

## Department of Homeland Security Issues New Fraud Rule

The United States Department of Homeland Security (DHS) has issued an interim rule that establishes uniform administrative procedures for DHS to implement the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801-3812 (the Act), which provides for penalties of up to \$5,500 per false claim or statement and double the amount falsely claimed. This interim rule provides a uniform, department-wide, administrative process for assessing penalties and recovering funds procured by fraud under departmental programs, while setting forth complaint processing, hearing and appeal rights. This interim rule also replaces the existing program fraud civil remedies rules and establishes civil administrative procedures to deal with fraud under Federal Emergency Management Agency (FEMA) programs. This interim rule was published at 70 Fed. Reg. 59209 on October 12, 2005 and became effective on that date.

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With one notable exception, the interim rule may be characterized as a technical fix in that it merely replaces - and is arguably indistinguishable from - numerous existing program fraud civil remedies rules of components transferred from other departments and agencies into DHS with the creation of that agency. For example, prior to the interim rule's publication, DHS's United States Secret Service, formerly part of the Treasury Department, operated under Treasury program fraud regulations, while the Transportation Security Administration (TSA), formerly within the Transportation Department, operated under Transportation regulations. Now, Secret Service and TSA will be subject to a single DHS rule that is substantially similar to program fraud regulations of their legacy agencies.

Significantly, the only major DHS function not previously covered by regulations providing for an administrative resolution of suspected program fraud was FEMA. Until now, FEMA's cases of suspected fraud have required direct referral to the Justice Department, which then reviewed the merits of the case before determining whether to proceed criminally or civilly against the defendant. The new rule will enable FEMA to pursue fraud claims administratively that the Justice Department might not have brought in the past. As the interim rule's preamble explains, this is an important procedural change for those who are contracting in the post-Hurricane Katrina environment:

"FEMA will have the same administrative procedures and administrative adjudication that are available to the rest of DHS, and, we estimate, a greater likelihood that legal action would be taken on cases that the Department of Justice might not otherwise prosecute."

The most important aspect of the interim rule, consistent with the government's recent steps to combat fraud and abuse in the aftermath of Katrina (e.g., DHS Inspector General establishing a Katrina Oversight Plan and the United States Attorney General establishing the Justice Department's Hurricane Katrina Fraud Task Force) may be the rule's express concern that Katrina relief and reconstruction will serve as fertile ground for fraud:

"The historic assistance relief efforts following Hurricane Katrina will make more urgent the need for efficient administrative procedures for processing cases of fraud. The department is responsible to the public for stewardship of public funds. The increase in expenditure of program funds in response to Hurricane Katrina necessitates these immediate measures to ensure that resources appropriated for relief efforts reach their intended recipients."

Although DHS is publishing the rule without prior notice and comment, for purposes of amending or revising the rule in the future, it will consider any comments received by November 14, 2005.

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