You Can't Take the Money and Run:

Federal Oversight of COVID-19 Spending

On March 27, 2020, the President signed the much-anticipated Phase 3 of the coronavirus disease 2019 (COVID-19) stimulus package (the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act). When signed into law, the Act will inject US$2 trillion into the nation's economy. It will send checks to more than 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.[1]

This alert provides information about the robust oversight mechanisms that the CARES Act establishes. In this regard, the CARES Act is similar to bailout and stimulus packages of the past. Experience with previous stimulus packages, including the Troubled Asset Relief Program (TARP) and the American Recovery and Reinvestment Act of 2009 (ARRA), 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 Treasury Department (the Special Inspector General); (2) the Pandemic Response Accountability Committee; and (3) the Congressional Oversight Commission.[2] While the Special Inspector General has oversight over the CARES Act funds, the Pandemic Response Accountability Committee and the Congressional Oversight Commission are tasked with ensuring accountability in the disbursement of funds from the CARES Act and two prior legislative vehicles related to the COVID-19 response, the Coronavirus Preparedness and Response Supplemental Appropriations Act and the Families First Coronavirus Response Act.

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. The office of the Special Inspector General will be an independent federal law enforcement authority and oversight body with broad authority, including subpoena power, to undertake investigations and audits. 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, and 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 US$25 million. Unlike under TARP, where the oversight of the Special Inspector General had no termination date, the office of the Special Inspector General under CARES Act will terminate five years after the enactment of the Act.

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, as well as to mitigate major risks that cut across agency and program boundaries. The Committee will be able to conduct its own investigations, audits and other reviews, and it must 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 US$80 million to the Committee, which will terminate on September 30, 2025.

The Congressional Oversight Commission is tasked with overseeing the implementation of the Act and assessing the effectiveness of the CARES Act and that of all other pandemic-related actions taken by Congress and federal agencies. The Commission will have a bipartisan membership chosen by the majority and minority leadership of both houses of Congress, and, as with previous similar panels, members are expected to be chosen from outside 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 on the impact of the Act on the financial wellbeing of the people of the US, financial markets and financial institutions; market transparency; and the effectiveness of loans, loan guarantees and other investments. The Act makes any funds required to accomplish its mission available to the Commission, which will terminate on September 30, 2025.

1 Squire Patton Boggs, "CARES Act to Become Law: What It Means and What Comes Next," March 26, 2020.

2 Coronavirus Aid, Relief, and Economic Security Act, S. 3548, §§ 4018, 4020, 15010, 2020.

TARP and ARRA Oversight

The Emergency Economic Stabilization Act of 2008 (EESA), passed in response to the 2008 financial crisis, included the TARP, which authorized the injection of US$700 billion into the US 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 (SIGTARP).[3]

Both the Congressional Oversight Panel and SIGTARP have had lasting impact. Under now-Senator Elizabeth Warren's 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 US history.

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 Department of Justice, the Securities and Exchange Commission, and other agencies.[4]

ARRA, likewise, had oversight provisions, although they were not as wide-ranging as in TARP. ARRA created the Recovery Accountability and Transparency Board (the Board) 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 Pandemic Response Accountability Committee created by the CARES Act. During its six-year tenure, the Board recommended ways in which some US$8 billion could be put to better use; questioned costs totaling US$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 US$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 US$2 trillion price tag and the unprecedented health care crisis now gripping the country, affecting literally every single US citizen 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 will use the nexus of federal funds to pursue any kind of wrongdoing uncovered during their work. For example, the SIGTARP's investigation of TARP fund recipient General Motors (GM) 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 industry-wide, and a whopping US$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 Special Inspector General, the Pandemic Response Accountability Committee, and the Congressional Oversight Commission will all focus more heavily on private sector entities than their predecessors. Unlike previous administrations, the Trump Administration has refused to provide information and documents in response to most congressional requests, and has also taken steps to limit the power of Inspectors General.[8] In a signing statement accompanying the CARES Act, President Trump stated that he and his Administration would not permit the Special Inspector General to freely report to Congress any denials of information from federal agencies.[9] Faced with likely resistance to their authorities from the executive branch and how long it takes for such disputes to be appealed to, and resolved by, the courts, all three CARES Act oversight bodies will likely be compelled to seek information and documents mostly from private entities that, in other circumstances, might more easily be obtained from federal agencies.

Fourth, 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 may well have wide-ranging consequences on any number of economic sectors and the regulatory regimes that govern them.

3 Economic Emergency Stabilization Act, Pub. L. No. 82 110-343, §§ 104, 121, 125, 2008.

4 About Us, SIGTARP: Office of the Special Inspector General for the Troubled Asset Relief Program.

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.

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

8 See, e.g., Letter from DHS Inspector General John Roth to Senators Richard Durban, Tammy Duckworth, and Claire McCaskill, November 20, 2017.

9 Statement by the President, March 27, 2020.

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, Pandemic Response Accountability Committee, and/or Congressional Oversight Commission. 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, to the extent doing so makes scrutiny by one or more of these bodies less likely or, as the case may be, painful.

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