
The Coronavirus Aid, Relief, and Economic Security (CARES) Act—Oversight Authorities and Managing New Risks

March 30, 2020

On March 27, the President signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The \$2 trillion stimulus package is the largest in American history and will make available hundreds of billions of dollars in loans and assistance to distressed companies. Companies seeking relief under the Act should be aware that any assistance will likely be subject to significant oversight.

Emergency infusions of government funding into the economy are typically followed by significant investigations—by both oversight entities created specifically for this purpose, and the standard constellation of law enforcement organizations and Congressional committees—into alleged waste, fraud, and abuse associated with the funds. These investigations, which can extend for years, offer a cautionary tale for companies as they now assess whether to seek and accept government funds or alter their operations in light of changing regulatory requirements. Now is the time for companies to ensure that they are proceeding with due caution as they develop plans related to the CARES Act and other federal coronavirus response efforts.

The CARES Act creates several new watchdogs designated with broad oversight and investigative authority for the new programs and funds. It vests primary oversight responsibility in four authorities:

- **Special Inspector General for Pandemic Recovery:** The Act creates a new Inspector General within the Treasury Department, appointed by the President after Senate confirmation, to provide oversight of Treasury loans and investments and to track and investigate disbursements made under the Act, including to contractors assisting the Treasury Department in administering the \$500 billion relief program.

- **Pandemic Response Accountability Committee:** The Act creates a new Committee made up of existing Inspectors General, and chaired by Acting Defense Department Inspector General Glenn Fine, with explicit authority to carry out independent investigations, issue and enforce subpoenas, and hold public hearings in connection with funds made available to companies under the Act or other federal programs associated with the government’s coronavirus response.
- **Congressional Oversight Commission:** The Act creates a new Commission within the legislative branch to examine decisions made by the Treasury Department and the Federal Reserve and to monitor how relief aid is spent. The five-member Commission will be appointed by the parties’ respective congressional leadership.
- **Comptroller General Oversight and Audit Authority:** The Act also directs the Comptroller General of the United States—an official responsible to Congress—to monitor, audit, and oversee the use of funds.

In addition to these watchdogs, the Justice Department will retain its traditional authorities, including enforcement of the False Claims Act (FCA). Certain forms of assistance under the CARES Act carry conditions, including limitations on executive compensation, workforce reduction, dividend payments, share buybacks, and conflict-of-interest prohibitions, including when federal officials or their families own significant equity in companies receiving assistance.

This alert first outlines several practical considerations for in-house counsel and compliance officials responsible for understanding the risks that accompany participation in the programs created by the CARES Act. It then goes on to describe in detail the oversight authorities contained in the CARES Act and identify potential FCA risks posed by participating in the legislation’s new programs.

I. Practical Considerations

Companies seeking to access programs created by the CARES Act should consider taking a number of proactive steps to ensure they act consistent with the law and in a way designed to minimize the risk of investigative inquiries by these oversight authorities or Congress. For example, companies should:

- Pay careful attention to communications related to these issues. Many communications with government officials will be subject to the Freedom of Information Act: all emails should reflect a professional tone and be drafted in a way that minimizes risk if they later become public. Similar considerations apply to internal communications, which could become public if subpoenaed by one of the CARES Act oversight authorities or in connection with congressional inquiries related to Administration decisions on allocating CARES Act funds or its response to the pandemic.

- Consider whether outreach should be directed to staff or political-level contacts; companies should take particular care with outreach to political staff and Administration representatives, as those contacts may receive greater scrutiny. For some issues, outreach through a trade group on behalf of an industry may be more appropriate than from an individual company.
- Establish compliance policies and documented controls to track and maintain compliance with new obligations triggered by participating in CARES Act programs, such as requirements to maintain required workforce levels and comply with executive pay limitations.
- Establish a procedure for escalating quickly to senior leaders any potential non-compliance with program requirements, as the potential reputational and monetary consequences could be severe.
- Ensure that any decisions related to agency interpretive decisions or exemptions are appropriately documented, as these decisions may be subject to further scrutiny.
- Be aware of business and governance actions that may be limited by the CARES Act or otherwise draw significant oversight or press attention. This could include, for example, paying lavish executive bonuses; increasing executive compensation while receiving government aid; reducing workforce materially; engaging in stock buybacks; or utilizing complex tax structures or accounting techniques.

The following sections outline the primary entities charged with conducting oversight of companies making use of CARES Act funding and resources. A brief overview of potential FCA risks is also provided.

II. Special Inspector General for Pandemic Recovery

The Special Inspector General for Pandemic Recovery (SIGPR) is a new office created within the Treasury Department charged with auditing and investigating loans, loan guarantees, and other investments made by the Secretary of the Treasury under Title IV of the CARES Act. Congress appropriated \$25 million for the SIGPR,¹ and the office will terminate after five years.²

The SIGPR is modeled after the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), an office created in the wake of the financial crisis by the Emergency Economic Stabilization Act (EESA) of 2008 to combat waste, fraud, and abuse related to the Troubled Asset Relief Program. The SIGTARP was similarly vested with broad investigative authority and subpoena power—and its activities serve as a reminder for companies seeking assistance under the CARES Act that exposure to federal oversight remains long after the transactions at issue. Over

¹ CARES Act § 4018(g).

² CARES Act § 4018(h).

the last decade, that office has undertaken hundreds of enforcement actions against individuals and institutions.³ The same approach can be expected of the SIGPR.

A. Principal Duties & Oversight Powers

In order to “conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments,”⁴ the SIGPR will have significant oversight and investigative capabilities, consistent with the “duties and responsibilities of inspectors general” under the Inspector General Act of 1978 (the IG Act).⁵ Among other powers, the SIGPR will have the power to subpoena documents from private parties.⁶ Like other Inspectors General, the SIGPR appears not to have the power to compel testimony, although the office has the power to take sworn voluntary testimony.⁷

The IG Act requires Inspectors General to use non-subpoena procedures to obtain documents and information from federal agencies.⁸ The SIGPR is empowered to request “information or assistance from any department, agency, or other entity of the Federal Government,” and the heads of such entities must provide it “to the extent practicable and not in contravention of any existing law.”⁹ To the extent such information or assistance is, in the judgment of the SIGPR, “unreasonably refused or not provided,” the SIGPR must report the circumstances to the appropriate committees of Congress.¹⁰

B. Qualifications and Removal

The CARES Act provides that the new Inspector General will be nominated “as soon as practicable” after the first loan, loan guarantee, or investment is made by the Secretary of the

³ The SIGTARP was especially active in the area of investigations and prosecutions, including targeting individual executives of financial institutions. According to the SIGTARP’s most recent report to Congress (covering the period through December 2019), the SIGTARP’s investigations have led to the conviction of 381 defendants. Of those convicted, 300 received prison sentences. The SIGTARP’s quarterly reports to Congress also resulted in significant interest by lawmakers and a number of follow-on congressional inquiries.

⁴ CARES Act § 4018(c)(1).

⁵ CARES Act § 4018(c)(3).

⁶ IG Act § 6(a)(4).

⁷ *See* IG Act § 6(a)(5).

⁸ *See* IG Act § 6(a)(4).

⁹ CARES Act § 4018(e)(4)(A).

¹⁰ CARES Act § 4018(e)(4)(B). President Trump’s signing statement noted his Administration will not treat Section 4018(e)(4)’s requirement that the SIGPR report to Congress “without delay” an agencies refusal of a request, “as permitting the SIGPR to issue reports to the Congress without the presidential supervision required.” *See* Statement by the President, THE WHITE HOUSE (Mar. 27, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/>.

Treasury's \$500 billion liquidity fund.¹¹ The SIGPR is to be selected "on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations,"¹² and is removable from office by the President.¹³

C. Reporting

Beginning not later than 60 days after confirmation, the SIGPR must make quarterly reports to Congress, including a detailed statement of all transactions, obligations, expenditures, and revenues associated with the Secretary of the Treasury's program, along with information about the financial terms of each transaction, an explanation of reasons justifying the transaction, and the status of the transaction at the time of the report.¹⁴

III. Pandemic Response Accountability Committee

The CARES Act created a new Pandemic Response Accountability Committee within the Council of Inspectors General on Integrity and Efficiency (the Council) to oversee loans and protect taxpayer dollars.¹⁵ The Committee will be made up of nine existing Inspectors General from a number of federal departments and agencies and chaired by Acting Defense Department Inspector General Glenn Fine. It will possess the authority to hold public hearings, issue subpoenas, and compel

¹¹ CARES Act § 4018(b)(2).

¹² *Id.*

¹³ CARES Act § 4018(b)(3); IG Act § 3(b).

¹⁴ SIGPR must collect and summarize the following information:

“(A) A description of the categories of the loans, loan guarantees, and other investments made by the Secretary.

(B) A listing of the eligible businesses receiving loan, loan guarantees, and other investments made under each category described in subparagraph (A).

(C) An explanation of the reasons the Secretary determined it to be appropriate to make each loan or loan guarantee under this Act, including a justification of the price paid for, and other financial terms associated with, the applicable transaction.

(D) A listing of, and detailed biographical information with respect to, each person hired to manage or service each loan, loan guarantee, or other investment made under section 4003.

(E) A current, as of the date on which the information is collected, estimate of the total amount of each loan, loan guarantee, and other investment made under this Act that is outstanding, the amount of interest and fees accrued and received with respect to each loan or loan guarantee, the total amount of matured loans, the type and amount of collateral, if any, and any losses or gains, if any, recorded or accrued for each loan, loan guarantee, or other investment.” CARES Act § 4018(c)(1); *id.* § 4018(f)(1).

¹⁵ CARES Act § 15010(b). The Committee is modeled after the Recovery Accountability and Transparency Board (the Board) created by the American Recovery and Reinvestment Act of 2009 (ARRA) to provide transparency and oversight over the use of recovery-related funds. *See* ARRA, Pub. L. 111-5, §§ 1521-1530 (2009). Less well-known than SIGTARP, the Board primarily focused on audits and tracking the use of funds during the six years it operated.

testimony from private parties. Congress appropriated \$80 million for the Committee,¹⁶ and the Committee will terminate on September 30, 2025.¹⁷

A. Principal Duties & Oversight Powers

The Committee's goal is to promote transparency and support oversight of covered funds¹⁸ by: (i) detecting and preventing fraud, waste, abuse, and mismanagement; and (ii) identifying and mitigating major risks that cut across program and agency boundaries.¹⁹ Its key functions include:

- Developing a strategic plan to coordinate oversight efforts;²⁰
- Reviewing the administration and management of coronavirus response programs;²¹
- Auditing covered funds to identify fraud, waste, or abuse;²²
- Collaborating with and supporting agency Inspectors General on matters related to oversight of covered funds and the coronavirus response;²³
- Conducting independent investigations, audits, and reviews,²⁴ including by holding public hearings;²⁵ and
- Making criminal referrals of potential violations of federal law.²⁶

To carry out its work, the Committee will have many of the authorities provided to Inspectors General under the IG Act,²⁷ including the ability to conduct investigations and issue reports, access records, issue subpoenas for documents (outside of federal agencies), and administer oaths.²⁸

¹⁶ CARES Act § 15003.

¹⁷ CARES Act § 15010(k).

¹⁸ “Covered funds” means any funds, including loans, that are made available in any form to any non-federal entity, not including an individual, under (a) the CARES Act; (b) the Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020 (Public Law 116–123); (c) the Families First Coronavirus Response Act (Public Law 116–127); or (d) any other Act primarily making appropriations for the coronavirus response and related activities. CARES Act § 15010(a)(6).

¹⁹ CARES Act § 15010(b)(1)–(2).

²⁰ See CARES Act § 15010(d)(1)(B)(i).

²¹ See CARES Act § 15010(d)(1)(B)(ii).

²² See *id.*

²³ See CARES Act § 15010(e)(2)(B)–(C).

²⁴ CARES Act § 15010(e)(2)(A).

²⁵ See CARES Act § 15010(e)(4)(A).

²⁶ See CARES Act § 15010(d)(1)(B)(x).

²⁷ See CARES Act § 15010(e)(3)(A)(i) (granting the Committee the authorities provided under Section 6 of the IG Act).

²⁸ IG Act § 6(a).

In addition, the Committee is explicitly authorized to issue subpoenas to compel the testimony of private persons, including at public hearings (although the rules governing those hearings would need to be determined).²⁹ While the Committee does not possess the power to subpoena federal officials, the CARES Act directs the head of each agency to make all officers and employees of that agency available to provide testimony.³⁰

B. Composition

The initial members of the Committee will be the current Inspectors General from nine specified offices.³¹ The Committee will be chaired by Acting Defense Department Inspector General Glenn Fine,³² who may designate, as an additional member of the Committee, any other Inspector General from an agency involved in the coronavirus response.³³

The Committee will be staffed with an Executive Director and Deputy Executive Director, both of whom will be appointed by the Chairperson of the Council in consultation with the Majority and Minority Leaders of the Senate, the Speaker of the House, and the Minority Leader of the House.³⁴ The directors are to be appointed within 30 and 90 days of the date of enactment, respectively.³⁵

C. Reporting

The Committee is required to submit several types of reports, including biannual reports to the president and Congress that summarize its findings and quantify the impact of any tax expenditures or credits authorized under the CARES Act.³⁶ All reports will be made public.³⁷

It will also publicly report a wide range of information relating to the oversight of covered funds and the coronavirus response, including, for example, detailed data on any federal awards that expend covered funds, reports on covered funds obligated by month to each state and congressional district, a link to estimates of the jobs sustained or created by the CARES Act, and plans from each

²⁹ CARES Act § 15010(e)(3)(A)(ii), (e)(4)(C).

³⁰ CARES Act § 15010(e)(4)(B).

³¹ CARES Act § 15010(c)(2)(A)–(D) (the Departments of Defense, Education, Health and Human Services, Homeland Security, Justice, Labor, Treasury, the Small Business Administration, and the Treasury Inspector General for Tax Administration).

³² Glenn A. Fine Appointed Chair of CIGIE’s Pandemic Response Accountability Committee, CIGIE (Mar. 30, 2020), <https://www.ignet.gov/sites/default/files/files/PRAC-press-release.pdf>.

³³ CARES Act § 15010(c)(2)(E).

³⁴ CARES Act § 15010(c)(3)(A)–(B). President Trump’s signing statement noted his Administration will not treat as mandatory the requirement to consult with congressional leaders on the selection of directors of an executive branch entity. See Statement by the President, THE WHITE HOUSE (Mar. 27, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/>.

³⁵ CARES Act § 15010(c)(3)(A)–(B).

³⁶ CARES Act § 15010(d)(2).

³⁷ CARES Act § 15010(d)(2)(C).

agency for using covered funds.³⁸ In addition to reports, the Committee is required to make recommendations to agencies on measures to prevent or address fraud, waste, abuse, and mismanagement relating to covered funds and the coronavirus response.³⁹

IV. Congressional Oversight Commission

The CARES Act also establishes a five-member Congressional Oversight Commission (the Commission) within the legislative branch to conduct oversight of the Treasury Department and the Board of Governors of the Federal Reserve as they implement the legislation's economic stabilization provisions.⁴⁰ The Commission will review the implementation of the provisions by the federal government and regularly report to Congress on how the provisions have aided the financial well-being of people in the United States, the extent to which the information made available on transactions under the provisions has contributed to market transparency, and whether loans and investments made under the provisions have minimized long-term costs to taxpayers.⁴¹ The Commission is similar to the Congressional Oversight Panel created as part of the EESA in 2008.

The Commission's five members will be appointed by congressional leaders, with one member appointed by each of the Speaker and Minority Leader of the House and the Majority and Minority Leader of the Senate.⁴² The fifth member, the Commission's Chairperson, will be appointed by the Speaker of the House and Majority Leader of the Senate in consultation the Minority Leaders of the House and Senate.⁴³ Four members of the Commission will constitute a quorum, though a lesser number will be able to hold hearings.⁴⁴ The Commission is entitled to retain staff as it deems appropriate and may procure experts and consultants.⁴⁵

The Commission may hold hearings, take testimony, receive evidence, and administer oaths to witnesses appearing before it.⁴⁶ The Commission may also secure directly from any department or agency information necessary to enable it to carry out its duties.⁴⁷ The Commission will terminate on September 30, 2025.⁴⁸

³⁸ CARES Act § 15010(g).

³⁹ CARES Act § 15010(d)(3)(A).

⁴⁰ CARES Act § 4020(a)–(b).

⁴¹ CARES Act § 4020(b).

⁴² CARES Act § 4020(c).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ CARES Act § 4020(d).

⁴⁶ CARES Act § 4020(e).

⁴⁷ *Id.*

⁴⁸ CARES Act § 4020(f).

In addition to the Commission, Congress also will continue to exercise its traditional oversight authority over the funds and programs included in the relief package. Hearings may focus on the Trump Administration's response to the pandemic and its continued implementation of relief programs. Companies also could receive subpoenas, letters, and requests for information pertaining to their use of relief funds and specific interactions with the members of the Administration.

V. Comptroller General Oversight and Audit Authority

The CARES Act directs the Comptroller General of the United States, who heads the Government Accountability Office, to conduct monitoring and oversight of the exercise of authorities and the receipt, disbursement, and use of funds made available by the Act or any other legislation related to the coronavirus pandemic and its effects on the health, economy, and institutions of the United States, including public health and homeland security efforts by the federal government.⁴⁹ The Comptroller also is tasked with conducting a comprehensive audit of charges made to federal contracts pursuant to authorities provided in the bill.⁵⁰

The Act requires the Comptroller to submit reports to Congress regarding monitoring and oversight efforts⁵¹ and offer regular congressional briefings on at least a monthly basis until the coronavirus national emergency declaration is lifted.⁵² The first of these reports is to be made within 90 days of the legislation's enactment and subsequent reports are to be made every other month thereafter until one year from the date of enactment.⁵³

The Comptroller will have broad access to the records of those receiving assistance under the Act.⁵⁴ Specifically, the Act states that the Comptroller "shall have access to records, upon request, of any Federal, State, or local agency, contractor, grantee, recipient, or subrecipient pertaining to any Federal effort or assistance of any type related to the Coronavirus 2019 pandemic under this Act or any other Act, including private entities receiving such assistance."⁵⁵ The Comptroller is further authorized to make copies of such records and to conduct interviews and inspect facilities.⁵⁶

⁴⁹ CARES Act § 19010(b).

⁵⁰ *Id.*

⁵¹ CARES Act § 19010(c).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See* CARES Act § 19010(d).

⁵⁵ *Id.*

⁵⁶ *Id.*

VI. False Claims Act Risks

The FCA is the federal government’s principal tool for policing fraud in government programs. It applies not just to government procurement contracts and government healthcare programs, but to any program in which recipients benefit from federal dollars. Thus, many FCA cases were filed against recipients of assistance under the programs established following the 2008 financial crisis, and we are likely to see a similar uptick in FCA filings against companies that participate in the programs established by the CARES Act.

The FCA prohibits false or fraudulent claims, statements, or records companies make or cause others to make that are material to payment of federal funds. The false claims, statements, or records must be made “knowingly” to be actionable, but the FCA defines knowingly loosely as including reckless disregard of the truth, *i.e.*, ignoring red flags suggesting inaccuracy, and willful blindness, *i.e.*, looking the other way. FCA violations carry triple damages and penalties of roughly \$22,000 per false claim, statement, or record. Intentional violations can bring criminal prosecution.

Civil FCA claims can be brought either by the Justice Department—which may do so as a result of its own investigation or based on a referral from an inspector general’s office, such as the SIGPR—or by private plaintiffs known as relators. Relators are typically employees of the defendant company, but may also be employees of businesses with which the defendant company has business relationships, or even competitor businesses. In recent years, a number of sophisticated organizations, backed by venture funding, have used data analysis techniques to try to identify fraud in government programs and bring lawsuits on that basis. If a private plaintiff files an FCA complaint, it is sealed and shared with the Justice Department, and the defendant company is not notified until the government finishes its investigation.

A common basis for FCA claims is the allegation that a recipient company falsely certified its compliance with statutory, regulatory, or contractual requirements. Thus, the certifications required in various parts of the CARES Act as conditions of eligibility are likely hooks for FCA claims. For example, compliance officers should pay particular attention to Section 4003’s workforce retention requirements and limitations on stock buybacks and dividends, Section 4004’s limitations on excessive executive compensation, and Section 4019’s certification requirements regarding the lack of conflicts of interest. It is possible that the risk of FCA claims could still be mitigated by safe harbors created by regulators for institutions that conduct reasonable diligence considering the current facts and circumstances.

For more information about recent trends in FCA enforcement, see our [False Claims Act: 2019 Year-in-Review](#).

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WilmerHale regularly assists clients in responding to inquiries by congressional committees, commissions, the Justice Department and Inspectors General, and we continue to monitor developments around coronavirus-related issues closely. We also counsel compliance and risk officers. Our experienced team of lawyers and policy professionals are available to help clients navigate this challenging environment. In particular, WilmerHale has a Coronavirus Task Force and dedicated site with frequent legal updates on critical issues affecting our clients' companies, including access to alerts, news, guidance, and analysis.

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