

CLIENT ALERT

PRAC Report Confirms OIG Focus on Combatting Fraud Related to Emergency Funding Programs

Jun.30.2020

On June 17, 2020, the Pandemic Response Accountability Committee (PRAC) issued its first report, “Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Effort” (the “Report”). PRAC was established by the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). It consists of the twenty-one offices of inspectors general (OIGs) that oversee the agencies that received the bulk of the emergency funding, and it sits within the Council of Inspectors General on Integrity and Efficiency (CIGIE). The purpose of PRAC is to lead the efforts of CIGIE to promote transparency and conduct oversight of the funds disbursed under the CARES Act and related legislation, which currently totals \$2.4 trillion. This first report provides a summary, by agency, of identified challenges in disbursing the emergency funding, especially the potential for fraud, abuse, and misuse of those funds, which will likely lead to audits, investigations, and *qui tam* lawsuits under the federal False Claims Act (FCA) in the months and years to come.

Under the CARES Act, PRAC is required to issue periodic reports, including management alerts to the President and Congress on “management, risk, and funding issues that require immediate attention.” The \$2.4 trillion in emergency funding has been provided via programs under four pieces of legislation: (1) the CARES Act; (2) the Coronavirus Preparedness and Response Supplemental Appropriations Act; (3) the Families First Coronavirus Response Act, and (4) the Paycheck Protection Program and Health Care Enhancement Act. While not specifically required by the CARES Act, PRAC undertook this particular Report in an effort to raise awareness of the most frequently reported challenges for agencies implementing programs under these programs and methods of addressing them. The Report consolidates and summarizes the top reported challenges by the thirty-seven OIGs that submitted responses .

The Report identifies four overarching challenges in disbursing the emergency funding: (1) Financial Management, including ensuring that funds are used effectively and to prevent and detect fraud, waste, and abuse via accurate information regarding spending, improving financial reporting and systems, and preventing and reducing improper payments, such as payments to ineligible recipients, duplicate payments, and payments that are not supported by required documentation; (2) Grant and Guaranteed Loan Management, including overseeing the use of grant funds, obtaining accurate information from grantees, and assessing performance to ensure intended results; (3) Information Technology Security and Management, including managing federal systems to promote maximum telework capabilities and protecting government systems against cyberattack; and (4) Protecting Health and Safety, including protecting the health of federal employees, those in federal custody, and the workers in industries regulated by the federal government while maintaining effective operations.

In identifying financial management challenges, the Report makes clear that the OIGs are particularly focused on fraud, waste, and abuse of the emergency funding and the related oversight challenges. Indeed, the term “fraud” appears more than 80 times throughout the Report, leaving little doubt that the government intends to use the FCA to investigate and litigate alleged misrepresentations and misuses of COVID-19 emergency funds and to recover damages and punish those responsible. The Report describes several representative examples of specific concerns and actions already taken by OIGs at various agencies including:

- Department of Defense (DoD). According to the DoD OIG, DoD “must ensure that it gets what it pays for in its acquisitions and contracts funded with COVID-19 respond funding, as well as guard against fraud and improper payments;” is poised to focus on identifying and evaluating requirements and robustly vetting contractors and vendors before awarding contracts; establishing and following well-documented contract oversight and surveillance plans; and maintaining complete, consistent, and accurate contracting documentation and accounting records. The DoD OIG has already received 225 hotline complaints related to emergency COVID-19 funding and has begun taking action in response to some of those complaints. DoD has also started to conduct criminal investigations targeting fraud and corruption via its investigative branch.
- Department of Homeland Security (DHS). DHS has already identified a number of challenges and potential avenues for fraudulent conduct based on its “prior, planned, and ongoing audits, inspections, special reviews, and investigations.” According to DHS, one of the primary challenges it faces is ensuring that proper oversight and controls are in place, particularly with respect to FEMA’s disaster assistance programs, which the DHS OIG notes are highly susceptible to fraud, waste, and abuse. The DHS OIG is working to prevent that lack of controls from impairing DHS’ ability to “take action” related to misspent and misused funding and against contractors that do not comply with the requirements of procurements involving emergency COVID-19 funding.
- Health and Human Services (HHS). As the lead federal agency responsible for medical support and coordination during public health emergencies with a substantial portion of COVID-19 related funding, the top challenges reported by HHS OIG are particularly noteworthy. With respect to its \$251 billion dollars in funding, consisting in large part of the Provider Relief Fund, CDC testing, and grants, HHS OIG identified the risk of fraud by those seeking to exploit the emergency of particular concern, which is consistent with the Office’s prior statements that there will be significant anti-fraud monitoring and auditing of the COVID-19 distributed funds. HHS OIG noted the importance of effective internal controls among both Provider Relief Fund recipients as well as grant recipients. With respect to protecting health and safety, HHS noted, unsurprisingly, concerns with preventing further outbreaks in health care facilities and highlighted particular concerns with nursing homes as well as Indian Health Service hospitals and outpatient centers. Lastly, with respect to infrastructure, HHS indicates there is the serious threat of cyberattacks on HHS partners, grantees, and the health care system at large that could have “significant potential negative effects on the health and welfare of the nation.”
- Department of Treasury. While Treasury is still working to identify potential avenues for fraud, its OIG notes that it is currently coordinating anti-fraud investigations across agencies with other OIGs, law enforcement agencies, and the Department of Justice.
- Department of Veterans’ Affairs (VA). Like DoD, the VA has significant spending of the funding and has already referred “suspicious activity” to the OIG and has already collaborated with other law enforcement agencies to arrest an individual for attempting to sell millions of nonexistent Personal Protective Equipment (PPE) totaling over \$750 million. The VA is focused on “quick handoffs” to the OIG and plans to use predictive analytics of procurement and claims data, which VA states will help address misconduct related to the pandemic funding.
- The Environmental Protection Agency (EPA). EPA is one of the few OIGs that specifically refers to potentially fraudulent certifications of approvals and compliance in its discussion of concerns related to fraud, such as with respect to products marketed with unsubstantiated claims of protection against SARS-CoV-2. EPA also notes that it expects that companies will continue to identify new fraudulent avenues as the pandemic continues and more funding is disbursed.

In short, the Report makes clear that, while the Government is moving rapidly to mitigate the financial effects of the COVID-19 pandemic, the OIGs have not abdicated their oversight authority and do not intend to do so in the future. Consequently, the audits and investigations will be forthcoming. Government contractors and particularly grantees should be aware of the OIGs' focus on detection of fraud, waste, and abuse. In addition to the risk of criminal investigations, contractors and grantees receiving COVID-19 funding now, may well see suits brought under the FCA by relators and/or the government later. Companies and grantees should, therefore, take proactive steps now to ensure they are properly using all funding and that they are maintaining accurate and complete records for the inevitable future audits and investigations. Proactive measures now will help mitigate against risk of liability, damages, and possible suspension and debarment.

Listed below are several simple, but important, tasks companies and grantees can take now to avoid painful and expensive litigation in the future.

- Keep accurate and organized records of funding, spending, and communications about the same. One of the most common ways to audit a contract is to seek records about how the funding has been spent to ensure that there is no suggestion of fraud or waste. It will be significantly more difficult to try to retroactively recreate those records than to create contemporaneous documentation. Contractors and grantees should centralize files and ensure that significant correspondence and emails are included.
- Document government approvals. A typical pitfall for government contractors and grantees is in contract or grant modifications, particularly when the funding must be quickly disbursed. Contractors and grantees should ensure that any instructions from the government regarding the use of funding are documented and that the instructions are coming from the proper government officials with the requisite authority to give them. For example, a company could save a lot of potential aggravation later by ensuring that changes to contracts and grants are properly approved by the relevant official – typically the contracting officer.
- Be transparent. With various types of new funding made available so rapidly, the OIGs will be focused on evaluating whether recipients were eligible for that funding and whether they made misrepresentations to obtain funds. Material misrepresentations could subject recipients to treble damages under the FCA, measured by the full value of the payments by the government. Contractors and grantees should not only carefully evaluate eligibility requirements and certification language internally, and also consider how the content of their proposals and communications to the government related to those requirements may impact the likelihood of later allegations of, among other things, fraudulent inducement.
- Avoid the speed traps. As is clear from the Report, although the government is under pressure to disburse the funding as quickly as possible to address the multitude of issues that have arisen as a result of the COVID-19 emergency, the OIGs feel pressure to ensure that the funds are not misused. As a result, contractors and grantees cannot allow the speed of the funding to lead to sloppy internal record-keeping or hasty actions without the necessary government approvals. Again, accurate and complete records will assist in supporting defenses to future investigations, audits and lawsuits.

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