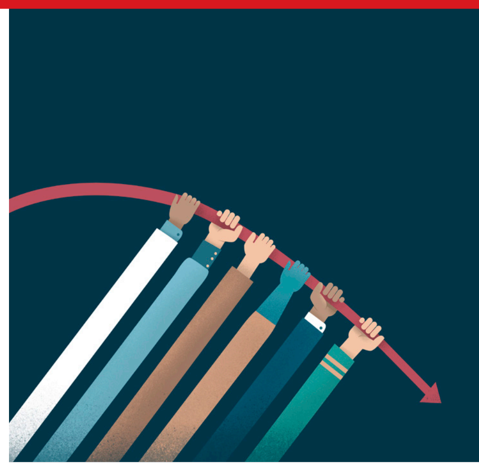
A COVID-19 SPECIAL REPORT

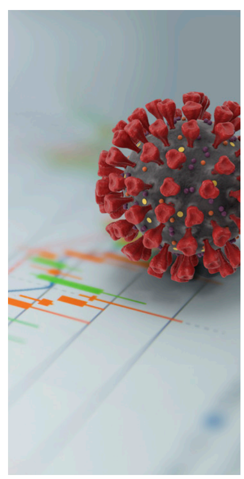
Controls Lacking in CARES Act/ Coronavirus Relief Fund Spending

August 24, 2023

A report by EFPR Group LLP for the Office of the D.C. Auditor






Audit Team
EFPR Group LLP

Office of the District of Columbia Auditor

Kathleen Patterson, District of Columbia Auditor
www.dcauditor.org

August 24, 2023

The Hon. Muriel Bowser
Mayor of the District of Columbia
1350 Pennsylvania Avenue, N.W
Washington, DC 20004

The Hon. Phil Mendelson
Chairman, Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Mayor Bowser and Chairman Mendelson:

The report that follows, **Controls Lacking in CARES Act Coronavirus Relief Fund Spending**, was prepared by the New York-based accounting firm EFPR Group, LLP. We are also sharing a related legal memorandum prepared for the Office of the D.C. Auditor by outside counsel, Boies Schiller Flexner, LLP, as an appendix.

The findings include:

- The expenditures made from the CARES Act Coronavirus Relief Fund (CRF) met federal requirements on the use of funds including for such purposes as public safety overtime and other "necessary expenditures incurred due to the public health emergency." The report notes, "our analysis of the District's expenditures...did not reveal any unnecessary expenditures nor did we note any expenditures that were not related to actions taken to respond to the public health emergency."
- The CARES Act CRF funds were spent without appropriation by the Council of the District of Columbia which is required by the Home Rule Act, [*See* D.C. Code § 1-204.46].
- A sampling of awards made by the District found that neither program nor financial staff appeared to be trained in federal requirements for monitoring funding awarded to subgrantees—primarily non-profit organizations. Evaluators found that "no control system is currently in place to ensure that subgrant awards are appropriately identified, assessed for risk or monitored."
- The District "is currently exposed to potential disallowances of expenditures due to the nature of the control system currently in place" which lacks effective monitoring and lack of documentation.

The report recommends that the District:

- Develop procedures that clearly outline legal requirements for disbursement of federal funds.
- Develop a robust system of internal controls over subrecipient monitoring.
- Invest in training and education for all staff involved in the subrecipient process across all programs that receive federal funds.

The Council's failure to appropriate the $495 million received through the CARES Act in 2020 as required by law was addressed before the District allocated approximately $2.3 billion in Coronavirus State and

Local Federal Recovery Funds (SLFRF) approved by Congress in the American Rescue Plan Act of 2021 signed March 11, 2021. On August 3, 2021, the Council approved the Fiscal Year 2021 Revised Local Budget Adjustment Emergency Act of 2021 and the Fiscal Year 2022 Local Budget Emergency Act of 2021 authorizing expenditures, respectively, from the two federal payments made to the District as part of federal COVID-19 relief.

ODCA invited comments from both agencies engaged in this review, the Office of the City Administrator (OCA) and the Office of the Chief Financial Officer (OCFO), and we received and include in the report comments from the OCA. ODCA and our accounting team appreciate the collaboration of District government staff in producing this report. We hope the findings and recommendations will assist the District in improving and monitoring internal controls on the expenditure of federal funds and we look forward to following up on our recommendations.

Sincerely yours,

Kathleen Patterson
District of Columbia Auditor

cc: D.C. Councilmembers
Glen Lee, Chief Financial Officer
Kevin Donahue, City Administrator
The Hon. Brian Schwalb, Attorney General

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CARES Act – Coronavirus Relief Fund Spending

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INDEPENDENT ACCOUNTANTS' REPORT
ON APPLYING AGREED-UPON PROCEDURES

Kathleen Patterson, D.C. Auditor
Office of the D.C. Auditor
1331 Pennsylvania Avenue, N.W.
Washington D.C., 20005

We have performed the procedures enumerated below on evaluating the CARES Act Coronavirus Relief Fund (the Fund) spending of the District of Columbia (the District) as of December 31, 2021. The District's management is responsible for the District's spending of the Fund.

The Office of the District of Columbia Auditor (ODCA) has agreed to and acknowledged that the procedures performed are appropriate to meet the intended purpose of evaluating the District's spending of the Fund. This report may not be suitable for any other purpose. The procedures performed may not address all the items of interest to a user of this report and may not meet the needs of all users of this report and, as such, users are responsible for determining whether the procedures performed are appropriate for their purposes.

The procedures and associated findings are as follows:

Procedure No. 1

Review the District's receipt of $495 million Coronavirus Relief Funds to be obligated/encumbered by December 31, 2021 and whether the District received the maximum available from the Federal Legislation.

Findings

See pages 6 - 7.

Procedure No. 2

Identify the amount unspent, spent, obligated/encumbered by December 31, 2021 and examine a sample of cash disbursements made with Coronavirus Relief Funds. The sample will be made in consultation with ODCA based on the accountant's judgement intended to achieve a control risk level of low.

Findings

No findings noted.

Procedure No. 3

Test the sample of cash disbursements for compliance with the Office of Management and Budget's compliance supplement specifically on:

a. Activities Allowed or Unallowed
b. Allowable Cost/Cost Principles
c. Appropriate and Sufficient Receipts

Findings

See pages 11 - 18.

Procedure No. 4

Test the sample of cash disbursements for compliance with the District's laws, including:

a. D.C. Council appropriation of Federal funds before they are spent
b. Do District policy and practice conform with budgetary "Best Practices" including legislative approval/oversight.
c. Whether the movement of funds conforms with "Best Practices" under emergency circumstances.

Findings

See page 8.

We were engaged by ODCA to perform this agreed-upon procedures engagement and conducted our engagement in accordance with attestation standards established by the American Institute of Certified Public Accountants. We were not engaged to and did not conduct an examination or review engagement, the objective of which would be the expression of an opinion or conclusion, respectively, on the District's spending of the Fund. Accordingly, we do not express such an opinion or conclusion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

We are required to be independent of the District and to meet our other ethical responsibilities, in accordance with the relevant ethical requirements related to our agreed-upon procedures engagement.

This report is intended solely for the information and use of the ODCA and the District and is not intended to be and should not be used by anyone other than those specified parties.

EFPR Group, CPAs, PLLC

Williamsville, New York
August 24, 2023

Introduction

EFPR Group, CPA's PLLC, has been engaged by the Office of the District of Columbia Auditor (ODCA) to assess whether the $495 million received by the District of Columbia (the District) from the Coronavirus Relief Fund (the Fund) which was established under the 2020 Coronavirus Aid, Relief, and Economic Security Act (CARES Act)[1] were spent in compliance with Federal and District laws and regulations. As part of the scope of this engagement, the receipt of the $495 million was observed and analyzed to verify that the District received the maximum available from Federal legislation.

The results of the testing in this report are for expenditures up to December 31, 2021, as the funding was not fully completed as of the date this engagement commenced.

Coronavirus Relief Fund

The United States Department of the Treasury (the Treasury) provided assistance to States as well as eligible local governments through the Fund. The CARES Act was signed into law on March 27, 2020. The Fund provided $150 billion in total assistance. $139 billion was reserved for the 50 States and eligible local governments within each State, $8 billion was reserved for tribal governments, and the remaining $3 billion was reserved for U.S. territories, which in this specific instance included the District.

The $3 billion referred to above was for payments to the District, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands.

In nearly all cases of Federal support to states, the District is considered a state. In the case of COVID-19 relief monies, the District was subsequently made whole through additional funding provided in the American Rescue Plan Act of 2021 to equal what the District would have received if considered a state in the CARES Act.

Assistance from the Fund was intended to cover necessary expenditures incurred due to the public health emergency with respect the Coronavirus Disease 2019 (COVID–19).

Procedures in this report are limited to expenditures of the Fund and do not cover any other expenditures of the CARES Act, of any other Federal payments, or any non-Federal payments. The $495 million direct award received from the Treasury is the only applicable payment in this report, any indirect awards received are excluded.

1 - Public Law 116 - 136

Summary of Spending

As of December 31, 2021, the District had expended $470,438,094 of the funds that they were awarded. The following chart represents the amount expended by each of the District's agencies as of December 31, 2021.

Agency	Amount
Office of the Mayor	$ 9,973,736
Department of General Services	22,719,441
Department of Aging and Community Living	2,866,667
Department of Employment Services	16,421,225
Department of Housing and Community Development	2,351,341
Deputy Mayor for Planning and Economic Development	41,138,873
Convention Center	20,052,786
Metropolitan Police Department	93,750,000
Fire and Emergency Medical Services	106,326,923
Department of Corrections	22,599,242
Department of Forensic Sciences	959,304
Office of the Chief Medical Examiner	2,727,292
District of Columbia Public Schools	14,409,730
State Superintendent of Education	248,000
Department of Health	4,995,454
Department of Human Services	7,690,404
Department of Youth Rehabilitation Services	2,015,562
Office of Contracting and Procurement	72,583,516
Office of the Chief Technology Officer	15,095,198
Unemployment Compensation Fund	11,513,400
	$ 470,438,094

The following chart represents the amount of contractual expenditures that were sampled for this report by department.

Agency		Amount
Office of the Mayor	$	90,000
Department of General Services		229,288
Department of Aging and Community Living		1,063,246
Department of Employment Services		1,739,657
Department of Housing and Community Development		2,533,733
Deputy Mayor for Planning and Economic Development		10,009,800
Convention Center		20,052,786
Department of Corrections		15,940,257
District of Columbia Public Schools		173,205
State Superintendent of Education		248,000
Department of Health		4,995,454
Department of Human Services		261,210
Office of Contracting and Procurement		1,995,400
Office of the Chief Technology Officer		107,944
Unemployment Compensation Fund		284,460
	$	59,724,440

A minimum of two expenditures per agency were selected for analysis in order to analyze each agency. The exception to this is the State Superintendent of Education as only one expenditure was incurred. There were several selections which were comprised of multiple expenditures, expanding the sample.

Allocation Received

Federal Regulations

The CARES Act specified the $3 billion reserved for U.S. territories, including the District, was to be allocated based on each territory's share of the combined total population. Additionally, the CARES Act stated that the data used for the population would be from the most recent year for which data is available from the U.S. Bureau of the Census (the Bureau).

Census Information

Census day was April 1, 2020 which is subsequent to the date of the passage of the CARES Act. Therefore, the Federal government used the information that was available from the Bureau in 2019.

U.S. Department of the Treasury's Allocation Chart

The following chart was posted on the Treasury's website which shows each territory's 2019 population, share of the total population, and the amount of funding allocated.

	Population, 2019	Share of Total Population	Allocation
District of Columbia	705,749	0.1650	$495,138,063.60
Puerto Rico	3,193,694	0.7469	$2,240,625,863.80
American Samoa	50,135	0.0117	$35,173,619.50
Guam	168,147	0.0393	$117,968,257.80
Northern Mariana Islands	51,718	0.0121	$36,284,217.70
Virgin Islands	106,631	0.0249	$74,809,977.60
Total	4,276,074	1.0000	$3,000,000,000.00

Analysis of the Allocation Received

The main driver of the allocations distributed by the Treasury was each territory's share of the 2019 population. The District and Puerto Rico's populations agreed with no exceptions to information on the Bureau's website. This same information was provided via a link with the chart above on the Treasury's website.

On the Treasury's website, a link was provided to support the remaining information in the chart above, however, this link was not functional and did not provide any data from the Bureau. After several attempts to retrieve the data from both the Treasury and the Bureau, the Bureau provided data on the 2019 population. However, this data contradicted the information in the chart above. This new data stated that the population of American Samoa as 48,456, Guam as 168,149, the Northern Mariana Islands as 52,048 and the U.S. Virgin Islands as 106,669.

Had these populations been used instead, in conjunction with the verified District and Puerto Rico populations, the allocations would have appeared as follows:

	Population, 2019	Share of Total Population	Allocation
District of Columbia	705,749	0.1651	495,289,683
Puerto Rico	3,193,694	0.7471	2,241,311,979
American Samoa	48,456	0.0113	34,006,080
Guam	168,149	0.0393	118,005,785
Northern Mariana Islands	52,048	0.0122	36,526,920
Virgin Islands	106,669	0.0250	74,859,553
Total	4,274,765	1.0000	3,000,000,000

The difference in the two charts is as follows:

	Actual Allocation Received	Re-calculated Allocation	(Under) Over Paid
District of Columbia	495,138,063.60	495,289,682.59	(151,618.99)
Puerto Rico	2,240,625,863.80	2,241,311,978.55	(686,114.75)
American Samoa	35,173,619.50	34,006,079.87	1,167,539.63
Guam	117,968,257.80	118,005,785.11	(37,527.31)
Northern Mariana Islands	36,284,217.70	36,526,920.19	(242,702.49)
Virgin Islands	74,809,977.60	74,859,553.68	(49,576.08)
Total	3,000,000,000.00	3,000,000,000.00	0.00

Based upon the data that was available and could be provided for the 2019 populations of the territories, there appears to be variances in what was paid and what should have been paid. It appears that the District was underpaid by $151,619.

Authorization to Accept, Obligate and Expend

As a companion to this review of the Fund appropriated by the CARES Act, ODCA independently sought a legal opinion from Boies Schiller Flexner LLP (BSF) concerning whether the 2020 CARES Act appropriation was expended in compliance with Federal and District laws and regulations.

In general, D.C. Code § 1-204.46 requires D.C. Council adoption of the annual budget, as well as any supplements thereto. Additionally, that Code provision prohibits any obligation or expenditure of any amount by any officer or employee of the District government without approval by the Council.

The District did not follow this required procedure for the COVID-19 Federal relief funds provided to state and local governments in the CARES Act and dispersed by the Treasury, spending the Federal payment without Council review or approval. The supposed basis for this was a reliance on D.C. Code § 7-2304(b)(1) which provided that "Upon the issuance of an emergency executive order the Mayor may...Expend such funds appropriated to the District of Columbia government sufficient to carry out public emergency service missions and responsibilities." This provision was repealed in 2021.

The independent legal review undertaken by BSF considered whether Council approval was required for the Fund expenditures taking into account of the emergency spending authority provided by the now-repealed D.C. Code § 7-2304(b)(1). The conclusion reached in that review is that the executive branch violated the District Charter by spending the CARES Act Coronavirus Relief Funds without prior Council review and approval. A detailed and substantive review of this determination is provided in the legal memo.

Grant Budget Modifications

The District also has a specified process for approvals of Federal grant funds typically provided by Federal agencies. Grant spending was not a focus of this review and we include only to acknowledge additional statutory provisions related to District government spending. In the Coronavirus Support Temporary Amendment Act of 2020[2], the Council acted to amend the portion of the D.C. Code regarding acceptance of grant amounts not included in the annual budget to shorten the written notice of approval filing time from 14 days to 2 days, as well as shortening the active disapproval resolution passage timeframe from 30 calendar days to 5 calendar days. It is arguable that the Council did not have the authority to amend a portion of the law governing grants that is included in the Home Rule Act for the same reasons noted in the legal memorandum with regard to spending direct appropriations. Amending the Home Rule Act requires either a vote by District residents or Congressional action. The effect of this and subsequent amendments nevertheless lead to an abbreviated and speedier process for the approval of Federal grants during the pandemic. The shorter timeframes were later rescinded on July 22, 2021.

2 - D.C. Law 23-130, effective from October 9, 2020 - May 21, 2021. Additionally, there was an Emergency version of this Act (Act 23-326) passed on May 19, 2020 which expired on June 9, 2020. Subsequently, Law 24-009, the Coronavirus Support Temporary Amendment Act of 2021 extended the abbreviated process for grants through February 4, 2022. However, Act 24-125, the Public Emergency Extension and Eviction and Utility Moratorium Phasing Emergency Amendment Act of 2021, repealed the abbreviated process set forth in earlier acts as of July 22, 2021.

Federal Compliance Introduction

Title 2 U.S. Code of Federal Regulations Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) is the set of rules established for Federal awards. The Uniform Guidance is developed by the U.S. Office of Management and Budget (OMB). Each year, OMB releases a compliance supplement[3] which outlines the compliance requirements of Federal programs.

The compliance supplement lists programs by name and assistance listing number as a unique identifier. Each program in the compliance supplement provides an overview of compliance requirements which is referred to as the matrix of compliance requirements (the matrix). Below is the matrix provided by OMB for the Fund which illustrates which areas are subject to audit.

A	B	C	E	F	G	H	I	J	L	M	N
Activities Allowed or Unallowed	Allowable Costs/Cost Principles	Cash Management	Eligibility	Requipment/Real Property Management	Matching, Level of Effort, Earmarking	Period of Performance	Procurement, Suspension & Debarment	Program Income	Reporting	Subrecipient Monitoring	Special Tests and Provisions
Y	Y	N	N	N	N	Y	N	N	Y	Y	N

OMB has identified that the Fund has five applicable areas. The requirements come from pages 918 through 924 of the April 2022 compliance supplement. The areas and a brief overview of the compliance requirements are as follows:

Activities Allowed or Unallowed & Allowable Costs/Cost Principles

Activities Allowed or Unallowed and Allowable Costs/Cost Principles are often combined into one compliance area for testing and review purposes due to the overlapping nature of the two. Payments must be used to cover costs that are:

1. Necessary expenditures incurred due to the public health emergency with respect to COVID-19;
2. Not accounted for in the governments' most recently approved budget as of March 27, 2020; and
3. Incurred during the period that begins on March 1, 2020 and ends on December 31, 2021.

3 - 2 U.S. Code of Federal Regulations Part 200, Subpart F

Period of Performance

Governments must use the direct payments for necessary expenditures incurred between March 1, 2020 and December 31, 2021, due to the COVID-19 public health emergency. On December 14, 2021, the Treasury extended the period of performance from December 31, 2021 to September 30, 2022.

Reporting

Each prime recipient of the Fund shall provide a quarterly financial progress report that contains COVID-19 related costs incurred during the covered period (the period beginning on March 1, 2020 and ending on December 31, 2021) to the Treasury.

A prime recipient is defined as an entity that receives money directly from the Federal government.

Subrecipient Monitoring

While the program does not have any specific subrecipient monitoring requirements, it is subject to requirements that all Federal programs are subject to. Page 20 of the April 2022 compliance supplement states "When a "Y" is present on the matrix and the auditor determines that the requirement should be tested at a nonfederal entity, the auditor must use Part 3, Compliance Requirements, and Part 4 (or 5), if applicable, in planning and performing the tests of compliance." Part 3 of the compliance supplement covers the common compliance requirements of all Federal programs. Since subrecipient monitoring has a "Y" present on the matrix displayed on page 9 of this report, subrecipient monitoring requirements are applicable to the District. Those requirements include:

1. Identify the award and applicable requirements
2. Evaluate risk
3. Monitor

The purpose of subrecipient monitoring is to provide oversight on Federal funds and to ensure they are being managed and spent in accordance with program requirements when the direct recipient decides to have third party entities administer program funds.

Federal Compliance Results

Activities Allowed or Unallowed & Allowable Costs/Cost Principles

All expenditures are required to meet all three tests of allowable costs and activities.

1 - Necessary expenditures incurred due to the public health emergency with respect to COVID–19;

The guidelines on what is defined as necessary expenditures is very broad. It allows for a large interpretation of what is necessary and judgement by recipients must be used in order to define this term.

The Federal register states the rest of the requirement as "expenditures must be used for actions taken to respond to the public health emergency."[4]

Our analysis of the District's expenditures of fund amounts did not reveal any unnecessary expenditures nor did we note any expenditures that were not related to actions taken to respond to the public health emergency.

2 - Not accounted for in the governments' most recently approved budget as of March 27, 2020; and

This requirement can be met in a two different manners. Per Federal guidelines "either the (a) cost cannot lawfully be funded using a line item, allotment, or allocation within that budget or (b) the cost is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation." The District would need to either make budget amendments or be able to show costs are for a substantively different use. Additionally, the Treasury has allowed for public health and public safety employees to have meet the substantively different test in order to remove some of the administrative burden placed on recipients of the Fund.

As costs for pandemic related expenses could not have been budgeted for in the District's budget that would cover the period of October 1, 2019 through September 30, 2020, any costs, directly related to the pandemic, incurred would be for a substantively different use than originally budgeted for.

3 - Incurred during the period that begins on March 1, 2020 and ends on December 31, 2021.

As noted below in the period of performance requirements the December 31, 2021 cutoff date has been extended. All expenditures analyzed for the purpose of this report were incurred between March 1, 2020 and December 31, 2021.

Period of Performance

All expenditures and obligations analyzed for the purpose of this report occurred between March 1, 2020 and December 31, 2021. This report covers expenditures and activity through December 31, 2021, and therefore, the expenditures covered in this report were in compliance with period of performance requirements.

4 - Federal Register Volume 86, Number 10

As of December 31, 2021, there is an unspent portion of the award received. On December 14, 2021, the Treasury extended the period of performance from December 31, 2021 to September 30, 2022 thus giving the District an additional period of time to be in compliance with the requirements going forward.

There were no expenditures of the Fund noted to have been obligated prior to March 1, 2020.

Reporting

Financial progress reports were submitted to the Treasury. We obtained a copy of the financial progress report for the quarter ended December 31, 2021. The financial progress report requires two individuals to be listed, the point of contact of the District as well as the name of the authorized certifying official of the report. It was noted that the individual listed as the District's point of contact was no longer an employee of the District the day that the report was submitted to the Treasury.

It is essential that that the financial progress report reflect a current employee. Failure to have an updated point of contact can result in delayed information to the District. New Federal funding resulting for the COVID-19 pandemic has been subject to evolving rules and regulations. Without a proper point of contact there is a possibility of not receiving the proper information on a timely basis.

The Federal requirement is that the quarterly reports be submitted no later than ten days after each calendar quarter. Because of this short window to complete this report, not all accounting entries could be processed timely to be in accordance with the accrual basis of accounting. As such, there are differences in the amount reported in quarterly reports and in the District's accounting system. The submission date did not provide ample time for an entity the size of the District to be able to submit complete information. We did note that the District had submitted all of the quarterly reports for the period of this report.

Subrecipient Monitoring

All subrecipient monitoring testing and results are through September 30, 2021. Amounts subsequent to this date are excluded as the detail provided for this report were compared to the District's Schedule of Expenditures of Federal Awards on its September 30, 2021 and 2020 Uniform Guidance reports to ensure that there was a complete sample. Uniform Guidance reports are the Federal award compliance audit reports which are required when a non-Federal entity expands $750,000 or more during a fiscal year.

For the period through September 31, 2021, the District provided subaward funds to 172 different subrecipients for a total of $31,206,699. The amount of subaward funds provided by agency through September 31, 2021 is as follows.

Agency		Amount
Office of the Mayor	$	9,973,736
Department of Housing and Community Development		2,351,341
Deputy Mayor for Planning and Economic Development		13,886,167
Department of Health		4,995,455
	$	31,206,699

We selected ten subrecipients to assess the District's compliance. The ten subrecipients selected were the following:

1. Bread for the City
2. Centro de Alfabetizacion en es
3. Community of Hope, Inc.
4. Exodus Treatment Center
5. Hola Cultura
6. Miriams Kitchen
7. Palisades Village
8. Sasha Bruce Youthworks
9. Stoddard Baptist Home Foundation
10. Voices for a Second Chance

Due to the lack of a control system and pervasive issues noted which are detailed below, additional samples were not deemed to be necessary. Typically, if isolated incidents are identified, samples would be expanded to diagnose the reoccurring and more problematic issues. In this situation, all ten subrecipients had the same issues, except where noted below, indicating that it is likely that all subrecipients, including those that were not sampled, also have the same issues. The detailed Federal requirements that were observed to ensure that the District's compliance were as follows, including the results and the applicable findings to the respective tested monitoring areas:

(1) Identify the award and applicable requirements

Federal Requirements

Ensure that every subaward is clearly identified to the subrecipient as a subaward and includes the following information at the time of the subaward and if any of these data elements change, include the changes in subsequent subaward modification. When some of this information is not available, the pass-through entity must provide the best information available to describe the Federal award and subaward. Required information includes:

1. Federal award identification:
    a. Subrecipient name
    b. Subrecipient's unique entity identifier
    c. Federal award date
    d. Subaward period of performance state and end date
    e. Subaward budget period state and end date
    f. Amount of Federal funds obligated by this action by the pass-through entity to the subrecipient
    g. Total amount of Federal funds obligated to the subrecipient by the pass-through entity including the current financial obligation
    h. Total amount of the Federal award committed to the subrecipient by the pass-through entity
    i. Name of Federal awarding agency, pass-through entity, and contact information for awarding official of the pass-through entity
    j. Assistance listings number and title; the pass-through entity must identify the dollar amount made available under each Federal award and the assistance listings number at time of disbursement
2. All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award
3. A requirement that the subrecipient permit the pass-through entity and auditors to have access to the subrecipient's records and financial statements as necessary for the pass-through entity to meet the requirements of this part
4. Appropriate terms and conditions concerning closeout of the subaward

Results and Findings

All ten of the subaward funding agreements evaluated failed to list a subrecipient unique entity identifier, name of the Federal awarding agency, assistance listing number, title of the Federal program, and requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award.

Because of the failure to list these items, the District is not in compliance with the requirements to properly identify the award and the applicable requirements. Failure of this compliance requirement can have far reaching effects. Since none of the evaluated funding agreements identified the Federal nature and program requirements of the funding there is an increased risk of misuse of the subawards. Subrecipients may not realize that they are administrating Federal funds and could be using the funds for activities and costs that are not allowable.

(2) Evaluate risk

Federal Requirements

Evaluate each subrecipient's risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring, which may include consideration of such factors as:

1. The subrecipient's prior experience with the same or similar subawards;
2. The results of previous audits including whether or not the subrecipient receives a Uniform Guidance report and the extent to which the same or similar subaward has been audited as a major program;
3. Whether the subrecipient has new personnel or new or substantially changed systems; and
4. The extent and results of Federal awarding agency monitoring (e.g., if the subrecipient also receives Federal awards directly from a Federal awarding agency).

Results and Findings

Our inquires of the Executive Office of the Mayor revealed that there was no such risk of noncompliance assessment (risk assessment) performed of the subrecipients.

Because of the failure to perform and document risk assessments, the District is not in compliance with Federal regulations. Failure to perform this compliance requirement can result in providing funds to an entity that would not be able to support the program and use the Federal award properly. It will also have effects on the monitoring aspect of the subrecipient requirements which will follow this section. The risk assessment is intended to be a tool that allows the District to understand the subrecipients' ability to properly manage the program as well as provide the District with a roadmap as to how they are going to monitor the subrecipients' compliance and performance going forward.

The risk assessment should result in a tailored plan for monitoring each subrecipient. While it may not be cost effective to fully customize a plan for each subrecipient, an overall plan, with subrecipient specific considerations, should reflect the District's conclusions on how well each subrecipient is expected to able to administer the program. The risk assessment may also result in identifying potential subrecipients that are not capable of administering the program and ultimately changing the District's determination on whom will receive funds. An entity that has a history of non-compliance, or no history of administering Federal funds, may lead to a risk assessment determination that funds should not be provided or that increased monitoring of this subrecipient is required. Conversely, an entity that has a vast history of administering Federal funds with no issues and an experienced staff, may not need the same amount of monitoring as other entities.

Failure to perform a risk assessment can result in improper monitoring plans which can lead to misuse of the funds and mismanagement of the District's personnel and resources.

<u>(3) Monitor</u>

<u>Federal Requirements</u>

Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved.

1. Pass-through entity monitoring of the subrecipient must include:
    a. Reviewing financial and performance reports required by the pass-through entity.
    b. Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and written confirmation from the subrecipient, highlighting the status of actions planned or taken to address single audit findings related to the particular subaward.
    c. Issuing a management decision for applicable audit findings pertaining only to the Federal award provided to the subrecipient from the pass-through entity.
    d. The pass-through entity is responsible for resolving audit findings specifically related to the subaward and not responsible for resolving crosscutting findings. If a subrecipient has a current single audit report posted in the Federal Audit Clearinghouse and has not otherwise been excluded from receipt of Federal funding (e.g., has been debarred or suspended), the pass-through entity may rely on the subrecipient's cognizant audit agency or cognizant oversight agency to perform audit follow-up and make management decisions related to cross-cutting findings. Such reliance does not eliminate the responsibility of the pass-through entity to issue subawards that conform to agency and award-specific requirements, to manage risk through ongoing subaward monitoring, and to monitor the status of the findings that are specifically related to the subaward.
2. Depending upon the pass-through entity's assessment of risk posed by the subrecipient, the following monitoring tools may be useful for the pass-through entity to ensure proper accountability and compliance with program requirements and achievement of performance goals:
    a. Providing subrecipients with training and technical assistance on program-related matters; and
    b. Performing on-site reviews of the subrecipient's program operations;
    c. Arranging for agreed-upon-procedures engagements.
3. Verify that every subrecipient is audited when it is expected that the subrecipient's Federal awards expended during the respective fiscal year equaled or exceeded $750,000.
4. Consider whether the results of the subrecipient's audits, on-site reviews, or other monitoring indicate conditions that necessitate adjustments to the pass-through entity's own records.
5. Consider taking enforcement action against noncompliant subrecipients.

Results and Findings

Per our inquires of the Executive Office of the Mayor, it was stated that monitoring activities do occur. As a follow up to this statement, we requested the documented financial and performance files of the monitoring results to inspect. Management could not produce any record that the monitoring had in fact occurred and stated that they had identified a need for retention of correspondence. Based on the lack of records, we conclude that no sufficient monitoring occurred.

The Office of Public Records schedules, collects, stores and manages records of the District through the services of the District of Columbia Archives, the District of Columbia Records Center (Records Center) and the Library of Government Information. The Office of Public Records was established in the Office of the Secretary, February 11, 1986, by Mayor's Order 86-28, in accordance with D.C. Law 6-19, to collect and preserve the history of the District government.

This is also indicative of poor data retention by the District. The Federal data retention requirement of the Fund is "records shall be maintained for a period of five (5) years after final payment is made using Coronavirus Relief Fund monies." Also, the Records Center posts a general records retention schedule. Under General Records - Schedule 16 Administrative Management Records - item #10 Records Management Files, the description is "Correspondence, reports, authorizations, and other records that relate to the management of agency records, including, such matters as forms, correspondence, reports, mail, and the use of files management; the use of microforms, ADP systems, and word processing; records management surveys; vital records programs; and all other aspects of records management not covered elsewhere in this schedule." The authorized disposition for these records is "Destroy when 6 years old. Earlier disposal is authorized if records are superseded, obsolete, or no longer needed for reference." Therefore, the District is not in compliance with either Federal or local regulations as a result of not being able to provide these monitoring reports.

As part of our procedures, we also inquired if the subrecipient's Uniform Guidance reports were obtained for analysis. While management stated that they had obtained these as part of the application process, no subsequent Uniform Guidance reports were obtained. This alone is a indicates a flaw in the monitoring process.

Additionally, we searched the Federal Audit Clearinghouse for all ten of the sampled subrecipients and found that two of them, Bread for the City and Community of Hope, Inc., had subsequent single audits that were freely and publicly available for the District to obtain and review. Of the two that had Uniform Guidance reports, only Bread for the City had identified that they had expenditures from the Treasury, however not from the Fund. Neither of the subrecipients' Schedule of Expenditures of Federal Awards showed any Federal funding passed through to them from the District. The subrecipient that showed expenditures from the Treasury reported that the award was passed through from the D.C. Bar Foundation and was for a significantly larger amount than what was awarded by the District. Therefore, there was no evidence of the District's funding being reported.

As part of the inspection of the subrecipient's Uniform Guidance reports, Bread for the City had reported Uniform Guidance findings on both their June 30, 2019 Uniform Guidance report (the report was dated May 18, 2020, and therefore the report that would have been used during the application, review and awarding process) and their subsequent Uniform Guidance report as of June 30, 2020. These reports should have been used to tailor monitoring activities for deficiencies that were known to the District at the time the funding was awarded, as well as, during the period in which funds were available for the subrecipient to be expended.

Overall Overview of Subrecipient Monitoring of the District

The testing performed related to subrecipient monitoring has demonstrated that no control system is currently in place to ensure that subgrant awards are appropriately identified to subrecipients, assessed for risk or monitored throughout the funding's life. While this report is limited in scope to inspection of subgrants related to the Fund, it is evident that program and financial staff of the District are not trained in these requirements, and no control system has been implemented.

We recommend that the District re-evaluate the procedures that it currently has in place and invest in training and education for all individuals involved in the subrecipient process, regardless of which assistance program requires monitoring. We also recommend a robust system on internal controls over subrecipient monitoring be developed in order ensure all required steps are taken and reviewed by another individual.

This recommendation would be an important investment for the District to consider. The District is currently exposed to potential disallowance of expenditures due to the nature of the control system currently in place. The following is the Federal guidance for disallowed costs under Code of Federal Regulations Title 2 Subtitle A Chapter 11 Part 200 Subpart D § 200.339 remedies for noncompliance:

If a non-Federal entity fails to comply with the U.S. Constitution, Federal statutes, regulations or the terms and conditions of a Federal award, the Federal awarding agency or pass-through entity may impose additional conditions, as described in the Code of Federal Regulations Title 2 Subtitle A Chapter 11 Part 200 Subpart C § 200.208 - Specific Conditions. If the Federal awarding agency or pass-through entity determines that noncompliance cannot be remedied by imposing additional conditions, the Federal awarding agency or pass-through entity may take one or more of the following actions, as appropriate in the circumstances:

(a) Temporarily withhold cash payments pending correction of the deficiency by the non-Federal entity or more severe enforcement action by the Federal awarding agency or pass-through entity.

(b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(c) Wholly or partly suspend or terminate the Federal award.

(d) Initiate suspension or debarment proceedings as authorized under 2 CFR part 180 and Federal awarding agency regulations (or in the case of a pass-through entity, recommend such a proceeding be initiated by a Federal awarding agency).

(e) Withhold further Federal awards for the project or program.

(f) Take other remedies that may be legally available.

Business Process Internal Controls

The expenditures of the Fund were subject to the District's normal business processes and related internal controls in order to request, approve, and issue payment to vendors for authorized charges. Our analysis evaluated the internal controls over cash disbursements. We noted various methods that were available and utilized for expending money from the Fund. The various methods are as follows:

Procurement system - The District utilizes a procurement system known as PASS to process most cash disbursements. The essential control elements of the procurement process are documented in the PASS system when completed. They include:

- Departments/agencies within the District submit purchase requisitions with supporting documentation (i.e. quotes, contracts).
- Purchase requisitions are approved within the PASS system by authorized individuals along the established approval path for each department/agency.
- Once fully approved, the requisition is converted to a valid purchase order.
- Authorized vendors are provided access to the District's online portal to submit their invoices.
- A "Receipt" function is completed by the requesting department/agency to confirm that the goods and/or services have been rendered.
- Accounts payable clerks complete the three way matching of the purchase order, the vendor invoice, and the receipt of goods/services.
- Payment is issued to vendor upon final review by the accounts payable manager.

Direct Vouchers - Payments processed under this method are done so in accordance with Financial Management and Control Orders issued by the Chief Financial Officer pursuant to his authority granted by Section 424 of the District of Columbia Self Government and Governmental Reorganization Act of 1973. The Control Orders allow for this method of payment when the payee cannot be determined in advance or because the nature of the expenditure does not lend itself to prior obligation. The Control Orders specifically enumerate various categories of expenditures where it would be appropriate to process payments under this method. In the context of the Fund, the expenditures processed using the direct voucher method were generally related to grants, loans, subsidies, or third-party payments made to, or on behalf of, District residents for programs that promote various District initiatives.

The essential control elements of the direct voucher process include:

- The agency/department fiscal office outlines the spending request in a memo that is approved by management.
- A copy of the Control Order that demonstrates how/why the expenditure is allowable to be processed using a direct voucher.
- Supporting documentation that substantiates the expenditure (i.e. grant agreement).

Journal entry reclassification: In some cases the District applied the Fund to prior expenditures that were incurred during the applicable time period for the COVID emergency and were related to an allowable purpose. In these cases a journal entry form was created, approved by accounting personnel and agency/department management, and processed to reclassify the expenses to the appropriate Fund codes.

Results and Findings

We sampled transactions related to the use of the Fund from 15 different District agencies. There were 146 transactions totaling $59,724,440 in our sample. We reviewed supporting documentation to determine that the internal control procedures outlined above were adhered to and that the purpose of the expense was associated with the COVID-19 emergency.

With the exception noted below related to the Convention Center, our testing substantiated that the internal control elements described in the processes outlined above were satisfied.

The Convention Center was allocated funding in order to create the Hotel Bridge Fund Program (the Program). The purpose of the Program was to issue grants to eligible hotels in the District to serve as an intervention and stabilization effort. To avoid fraud and confirm that distributions of the funds were made to eligible hotels, various information was required to be submitted with the grant application. One required item was a cover letter on hotel letterhead itemizing specific information that could be used to verify its authenticity. However, our testing could not substantiate that this element of the process was satisfied, as we were not provided with this documentation.

Memorandum of Agreement

The Convention Center, also known as the Washington Convention and Sports Authority (WCSA), is a component unit of the District. A component unit is a legally separate organization for which a primary government appoints a voting majority of its governing board, there is a financial dependence, or the primary government holds a majority equity interest in. Being a component unit, the District and WCSA have the option of including the WCSA's Federal expenditures as part of the District's Uniform Guidance audit or for the WCSA to have its own Uniform Guidance audit performed. As noted in the District's Uniform Guidance reports, specifically in the Independent Auditor's Report on Compliance For Each Major Federal Program and Report on Internal Control Over Compliance Required by Uniform Guidance, only one component unit is excluded from the report which is not the WCSA. Therefore, the District's single audit report covers the WCSA's Federal expenditures.

With the WCSA being part of the primary government for the Uniform Guidance audit, expenditures on the Schedule of Expenditures of Federal Awards are to be shown when the WCSA expends the funds, as opposed to when the funds are provided to the WCSA. This was properly reported.

Also, with the WCSA being considered part of the primary government, they are not a subrecipient even though they are a legally separate entity. This means that they are not subject to subrecipient monitoring requirements. Instead of there being a grant agreement, there was a memorandum of agreement (MOA) between the WCSA and the District, specifically the Office of the Deputy Mayor for Planning and Economic Development.

Similar to the subrecipient monitoring deficiencies noted above, the MOA does not identify the award and applicable requirements. Instead, the MOA states that the funds are from Federal CARES Act funding. While this is factually true since the Fund was created under the CARES Act, it may be misleading. The CARES Act created several new grants and programs, all of which have very specific and particular compliance requirements. By stating that this is CARES Act funding, there is the possibility that the wrong CARES Act program requirements are followed. Failure of identifying the award and requirements could result in misuse of the funds by the WCSA as well as any other MOA's of this nature.

Summary of Recommendations

The below are our recommendations to the District:

1. Allocation Received - Bureau's Publicly Available Information
   The District should contact the Bureau and request that they locate the information for which the allocations were determined. It is important that the publicly available information be accurate. In the event that the publicly available information is not accurate, a remedy for the allocation received should be pursued.
2. Authorization to Accept, Obligate and Expand - Standard Procedures
   The District should have standard procedures for when new funding becomes available and how those new funds are disbursed to different agencies before they are obligated to be expended. As part of these standard practices, it is imperative that the correct law be identified which authorizes the District's ability and authority to accept new funds. We recommend that the District, along with their attorneys, create these practices along with a list of laws which are acceptable for accepting funding when it becomes available.
3. Federal Compliance - Reporting
   The District's point of contact information should remain current. We recommend that whoever certifies Federal reports, review that all contact information is current.
4. Federal Compliance - Subrecipient Monitoring
   As stated earlier in this report, there are a significant amount of findings related to subrecipient monitoring. We recommend:

   (a) The District examine whether these are isolated to the Fund or if there is a more pervasive issue. Based on the results of this report, the District needs to consider remodeling its entire subrecipient process.

   (b) Award letters should be modified to be uniform and include all the required federal award identification information.

   (c) A risk assessment process should be adopted including a standard questionnaire for potential recipients along with a correlated pathway for determining whether funding will be provided and the proper monitoring techniques which will be placed on recipients.

   (d) All monitoring be digitally backed up and easily accessible.

   (e) The District should consider developing an on-line portal in which subrecipients are required to upload monitoring documents. This could also allow for automated follow up requests and reminders for due dates.

   (f) Last, the District should consider a unit of government designated for oversight of the subrecipient monitoring process.

Agency Comments

The Office of the D.C. Auditor submitted the draft report to the Office of the City Administrator (OCA) and the Office of the Chief Financial Officer (OCFO) on July 6, 2023, with a request for written comment by July 20, 2023. The OCA requested an extension which was granted and provided the written response that follows.

On August 1, 2023, in an email to ODCA the OCFO wrote that they were providing the following response on behalf of the Deputy Chief Financial Officer and Chief of Staff: "Please be informed that the OFCO will not be providing a response as there are no financial findings or recommendations reflected in the audit."

Office of the City Administrator

August 10, 2023

Ms. Kathleen Patterson
District of Columbia Auditor
1331 Pennsylvania Avenue, NW, Suite 800 South
Washington, DC 20004

Dear Auditor Patterson:

Thank you for the opportunity to review and respond to the Office of the District of Columbia Auditor's (ODCA's) draft evaluation, "*Controls Lacking in CARES Act/Coronavirus Relief Fund Spending*." I appreciate the time and effort your team dedicated to evaluating the District Government's processes and procedures related to expenditures from the CARES Act Coronavirus Relief Fund (CARES Fund).

The Office of the City Administrator (OCA) has continually worked during and after the COVID-19 pandemic to ensure all CARES Fund dollars are used to support a strong and vibrant recovery for District residents and businesses, in compliance with federal regulations and guidance. We have carefully reviewed ODCA's recommendations related to the CARES Fund expenditures and our responses to those recommendations are provided below.

1. **ODCA Recommendation #1** (Allocation Received – Census Bureau's Publicly Available Information): The District should contact the Census Bureau and request they locate the information for which allocations were determined. It is important the publicly available information be accurate. In the event the publicly available information is not accurate, a remedy for the allocation received should be pursued.

   OCA Response: We disagree with this recommendation, because ODCA based the recommendation on inaccurate information. The U.S. Department of the Treasury (Treasury) provided the District Government with $495,138,063.60 in CARES Act funding in April 2020 based on the methodology and data set forth in the Treasury document entitled *Data sources and the distribution methodology for units of local government*.[1] ODCA, however, believes the District may have been entitled to an additional $151,618.99. In making this calculation, ODCA questioned the population data Treasury used for American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. Specifically, ODCA stated that the 2019 population data it identified for these jurisdictions contradicts the data used by Treasury. However, ODCA appears to have erred in its analysis by using *actual 2019 population estimates* for those jurisdictions.

[1] https://home.treasury.gov/system/files/136/Census-Data-and-Methodology-Final.pdf.

As stated in the *Data sources* document, Treasury was using the *2019 population projections* issued by the U.S. Census Bureau's International Programs in August 2017. That is, Treasury was not using the actual 2019 population estimates for those jurisdictions; it was using the 2019 population estimates for those jurisdictions that were developed in 2017. Although the link to the underlying data provided in the *Data sources* document is no longer active, ODCA's data does not provide a basis to question the accuracy of Treasury's data. Moreover, ODCA says it made several unsuccessful attempts to obtain the underlying data from Treasury and the Census Bureau.

Since ODCA's data does not contradict the Treasury data and the underlying data apparently is no longer accessible by the relevant agencies, OCA disagrees with this recommendation.

2. **ODCA Recommendation #2** (Authorization to Accept, Obligate and Expand – Standard Procedures): The District should have standard procedures for when new funding becomes available and how those new funds are disbursed to agencies before they are obligated to be expended. We recommend the District create these practices along with a list of laws which are acceptable for accepting funding when it becomes available.

   OCA Response: We disagree with this recommendation. The OCA and the Office of the Chief Financial Officer are cognizant of the laws that authorize the District to accept and expend new funds. This recommendation appears to stem from ODCA's interpretation of a former version of D.C. Official Code § 7-2304(b)(1) and, based on an opinion provided to ODCA by an outside law firm, ODCA appears to believe the Executive and the Council violated District law in the expenditure of CARES Act funds. While such an allegation surely would be newsworthy, it is totally unfounded.

   The Office of the Attorney General (OAG) has previously confirmed the Executive's interpretation that the former version of D.C. Official Code § 7-2304(b)(1) authorized the spending of the CARES Act funds without specific Council approval. Once that provision was repealed, the CARES Act funds were appropriated through the usual budget process.

   Because existing OCA and OCFO processes properly account for the acceptance of new funding and its disbursement to the appropriate District agencies, OCA disagrees with this recommendation. Moreover, it is unclear why ODCA sought the opinion of an outside law firm—at taxpayer expense—when OAG was available to provide an opinion and is far better positioned to analyze this District law-specific issue.

3. **OCA Recommendation #3** (Federal Compliance – Reporting): The District's point of contact information should remain current.

   OCA Response: We agree with this recommendation, although it is unnecessary with respect to OCA, since OCA's contact information has in fact remained current.

4. **ODCA Recommendation #4** (Federal Compliance – Subrecipient Monitoring): There are a significant amount of findings related to subrecipient monitoring. We recommend: (a) The District examine whether these are isolated to the CARES Act Fund or if there is a more pervasive issue. Based on the results of this report, the District needs to consider remodeling

its entire subrecipient process; (b) Award letters be modified to be uniform and include all the required federal award identification information; (c) A risk assessment process be adopted including a standard questionnaire for potential recipients along with a correlated pathway for determining whether funding will be provided and the proper monitoring techniques which will be placed on recipients; (d) All monitoring be digitally backed up and easily accessible; (e) The District consider developing an online portal in which subrecipients are required to upload monitoring documents. This could also allow for automated follow up requests and reminders for due dates; and (f) The District consider a unit of government designated for oversight of the subrecipient monitoring process.

OCA Response: We partially agree with this recommendation.

(a) The District's management of federal grant funding is audited each year by an independent, outside auditing firm as part of the Single Audit. Based on the results of prior Single Audits, we do not believe this issue is pervasive.

(b) We agree award letters should include all required federal award identification information. OCA does not believe, however, the award letters need to be uniform across agencies, as long as the letters include the appropriate information.

(c) Risk assessment processes already exist in several agencies. OCA agrees all agencies should have a risk assessment process.

(d) OCA agrees monitoring should be appropriately documented and the monitoring documents be appropriately maintained. Although digital backups are often helpful, OCA does not believe a requirement to create digital backups is needed at this time.

(e) OCA does not believe an online portal needs to be developed for the upload of all subrecipients' monitoring documents. Different grant requirements, differing agency policies and procedures, and differing subrecipient practices may dictate different monitoring methods and needs, and a singular online portal may not meet a minimum threshold for all agencies. Moreover, some agencies already use grants management platforms appropriate to their needs; their staff and grantees are trained on the platform software; and the platforms already include information about and from grantees and prior performance. Centralizing platforms would not be an efficient use of resources at this point. However, agencies should develop consistent policies and practices for their subrecipients, including procedures for the submission of subrecipient monitoring documents, to the extent such standardized policies do not already exist at an agency.

(f) OCA does not believe a central unit should be designated for oversight of the subrecipient monitoring process. It is important for the programmatic and grants-related functions to be integrated within an agency to improve subrecipient performance and achieve the best programmatic results. Moreover, each agency's grants and policies may require a different set of monitoring skills and knowledge that are specialized to the agency's program sector. Centralized subrecipient monitoring is more likely to lack the specialized programmatic knowledge necessary for each sector's monitoring needs.

Thank you for the opportunity to respond to your office's evaluation.

Sincerely,

Kevin Donahue
City Administrator

ODCA Response to Agency Comments

The Office of the D.C. Auditor appreciates OCA's response to the draft report and that the OCA agrees in part with some recommendations made in this report.

Regarding our first recommendation, until the Treasury makes the population information available that is stated in the *Data sources and the distribution methodology for units of local government*, our consultant notes that ODCA "can only re-calculate their proportionate share of the funding from alternative populations that are provided to them."

OCA's comment notes disagreement with the legal analysis by ODCA's outside counsel. ODCA did consult with the Office of the Attorney General (OAG) on the issue of the Home Rule Charter requirements and determined that an independent assessment was advisable on such an important matter. It is also the case that the appropriations requirement is a matter on which the OAG could reasonably be expected to find the most plausible argument that the actions taken by the Administration were appropriate. Further, ODCA's outside counsel includes considerable expertise on the background of federal appropriations law that was a precedent for budget provisions in the Home Rule Charter.

We appreciate that the OCA agrees with the recommendation that the District point of contact information on all federal reports remains current, and encourage the OCA to ensure that all agencies independent or not and who certify Federal reports for submission are cognizant of accurate information including contacts.

Regarding the recommendations on subrecipient monitoring we hope the OCA takes a leading role in ensuring all District government agencies have a risk assessment process in place and that subrecipient monitoring is accurate and consistent throughout the District government.

Finally, ODCA regrets that the Chief Financial Officer and his team have chosen not to provide written comments for publication in this report concerning the District's expenditure of $495 million in federal COVID-19 relief funds.

Appendix

Memorandum from Boise Schiller Flexner LLP

MEMORANDUM PREPARED FOR THE D.C. AUDITOR REGARDING THE AUTHORITY OF THE MAYOR OF THE DISTRICT OF COLUMBIA TO EXPEND D.C. CARES ACT FUNDING WITHOUT APPROVAL OF THE COUNCIL OF THE DISTRICT OF COLUMBIA

To: **Kathy Patterson, D.C. Auditor**

From: **Samuel C. Kaplan, Partner, Boies Schiller Flexner LLP**
Victoria Scordato, Associate, Boies Schiller Flexner LLP

Date: **August 7, 2023**

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Question Presented

The Office of the D.C. Auditor (ODCA) is currently conducting a review of whether $495 million in Coronavirus Relief Funds—the first major tranche of COVID-19 funding provided to states and localities under the 2020 CARES Act—was spent in compliance with federal and District law and regulations. As part of this review, the ODCA requested a legal opinion on whether the Office of the City Administrator (OCA) and the Office of the Chief Financial Officer (CFO) violated the District Charter by directing and carrying out the spending of this funding without review or approval by the D.C. Council.

D.C. Code §1-204.46 governs the enactment of the local budget and requires the Council to adopt the annual District budget as well as any supplements thereto.[1] It explicitly provides that "no amount may be obligated or expended by any officer or employee of the District of Columbia government"—including the Mayor, the OCA, and the CFO—"unless such amount has been approved by an act of the Council" and "transmitted by the Chairman to the Congress and has completed the review process under §1-206.02(c)(3)."[2]

The asserted basis for spending the 2020 CARES Act funding without Council review or approval—in contravention of §1-204.46—was D.C. Code §7-2304(b)(1). Prior to its repeal in 2021, §7-2304(b)(1) provided that, "[u]pon the issuance of an emergency executive order the Mayor may…[e]xpend such funds appropriated to the District of Columbia government sufficient to carry out public emergency service missions and responsibilities."[3] This provision was enacted as part of the Public Emergency Act of 1980.[4]

The D.C. Council repealed §7-2304(b)(1) on March 17, 2021.[5] We therefore do not understand there to be any dispute that the expenditures at issue would require Council approval today. However, §7-2304(b)(1) was still in place at the time the expenditures at issue took place, and so the question addressed here is whether Council

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[1] D.C. Code § 1-204.46(a) (2023) ("The Council…shall by act adopt the annual budget for the District of Columbia government…Any supplements to the annual budget shall also be adopted by act of the Council, after public hearing, by a vote of a majority of the members present and voting.").

[2] D.C. Code § 1-204.46(c)(1) (2023); D.C. Code § 1-206.02(c)(3) (2023) ("The Council shall submit with each Act transmitted under this subsection an estimate of the costs which will be incurred by the District of Columbia as a result of the enactment of the act in each of the first 4 fiscal years for which the act is in effect, together with a statement of the basis for such estimate.").

[3] D.C. Code § 7-2304(b)(1) (2020).

[4] Mar. 5, 1981, D.C. Law 3-149, § 5, 27 D.C.R 4886 (D.C. Code § 7-2304).

[5] The Council repealed §7-2304(b)(1) through emergency legislation effective on March 17, 2021, D.C. Act 24-30, § 507(a), 68 D.C. Reg. 3101, and permanent legislation effective on November 13, 2021, D.C. Law 24-45, § 7162, 68 D.C.R 10163.

approval was required for these expenditures in light of the emergency spending authority provided by §7-2304(b)(1) prior to its repeal.

Executive Summary

We conclude that the Executive Branch violated the District Charter by spending $495 million in CARES Act funding without prior Council review and approval. When a federal statute conflicts with state or local law, the federal statute preempts that law. The same is true of a conflict between a state or local statute and a state constitution. As both federal and D.C. courts have made clear since the Home Rule Act became law in 1973, the District Charter is a constitutional analog. As a result, the Charter and any amendments thereto supersede and preempt conflicting local legislation passed by the D.C. Council.

Absent specified circumstances that do not include the Public Emergency Act, §1-204.46 of the D.C. Charter prohibits District officials from obligating or spending funds without prior D.C. Council approval. Section 7-2304(b)(1)'s authorization of emergency spending without Council approval thus conflicts with §1-204.46 of the District Charter. Because §7-2304 is local legislation, it is preempted by the conflicting provisions of the D.C. Charter. As a result, the Executive Branch could not permissibly invoke §7-2304(b)(1) to bypass Council approval of the 2020 CARES Act expenditures.

Background

For much of the twentieth century, prior to the passage of the Home Rule Act, "Congress wielded its authority under the Constitution to exercise exclusive legislation over the District and confined the District's municipal government to mere administration."[6] However, in 1973, Congress passed and D.C. residents ratified the Home Rule Act, "entrust[ing] the District with the management of its own affairs, while retaining the power to veto the District's actions."[7] The self-governing aspects of the Home Rule Act are contained in Title IV, known as the "District Charter," which establishes the organizational structure of the Government of the District of Columbia.[8]

The Charter "fundamentally change[d]" the relationship between Congress and the District by establishing a tripartite form of government for the District that "parallel[ed] the structure of state and federal governments."[9] This structure includes a

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[6] *Council of the Dist. of Columbia v. Dewitt*, 2016 WL 1109117, at *3 (D.C. Super. Mar. 18, 2016) (internal citations omitted).
[7] *Dewitt*, 2016 WL 1109117 at *10.
[8] *Dewitt*, 2016 WL 1109117 at *4 (citing *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 94-95 (D.C. 2010)).
[9] *Dewitt*, 2016 WL 1109117 at *3-4 (citing *Jackson*, 999 A.2d at 95); *see also Hessey v. D.C. Bd. of Elections & Ethics,* 601 A.2d 3, 14 (D.C. 1991) ("Title IV of the Self–Government Act (the Charter)

legislative branch (the D.C. Council), an executive branch (the Mayor), and a judicial branch (the Superior Court of the District of Columbia and the D.C. Court of Appeals).[10] As a result, the District's highest court has held that "the same general principles should govern the exercise of such power in the District Charter as are applicable to the three branches of government at the federal level."[11]

One such principle is ensuring the separation of powers through a system of checks and balances by vesting responsibility for appropriations in the legislature instead of the executive.[12] In the federal system, this manifests as a budget process that begins with the formulation and submission to Congress of the President's budget, and requires Congressional approval of all budgetary measures, including budget resolutions and appropriations bills.[13] The Home Rule Act created a similar separation of powers, vesting the District's legislative power in the D.C. Council[14] and its executive power in the Mayor.[15] Thus, "the fundamental statutory framework" of the Home Rule Act gave "the Council, not the Mayor, ultimate authority (subject to Congressional review) over the District's annual budget."[16] As the D.C. Court of Appeals explained:

> "Although the Mayor is the chief executive of the District…and its financial administrator…these duties depend on legislative authorization and funding of the programs to be administered…The Council's budget request acts represent the formulation of a set of governmental priorities by the elected representatives of the public. The determination of the levels of funding to request from Congress for competing programs involves a myriad of policy decisions. The passage of the budget, therefore, is legislative action."[17]

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establishes a tripartite form of government for the District of Columbia, with an elected Council and Mayor, and a judicial system").

[10] *Dewitt*, 2016 WL 1109117 at *4 (citing D.C. Code §§ 1-204.01 (Charter provisions for the Council), 1-204.21 (Charter provisions for the Mayor), 1-204.31 (Charter provisions for the D.C. Courts)).

[11] *Unum Life Ins. Co. of Am. v. D.C.*, 238 A.3d 222, 232 (D.C. 2020) (quoting *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992)).

[12] *Unum Life Ins. Co.*, 238 A.3d at 232 (quoting D.C. Code § 1-301.44(b)) ("The Council recognizes the principle of separation of powers in the structure of the District of Columbia government."); *see also Fraternal Ord. of Police Metro. Police Dep't Lab. Comm. v. D.C.*, 290 A.3d 29, 41 (D.C. 2023) (quoting *Wilson*, 615 A.2d at 231) ("This court has long acknowledged that the separation-of-powers principles 'as are applicable to the three branches of government at the federal level' likewise 'govern the exercise of [each branch's powers] in the District Charter.'").

[13] Saturno, James V. (2023), *Introduction to the Federal Budget Process* (CRS Report No. R46240), https://crsreports.Congress.gov/product/pdf/R/R46240/4.

[14] D.C. Code § 1-204.04(a) (2023) ("The legislative power granted to the District by this chapter is vested in and shall be exercised by the Council").

[15] D.C. Code § 1-204.22 (2023) ("The executive power of the District shall be vested in the Mayor who shall be the chief executive officer of the District government.").

[16] *Convention Ctr. II*, 441 A.2d at 906 n. 31.

[17] *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 910 (D.C. 1981) (hereinafter "*Convention Ctr. II*").

Another fundamental feature of the federal framework reflected in the organizational structure of the District government is the notion of constitutional supremacy. As the drafters of the Home Rule Act acknowledged at the time of its passage, "[t]he Charter…is superior to the laws enacted by the City Council, and establishes the basic governmental structure within which the Mayor, the Council, and all other instrumentalities operate."[18] This is because the purpose of the Charter was, at least in part, "to establish a legal structure similar to a state constitution or municipal charter which would take precedence over normal laws, ordinances, and regulations."[19] As a result, the D.C. Charter is a "constitutional analog,"[20] making amendments to the Charter "functionally equivalent" to "constitutional amendments."[21]

<u>Analysis</u>

I. As an Amendment to the D.C. Charter, the Budget Autonomy Act Preempts Conflicting "Ordinary" Legislation Like the Public Emergency Act

On July 25, 2013—"after ratification by an overwhelming majority of voters of the District"[22]—the Local Budget Autonomy Act became law,[23] amending §1-204.46 of the D.C. Charter to prohibit "any officer or employee of the District of Columbia government" from obligating or expending funds "unless such amount has been approved by an act of the Council."[24]

Because the Charter is a constitutional analog, courts apply principles of preemption in assessing conflicts between the Charter and "ordinary," local legislation enacted by the D.C. Council.[25] As the Charter itself states: "To the extent that any

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[18] Jason I. Newman & Jacquez B. DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U.L. REV. 537, 576 (1975) (citing HOUSE COMM. ON THE DISTRICT OF COLUMBIA, 93D CONG., 1ST SESS., UNPUBLISHED REPORT OF PROCEEDINGS OF MARK-UP HEARING ON H.R. 9056, VOL. 3, AT 193 (1973)).

[19] Newman & DePuy, at 576-577 (citing Interview with Harley Daniels, Staff Counsel, Subcomm. On the Judiciary of the House Comm. On the District of Columbia, in Washington, D.C., Jan. 27, 1975).

[20] *Jackson,* 999 A.2d at 108 (citing *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1367 (D.C. 1980) (hereinafter "*WHOC*")); *see also Dewitt,* 2016 WL 1109117 at *4 (citing *Zukerberg v. D.C. Bd. of Elections & Ethics*, 97 A.3d 1064, 1072 (D.C. 2014) (holding that the D.C. Charter is "comparable to a state constitution")).

[21] *Convention Ctr. Referendum Comm. v. Bd. of Elections & Ethics*, 399 A.2d 550, 551 (D.C. 1979) (hereinafter "*Convention Ctr. I*"); *see also Potomac Elec. Power Co. v. D.C. Gov't*, 651 F. Supp. 907, 910 (D.D.C. 1986) ("Charter amendments therefore refer to actions which, like state constitutional amendments, fundamentally change the nature of the system of government.").

[22] *Dewitt*, 2016 WL 1109117 at *6.

[23] D.C. Law 19-321; Act 19–632; 60 D.C. Reg. 12135, Effective July 25, 2013 (D.C. Code § 1-204.46).

[24] D.C. Code § 1-204.46(c).

[25] *Jackson,* 999 A.2d at 123 (quoting D.C. Code § 1–203.02) ("[L]egislation passed by the Council (or by initiative) must be 'consistent with the Constitution of the United States and the provisions of this chapter [of the Home Rule Act]....'"); *see also Convention Ctr. II*, 441 A.2d at 903 (legislation enacted by the Council must "be consistent with the U.S. Constitution and the Home Rule Act"); *Price v. District of*

provisions of this chapter are inconsistent with the provisions of any other laws, the provisions of this chapter shall prevail and shall be deemed to supersede the provisions of such laws."[26]

Preemption is "a rule of decision"[27] which specifies that, "just as with a state constitution, the dictates of the Charter and any lawful amendments thereto cannot be countermanded by simple legislation."[28] As a result, ordinary legislation passed by the D.C. Council "is valid, of course, only insofar as it conforms to the underlying Charter Amendments."[29]

This hierarchy is reflected by the heightened procedural requirements for enacting charter amendments as opposed to ordinary, local legislation.[30] For example, the D.C. Council may not by itself amend the Charter.[31] Instead, amending the Charter requires either affirmative action by Congress or ratification "by a majority of the registered qualified electors of the District."[32] The Budget Autonomy Act became law via the latter process, making it a properly ratified Charter amendment.[33] As a result, §1-204.46 "cannot be countermanded by simple"[34] or "ordinary legislation,"[35] like §7-2304 of the Public Emergency Act.[36]

Columbia Bd. of Elections & Ethics, 645 A.2d 594, 599 (D.C. 1994) ("[T]he Council may not enact legislation that is inconsistent with the Charter Amendments.").

[26] D.C. Code § 1-207.61(a).

[27] *Kansas v. Garcia,* 140 S. Ct. 791, 801 (2020).

[28] *Zukerberg*, 97 A.3d at 1072; *see also Jackson*, 999 A.2d at 99 (noting that Charter Amendments are "in the nature of constitutional provisions"); *Convention Ctr. II*, 441 A.2d at 915 (noting that Charter Amendments "cannot be amended or contravened by ordinary legislation" of the D.C. Council).

[29] *Jackson*, 999 A.2d at 99.

[30] *McClough v. United States*, 520 A.2d 285, 289 (D.C. 1987) (noting that "the authority to amend the charter is substantively different…procedurally distinct, and found in separate sections" of the D.C. Code); *see also Zukerberg*, 97 A.3d at 1068-1069 (detailing the Charter Amendment process and highlighting it as distinct from "legislation which does not seek to amend the Charter").

[31] *Potomac Elec. Power Co.*, 651 F. Supp. at 910 (citing D.C. Code § 1–203.03(a)) ("The authority to legislate on local matters is limited by a provision that a Council action cannot 'amend' the charter of the District of Columbia, Title IV of the Home Rule Act, without such an amendment being ratified by a majority of registered voters by referendum.").

[32] *Zukerberg*, 97 A.3d at 1066 (quoting D.C. Code § 1–203.03(a)).

[33] *See Dewitt*, 2016 WL 1109117 (upholding the Local Budget Autonomy Amendment Act of 2012 as valid in 2016); *see also Feldman v. Bowser*, 315 F. Supp. 3d 299 (D.D.C. 2018) (dismissing a challenge against the Local Budget Autonomy Amendment Act of 2012).

[34] *Zukerberg*, 97 A.3d at 1072 (citing *Price*, 645 A.2d at 599 n. 15) ("Comparable to a state constitution, the District of Columbia has a Charter; and just as with a state constitution, the dictates of the Charter and any lawful amendments thereto cannot be countermanded by simple legislation.")

[35] *Jackson,* 999 A.2d at 99 (quoting *Convention Ctr. II*, 441 A.2d at 915) ("[T]he Charter Amendments are 'in the nature of constitutional provisions'" and "cannot be amended or contravened by ordinary legislation.").

[36] D.C. Law 3-149, § 2, 27 D.C.R 4886, D.C. Code §§ 7-2301, et al., Legislative History, http://D.C.code.elaws.us/code?no=7-23&e=8 ("Law 3-149, the 'District of Columbia Public Emergency

II. The Plain Text of §1-204.46, as Amended by the 2013 Budget Autonomy Act, Conflicts with and Thus Preempts §7-2304(b)(1) of the Public Emergency Act

In order to determine whether §1-204.46 of the Home Rule Act expressly bars—and thus preempts—§7-2304 of the Public Emergency Act, a court would apply the "usual tools of statutory interpretation and, as always, look first to the text"[37] of the superseding law to determine whether "the language is plain and admits of no more than one meaning."[38] A lack of ambiguity in the text of a statute creates a strong presumption that "the plain meaning of legislation should be conclusive."[39] In this case, the plain language of §1-204.46 (excerpted below) clearly conflicts with the plain language of §7-2304(b)(1).

The relevant text of §1-204.46 reads:

"(a) *Adoption of Budgets and Supplements* - The Council…shall by act adopt the annual budget for the District of Columbia government…Any supplements to the annual budget shall also be adopted by act of the Council, after public hearing, by a vote of a majority of the members present and voting.

…

(c) *Prohibiting Obligations and Expenditures Not Authorized Under Budget* - Except as provided in §1-204.45a(b), §1-204.46b, §1-204.67(d), §1-204.71(c), §1-204.72(d)(2), §1-204.75(e)(2), §1-204.83(d), and subsections (f), (g), (h)(3), and (i)(3) of §1-204.90, no amount may be obligated or expended by any officer or employee of the District of Columbia government unless —

(1) such amount has been approved by an act of the Council (and then only in accordance with such authorization) and such act has been transmitted by the

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Act of 1980,' was introduced in Council and assigned Bill No. 3-198, which was referred to the Committee on Government Operations. The Bill was adopted on first and second readings on September 30, 1980 and October 14, 1980, respectively. Signed by the Mayor on October 29, 1980, it was assigned Act No. 3-274 and transmitted to both Houses of Congress for its review.").

[37] *Unum Life Ins. Co.*, 238 A.3d at 227 (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)) ("[W]e begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs."); *see also Lumen Eight Media Grp., LLC v. D.C.*, 279 A.3d 866, 874 (D.C. 2022) (*citing Lopez-Ramirez v. United States*, 171 A.3d 169, 172 (D.C. 2017)); *Peterson v. United States*, 997 A.2d 682, 684 (D.C. 2010) ("We begin by looking first to the plain language of the statute to determine if it is 'clear and unambiguous.'").

[38] *Zukerberg*, 97 A.3d at 1073 (quoting *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C.1983)).

[39] *Est. of Doe v. Islamic Republic of Iran,* 808 F. Supp. 2d 1, 18 (D.D.C. 2011); *see also Qi–Zhuo v. Meissner,* 70 F.3d 136, 140 (D.C. Cir. 1995) ("Where ... the plain language of the statute is clear, the court generally will not inquire further into its meaning.").

> Chairman to the Congress and has completed the review process under §1-206.02(c)(3)."

This language is unambiguous and mandatory.[40] As the Supreme Court has repeatedly held, "the word 'shall' usually creates a mandate, not a liberty."[41] This mandate is normally "an obligation impervious to judicial discretion."[42] Further, the Supreme Court has "repeatedly explained that the word 'any' has an expansive meaning."[43] In multiple cases, the Supreme Court has held that "the expansive word 'any' and the absence of restrictive language left no basis in the text for limiting the phrase" that came after "any" in the statute.[44] In §446(a), the word "any" comes before "supplements to the annual budget" and includes no qualifying or otherwise limiting language. Thus, a court must read §446(a) expansively, making D.C. Council approval a prerequisite for the expenditure of any funds that Congress appropriates, including funds appropriated outside of the District's annual budget process such as the CARES Act funding.

Section 446(c)(1) similarly provides that, absent specified circumstances not present here, "*no* amount may be obligated or expended by any officer or employee of the District of Columbia government unless…such amount has been approved by an act of the Council."[45] The phrase "no amount" is not qualified or otherwise limited by the text of the statute, encompassing all funding that Congress appropriates both within and outside of the District's annual budget process.[46]

This understanding of §1-204.46 is further supported by the law's specific enumeration of exceptions. The statutory interpretation canon *expressio unius est exclusio alterius* dictates that when a statute includes a list of specific items, that list is presumed to be exclusive.[47] Section 446(c)'s list of 11 enumerated exceptions does not include §7-2304. This omission should be interpreted as intentional because the drafters

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[40] *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016)) ("The first sign that the statute imposed an obligation is its mandatory language: 'shall.' 'Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.'").

[41] *Murphy v. Smith,* 138 S. Ct. 784, 787 (2018) (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998)).

[42] *Murphy*, 138 S. Ct. at 787 (citing *Lexecon Inc.,* 523 U.S. at 35).

[43] *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020) (quoting *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008)).

[44] *Ali*, 552 U.S. at 219 (some internal quotation marks omitted); *see also United States v. Gonzales,* 520 U.S. 1, 5 (1997).

[45] *Emphasis added.*

[46] D.C. Code § 1-204.46(c)(1).

[47] *In re Uwazih*, 822 A.2d 1074, 1078 (D.C. 2003) (*citing* William D. Popkin, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE & THE POLITICAL PROCESS (3d ed. 2001)) (*Expressio unius est exclusio alterius* "asserts that the express inclusion of one (or more) thing(s) implies the exclusion of other things from similar treatment").

clearly knew how to express any intended exceptions in the text of the statute. If the drafters did not intend this list to be exclusive, they could have prefaced it with words or phrases—like 'among others,' 'including,' 'not limited to,' or 'such as'—indicating that the enumerated exceptions were "merely illustrative."[48] However, such language is "notably missing" from the statute.[49]

Given that courts are prohibited from "adding words that are not in the statute that the legislature enacted,"[50] §7-2304 cannot be construed as an implicit, unenumerated exception to §1-204.46. Thus, to the extent §7-2304(b)(1) allows the Mayor to expend District funds without D.C. Council approval beyond §1-204.46's enumerated exceptions, §7-2304(b)(1) fundamentally conflicts with §1-204.46. Given that §1-204.46 is a provision of the D.C. Charter while §7-2304 is ordinary, D.C. Council-enacted legislation, §1-204.46 preempts §7-2304(b)(1).

In reaching this conclusion, we have considered—and rejected—the proposition that the "presumption against implied repeal" would require a court to reconcile the two provisions and preserve the spending authority provided in the Public Emergency Act. The presumption against implied repeal holds that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."[51] The argument would therefore be that because the later-enacted Budget Autonomy Act did not expressly address or repeal §7-2304(b)(1) of the Public Emergency Act, §1-204.46 should be interpreted in way that allows the two statutes to coexist.

For instance, the interpretive canon *generalia specialibus non derogant* dictates that "where a general permission or prohibition is contradicted by a specific prohibition or permission, courts eliminate the contradiction by construing the specific provision . . . as an exception to the general one."[52] As a result, one might argue that the specific unilateral spending authority in the Public Emergency Act should be interpreted as an implicit exception to the Charter's more general prohibition against unapproved expenditures in order to avoid nullifying §7-2304(b)(1).

However, the presumption against implied repeal does not apply for at least two reasons. First, as established above, the text of §1-204.46 and §7-2304(b)(1) are

[48] *Doe v. Sec. & Exch. Comm'n*, 28 F.4th 1306, 1314 (D.C. Cir. 2022) (hereinafter "*SEC*").
[49] *SEC*, 28 F.4th at 1314.
[50] *United States v. Nordean*, 579 F. Supp. 3d 28, 56 (D.D.C. 2021) (citing *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 816 (D.C. Cir. 2008)); *see also Amoco Prod. Co. v. Watson*, 410 F.3d 722, 734 (D.C. Cir. 2005), *aff'd, BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 127 (2006) ("No canon of construction justifies construing the actual statutory language beyond what the terms can reasonably bear.").
[51] *Fisher v. Pension Benefit Guar. Corp.,* 468 F. Supp. 3d 7, 26 (D.D.C. 2020), *aff'd*, 994 F.3d 664 (D.C. Cir. 2021) (*citing Morton v. Mancari,* 417 U.S. 535, 550 (1974)).
[52] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks omitted).

irreconcilable. Second, the presumption against implied repeal only applies when conflicting statutes "are acts of the same legislative body," like the U.S. Congress, a state legislature, or the D.C. Council. Here, as already discussed, that is not the case. An amendment to the D.C. Charter and the Council-passed Public Emergency Act are not statutes of "equivalent dignity," enacted by the same local, state, or federal legislature. Instead, §1-204.46 is a "constitutional analog" while §7-2304(b)(1) is an "ordinary," locally-enacted law. As a result, preemption—not implied repeal—is the proper doctrine to apply. As the U.S. Supreme Court has explained:

> "[T]he ancient interpretive principle that the specific governs the general (*generalia specialibus non derogant*) applies only to conflict between laws of equivalent dignity. Where a specific statute, for example, conflicts with a general constitutional provision, the latter governs. And the same is true where a specific state statute conflicts with a general federal statute. There is no general-specific exception to the Supremacy Clause, U.S. Const. Art. VI, cl. 2."[53]

In applying principles of preemption, courts do "not have to struggle to harmonize the statute with prior laws."[54] Instead, they can "give the statute its natural meaning and let it displace whatever law it contradicted."[55] Given the fact that §1-204.46 clearly conflicts with and supersedes §7-2304(b)(1) where the Council has not approved an expenditure, §7-2304(b)(1) may not properly be construed as an implicit exception to §1-204.46.[56] As a result, the Mayor and her Administration could not properly rely on §7-2304(b)(1) to expend $495 million in CARES Act funding without prior review or approval by the D.C. Council.

III. The Emergency Spending Authority the Mayor Relied on to Spend the CARES Act Funds Was Also Likely Void When Enacted in 1981

While a closer question—and one that need not be addressed to conclude that the expenditures in question violated §1-204.46—§7-2304(b)(1) also appears to have been

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[53] *Nitro-Lift*, 568 U.S. at 21–22.

[54] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231 (2000) ("The final phrase in the Supremacy Clause – 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding' - is something called a 'non obstante clause.' Although such clauses are no longer familiar to us, legal draftsmen in late eighteenth-century America used them to acknowledge that a statute might contradict some other laws and to instruct courts not to apply the traditional presumption against implied repeals. When a statute contained a non obstante clause, courts did not have to struggle to harmonize the statute with prior laws; they could give the statute its natural meaning and let it displace whatever law it contradicted.")

[55] Nelson, *Preemption* at 231.

[56] *See Price,* 645 A.2d at 599 n. 15 ("[T]he Council may not enact legislation that is inconsistent with the Charter Amendments."); *Zukerberg*, 97 A.3d at 1072 ("Comparable to a state constitution, the District of Columbia has a Charter; just as with a state constitution, the dictates of the Charter and any lawful amendments thereto cannot be countermanded by simple legislation.").

void *ab initio* at the time of its enactment given its conflict with the original Home Rule Act.

When §7-2304(b)(1) of the Public Emergency Act was enacted in 1981, §1-204.46 of the Home Rule Act provided that:

> "The Council, within Fifty Calendar Days after receipt of the budget proposal from the Mayor, and After Public Hearing, shall by act adopt the annual budget for the District of Columbia Government. Any Supplements Thereto Shall also be adopted by act by the Council after public hearing. Such budget so adopted shall be submitted by the Mayor to the President for transmission by him to the Congress. No amount may be obligated or expended by any office or employee of the District of Columbia Government unless such amount has been approved by Act of Congress, and then only according to such Act. Notwithstanding any other provision of this Act, the Mayor shall not transmit any annual budget or amendments or supplements thereto, to the President of the United States until the completion of the budget procedures contained in this Act."[57]

One could conceivably argue that the type of expenditure at issue here would have been permissible under the original language of §446 because it involved funds appropriated by Congress outside of the prescribed budgetary process. Further, the original language of §446 prohibited expenditures without *Congressional* approval but did not require *D.C. Council* approval. This would not have permitted the Mayor to alter the budget passed by Congress, but one might argue that Executive branch officials did not require D.C. Council approval or further Congressional approval to expend funds that were appropriated outside of the process for preparing a budget or supplements to the budget. Under this argument, because the "amount" would have been approved by Congress, the "amount" could be spent by executive officials without D.C. Council approval. Further, funds that were not part of the District of Columbia budget, but rather were appropriated specifically by Congress, could still be spent "according to" the Act of Congress that appropriated them.

Ultimately, however, we do not believe this argument has merit even under the law as it existed prior to 2013. To begin with, nothing in §7-2304(b)(1) appears to limit the Mayor's spending authority to funds appropriated by Congress outside of the prescribed budgetary process. Instead, §7-2304(b)(1) gives the Mayor the ability to "expend such funds appropriated to the District of Columbia government sufficient to carry out public emergency service missions and responsibilities." This provision would appear to give the Mayor the power to reprogram and spend any appropriated funds—including the District's annual budget and supplements thereto.

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[57] D.C. Code § 1-204.46 (1981).

However, even before the passage of the Budget Autonomy Act, the Home Rule Act prescribed specific roles for the Mayor, the D.C. Council, and Congress in preparing a budget and prohibited spending funds outside of that process. This process required both Congress and the D.C. Council to review and approve the District's budget—either actively or passively. At the same time, §7-2304(b)(1) purportedly empowered the Mayor to unilaterally expend funds appropriated to the District—regardless of the budget the D.C. Council enacted and/or Congress approved. By effectively giving the Mayor a roving commission to spend District funds in emergencies, §7-2304(b)(1) of the Public Emergency Act also conflicted with §1-204.46 of the Home Rule Act *before* it was amended by the Budget Autonomy Act in 2013. Given that the Home Rule Act preempts "ordinary" legislation, which cannot amend or modify the Charter, §7-2304(b)(1) of the Public Emergency Act appears to have been void from the outset.

Further, and even as limited to funds appropriated to the District outside of the budgetary process, the Public Emergency Act would appear to upset the purpose of the Home Rule Act both as to the prescribed role of the Council and as to the prescribed role of Congress. As noted above, the D.C. Charter provides for the separation of legislative and executive power between the Mayor and the D.C. Council. This separation of powers "is designed to preclude 'encroachment or aggrandizement of one branch [of government] at the expense of the other."[58] "The genius of our Framers," federal courts have repeatedly noted, "was to limit the Executive's power 'by a valid reservation of Congressional control over funds in the Treasury.'"[59] This is because the legislature's, "power of the purse is the ultimate check on the otherwise unbounded power of the Executive."[60] "Disregard for that reservation" of power in the legislature, would result in "grievous harm" to the legislature by "depriv[ing] [it] of its rightful and necessary place under our Constitution."[61] Disregarding the D.C. Council's essential role as appropriator in the triparte system of the District Government would result in similarly "grievous harm" to both the Council and its constituents. This is because, "[a]bsent careful regard for each governmental body there is a danger that this decision inadvertently could distort the way our local government was designed to function."[62]

Additionally, "in order to comply with its constitutional duties, Congress "retained a role in the legislative process,"[63] by establishing a "myriad" of "controls" to

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[58] *District of Columbia v. Fitzgerald*, 953 A.2d 288, 298 (D.C. 2008) (per curiam) (quoting *Clinton v. Jones*, 520 U.S. 681, 699 (1997)).
[59] *United States House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76–77 (D.D.C. 2015) (quoting *OPM v. Richmond*, 496 U.S. 414, 425 (1990)).
[60] *Burwell*, 130 F. Supp. 3d at 76–77 (citing *U.S. Dep't of the Navy v. Fed. Labor Relations Auth*., 665 F.3d 1339, 1347 (D.C. Cir. 2012)) ("If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.").
[61] *Burwell*, 130 F. Supp 3d at 77.
[62] *Convention Ctr. II*, 441 A.2d at 916.
[63] *Convention Ctr. II*, 441 A.2d at 903.

"insur[e] appropriate federal oversight."[64] Chief among these controls is the requirement of an act of Congress to spend funds and "the reservation to Congress of a substantial role in the legislative process through the 'lay-over' provision permitting Congressional veto or amendment of Council legislation."[65] Specifically, the "Council is empowered to pass legislation by a majority vote after two readings" and "a 30 legislative-day layover in Congress."[66] The legislative layover period "was imposed as an orderly way for Congress to carry out its constitutional responsibility to legislate for the District."[67] As a result, the "Council and the Mayor function under limitations on their legislative power imposed by Congress,"[68] and these limitations underlie both the budget and emergency legislative processes established by the Home Rule Act.

Both the original and current Home Rule Acts also include provisions for passing emergency legislation that directly conflict with §7-2304(b)(1)'s grant of indefinite unilateral emergency spending authority to the Mayor. The Home Rule Act explicitly vests the power to pass emergency legislation in the D.C. Council—not the Mayor.[69] The fact that the Charter provides for how to govern in emergencies without providing for unilateral Executive spending authority suggests that the Charter was not intended to give the Executive that authority or to give the D.C. Council the power to give the Executive that authority.

Moreover, construing the Charter to implicitly allow for the Executive to exercise such authority conflicts with the limitations on emergency *legislative* authority expressly allowed for in the Charter and the fundamental principle embodied in those limitations that even though an "exception for emergencies was provided," in the Home Rule Act, "it is clear that government by emergency edict is invalid."[70] "Emergency circumstances by definition cannot last very long," the D.C. Court of Appeals has explained, because emergency legislation that "functions as permanent legislation circumvents the review process mandated by the Home Rule Act, particularly the Congressional layover period."[71] As a result, the Home Rule Act limits an emergency act's enforceability to no

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[64] *Gary v. United States*, 499 A.2d 815, 830 (D.C. 1985).
[65] *Am. Fed'n of Gov't Emps. v. Barry*, 459 A.2d 1045, 1050 (D.C. 1983) (citing D.C. Code §§ 1-206, 1-207 (1981)).
[66] *WHOC*, 415 A.2d at 1351–52 (citing D.C. Code 1979 Supp. § 1-146(a)).
[67] *WHOC*, 415 A.2d at 1351–52.
[68] *Am. Fed'n of Gov't Emps.*, 459 A.2d at 1050.
[69] *Lumen*, 279 A.3d at 878 (citing D.C. Code § 1-204.12(a)) ("Although the Home Rule Act gives the Council general authority to enact emergency legislation in appropriate circumstances, the District has not suggested that the Mayor or her delegate has general authority to promulgate emergency rules.")
[70] *Am. Fed'n of Gov't Emps.*, 459 A.2d at 1050-1051 (citing *WHOC*, 415 A.2d at 1351–52).
[71] *Atchison v. D.C.*, 585 A.2d 150, 156 n. 8 (D.C. 1991); *see also WHOC,* 415 A.2d 1349 (passage of series of emergency acts in lieu of permanent legislation in response to ongoing emergency improper); *Maryland v. Barry,* 604 F. Supp. 495, 500–01 (D.D.C.1985) (passage of annual emergency acts in response to repetitive seasonal emergencies in lieu of permanent legislation improper).

more than 90 days.[72] By contrast, §7-2304 does not contain any temporal limitations. In fact, it allows the Mayor to dictate an emergency order's duration.[73]

Thus, §7-2304(b)(1) appears to have irreconcilably conflicted with the Home Rule Act from the beginning. Interpreting it as an exception to §1-204.46 would have bypassed the prescribed roles of Congress and the D.C. Council in the budget process by providing the Executive with indefinite, unilateral emergency spending authority. Such an exception would "undermine the role of Congress in the District's governmental structure" and allow the Executive Branch to usurp "the power to authorize expenditures" that the Home Rule Act "explicitly reserve[s] to the Council and Congress."[74]

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[72] *Am. Fed'n of Gov't Emps.*, 459 A.2d at 1051 (quoting D.C. Code § 1–229(a) (1981)) ("…such act shall be effective for a period of not to exceed 90 days ....").
[73] D.C. Code § 7-2304(a)(4) ("Upon reasonable apprehension of the existence of a public emergency and the determination by the Mayor that the issuance of an order is necessary…the Mayor may issue an emergency executive order which shall state…The duration of the order.").
[74] *Convention Ctr. II*, 441 A.2d at 912; *see also id.* at 910 ("The District budgetary process involves two legislatures: the Council and Congress.").

About ODCA

The mission of the Office of the District of Columbia Auditor (ODCA) is to support the Council of the District of Columbia by making sound recommendations that improve the effectiveness, efficiency, and accountability of the District government.

To fulfill our mission, we conduct performance audits, non-audit reviews, and revenue certifications. The residents of the District of Columbia are one of our primary customers and we strive to keep the residents of the District of Columbia informed on how their government is operating and how their tax money is being spent.

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