



FEDERAL ASSISTANCE LAW DIVISION (FALD)

U.S. Department of Commerce

Office Overview.

The Federal Assistance Law Division (FALD) is a part of the Office of the Assistant General Counsel for Finance and Litigation. FALD is led by Michelle McClelland and is staffed by 9 full-time attorneys, 1 attorney who works half-time for FALD and half-time for the OGC General Law Division, and by one support staff. FALD staff is co-located with the three primary grants offices servicing the Department, at headquarters in Washington, D.C., at the National Oceanic and Atmospheric Administration's offices in Silver Spring, MD, and at the National Institute of Standards and Technology in Gaithersburg, MD.

Legal Advisor to the Office of Acquisition Management (OAM).

OAM establishes Department-wide policies, procedures, terms and conditions, and regulations governing federal assistance programs which are issued by the Chief Financial Officer and Assistant Secretary for Administration and binding upon all the agencies within the Department. FALD is currently working with OAM to update the Department of Commerce Financial Assistance Standard Terms and Conditions, which were last updated in March 2008. The Standard Terms and Conditions generally apply to all financial assistance awards issued by the Department and its bureaus.

Federal Assistance Program Advisor.

FALD serves as program counsel to all of the bureaus in the Department and their servicing Grants Officers, with limited oversight of the Economic Development Administration's (EDA) programs that are served by their Regional Counsels, providing legal advice on a daily basis on all matters related to federal assistance. We assist in the drafting of rules, regulations, forms, application kits, evaluation processes, peer review procedures, selection processes, terms and conditions of grants and cooperative agreements, and award documents. We also work with NOAA, NIST and NTIA regarding real property issues in connection with their respective construction programs (Jedd will discuss in more detail). We often work closely with Chief Counsels when an issue surrounds specific programmatic legislation or regulation and also work with General Law Division on appropriation issues and other funding agreements authorities.

Legal Advisor to the Nonprocurement Debarment Official.

Pursuant to Executive Order No. 12549, Nonprocurement Suspension and Debarment regulations were established by the Department at 15 C.F.R. Part 26, relocated to 2 CFR Part 1326 (December 26, 2006). FALD advises the Director of the Office of Executive Budgeting and Assistance Management, who is the Department's Non-procurement Debarment Official, on the legal sufficiency of the administrative record supporting a proposed debarment or suspension, to assure that burden of proof and due process requirements are met.

Legal Advisor on Financial Assistance Audits, Audit Resolutions, and Appeals.

Department Administrative Orders (DAO) 213-3 and 213-5 establish the procedures for audits of financial assistance awards and recipients and specifies that OGC shall review any determination that results in adverse action taken against the auditee and also provide clearance of all audit appeal decisions. These two responsibilities fall within the purview of FALD.

Legal Advisor on Native American Affairs.

The Senior Advisor on Native American Affairs acts as a liaison for the Secretary of Commerce for many issues involving Native Americans. FALD provides legal advice for the Senior Advisor and reviews legislation and regulations affecting or involving Indian tribes. FALD is currently assisting the Senior Advisor in a working group that is developing a Department policy on tribal consultation and coordination. This latest effort is in response to Executive Order (E.O.) No. 13175, “Consultation and Coordination with Indian Tribal Governments” (November 9, 2000) and Presidential Memorandum, “Tribal Consultation”, 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009).

Federal Assistance Litigation.

Assistance recipients or potential applicants or other interested parties may initiate litigation against the Department in the Government Accountability Office, Court of Federal Claims, Federal District Courts and the Court of Appeals. The lawsuits include challenges under the Constitution and Administrative Procedures Act, usually seeking injunctive relief, related to agency determinations of recipient selections, responsibility determinations, disallowance of costs, contractual disputes, and other claims. We also provide defensive litigation services to the bureaus when a recipient challenges a Departmental audit appeal determination or other cost disallowances. We have successfully defended all challenges. The most recent case was *Trans World Marine v. Hogarth*, which went up to the 9th Circuit on appeal. The United States Court of Appeals ruled in our favor affirming the district court's conclusion that the Department lawfully denied benefits to Trans World. We also represent the Department in Qui Tam actions involving federal assistance and under the Program Fraud Civil Remedies Act (PFCRA). This includes providing DOC's recommendations respecting seeking such relief and, if DOJ decides the Government should proceed, providing legal support to DOJ in Qui Tam matters and prosecuting PFCRA cases. We also provide drafting support to DOJ on various appellate briefs and Supreme Court Briefs as amicus curiae supporting respondents involving federal assistance questions. (e.g., whether FCA imposes liability for a false claim submitted to a recipient of a federal grant – not evidence that claim was ever submitted to an officer or employee of the United States.)

Governmentwide Support

Federal Bar Association. FALD staff preside over the Grants Committee Section of the Federal Bar Association.

Interagency Suspension and Debarment Committee (ISDC). FALD serves as the Department's representative on the ISDC.

The Federal Financial Assistance Management Improvement Act (Pub. L. 106-107). The Chief Financial Officers Council, which represents the 24 largest agencies in the government, has established a Grants Policy Committee to lead implementation of [Public Law 106-107](#). FALD serves as the legal adviser to the Department, and is an ex officio member of the Grants Policy Committee.

Grants.gov and GMLoB initiatives. We provide support to NOAA, NIST and the Department to meet the requirements of the Federal Financial Assistance Management Improvement Act. Grants.gov is a single, government-wide electronic portal where the public can find information about all federal funding opportunities for grants under which an agency has discretion to make awards and through which applicants may electronically submit applications. The GMLoB initiative is intended to reduce the number of different “back office,” or internal agency, grants processing systems, and establish common sets of business practices across agencies, thereby reducing redundancy and costs.

Federal Funding Accountability and Transparency Act (P.L. 109-282). The new law requires the Office of Management and Budget (OMB) to establish a publicly available online database containing information about entities that are awarded federal grants, loans, and contracts. USApending.gov

Title 2 Code of Federal Regulations.

In the May 11, 2004 Federal Register, OMB published two final rules that change the current system of agency implementations of common rules and the somewhat duplicative nature of the various OMB circulars affecting grants administration (69 FR 26276 and 26281). The first rule establishes Title 2 of the Code of Federal Regulations (CFR) as the location for OMB’s grants guidance and agency grants regulations; the second moves OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, to 2 CFR 215. Both rules have an effective date of May 11, 2004. When completely implemented, this new system will fold the common rules, circulars, and policy requirements into Title 2.