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No Time to Waste

By Kristina Arianina, Squire Patton Boggs

"There isn't time to waste," Bharat Ramamurti, the first—and at the time the lone—member of the Congressional Oversight Commission, concluded in his New York Times op-ed on April 16. The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")—with its robust oversight provisions establishing three separate oversight bodies—was signed into law on March 27. Almost a month later, there is still little oversight to speak of, although last Friday, on April 17—finally—three additional members of the five-person Commission were appointed.

Two other oversight bodies under the CARES Act have not taken off the ground yet. As Ramamurti stressed in his tweet on April 6, the CARES Act overseers "have a serious obligation to the American people to monitor this half-trillion dollar program. Let's get to work." It is unclear how active the Commission as a body will be until a chair is appointed. What is clear, however, is that the Commission's first member, Ramamurti, will likely continue his aggressive press for action. There is also mounting political pressure on companies eligible for relief under the CARES Act to receive funds only when they have a genuine need. On April 22, Harvard and Stanford decided to forego money for which they were eligible under the CARES Act Higher Education Emergency Relief Fund, and earlier in the week, the restaurant chain Shake Shack promised to return $10 million it received under the Paycheck Protection Program. Government agencies that are dispensing the money and companies that will be receiving it should take notice of these developments as they make clear scrutiny will continue to intensify.

Oversight Off to a Slow Start

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 ("PRAC"), and (3) the Congressional Oversight Commission. President Trump has nominated White House lawyer Brian Miller to serve as the Special Inspector General, but the Senate has yet to confirm him. Michael E. Horowitz, the chair of the Council of Inspectors General on Integrity and Efficiency and the Department of Justice's Inspector General, appointed Glenn Fine to serve as the chair of the Pandemic Response Accountability Committee (PRAC), but Fine became ineligible for that role after the President removed him from his position as the Pentagon's Acting Inspector General. While PRAC has 20 other members, it has been silent since April 1, which was when Horowitz and then-Chair Fine announced the appointment of 11 new PRAC members.

Ramamurti, a former aide to Senator Elizabeth Warren (D-MA), was nominated by Senate Democratic Leader Chuck Schumer (D-NY) to serve on the Commission on April 6. On April 17, the Commission received three new members as Senate Majority Leader Mitch McConnell (R-KY), House Speaker Nancy Pelosi (D-CA), and House Minority Leader Kevin McCarthy (R-CA) named their picks—Senator Pat Toomey (R-PA), Representative Donna Shalala (D-FL),[1] and Representative French Hill (R-AR), respectively. Toomey is the former chairman of the conservative advocacy group, the Club for Growth; Shalala is a former Clinton Administration Health and Human Services Secretary; and Hill is a former George H.W. Bush Administration Deputy Assistant Treasury Secretary. The fifth member, to be appointed jointly by McConnell and Pelosi, will be the Commission's chair. In the past couple of weeks, there have been reports of McConnell's and Pelosi's exchanging names, but it is unclear how close they are to agreement.

Independently of the CARES Act oversight provisions, on April 2, Pelosi announced the creation of a new select House subcommittee to serve as an additional watchdog over the government's coronavirus spending. Called the "House Select Committee on the Coronavirus" and chaired by Rep. James E. Clyburn (D-SC), this panel will be an investigative subcommittee of the Committee on Oversight and Reform and will be modeled after the WWII-era committee chaired by then-Sen. Harry Truman. On April 23, the House finally had an opportunity to vote to formally establish the committee.

First Rounds of Document Requests

Thus far, the only tangible evidence of any oversight the CARES Act envisioned has come from Ramamurti. On April 15, he wrote a letter to the Federal Reserve Chair Jerome Powell asking for "detailed and timely information about each individual transaction" under the CARES Act. In this letter Ramamurti focused on seven lending facilities issued by the Federal Reserve with contributions from the Treasury: Primary Market Corporate Credit Facility, Secondary Market Corporate Credit Facility, Term Asset-Backed Securities Loan Facility, Money Market Mutual Fund Liquidity Facility, Commercial Paper Funding Facility, Main Street New Loan Facility, and Main Street Expanded Loan Facility. Ramamurti pointed out that, collectively, these facilities "could pump trillions of dollars into the economy through tens of thousands of individual transactions." Emphasizing the importance of informing the public which companies benefit from taxpayer-backed relief, "what exactly" they received, and "on what terms and conditions," Ramamurti made two sets of specific requests to Powell.

First, he requested that the Federal Reserve issue "regular public reports (no more than 30 days apart)" that provide, at a minimum, the following information on individual transactions through each facility under the CARES Act: (1) the borrower's identity, (2) the loan terms, (3) the stated or intended use of the proceeds, (4) the amount of supporting equity behind the deal, and (5) the full deal documents. Additionally, if applicable, Ramamurti requested any information the borrower offered to demonstrate compliance with the CARES Act's prohibition on lending to "foreign businesses and to companies controlled by top Executive Branch officials, Members of Congress, and their families."

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1 On April 22, Rep. Shalala acknowledged that, contrary to the Stock Act requirements, she failed to disclose 2019 stock sales after she was elected to Congress in 2018. Amidst calls for Rep. Shalala's removal from the Commission, on April 23, House Speaker Pelosi stated Rep. Shalala "has taken responsibility for her mistake" and has the Speaker's "complete confidence."

Second, Ramamurti requested additional information for all of these facilities, with the exception of Commercial Paper Funding Facility. For example, for Primary Market and Secondary Market Corporate Credit Facilities, he requested the bond rating and the identity of the ratings agency providing the rating; for Main Street New Loan and Expanded Loan Facilities, Ramamurti requested the identity of the bank that makes the initial loan and the text of attestation offered by the said bank and the borrower; for Term Asset-Backed Securities Loan Facility, Ramamurti seeks the underlying loan data for the securitization; and for Money Market Mutual Fund Liquidity Facility, he requested the specific collateral supporting the loan, among other things.

Government and Companies Should Take Notice

The CARES Act intends for the Commission to be Congress' primary oversight tool, tasked with overseeing the implementation of the Act by 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 is authorized to hold hearings, take testimony, and receive evidence.

With regard to documentary evidence, the CARES Act provides that "the Commission may secure directly from any department or agency of the United States information necessary to enable it to carry out" its oversight. Notably, congressional Republicans are beginning to join Ramamurti in exercising oversight. On April 16, the Federal Reserve and Treasury were reminded of their disclosure obligations by Senator Mike Crapo (R-ID), Chairman of the Senate Committee on Banking, Housing, and Urban Affairs. In a letter to the two agencies, Crapo encouraged them to "begin to collect and track the necessary data sets" to make sure they meet the disclosure deadlines under the CARES Act. Like Ramamurti, Crapo also requested details about the Federal Reserve's lending facilities.[2] On April 23, facing growing pressure, the Federal Reserve vowed to "transparency and accountability" and announced it would disclose the borrowers' names, as well as the amounts borrowed and the associated costs, fees, and revenue on a monthly basis. While this information is not as detailed as Ramamurti requested in his letter to the Federal Reserve, at least for now, in an April 23 tweet, Ramamurti called the announcement a "significant victory for the public" and a "very good step."

Additionally, the Government Accountability Office has been gearing up to exercise its own oversight over the government's COVID-19 response. According to GAO, by the end of April, at least 30 CARES Act reviews and audits are expected to be underway by its 3,000 person strong army of investigators, auditors, and analysts. The CARES Act provided an additional $20 million in funding to GAO to facilitate its oversight activities.

So, while admittedly slow to get off the ground, we are beginning to see what the robust oversight envisioned under the CARES Act will look like. Companies benefiting from any relief measures, including the various loan facilities, should take care to provide complete and truthful information

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2 Notably, on April 17, McConnell appointed Crapo to lead the Senate's oversight of the government's COVID-19 response, including the distribution of CARES Act funds.

in each submission to make sure they do not make any misrepresentations, which may result in False Claims Act claims. They should also be vigilant in complying with all loan facilities' requirements and the CARES Act provisions in order to avoid attracting the attention of the Commission, the Special Inspector General, and PRAC. And, they should learn from the experience of Harvard, Shake Shack, and other large companies facing political and public scrutiny that, even if they qualify for relief funds, it does not mean they should take them. 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. This is so because, while the CARES Act's oversight mechanisms are off to a slow start, that will likely change soon.

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