



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

January 27, 2021

The President
The White House
Washington, DC 20510

Re: OSC File No. DI-16-3098

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e), the U.S. Office of Special Counsel (OSC) is submitting to you a report of a U.S. Department of Health and Human Services (HHS) investigation of whistleblower allegations.¹ The whistleblower, who chose to remain anonymous, alleged that the Office of the Assistant Secretary for Preparedness and Response (ASPR) misappropriated millions of dollars that Congress appropriated for the Biomedical Advanced Research and Development Authority (BARDA) to respond to public health emergencies like outbreaks of Ebola, Zika, and—now—COVID-19.² The whistleblower alleged that ASPR’s misappropriations have been ongoing since fiscal year (FY) 2010, and that ASPR did not accurately report this misuse of funds to Congress.

The investigation, conducted by the HHS Office of Inspector General (OIG), substantiated the allegations in part. Specifically, OIG determined that ASPR had “(1) violated the Purpose Statute []³; (2) potentially violated the Antideficiency Act (ADA); and (3) potentially augmented other ASPR appropriations with BARDA funds” through its misuse of millions of dollars in BARDA ARD funds. While the report does not contain a single estimate for total misappropriated funds, it notes there is more work to be done, and contains evidence that—as recently as FY 2019—approximately \$25 to \$26 million was “taken from the BARDA ARD funding stream and [improperly] provided to ASPR.” OIG’s investigation of ASPR’s reporting to Congress from FY 2007 to FY 2016 also found that those reports “did not adequately display [\$517.8 million in] administrative expenditures” and that “ASPR is unable to demonstrate that the[se] BARDA funds were used for their appropriated purposes.” The investigation further concluded that “[a] necessary expense justification, with ASPR claiming

¹ See 5 U.S.C. § 1213(c) and (e).

² BARDA is a component of ASPR whose primary work is Advanced Research and Development (ARD) to advance the development and purchase of vaccines, drugs, therapies and other medical countermeasures to respond to public health emergencies.

³ The Purpose Statute states that appropriations must be applied only to the objects for which the appropriations were made except as otherwise provided by law. 31 U.S.C. § 1301(a).

that the non-BARDA expenditures are reasonably related to the accomplishment of the purposes stated in the BARDA appropriation, would likely fail.”

The report contains evidence that ASPR used BARDA’s ARD funds—funds intended for the development of public health countermeasures, like vaccines—to pay for the removal of ASPR office furniture, ASPR administrative expenses and news subscriptions, legal services used by ASPR, ASPR’s internal resource management system, and the salaries of personnel who did not work for BARDA. The report reveals that this apparent practice of using BARDA funds for non-BARDA purposes was so common, that there was a name for it within the agency: “Bank of BARDA.” Evidence in the report indicated that ASPR’s apparent misuse of BARDA ARD funds began under the then-Assistant Secretary for Preparedness and Response, Dr. Nicole Lurie (June 2009 – January 2017), and persisted despite objections from various BARDA officials over approximately a decade.

In response to the findings, HHS’s Assistant Secretary for Financial Resources (ASFR) and Office of General Counsel have initiated a review of the agency’s use of ARD funding for FYs 2015 through 2019 to identify potential ADA violations. The agency estimates it will complete this review by the summer of 2021 and will continue to report the review as pending in its Agency Financial Report until it is complete, any required notifications are made, and any corrective actions are taken. ASFR⁴ has also engaged an outside accounting firm that is competent in federal funding requirements to audit the agency’s use of ARD funding for FYs 2017 through 2019 and estimates that the audit will be complete by the summer of 2021.⁵

The whistleblower declined to comment on the report, but I commend the whistleblower for coming forward to bring this critical issue to OSC’s attention.

I am deeply concerned about ASPR’s apparent misuse of millions of dollars in funding meant for public health emergencies like the one our country is currently facing with the COVID-19 pandemic. Equally concerning is how widespread and well-known this practice appeared to be for nearly a decade. While I have determined that HHS’s report contains the information required by statute and that its findings appear reasonable, I urge the agency to expediently follow through on its proposed remedial actions—including the additional audit work and any required reporting to Congress—as outlined in the agency’s response to OSC.

As required by 5 U.S.C. § 1213(e)(3), OSC has sent copies of the agency report and attachments, along with this letter, to the Chairs and Ranking Members of the Senate Committee on Health, Education, Labor, and Pensions and the House Committee on Energy and Commerce, and both the Senate and House Appropriations Committees. OSC has also filed redacted copies

⁴ HHS’s September 23, 2020 letter to OSC states that ASPR, not ASFR, will retain the accounting firm; however, HHS later agreed that ASFR would oversee this review instead to avoid the appearance of a conflict of interest.

⁵ HHS committed to take the actions outlined in this paragraph after OSC requested concrete corrective actions from the agency. Because OIG’s report does not contain explicit recommendations for corrective action to HHS, OSC’s expectation is that the additional review and audit will result in concrete findings and recommendations.

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of these documents and a copy of our original referral letter in our public file, which is available at www.osc.gov. This matter is now closed.

Respectfully,

A handwritten signature in black ink, appearing to read "Henry J. Kerner". The signature is fluid and cursive, with a long horizontal stroke at the end.

Henry J. Kerner
Special Counsel

Enclosures