

# CLIENT ALERTS

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## OIG Expands Its Authority

4.30.2020

Remember the money provided with “no strings attached”? On April 21, 2020, Health and Human Services Office of Inspector General released a proposed rule that would amend the Civil Money Penalties (CMP) regulations to address the 21<sup>st</sup> Century Cures Act amendment to the CMP Law authorizing penalties and exclusions upon individuals and entities that engage in fraud and other misconduct related to HHS “grants, contracts and other agreements”[1].

June 23, 2020, is the current deadline for comments, though the comment period may be extended as a result of the COVID-19 health emergency.

The proposed regulations would list new CMP offenses created by the Cures Act where someone:

1. Knowingly presents or causes to be presented a specified claim relating to an application, request or demand for money or property under a grant, contract or other agreement and would include a request for a drawdown or other payment administration system such as HHS Payment Management System that a person knows or should know is false or fraudulent.
2. Knowingly makes, uses or causes to be made or used any false statement, omission, or misrepresentation of a material fact in any application, bid, progress report or other document required to be submitted in order to directly or indirectly receive or retain funds provided in whole or in part pursuant to an HHS grant, contract or other agreement.
3. Knowingly makes, uses, or causes to be made or used false records or statements material to false or fraudulent claims under a contract, grant, or other agreement.
4. Knowingly conceals, avoids or decreases an obligation to pay or transmit funds or property with respect to a grant, contract, or other agreement, or knowingly makes, uses or

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causes to be made or used a false record or statement material to such an obligation.

5. Fails to timely grant access upon a reasonable request to OIG personnel who are carrying out audits, evaluations, investigations, and other statutory functions related to grants, contracts, and other agreements.

The OIG views the authority they have as broadly expanding its civil jurisdiction beyond federal healthcare programs to many other HHS programs such as the National Institute of Health or Centers for Disease Control and Prevention grants or any other contracts that HHS uses to manage its programs. OIG may also view these authorities as applying to the Provider Relief Payments under the recent CARES Act. Because the Social Security Act governs Medicare and Medicaid programs as well as grants to states for unemployment compensation, it may be argued that the CMP authority does not extend to other HHS programs not contained in the Social Security Act.

There are also aggravating and mitigating factors discussed in the Proposed Rule. Mitigating factors are that there were few violations and that they accounted for less than \$5000 and were over a short duration and of the same type. A non-exclusive list of aggravating factors include:

1. Violations were of several types over a lengthy period of time.
2. There were many such violations or the circumstances indicate a pattern of false or fraudulent claims, requests for payment, or a pattern of violations.
3. The amount requested or claimed related to violations of \$50,000 or more.
4. Violations resulted or could have resulted in physical harm to any individual.

For more information on the OIG, please contact the authors of this alert or any member of the Butzel Long Healthcare Industry Team. For more information resources on all COVID-19 related legislation, programs, and orders from both federal and state authorities, see the Butzel Long Coronavirus Resource Center.

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[1] The new rule would also address the Cures Act amendment to the Public Health Services Act authorizing OIG to investigate claims of information blocking and providing the Secretary of HHS authority to impose CMPs for information blocking as well as Bipartisan Budget Act of 2018 increases to

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penalties in the CMP. This Health Alert will concentrate on the aspect of the rule relating to penalties addressing grants, contracts and other agreements and not the information blocking.