

An Overview Of Oversight For COVID-19 Relief

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On Friday, President Donald Trump signed the much-anticipated Phase 3 of the COVID-19 stimulus package (the Coronavirus Aid, Relief, and Economic Security, or CARES, Act). The act will inject \$2 trillion into the nation's economy. It will send checks to over 150 million American households, set up loan programs for businesses, pump billions of dollars into unemployment insurance programs, and increase hospital spending, among many other things.

The act follows two earlier measures to combat the pandemic. Phase 1 (Coronavirus Preparedness and Response Supplemental Appropriations Act) provided \$8.3 billion to states, cities, tribes and territories to prepare for and mitigate COVID-19 spread and to federal agencies working on diagnostic tests, therapeutic interventions, and a vaccine to stop coronavirus spread. Phase 2 (the Families First Coronavirus Response Act) included, among other relief, food safety support related to school and business closures, and enhanced unemployment insurance benefits.

With a \$2 trillion price tag, the CARES Act is the largest of the three COVID-19 measures and the largest stimulus package in U.S. history. This money comes with strings attached. As expected, the CARES Act establishes robust oversight mechanisms, and it does so not only with respect to the CARES Act funds but Phases 1 and 2 stimulus measures as well. These provisions are critical in ensuring transparency and accountability.

In this regard, the CARES Act is similar to bailout and stimulus packages of the past, such as the Troubled Asset Relief Program, or TARP, within the Emergency Economic Stabilization Act of 2008, or EESA, and the American Recovery and Reinvestment Act of 2009, or ARRA. Experience with EESA and ARRA oversight teaches that any company that accepts government funds related to the COVID-19 pandemic will be subject to scrutiny by aggressive overseers committed to finding any improprieties, directly, and even indirectly, related to their receipt.

CARES Act Oversight

The CARES Act establishes three separate oversight bodies: (1) the Office of the Special Inspector General for Pandemic Recovery within the U.S. Department of the Treasury, (2) the Pandemic Response Accountability Committee and (3) the Congressional Oversight Commission.[1] While the special inspector general has oversight over the CARES Act funds, the committee and the commission are tasked with ensuring accountability in the disbursement of funds from all three phases of the COVID-19 legislative response.

Like the inspectors general of larger federal agencies, the special inspector general will be appointed by the president, with the advice and consent of the Senate. He or she is granted the same powers as other inspectors general of such agencies under the Inspector General



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Act of 1978. Accordingly, the special inspector general is an independent federal law enforcement authority and oversight body with broad authority, including subpoena power, to undertake investigations and audits without the prior approval of the applicable agency head (in this case, the treasury secretary).

Specifically, the special inspector general will conduct, supervise, and coordinate audits and investigations regarding the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the treasury secretary under the CARES Act. He or she will provide Congress with quarterly reports detailing all such loans, loan guarantees, or other investments made by the secretary.

To accomplish this task, Congress has appropriated \$25 million to be used until expended. Unlike under TARP, where the oversight of the special inspector general had no termination date, the office of the special inspector general under the CARES Act will terminate five years after the enactment of the act. This suggests Congress wants the new inspector general to be vigorous but not perpetual in his or her oversight.

The Pandemic Response Accountability Committee will be established within the Council of Inspectors General on Integrity and Efficiency, the association of all federal inspectors general, to prevent and detect fraud, waste, abuse, and mismanagement and to mitigate major risks that cut across agency and program boundaries. Unlike the special inspector general, the committee, as noted above, is tasked with oversight over not only the CARES Act funds, but also funds from all three phases of the coronavirus legislative relief.

The committee is given the power to conduct its own investigations, audits, and other reviews and is required to submit biannual progress reports to the president and Congress. The committee will be chaired by an inspector general selected by the chairperson of the Council of Inspectors General on Integrity and Efficiency. The act allocates \$80 million to the committee, which will terminate on Sept. 30, 2025.

The Congressional Oversight Commission is intended to be Congress' primary oversight tool, tasked with overseeing the implementation of the act by the Department of the Treasury and the Federal Reserve Board. In addition, the commission will assess the effectiveness of the CARES Act and that of all other pandemic-related actions taken by Congress and federal agencies as regards the economic health of the country, as well as the costs and benefits of such actions to taxpayers.

The commission will have a bipartisan membership chosen by the majority and minority leadership of both houses of Congress, and membership will not be limited to members of Congress. The commission may hold hearings, take testimony and otherwise obtain information from any federal department or agency it deems necessary to contact.

The commission will be required to submit reports to Congress every 30 days specifying: the impact of transactions made under the act on the financial well-being of the people of the United States, financial markets, and financial institutions; the extent to which the information made available on transactions has contributed to market transparency; and the effectiveness of loans, loan guarantees, and other investments made under the act in minimizing long-term costs to the taxpayer and maximizing the benefits for taxpayers. The act makes any funds required to accomplish its mission available to the commission, which terminates on Sept. 30, 2025.

TARP Oversight

The EESA, passed in response to the 2008 financial crisis, included the TARP, which authorized the injection of \$700 billion into the U.S. economy to help troubled banks and companies and to stabilize the markets. Like the CARES Act, the EESA established several different oversight mechanisms including (1) the Financial Stability Oversight Board, (2) the Congressional Oversight Panel and (3) the Office of the Special Inspector General of TARP, or SIGTARP.[2]

Both SIGTARP and the Congressional Oversight Panel have had lasting impact. Further, while other EESA oversight mechanisms have expired, SIGTARP continues to this day to investigate and audit banks and other financial institutions that have received TARP funds. As of its latest report to Congress, SIGTARP's criminal investigations have led to the conviction of 381 defendants, including 76 bankers, and many more defendants have been subjected to civil fines or other enforcement actions by the U.S. Department of Justice, the U.S. Securities and Exchange Commission, and other agencies.[3]

Under now-Sen. Elizabeth Warren's, D-Mass., leadership, the Congressional Oversight Panel aggressively questioned the actions of recipients of TARP funds and the effectiveness of the funds in bolstering the economic health of the country. The panel greatly contributed to the national conversation on the effectiveness of the EESA measures, and was seen as a primary driver of the resulting Dodd-Frank bill, one of the most consequential financial regulations in American history.

ARRA Transparency Board

The ARRA likewise had oversight provisions, although they were not as wide-ranging as in TARP or the CARES Act.[4] The Recovery Accountability and Transparency Board was created to oversee the distribution of funds. In addition to a chairman appointed by the president, the board consisted of the inspectors general of all departments and agencies that received funds from the ARRA, similar to the committee in the CARES Act.

Unlike the SIGTARP, the board did not become a law enforcement agency. Rather, it focused heavily on tracking the flow of funds. During its six-year tenure, the board recommended ways in which some \$8 billion could be put to better use, questioned costs totaling \$5 billion, and played a role in nearly 3,200 audits, inspections, and other reviews and probes by inspectors general resulting in 1,665 convictions, pleas and judgments, and more than \$157 million in recoveries, forfeitures, seizures and estimated savings.[5]

What to Expect

Though the CARES Act is brand new, several things are already clear.

First, considering the historic \$2 trillion price tag and the unprecedented health care crisis now gripping the country, affecting literally every single American in one way or another, it is safe to assume that these oversight mechanisms will not be paper tigers. Whatever their political affiliation or ideological persuasion, Americans will be united in demanding transparency and accountability in the expenditure of these funds to ensure that they are spent for the intended purposes.

Second, experience with TARP and ARRA tells us that these oversight bodies will construe their mandates broadly and the nexus to the receipt of federal funds can be attenuated.

For example, the SIGTARP's investigation of TARP fund recipient General Motors uncovered that the automaker had known about an ignition switch problem but failed to initiate a

timely recall. The resulting criminal charges led to changes in recall practices not only at GM, but industrywide, and a whopping \$900 million fine.[6]

Another example is that the very first investigation under TARP that resulted in a criminal case involved a Ponzi scheme fund manager who told his investors that he would be purchasing TARP-guaranteed debt, and yet never did so.[7]

Third, the Congressional Oversight Commission is likely to play a similar role as the Congressional Oversight Panel created in the EESA. Given the amount of money involved and the impact the pandemic has had on the American people and economy, the commission's actions have the potential of having wide-ranging consequences on any number of economic sectors and the regulatory regimes that govern them.

Given the robust oversight mechanisms in place, companies will need to be vigilant in complying with all applicable laws and regulations in order to avoid attracting the attention of the special inspector general, the commission and/or the committee. Putting in place at the outset mechanisms, procedures and other controls to ensure, and prove, that funds received are spent for their intended purpose will be more than worth the time, effort, and expense.

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[1] Coronavirus Aid, Relief, and Economic Security Act, S. 3548, §§ 4018, 4020, 15010 (2020).

[2] Economic Emergency Stabilization Act, Pub. L. No. 82 110-343, §§ 104, 121, 125 (2008).

[3] About Us, SIGTARP: Office of the Special Inspector General for the Troubled Asset Relief Program <https://www.sig tarp.gov/Pages/aboutus.aspx>.

[4] American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, §§ 1521-1530 (2009).

[5] <https://www.govexec.com/oversight/2015/09/historic-effort-track-stimulus-spending-wraps/122129/>.

[6] Investigations, SIGTARP: Office of the Special Inspector General for the Troubled Asset Relief Program, <https://www.sig tarp.gov/Pages/investigations.aspx>.

[7] Quarterly Report to Congress, SIGTARP, pp. 20-21 (July 21, 2009).