Follow-Up Questions and Responses Post Presentation - HHS Grant Terminations 2.0: The Agency's New Legal Strategy and How Institutions Should Prepare -
COGR Forum IV: Adapting to Change, Policy Shifts & Research Impact
(August 20, 2025)

Please note that the presentation given on August 20, 2025 and the below responses are provided for informational purposes only and are not intended and should not be construed to constitute legal advice by Epstein Becker & Green, P.C. Please consult your attorneys in connection with any fact-specific situation under federal, state, and/or local laws that may impose obligations on you or your institution.

1. What is your guidance regarding awards that focus on specific populations - e.g. traineeships for underrepresented individuals such as U-RISE, etc.?

In our view, the action items for institutions listed on our slides (slides 16-19) also apply to institutions who have/had grants focused on specific populations such as U-RISE.

2. Could you speak to what "retention of funds" covers? If we only draw down for expenses incurred, which funds would we "retain".

The new gender ideology term of awards, which began appearing in revised NOAs as of mid-late April 2025, includes a provision that states, "Payments under Agreement are predicated on compliance with the above requirements, and therefore Recipient is not eligible for funding under the Agreement ***or to retain any funding*** *under the Agreement absent compliance with the above requirements." (slide 20). This provision proports to apply to (i) going-forward grant-related payments (including payments for grant closeout costs), and (ii) grant funds already drawn down by the institution for expenses incurred under the grant (even if these funds are ultimately/immediately going to be used to pay vendors, subcontractors, etc., they would likely still fall under the "retained funds" bucket). In short, we understand the reference to "retention of funds" to be an assertion that the agency could seek to recoup funds already drawn down based on noncompliance with the term.*

3. In addition to the new language about complying with future EOs, we have also see that we have an "affirmative" action to monitor award actions for compliance and an "affirmative" action to stop work and notify grants officer. What do you make of these?

HHS grant recipients already have certain obligations under applicable regulations and the HHS/NIH Grants Policy Statements to monitor their own compliance and that of their subrecipients with federal law, regulations, and the terms of the award and to take actions to remedy noncompliance (see, e.g., 2 CFR 200.303(a)-(d); 2 CFR 200.332; 2 CFR 200.339, 45 CFR 75.303(a)-(d); 45 CFR 75.352; 45 CFR 75.371; NIH GPS Sections 4.1, 8.3, 15.2.6). However, current regulations and the GPS do not use the word "affirmative" or necessarily mandate that work stop and that the grants officer be notified in the event of noncompliance (an exception being that in connection with compliance with public policy requirements, the NIH GPS directs the recipient to inform NIH of problems/concerns, see NIH GPS Section 4.1). Rather, current regulations allow recipients to determine appropriate

monitoring and give recipients a number of options with respect to corrective/enforcement actions.

Without seeing the exact/full new language at issue, our guess is that HHS/NIH are expressing their interpretation of what the recipient's monitoring obligations consist of, at least as related to the EOs or other new DEI/gender/similar terms. In particular, the word "affirmative" emphasizes an expectation of proactive review and corrective actions. The direction to stop work and notify the grant officer suggests that the agencies will expect these particular remedies to be implemented by the recipient, seemingly narrowing the recipient's options for corrective actions from those that otherwise exist under the regulations. In these regards, the new language seems similar to the specific direction given to recipients in the July 30 Department of Justice Attorney General Office's Guidance for Recipients of Federal Funding, in which recipients are directed to "Include Nondiscrimination Clauses in Contracts to Third Parties and Monitor Compliance: Incorporate explicit nondiscrimination clauses in grant agreements, contracts, or partnership agreements, requiring third parties to comply with federal law, and specify that federal funds cannot be used for programs that discriminate based on protected characteristics. Monitor third parties that receive federal funds to ensure ongoing compliance, including reviewing program materials, participant feedback, and outcomes to identify potential discriminatory practices. Terminate funding for noncompliant programs."

4. If an institution is not subject to Title IX (i.e., a research institute that is NOT an IHE), how will that work? Is there a way to avoid agreeing to this or does it not apply?

We are assuming that this question is in regard to the new "gender ideology" term that we discussed during the presentation. If an institution is not subject to Title IX, then we think the institution can now reasonably argue that at least the portion of the term referencing Title IX and Executive Order 14168 does not apply to the institution. This argument would be based on both:
(1) the wording of the new term, which references the requirements of Executive Order 14168 specifically in relation to Title IX; and
(2) the newly issued October 2025 HHS Grants Policy Statement, which appears to limit the applicability of the new gender ideology term in its entirety to Title IX institutions (see Section 2.5.4.2, which discusses the requirement for recipients to certify compliance with all federal anti-discrimination laws and then goes on to say that "All recipients ***subject to Title IX requirements*** *must* ***also*** *adhere to the following term: [the new gender ideology term]" (emphasis added)).*

However, note that the new gender ideology term also references compliance with Title VI, which applies to federally assisted programs and activities more generally. Therefore, notwithstanding the language in the HHS GPS noted above, we think HHS could still take the position that the portion of the term referencing Title VI is relevant to non-Title IX institutions. Note also that Executive Order 14168 by its own terms is not limited to the education context, and HHS could try to evaluate an institution's compliance with the term in reference to the Executive Order even outside the context of Title IX.

At bottom, the new term may be highest risk for Title IX institutions and somewhat lower stakes for non-Title IX institutions, but we think it would be hard to say it is completely irrelevant for non-Title IX institutions.

5. What is a "discriminatory prohibited boycott" (on the earlier DEI slide)?

NIH's now rescinded "Notice of Civil Rights Term and Condition of Award" (NOT-OD-25-090), included the term "Discriminatory prohibited boycott" and defined it as "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."

6. If we have a subaward to a private community organization that engages in "DEI" activities, wholly unrelated to the project being supported - is that a risk to our institution.

Potentially. Under Title VI, Title IX, and other federal civil rights and antidiscrimination laws prohibiting discrimination in "any program or activity" receiving federal financial assistance, and under HHS regulations implementing the same, "program or activity" is broadly defined, and institutions are required to comply in connection with "all of the[ir] operations" if they are a college, university, or other institution of higher education, any part of which is receiving the assistance, or if they are a private organization to which assistance is extended "as a whole" or that is principally engaged in providing education, health care, or certain other services, any part of which is receiving the assistance. (As an example, see Title VI, 42 USC 2000d–4a, and the related HHS regulations for Title VI at 45 CFR Part 80, in particular Sections 80.4 and 80.5, which provide specific examples of the breadth of institutions' assurances of compliance.) Moreover, a broad range of institutional activities are typically supported by federally awarded indirect costs, making it difficult to isolate the obligations to the particular project being supported.

Both recipients and subawardees must assure HHS of their compliance with these federal laws (via HHS Form 690). Current HHS expectations appear to be that recipients will review subawardees' practices for compliance with antidiscrimination laws. Depending on the specific facts, HHS could view the subawardee's DEI activities as noncompliant with those laws and could attempt to take actions with respect to both the recipient and the subawardee as a result.

7. New term received on a Type 5 NOA:

NIH funds may not be used to support activities that are outside the scope of the award, including China research or related research training activities or programs. Any funds used to support activities outside the approved scope of award will result in a disallowance of costs, and funds will be recovered.
This term is consistent with NIH's ongoing internal review of NIH's priorities and the alignment of awards with those priorities as well as a review of program integrity of awards. Such review includes, but is not limited to, a review for fraud, waste and abuse, and a review of the NIH portfolio to determine whether awards are in the best interests of the government and consistent with policy priorities.

If recipients are unclear on whether a specific activity constitutes China research or has questions regarding other activities that could be considered outside the approved scope of the award, refrain from drawing down funds and consult with the funding IC.

Anecdotally, we have seen very similarly worded terms included in NOAs for reinstated grants. These seem to be "interim" iterations of new grant terms that the agency is contemplating while it works out what lines it will draw or awaits guidance from other sources within the administration as to the limits of activities that can be conducted. Notably with this term, there is no definition of what is meant by "China research" or "related" activities. If there is any doubt whether an activity can be conducted, we agree that as encouraged in the term itself, it is advisable to consult with the particular funding Institute prior to drawing funds for the activity.

Commentary Regarding NIH, et al., v. APHA, et al., No. 25A103, 2025 WL 2415669 (U.S. Aug. 21, 2025)

- *The Supreme Court granted the NIH's application for stay in part and denied it in part and held in a 5-4 ruling that the:*
    - *District Court did not have jurisdiction to (i) adjudicate APA claims based on **termination** of research-related grants (i.e., according to the Tucker Act, the APA challenges to the grant terminations belonged in the Court of Federal Claims), or (ii) order relief designed to enforce any obligation to pay money pursuant to those grants.*
    - *Government faced irreparable harm from inability to recoup research-related grants (i.e., there were no guarantees that the plaintiffs would be able to pay the government the money back if NIH were to ultimately prevail in the litigation).*
- *At the same time, the Court left in place the district court's ruling that the agency **guidance** directing termination of grants violated the APA.*
- *Under this ruling, the plaintiffs can continue to litigate their APA challenge to the agency guidance before the district court or First Circuit. To obtain the restoration of the terminated funds, however, they would have to challenge those terminations in the Court of Federal Claims.*
- ***Impact of Supreme Court Ruling:** On September 2, 2025, at a hearing intended for Phase Two claims in APHA v. NIH, Judge Young apologized to the Supreme Court and asked the parties to discuss the case off-the-record to determine whether a settlement can be reached – it is unclear if he meant with respect to Phase One, Phase Two, or both. On September 25, 2025, the court docket was updated to note that the pretrial conference and bench trial will be rescheduled, but there have been no new dates set.*

Commentary Regarding Trump v. Global Health Council and Department of State v. Vaccine Advocacy Coalition, 2025 WL 2740571 (U.S. Sept. 26, 2025)

- *After the District Court for the District of Columbia entered a preliminary injunction directing the Executive to obligate roughly $10.5 billion of appropriated aid funding set to expire on September 30, and after the District Court and the Court of Appeals denied stays of that order, the Government filed an application to stay the District Court's injunction.*

- *The Supreme Court granted the Government's stay and found that the Government had made a sufficient showing that the Impoundment Control Act (ICA) precluded the Plaintiffs from bringing a claim to enforce the appropriations laws under the Administrative Procedure Act (APA). It also determined that, the Government's claimed harm from compliance with the appropriations statutes appeared to outweigh the harm faced by Plaintiffs from being deprived of the funds – signaling that the ICA prevents private litigants from challenging impoundments and effectively allowing the administration to engage in a "pocket rescission" (i.e., to propose a rescission within 45 days of the expiration of the funds, thereby allowing the funds to expire without Congressional approval).*
- *Justice Kagan, joined by Justices Sotomayor and Jackson, dissented and were of the view that the Government had not made a strong showing on the merits because the text of the ICA refutes the notion that it precludes private enforcement of appropriations laws.*
- ***Impact of Supreme Court Ruling:*** *The decision was viewed by many as a threat to the separation of powers and an undermining of Congress's constitutional power of the purse. Effectively, the decision cleared the way for the Trump administration to continue to withhold over $4 billion in foreign aid already approved by Congress, undermining the core mission of the programs that relied on these funds and jeopardizing the services they were offering.*