

April 24, 2020

THE MULTIPRONGED APPROACH TO GOVERNMENT OVERSIGHT AND INVESTIGATIONS RELATED TO COVID-19 AND THE CARES ACT

To Our Clients and Friends:

With passage of the *Coronavirus Aid, Relief, and Economic Security Act* (“*CARES Act*” or the “*Act*”), Congress unleashed the greatest torrent of aid to private businesses this country has ever seen. Additional waves of assistance also are likely, all of which will spawn a massive, multi-branch oversight effort. And that’s not even counting investigations of alleged profiteering, other false claims, and the government’s response to the pandemic. Until November, a barrage of investigations and oversight will be conducted against the backdrop of the 2020 presidential election. The political reality is sure to intensify oversight efforts, particularly of private businesses that receive *CARES Act* funds.

This alert describes the various government entities that will oversee and investigate the use of *CARES Act* funds. It begins with Congress, noting the current and soon-to-be-created committees that will be tasked with, or have jurisdiction to, oversee funds dispersed through the *CARES Act*. The alert then explores the role that Inspectors General will play in overseeing expenditure of the funds, augmented by two supplemental oversight bodies created under the Act.

Congressional Oversight and Investigations

Congressional oversight of the *CARES Act* and its progeny, as well as the Administration’s response to COVID-19, will be robust and multifaceted. This oversight has already begun, and more is forthcoming. Yesterday, April 23, the House established a select subcommittee to spearhead oversight and investigative efforts. In the Senate, Majority Leader McConnell has designated a *CARES Act* oversight coordinator. Pursuant to the bill, a bicameral commission is being established to examine implementation of the *CARES Act*. And at the same time, several committees in both the House and Senate have either begun or announced COVID-related investigations or oversight. As a result of all these efforts, *CARES Act* and other COVID oversight is likely to dominate the investigative agenda of Congress for this year and likely next.

We look at the various congressional oversight and investigative efforts in the subsections below.

House Select Committee on the Coronavirus Crisis

On April 23, the House of Representatives passed H. Res. 935, a resolution establishing a new bipartisan select investigative subcommittee of the Committee on Oversight and Reform to oversee the Trump administration’s response to the coronavirus pandemic, called the “Select Subcommittee on the Coronavirus Crisis” (“*Coronavirus Subcommittee*” or “*the Subcommittee*”).^[1]

GIBSON DUNN

The Subcommittee will be composed of 12-members, with Speaker Pelosi (D-Calif.) choosing seven members and House Minority Leader Kevin McCarthy (R-Calif.) choosing five.[2] House Majority Whip Jim Clyburn (D-SC) has already been tapped to chair the Subcommittee.[3]

In remarks made on the House floor, Speaker Pelosi indicated that the Subcommittee’s efforts will be mainly directed towards investigating the implementation of the coronavirus stimulus packages and rooting out any sort of profiteering and fraud. Specifically, she stated that the Subcommittee “will be laser-focused on ensuring that taxpayer money goes to workers’ paychecks and benefits and it will ensure that the federal response is based on the best possible science and guided by health experts — and that the money invested is not being exploited by profiteers and price gougers.”[4] And in previous statements, Speaker Pelosi had similarly emphasized that the Committee would focus its attention on “preventing waste, fraud and abuse” and would “protect against price gouging, profiteering and political favoritism.”[5]

It is worth noting, however, that the Coronavirus Subcommittee’s mandate is significantly broader than simply overseeing the implementation of the coronavirus stimulus packages and protecting against profiteering. Indeed, pursuant to H. Res. 935, the Subcommittee has been given an expansive scope and is officially charged with investigating and reporting on the following issues relating to the pandemic:

- the efficiency, effectiveness, equity, and transparency of the use of taxpayer funds and relief programs to address the coronavirus crisis;
- reports of waste, fraud, abuse, price gouging, profiteering, or other abusive practices related to the coronavirus crisis;
- the implementation or effectiveness of any Federal law applied, enacted, or under consideration to address the coronavirus crisis and prepare for future pandemics;
- preparedness for and response to the coronavirus crisis, including the planning for and implementation of testing, containment, mitigation, and surveillance activities; the acquisition, distribution, or stockpiling of protective equipment and medical supplies; and the development of vaccines and treatments;
- the economic impact of the coronavirus crisis on individuals, communities, small businesses, health care providers, States, and local government entities;
- any disparate impacts of the coronavirus crisis on different communities and populations, including with respect to race, ethnicity, age, sex, gender identity, sexual orientation, disability, and geographic region, and any measures taken to address such disparate impacts;
- executive branch policies, deliberations, decisions, activities, and internal and external communications related to the coronavirus crisis;
- the protection of whistleblowers who provide information about waste, fraud, abuse or other improper activities related to the coronavirus crisis;
- cooperation by the executive branch and others with Congress, the Inspectors General, the Government Accountability Office, and others in connection with oversight of the preparedness for the response to the coronavirus crisis; and

GIBSON DUNN

- any other issues related to the coronavirus crisis.[6]

In short, the Subcommittee is tasked with investigating companies, grant recipients, and the Administration, with respect to matters broadly related to the pandemic.

It is noteworthy that the Subcommittee is authorized to investigate the preparedness for and response to the coronavirus crisis, considering Speaker Pelosi had previously said that the Subcommittee's mandate would be forward-looking in nature.[7]

While the Subcommittee has a broad scope, Speaker Pelosi's statements and the nature of the Subcommittee suggest that one of its focuses will be on tracking how the recovery money is distributed and which entities ultimately receive that money. For instance, the Subcommittee will almost certainly review the Paycheck Protection Program (PPP) disbursements, the \$349 billion in loan guarantees offered to small businesses under the SBA's 7(a) program pursuant to the CARES Act as well as an additional \$321 billion appropriated for the PPP under a fourth coronavirus package passed on April 23. There already has been considerable negative publicity focused on national hotel and restaurant chains that have received millions of dollars in grants pursuant to the PPP.[8]

Moreover, the fact that Rep. Jim Clyburn has been tapped as the chair also provides some leads on the potential direction and focus of the Committee's oversight efforts. In response to being named chairman of the Coronavirus Subcommittee, Rep. Clyburn stated he believes "very strongly that we cannot let the assistance directed toward addressing this crisis accrue in an inequitable fashion" and that in previous crises like the Great Depression and other recessions, parts of the country "were left behind, having not been treated equitably." [9] These statements indicate that Rep. Clyburn will focus the Subcommittee's attention on investigating whether the Trump administration implements the provisions aimed at providing financial assistance to workers and families as intended, including whether individuals and households receive the additional unemployment insurance funds and direct rebates.

The Subcommittee has been given all the bells and whistles an investigative Chair could desire. The Subcommittee Chair has the authority to issue subpoenas, both for testimony and documents. Staff can take depositions. And, unusually but importantly, the Chair can compel the submission of information via interrogatory.[10] Members can be allotted more than the usual five minutes for questioning during hearings, and the Subcommittee's staff will be permitted to question witnesses at hearings[11] Of course, there are still questions concerning the feasibility of actually convening hearings in light of the social distancing guidelines put in place in response to the coronavirus crisis. And while there have been some discussions concerning the possibility of holding virtual hearings, it remains to be seen whether Congress would pursue that option.[12]

Several Republican lawmakers voiced their opposition to the formation of the Coronavirus Subcommittee as being duplicative and unnecessary. In particular, Reps. Greg Walden (R-OR), Patrick McHenry (R-NC), and Kevin Brady (R-TX), Ranking Members of the Energy and Commerce, Financial Services, and Ways and Means Committees, respectively, sent Speaker Pelosi a letter on April 23, questioning Pelosi's claim that the Subcommittee will be bipartisan and noting that "standing committees have the respective institutional knowledge and expertise to ensure the appropriate questions are asked

GIBSON DUNN

and answered.”^[13] Rep. McCarthy had previously voiced similar concerns in response to the Speaker’s initial announcement regarding the Subcommittee.^[14] Republicans could choose not to participate in the Subcommittee once it is formed. When the Select Committee on Events Surrounding the 2012 Terrorist Attack in Benghazi (also known as the “Benghazi Committee”) was announced, Democrats initially did not commit to participating in it and a number of Democratic lawmakers suggested that appointing members to the Committee would give credence to an unnecessary and wasteful investigation.^[15] Nevertheless, ultimately the Democrats did choose to fully participate in the Benghazi Committee, with Speaker Pelosi reasoning that Democrats could at least have access to pertinent information and a say in determining the direction of the committee’s investigation.^[16] It seems similarly unlikely in this scenario that the Republicans would choose to not participate on the Subcommittee.

Other House Oversight and Investigations

It is almost certain that the Subcommittee will not be the only House body to investigate and oversee COVID-related matters. Indeed, committees and lawmakers are already beginning to review and investigate possible fraud, abuse, and/or profiteering related to COVID-19, and it is likely that more investigations will be announced in the near future.

For example, on April 1, Maxine Waters, Chair of the House Committee on Financial Services, sent a letter to Treasury Secretary Steven Mnuchin and SBA Administrator Jovita Carranza, stating “[a]ny funds granted through the [PPP] must not be used to pay any debts or obligations to private funds, including management or consulting fees.”^[17] Her letter stressed that the purpose of the program is to help companies maintain workforce levels, pay and benefits, and provide workers with a minimum of two weeks paid leave. Other House committees that could oversee different elements of the coronavirus packages include Energy and Commerce, Judiciary, and Ways and Means.

Moreover, there are other aspects of the coronavirus pandemic that Congress is likely to investigate besides the administration and implementation of the stimulus packages. Some of these investigations have already been initiated. For instance, in an April 15 letter Senator Elizabeth Warren (D-Mass.) and Rep. Katie Porter (D-Calif.) inquired into the role private equity firms have played in decisions made by physician practices that they own.^[18] Further, Rep. Raja Krishnamoorthi, a member of the House Committee on Oversight and Reform and Chairman of the Subcommittee on Economic and Consumer Policy, sent a letter on April 15, 2020 requesting documents and information from a corporation regarding its contract to produce low-cost, portable ventilators intended to be stockpiled by the federal government in the event of a pandemic.^[19] Similarly, the Democratic members of the Subcommittee on Antitrust, Commercial and Administrative Law, led by House Judiciary Committee Chairman Jerrold Nadler (D-NY) and Antitrust Subcommittee Chairman David N. Cicilline (D-RI), have initiated an inquiry of their own related to the development of ventilators for the national stockpile. On April 10, 2020, those Members sent a letter to the Federal Trade Commission Chairman Joseph Simons requesting documents regarding the FTC’s investigation of a company’s acquisition of a rival medical device manufacturer.^[20] Specifically, the request relates to allegations of abandoning a contract to develop inexpensive portable ventilators for the national stockpile.^[21]

Senate Oversight and Investigations

While the Republican-controlled Senate is unlikely to conduct as much oversight of the *CARES* Act as the Democratic-controlled House, we will see oversight and investigative activity. Majority Leader McConnell announced that Chairman Mike Crapo (R-ID) of the Senate Banking Committee will lead and coordinate the Senate’s oversight of the *CARES* Act.^[22] McConnell stated that “[t]he Banking Committee already has jurisdiction over the largest parts of the legislation, including economic stabilization and the Federal Reserve” and that “Chairman Crapo will also work closely with the chairs of other committees of jurisdiction as they supervise their own portions of the *CARES* Act.” As the Majority Leader suggests, other Senate committees, particularly Homeland Security and Governmental Affairs, Finance, and Small Business & Entrepreneurship, will have jurisdiction over various elements of the coronavirus packages.

It also appears that there will be multiple investigations and other oversight inquiries into the causes of the coronavirus pandemic and the Trump administration’s preparedness for, and initial response to, the pandemic. For example, Senate Homeland Security and Governmental Affairs Committee Chairman Ron Johnson (R-Wis.) has already stated that his committee will begin a probe into the origins and response to the coronavirus pandemic.^[23] Johnson added that the probe will focus on why the national stockpile of equipment was not better prepared, why pharmaceutical ingredients and medical devices are manufactured overseas, and the World Health Organization’s response to the virus.

Bicameral Congressional Oversight Commission

Additionally, the *CARES* Act created the Congressional Oversight Commission (the “Commission”), a bicameral commission composed of five members chosen by the majority and minority leaders of both houses of Congress.^[24] Four of the five members of the Commission have already been announced. The Democratic appointments are Donna Shalala (D-FL), a former Health and Human Services secretary, and Bharat Ramamurtri, a former Deputy Policy Director for Economic Policy for Elizabeth Warren, to sit on the Commission.^[25] Meanwhile, the Republicans have appointed Senator Pat Toomey (R-PA), a member of the Senate Banking, Budget and Finance Committees, and Rep. French Hill (R-Ark.), a member of the House Financial Services Committee.^[26] The Chairperson, who has yet to be named, will be chosen by Pelosi and Senate majority leader Mitch McConnell (R-KY), in consultation with House Minority Leader McCarthy and Senate Minority Leader Chuck Schumer (D-NY).^[27]

The Commission’s purpose is to conduct oversight on the implementation of the *CARES* Act by the Federal Government, including efforts by the Treasury Department and Federal Reserve to “provide economic stability as a result of the coronavirus disease 2019 (COVID–19) pandemic of 2020.”^[28] The Commission is responsible for submitting regular reports to Congress focusing on the following elements related to the *CARES* Act: (i) the use of contracting authority under the *CARES* Act and the administration of the *CARES* Act by Treasury and the Federal Reserve; (ii) the impact of loans, loan guarantees, and investments on the financial well-being of U.S. citizens and the U.S. economy; (iii) the extent to which information made available pursuant to the *CARES* Act has contributed to market

transparency; and (iv) the effectiveness of loans, loan guarantees, and investments in minimizing long-term costs to the taxpayers and maximizing the benefits for taxpayers.[29]

The Commission has the authority to convene hearings, call witnesses, take testimony, hire staff, and meet regularly.[30] Moreover, the chair is empowered to obtain information from any agency by request.[31]

The Commission appears to be similar in some respects to the Financial Crisis Inquiry Commission (FCIC) that was created in response to the financial crisis of 2007-2008, and was responsible for investigating the causes of that financial crisis. The FCIC was composed of ten members that were similarly appointed on a bipartisan and bicameral basis. The FCIC spent more than a year examining the causes of the financial crisis. During that span, it reviewed millions of pages of documents, interviewed more than 700 witnesses, held 19 days of public hearings, and ultimately issued a final report.[32]

Efforts to Create a 9/11-Style Commission

There are currently multiple proposals in both the House and Senate to establish a bipartisan and bicameral commission-style panel to conduct a comprehensive and wide-ranging review of the government's coronavirus response.[33] For the most part, these plans closely resemble the structure of the 9/11 Commission, which was a ten-member panel, evenly divided between the political parties, dedicated to investigating the failure to prevent the September 11, 2001 terrorist attacks.[34] Like the 9/11 Commission, a number of the proposals would give this panel the power to issue subpoenas and refer any defiance for prosecution.[35] However, a couple of the proposals would not have the panel begin its work until after the 2020 election.[36] Speaker Pelosi has indicated that she is supportive of an after the fact investigation but, as stated above, has emphasized that she is currently more focused on ensuring there is real-time oversight of the implementation of the CARES Act and other coronavirus stimulus packages.[37]

Agency Oversight

In parallel with Congress, Inspectors General (IGs) will play a key role in overseeing the federal pandemic response and expenditure of stimulus dollars. As further detailed below, the CARES Act provides specific funding for Offices of the IG (OIGs) at several agencies and creates two supplemental oversight bodies. This expanded role for IGs in overseeing the expenditure of the CARES Act funds is consistent with oversight mechanisms in past emergency relief packages. Both the Troubled Asset Relief Program ("TARP") under the Bush administration and the American Recovery and Reinvestment Act of 2009 in the Obama era appropriated substantial funds for OIG oversight. And if history is any indicator, OIGs, and the army of personnel and resources they bring to bear, are likely to be involved in investigations and enforcement actions related to the spending for years to come.[38]

The Role of IGs in Oversight of Federal Spending

Created by Congress through the Inspector General Act of 1978 ("the IG Act") in the wake of Watergate, IGs are designed to serve as independent agency watchdogs.[39] IGs are tasked with overseeing their

respective agency’s programs and operations and keeping agency heads and Congress informed of fraud, waste, and abuse. To accomplish these tasks, Congress has vested IGs with robust investigatory authority. IGs may independently hire staff, access relevant agency records and information, investigate matters without interference by agency heads, and report findings and recommendations directly to Congress.[40] And perhaps the most important information gathering tools an IG has in its arsenal are its subpoena authority and ability to take witness testimony under oath.[41] IG subpoenas can be extremely broad in scope, can be served on private parties, are enforceable in federal court, and offer limited protections to recipients.[42]

Investigatory authority is not the only power that OIGs possess. They also play a significant role in enforcement, both in their own right and by serving as extra sets of eyes and ears for DOJ agents and other regulators. OIGs are staffed with trained, credentialed, and sworn special agents, investigative attorneys, and administrative investigators. The IG Act vests 25 OIGs with law enforcement authority, including the power to carry a firearm and to “seek and execute warrants for arrest, search of premises, or seizure of evidence.”[43] In 2017 alone, OIGs boasted \$21.9 billion from investigative receivables and recoveries, as well as 4,383 successful prosecutions and 4,622 suspensions or debarments.[44]

OIG investigations may be initiated based on information received from a variety of sources, including other government agencies, the media, Congress, or whistleblowers. And although OIG investigations are generally inward-facing, government contractors and other recipients of federal funds may find themselves entangled in OIG investigations where they are suspected of involvement in wrongdoing in relation to an agency’s programs and operations. An OIG investigation can even reach companies who do not receive government funding but are believed to have information that may be relevant to allegations of waste, fraud, or abuse in programs that do receive federal dollars.

There are serious collateral risks to receiving an OIG subpoena or otherwise being investigated by an OIG. Whenever an OIG suspects that a federal criminal law has been violated, it may report that information to DOJ for further investigation or prosecution. For civil violations, the OIG may also refer the matter to DOJ for False Claims Act or other enforcement, impose civil penalties under the Program Fraud Civil Remedies Act, and/or refer the matter to their respective agencies for administrative action, including suspension or debarment.

CARES Act Provisions

The CARES Act appropriates over \$148 million to OIGs in 14 agencies, and creates two supplemental oversight bodies to augment the IG community: 1) the Office of the Special Inspector General for Pandemic Recovery (“SIGPR”) within the U.S. Department of Treasury, and 2) the Pandemic Response Accountability Committee (“PRAC”).[45]

Existing Offices of Inspector General

Of the \$148 million in appropriations for existing IGs, around \$120 million of that is earmarked for IGs comprising the PRAC—the agencies that have the greatest roles in spending the stimulus money.[46] The amounts provided under the Act range from \$35 million for the OIG at the Treasury Department, responsible for distributing over \$500 billion in emergency relief under the Act, to \$750,000

for the OIG at the Department of Agriculture, commensurate with their roles in “carrying out investigations and audits related to the funding provided to prevent, prepare for, and respond to coronavirus under [the] Act.”

Oversight of the Paycheck Protection Program

Capitalizing on lessons learned from past bailouts, Inspectors General are likely to be particularly focused on monitoring government lending under the Act, including the \$670 billion Paycheck Protection Program (“PPP”) under the Small Business Administration’s (“SBA”) 7(a) program. To facilitate audits and investigations of spending under the program, the CARES Act earmarks \$25 million for the OIG at the SBA, more than doubling its current annual budget, to be spent over a four-year period.^[47] Given the fact that the SBA processed more loan applications over 14 days than it had in the previous 14 years combined—over 1.6 million applications through nearly 5,000 lenders nationwide when the program ran out of funds on April 16—enforcement after-the-fact is likely to be substantial as the SBA OIG wades through audits and investigations over the next several years.^[48]

Failure to comply with the many regulations that attach to lending under the PPP or other programs under the CARES Act could result in fines, penalties, or worse for borrowers that fail to exercise proper diligence in applying for and using the funds from these loans. Although it was designed to make loans for small businesses more broadly and rapidly accessible, the PPP contains complex qualification and utilization criteria for borrowers (e.g., loan forgiveness under the Program is contingent on using the funds for specific purposes), who are responsible for agreeing to a battery of self-certifications—including that the applicant is eligible under the SBA’s PPP guidance.^[49] Because borrowers had to quickly navigate complex applications under extraordinarily stressful circumstances to obtain PPP loans before the funds ran out, they will be vulnerable to mistakes in the application process. Thus, SBA OIG audits and investigations related to the PPP are likely to be particularly focused on material false statements in the loan application process, which could give rise to liability under the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.* Through the FCA, the government can hold a PPP borrower responsible for up to three times the amount of the SBA loan if it finds the borrower knowingly made a false statement in the loan application or other representations to the government with “reckless disregard” for the truth or falsity of that statement.

As we explained in our April 8 client alert, “Fraud in the COVID-19 Age: Examining and Anticipating Changing Enforcement Activity,” in the aftermath of past crises, DOJ and qui tam relators have vigorously pursued FCA claims targeting entities that benefited from government spending—efforts contributing heftily to the nearly \$40 billion that the federal government has recovered under the FCA in the last decade alone.^[50] Indeed, DOJ has already signaled that it will prioritize the investigation and prosecution of coronavirus-related fraud schemes, and Attorney General Barr has issued guidance to all U.S. Attorneys to be on the lookout for misconduct.^[51]

Special Inspector General for Pandemic Relief

In addition to oversight from existing IGs, the Act established a new Special Inspector General for Pandemic Recovery (“SIGPR”) within the Department of the Treasury. SIGPR has a broad mandate to

GIBSON DUNN

oversee and audit the making, purchasing, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under the Act. To this end, the Act directs SIGPR to collect a list of all businesses that received loans and summarize “the reasons the Secretary determined it to be appropriate to make each loan or loan guarantee under th[e] Act.” The Act allocates \$25 million to SIGPR to conduct this oversight.

The Act grants SIGPR the authority provided in Section 6 of the Inspector General Act of 1978. Thus, SIGPR is authorized to subpoena information in the form of documents, reports, and related information.

SIGPR’s oversight will likely receive significant public attention—through a highly political lens. The Act requires SIGPR to submit quarterly reports to “the appropriate committee of Congress.” These reports will be highly scrutinized by Congress and the media. And if the reports raise issues about specific borrowers, this may well spawn congressional investigations into those borrowers or calls for those borrowers to testify.

SIGPR’s duties are similar to the duties of the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”). SIGTARP was charged with monitoring, auditing, and investigating funds dispersed through the 2008 Troubled Asset Relief Program. SIGTARP also provided quarterly reports to Congress and testified before numerous congressional committees.

Because of these similarities, SIGPR’s objectives and actions may resemble SIGTARP’s. In its reports to Congress, SIGTARP often emphasized statistics about the funds recovered from its investigations and the number of enforcement actions brought based on its investigation. Indeed, today SIGTARP’s website cites the number of individuals sent to prison based on its investigations (300).[52] The site also notes that SIGTARP investigations led to 24 enforcement actions against institutions, many of which are widely recognized companies.[53] SIGPR will likely channel its investigative efforts in a similar manner, hoping to expose (and recoup funds from) borrowers’ fraud or waste. And SIGPR’s oversight efforts may well focus on well-known private companies, as investigations into such companies will likely generate significant interest in SIGPR’s efforts. Finally, like SIGTARP, SIGPR will likely refer conduct uncovered during its investigations to government agencies with civil or criminal enforcement power.

Moreover, Congress is sure to pay close attention to SIGPR. In fact, Congress’ interest in SIGPR is already on display. President Trump recently nominated Brian Miller to serve as SIGPR. Miller currently serves as Special Assistant to the President and Senior Associate Counsel in the White House Counsel’s Office. Previously, Miller served as the Inspector General for the General Services Administration (“GSA”). In this role, he led a high-profile investigation into wasteful spending at a GSA conference in Las Vegas.[54] The head of GSA resigned because of the investigation.[55]

Miller’s nomination requires confirmation by the Senate, and Miller has already garnered significant criticism from Democrats. Senate Minority Leader Schumer, for example, called Miller “exactly the wrong type of person to choose for this position.”[56] Speaker Pelosi echoed this sentiment, saying: “The Inspector General providing oversight of the federal response of this historic relief package for workers and families must be independent from politics. The President’s nomination of one of his own

lawyers clearly fails that test.”^[57] Politically charged attacks against Miller make it more likely that Congress—particularly the Democratic-controlled House—will contend that it cannot rely on SIGPR to oversee CARES Act funds and, in turn, must conduct direct oversight of the CARES Act through investigations and hearings. Speaker Pelosi’s announcement of the House select committee exemplifies this dynamic.

There also may be tension between SIGPR’s oversight duties and the Trump Administration. Many new stories, for example, have scrutinized the signing statement President Trump issued regarding Section 4018(e)(4)(B) of the Act, which states that if “information or assistance requested by” SIGPR is “unreasonably refused or not provided,” SIGPR shall report that “without delay” to the appropriate congressional committees. President Trump’s signing statement noted that he did not understand, and his Administration would not treat, “this provision as permitting the SIGPR to issue reports to the Congress without the presidential supervision required by the Take Care Clause, Article II, section 3.”^[58] This statement reflects long-standing separation of powers disputes regarding the independence of IGs, which are members of the Executive Branch. Indeed, questions arose during the Obama Administration (and prior administrations) regarding the authority and independence of IGs.^[59] Still, President Trump’s signing statement may foreshadow complex internal dynamics between SIGPR and politically appointed leaders of the Treasury Department, or more generally between SIGPR and the White House.

Pandemic Response Accountability Committee

The Inspector General Reform Act of 2008 established the Council of Inspectors General on Integrity and Efficiency (“CIGIE”) to coordinate and oversee the IG community. The CARES Act requires CIGIE to establish a Pandemic Response Accountability Committee (“PRAC”) to “conduct and coordinate oversight of covered funds and the Coronavirus response.” Under the Act, the Chairperson of CIGIE, which currently is Department of Justice Inspector General Michael Horowitz, selects the Chair of PRAC. The other PRAC members are the Inspectors General of the Departments of Defense, Education, Health and Human Services, Homeland Security, Justice, Labor, and the Treasury; the Inspector General of the Small Business Administration; the Treasury Inspector General for Tax Administration; and any other Inspector General, as designated by the Chairperson from any agency that expends or obligates covered funds or is involved in the Coronavirus response.

PRAC will have an Executive Director and a Deputy Executive Director. The CARES Act provides that these appointments shall be made within 30 days of the Act’s passage by the Chair of PRAC, “in consultation with the majority leader of the Senate, the Speaker of the House of Representatives, the minority leader of the Senate, and the minority leader of the House of Representatives.” This reference to congressional coordination spurred another signing statement from President Trump, which said that any *requirement* for an Executive Branch Committee to consult with Congress would violate Article II of the Constitution.^[60]

PRAC has already sparked political controversy. On March 30, CIGIE Chair Horowitz appointed Glenn Fine as Chair of PRAC. At the time, Fine was the Deputy Inspector General of the Department of Defense, but he was serving as the Acting Inspector General of the Department of Defense. Yet a week

GIBSON DUNN

later, President Trump appointed a new Department of Defense Inspector General, Jason Bend, and designated a new Acting Inspector General at the Department of Defense, current Environmental Protection Agency Inspector General Sean O'Donnell. That meant that Fine was no longer on PRAC—and consequently could not serve as Chair. Democratic politicians claimed that this was yet another attempt by President Trump to thwart efforts to oversee the *CARES* Act. CIGIE Chair Horowitz has not yet appointed a new Chair of PRAC.

More substantively, CIGIE has announced that PRAC will “work closely with” other IGs to “ensure that the funds intended to support individuals, workers, healthcare professionals, businesses and others affected by the pandemic are used efficiently, effectively, and in accordance with the law.”^[61] To do so, the *CARES* Act provides PRAC with significant resources and authority. In terms of resources, PRAC receives \$80 million under the Act, which far exceeds the \$25 million allocated to SIGPR. In terms of authority, in addition to powers under Section 6 of the Inspector General Act, PRAC has subpoena power over persons who are not federal officers or employees. This is significant, and it will enable PRAC to compel testimony from private individuals and companies.

Like SIGPR, PRAC is required to draft numerous reports about its oversight efforts. Specifically, PRAC is required to submit to the President and Congress management alerts on management risks and funding problems. PRAC is also required to submit biannual reports to the President and Congress summarizing PRAC's activities. Finally, PRAC is permitted to submit to Congress “other reports or provide such periodic updates on the work of the Committee as the Committee considers appropriate.”

The precise role PRAC will play in oversight of *CARES* Act funds is uncertain, in part because PRAC is somewhat novel. No similar oversight committee was created to oversee funds dispersed under TARP. PRAC may play a supporting role, coordinating efforts between various IGs. Alternatively, PRAC may assert an independent role, using its subpoena power and funding to initiate broad-ranging investigations that cut across multiple agencies. Either way, PRAC's existence increases the likelihood that IGs will collaborate and initiate joint investigations.

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In the aftermath of the COVID-19 crisis and the torrent of aid that is flowing to mitigate its damage, businesses who receive funds under the *CARES* Act will face an unprecedented level of scrutiny by multiple congressional committees and agency oversight bodies. Indeed, companies that have stumbled through the gauntlet of complex certification and utilization requirements attached to lending under the Act's various programs are already coming under investigation. Gibson Dunn lawyers regularly counsel clients on issues raised by this pandemic, and are available to assist with any questions you may have regarding *CARES* Act oversight and enforcement.

[1] H. R. 935, 116th Cong. (2020).

[2] *Id* at § 2.

[3] Press Release, Speaker's Press Office, Apr. 2, 2020, *available at* <https://www.speaker.gov/newsroom/4220>.

[4] Kyle Cheney, *House creates new select coronavirus oversight committee over GOP objections*, Apr. 23, 2020, *available at* <https://www.politico.com/news/2020/04/23/house-creates-coronavirus-oversight-committee-204316>.

[5] *Supra* note 3.

[6] *Supra* note 1, § 3.

[7] Ramsey Touchberry, *What Is Pelosi's Coronavirus Committee? Why Overseeing Covid-19 Money Will Be Met With Hurdles*, April 3, 2020, *available at* <https://www.newsweek.com/what-pelosis-coronavirus-committee-why-overseeing-covid-19-money-will-met-hurdles-1496014>.

[8] Jonathan O'Connell, *White House, GOP face heat after hotel and restaurant chains helped run small business program dry*, April 20, 2020, *available at* <https://www.washingtonpost.com/business/2020/04/20/white-house-gop-face-heat-after-hotel-restaurant-chains-helped-run-small-business-program-dry>.

[9] Press Release, Office of the Majority Whip, Apr. 3, 2020, *available at* <https://www.majoritywhip.gov/?press=majority-whip-clyburn-statement-on-being-named-chairman-of-the-house-select-committee-on-the-coronavirus-crisis-2>.

[10] *Supra* note 1, § 4.

[11] *Id.*

[12] Michael Thorning, *Virtual Congressional Hearings: Could They Work? Six Recommendations*, Mar. 27, 2020, *available at* <https://bipartisanpolicy.org/blog/virtual-congressional-hearings-could-they-work-six-recommendations/>.

[13] Press Release, Patrick McHenry, Ranking Republican, House Committee on Financial Services, *McHenry, Walden, Brady Oppose Pelosi's Plan to Create Partisan COVID-19 Oversight Subcommittee*, Apr. 23, 2020, *available at* https://republicans-financialservices.house.gov/uploadedfiles/2020-04-23_gop_rankers_to_pelosi.pdf.

[14] Burgess Everett & Marianne Levine, *Senate Republicans plan coronavirus probe — with a focus on China*, Apr. 13, 2020, *available at* <https://www.politico.com/news/2020/04/13/senate-republicans-coronavirus-probe-china-184206>

[15] Josh Hicks, *Schiff: Benghazi select committee a 'colossal waste of time'*, May 4, 2014, *available at* <https://www.washingtonpost.com/news/post-politics/wp/2014/05/04/schiff-benghazi-select-committee-a-colossal-waste-of-time/?arc404=true>.

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- [16] Jennifer Steinhauer & Jonathan Weisman, *Pelosi Picks 5 Democrats for Panel on Benghazi*, May 21, 2014, available at <https://www.nytimes.com/2014/05/22/us/politics/bucking-deputies-pelosi-picks-5-democrats-for-benghazi-panel.html>.
- [17] Press Release, House Committee on Financial Services, April 2, 2020, available at <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406477>.
- [18] Isaac Arnsdorf, *Medical Staffing Companies Cut Doctors' Pay While Spending Millions on Political Ads*, Apr. 20, 2020, available at <https://www.propublica.org/article/medical-staffing-companies-cut-doctors-pay-while-spending-millions-on-political-ads>.
- [19] Press Release, House Committee on Oversight and Reform, *Krishnamoorthi Seeks Documents on Ventilators Meant to Supply Federal Stockpile*, April 15, 2020, available at <https://oversight.house.gov/news/press-releases/krishnamoorthi-seeks-documents-on-ventilators-meant-to-supply-federal-stockpile>.
- [20] Press Release, House Judiciary Committee, *Nadler, Cicilline, and Antitrust Subcommittee Democrats Demand Answers on FTC Approval of Covidien's Acquisition of Newport Medical Instruments*, Apr. 10, 2020, available at <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2914>.
- [21] *Id.*
- [22] Press Release, Senate Majority Leader's Press Office, Apr. 17, 2020, available at <https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-announces-oversight-plans-for-historic-cares-act->.
- [23] Burgess Everett & Marianne Levine, *Senate Republicans Plan Coronavirus Probe – with a focus on China*, Apr. 13, 2020, available at <https://www.politico.com/news/2020/04/13/senate-republicans-coronavirus-probe-china-184206>.
- [24] Coronavirus Economic Stabilization Act of 2020, Pub. L. No. 116-136 § 4020.
- [25] Kyle Cheney & Melanie Zanona, *Pelosi, McConnell name picks to serve on coronavirus oversight panel*, Apr. 17, 2020, available at <https://www.politico.com/news/2020/04/17/french-hill-coronavirus-oversight-panel-192660>.
- [26] *Id.*
- [27] Pub. L. No. 116-136 § 4020(c).
- [28] Pub. L. No. 116-136 § 4020(b).
- [29] *Id.*
- [30] Pub. L. No. 116-136 § 4020(e).

[31] *Id.*

[32] Rock Center for Corporate Governance, *available at* <http://fcic.law.stanford.edu/>.

[33] Kyle Cheney, *Lawmakers fight for a piece of coronavirus ‘9/11 Commission’*, Apr. 6, 2020, *available at* <https://www.politico.com/news/2020/04/06/congress-coronavirus-commission-168195>; Press Release, Senator Dianne Feinstein’s Newsroom, Apr. 10, 2020, *available at* <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=8FFEB75D-F6BB-4138-BD68-2B5629335340>.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Mike Lilis, *Pelosi forms House committee to oversee coronavirus response*, Apr. 2, 2020, *available at* <https://thehill.com/homenews/house/490798-pelosi-forms-house-committee-to-oversee-coronavirus-response>.

[38] In FY 2017, approximately 13,000 employees at 73 OIGs conducted audits, inspections, evaluations, and investigations. *See CIGIE’s Annual Report to the President and Congress, Fiscal Year 2017*, *available at* https://www.oversight.gov/sites/default/files/cigie-reports/FY17_Annual_Report_to_the_President_and_Congress.pdf.

[39] *See generally* Kathryn A. Francis, Cong. Research Serv., R45450, *Statutory Inspectors General in the Federal Government: A Primer* (2019), *available at* <https://fas.org/sgp/crs/misc/R45450.pdf>.

[40] *Id.*

[41] The IG Act authorizes IGs to subpoena information in the form of documents, reports, and related information. *See* 5 U.S.C. app. 3 §6(a)(4).

[42] Federal courts have enforced IG administrative subpoenas where “the subpoena (1) is within the IG’s statutory authority; (2) seeks information reasonably relevant to the inquiry; and (3) is not unreasonably broad or burdensome.” *See United States v. Westinghouse*, 788 F.2d 164, 171 (3d Cir. 1986).

[43] Pub. L. No. 107-296, § 812; listed in 5 U.S.C. Appendix (IG Act) §6(f); *see generally* Wendy Ginsberg, Cong. Research Serv., R43722, *Offices of Inspectors General and Law Enforcement Authority: In Brief* (Sept. 2014), *available at* <https://fas.org/sgp/crs/misc/R43722.pdf>. Relevant to CARES Act oversight, the OIGs for the Departments of Labor and Treasury, as well as the SBA, are among those vested with Law Enforcement Authority.

[44] Council of the Inspectors General on Integrity and Efficiency, *Annual Report to the President and Congress, Fiscal Year 2017*, published January 3, 2019, available at https://www.oversight.gov/sites/default/files/cigie-reports/FY17_Annual_Report_to_the_President_and_Congress.pdf.

[45] In addition to the provisions related to OIGs, the Act allocates \$20 million to the Government Accountability Office (“GAO”) and provides a mandate for GAO reports to Congress on all expenditures of funds under the act, including monthly briefings to congressional committees on the implementation of the new law, as well as quarterly reports to the public.

[46] The PRAC includes Inspectors General of the Departments of Defense, Education, Health and Human Services, Homeland Security, Justice, Labor, and the Treasury; the Inspector General of the Small Business Administration; the Treasury Inspector General for Tax Administration; and any other Inspector General, as designated by the Chairperson from any agency that expends or obligates covered funds or is involved in the coronavirus response.

[47] See SBA, Office of Inspector General, FY 2019 Congressional Budget Justification, available at https://www.sba.gov/sites/default/files/2019-08/FY_2019_CBJ_Office_of_Inspector_General.pdf.

[48] See Robin Saks Frankel, *The Paycheck Program Ran Out of Funding. What’s Next for Small Business Owners?*, Apr. 16, 2020, available at <https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners>; see also SBA’s *Agency Financial Report: Fiscal Year 2019*, available at https://www.sba.gov/sites/default/files/2019-12/SBA_FY_2019_AFR-508.pdf (“In FY 2019, the SBA approved more than 58,000 loans in the 7(a) and 504 loan programs, providing [approximately] \$28 billion to small businesses.”).

[49] SBA, *Paycheck Protection Program Interim Final Rule- Additional Eligibility Criteria and Requirements for Certain Pledges of Loans*, Apr. 14, 2020, available at <https://www.sba.gov/document/policy-guidance--ppp-interim-final-rule-additional-eligibility-criteria-requirements-certain-pledges-loans>.

[50] *Fraud in the COVID-19 Age: Examining and Anticipating Changing Enforcement Activity* (Apr. 8, 2020), available at <https://www.gibsondunn.com/fraud-in-the-covid-19-age-examining-and-anticipating-changing-enforcement-activity>.

[51] U.S. Dep’t of Justice, Memorandum from Attorney General William P. Barr (Mar. 16, 2020), <https://www.justice.gov/ag/page/file/1258676/download>.

[52] SIGTARP Investigations By the Numbers, Office of the Special Inspector General for the Troubled Asset Relief Program, available at <https://www.sig tarp.gov/Pages/Home.aspx>.

[53] *Id.*

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[54] Alexander Abad-Santos, *GSA Threw an \$800,000 Party and All You Got Was the Bill*, The Atlantic, Apr. 3, 2012, *available at* <https://www.theatlantic.com/politics/archive/2012/04/gsa-threw-800000-party-and-all-you-got-was-bill/329797/>.

[55] Lesa Jensen, *GSA head resigns over 'wasteful' Las Vegas seminar*, CNN, Apr. 2, 2012, *available at* <https://www.cnn.com/2012/04/02/politics/gsa-head-resigns/index.html>.

[56] Press Release, Senate Democrats, Apr. 4, 2020, *available at* <https://www.democrats.senate.gov/newsroom/press-releases/schumer-statement-on-nomination-of-brian-miller-to-be-special-inspector-general-for-pandemic-recovery>.

[57] Press Release, Speaker's Press Office, Apr. 6, 2020, *available at* <https://pelosi.house.gov/news/press-releases/pelosi-statement-on-nomination-of-white-house-lawyer-as-inspector-general-for>.

[58] Remarks by President Trump at Signing of H.R.748, The CARES Act, Oval Office, Mar. 27, 2020, *available at* <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-748-cares-act/>.

[59] *See Obama Administration Frustrates Inspectors General on Records Access*, Government Executive, Feb. 3, 2015, *available at* govexec.com/management/2015/02/obama-administration-frustrates-inspectors-general-records-access/104496/.

[60] More specifically, President Trump's statement said that required consultation with Congress would "violate[] the separation of powers by intruding upon the President's power and duty to supervise the staffing of the executive branch under Article II, section 1 (vesting the President with the 'executive Power') and Article II, section 3 (instructing the President to 'take Care' that the laws are faithfully executed)."

[61] Press Release, CIGIE, Apr. 1, 2020, *Additional Inspectors General Designated As Members of CIGIE's Pandemic Response Accountability Committee*, *available at* <https://www.ignet.gov/sites/default/files/files/PRAC-press-release-additional-members.pdf>.



Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact your usual contacts or any member of the Firm's Coronavirus (COVID-19) Response Team or the following authors:

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