laws material to the government's payment decisions for purposes of 31 U.S.C. § 372(b)(4).*

  (2) Grant award certification.

  (a) By accepting the grant award, recipients are certifying that:

  (i) They do not, and will not during the term of this financial assistance award, operate any programs that advance or promote DEI, DEIA, or discriminatory equity ideology in violation of Federal anti-discrimination laws; and

  (ii) They do not engage in and will not during the term of this award engage in, a discriminatory prohibited boycott.

  (3) NIH reserves the right to terminate financial assistance awards and recover all funds if recipients, during the term of this award, operate any program in violation of Federal anti-discriminatory laws or engage in a prohibited boycott.

New Certifications & False Claims Act

- False Claims Act (31 U.S.C. § 3729, et seq.)
  - Any person who knowingly presents, or causes to be presented, false or fraudulent claims for payment or false statements material to the government's payment decision will be liable for three times the government's damages plus penalties and costs.
  - The FCA's *qui tam* provisions permit relators who possess relevant non-public information to bring suits in the name of the government.
- Liability often turns on allegations of "legal falsity" -- defendant allegedly falsely certifies either expressly or impliedly that it complied with a term that is material to the government's decision to pay
- The elements of an FCA claim are falsity, scienter, materiality, and causation
- Consider subjective belief of defendants
- Materiality requires that the allegedly false statement was material to the government's payment decision

Certifications Strategy

Whether and **What** to certify is an institutional decision.

- Three types of certifications:
  - Specific grant or proposal complies with EOs and/or does not violate federal law.
  - Award conditioned on certification that no federal funds will be used to support DEIA or other EO-prohibited activities across institution “in violation of federal law.”
  - Certification that entire institution complies with federal laws as interpreted by various agency communications (without regard to funding).

Certifications Strategy

- Before you can certify anything, you need to know what your institution is doing.
  - Survey institutional activities, including outside of research ecosystem
  - Consider whether and how to define “DEIA” in order to determine whether activities are questionable.
- Centralize and reinforce AOR authority to sign any certifications


Q&A

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