

Professional Perspective

DOJ Lacks Capacity for CARES Act Cases

*Margaret Daum, Clark Ervin, and Ben Glassman,
Squire Patton Boggs*

Reproduced with permission. Published June 2020. Copyright © 2020 The Bureau of National Affairs, Inc.
800.372.1033. For further use, please visit: <http://bna.com/copyright-permission-request/>



DOJ Lacks Capacity for CARES Act Cases

Contributed by *Margaret Daum, Clark Ervin, and Ben Glassman, Squire Patton Boggs*

Congress has established new mechanisms and further empowered existing ones to conduct oversight over the more than \$2 trillion in coronavirus-related spending since the beginning of the pandemic. If early indications are any guide, the oversight will be robust and aggressive, with numerous high-profile investigations and audits by various inspectors general (IGs) and congressional bodies.

However, despite Congress's determination to hold recipients of CARES Act funds accountable, there is likely to be a significant gap between the expected oversight activity, and the capacity of the Department of Justice to, where merited, follow up with criminal prosecution or civil action.

CARES Act Oversight by Inspectors General

The last time we faced an economic crisis of staggering proportions, namely, the 2008-2009 recession, lawmakers inserted provisions into its bailout and stimulus packages to try to minimize waste, abuse, mismanagement, and fraud. A "special" inspector general was established to oversee the distribution and use of the hundreds of billions of dollars appropriated to fund the Troubled Asset Relief Program. SIGTARP continues to this day, and, to date, its investigations have led to the conviction of nearly 400 defendants and the recovery of more than \$11 billion in misspent funds.

Similarly, in response to the injection of trillions of CARES Act dollars into the economy amid the coronavirus pandemic, a special inspector general for pandemic recovery has been created, with a \$25 million budget and a five-year term. The mandate of the SIGPR is to "conduct, supervise, and coordinate audits and investigations regarding the making, purchase, management, and sale of loans, loan guarantees, and other investments by the Secretary of the Treasury under the CARES Act and the management by the Secretary of any program established under..." that act. On April 3, the president nominated Brian Miller to be the SIGPR; he was confirmed by the Senate on June 2, 2020.

Read literally, SIGPR will focus only on the government's role in disbursing CARES Act funds and otherwise managing CARES Act programs, but in practice it's certain that SIGPR will also focus on whether recipients are entitled to receive these funds and whether they are properly spending them. Indeed, certain existing inspectors general, those of the Treasury and the Small Business Administration, are doing just that and, indeed, working with DOJ, they have already helped to bring criminal fraud charges against a number of people who improperly sought and received CARES Act money.

SIGPR is granted all the traditional powers and authorities that are given to the inspectors general of the largest federal agencies to give them stature and to encourage them to be independent and aggressive. In addition to these traditional powers and authorities, SIGPR is given additional, "special" powers to further enhance his effectiveness. There is a provision requiring the SIGPR to report to Congress "without delay" when, in his judgment, information or assistance requested by him is "unreasonably refused" or not provided.

Another special provision to enhance the power of SIGPR is the requirement that the Treasury secretary either take action to address any deficiencies identified by the SIGPR in his audit reports or that the secretary certify to the appropriate congressional committees (House Ways and Means, the House Committee on Financial Services, the Senate Finance Committee, and the Senate Banking, Housing, and Urban Affairs Committee) that no action is necessary or appropriate.

The other inspector general-related mechanism created in the CARES Act is the Pandemic Response Accountability Committee (PRAC), which is modeled on the Recovery Accountability and Transparency Board created under the American Recovery and Reinvestment Act of 2009, and which has an \$80 million budget. PRAC is a committee of 21 existing inspectors general that was created within the existing inspectors general association, namely, the Council of Inspectors General on Integrity and Efficiency. The current chair of CIGIE is DOJ's Inspector General, Michael Horowitz.

The law gives the power to the CIGIE chair to name the chair of PRAC. Horowitz named his predecessor as DOJ IG and the longtime Acting Department of Defense IG, Glenn Fine, to that position in March 2020. Fine had developed a reputation over the course of more than a decade as a notably independent and aggressive watchdog.

On April 3, 2020, President Donald Trump effectively removed Fine as chair of the PRAC by demoting him (the law requires the PRAC chair to be a confirmed inspector general or an acting one), and on May 26, Fine resigned from office. Meantime, Horowitz named himself as acting chair of PRAC, and an executive director (Robert Westbrooks, former IG of the Pension Benefit Guaranty Corporation) and deputy executive director (Linda Miller, a former Government Accountability Office official and current senior auditor at Grant Thornton) have been named to run the body on a daily basis.

The mandate of the PRAC is the traditional one of IGs: to prevent and detect fraud, waste, abuse, and mismanagement. And, distinctively, the PRAC is also to “mitigate major risks that cut across program and agency boundaries.” PRAC may conduct its own audits, investigations, and other reviews, and it may collaborate on and otherwise support the work of SIGPR and existing individual IGs. In all likelihood, it will do both. Notably, the PRAC may issue a subpoena not only to compel the production of documents (which is true for other IGs, as noted above), but the body may also subpoena contractors and grantees to provide testimony, either privately in an interview or deposition-like setting, or publicly in a congressional-like hearing.

Finally, it should be noted that the pre-existing 70+ inspectors general are not sitting idle, waiting for SIGPR and the PRAC to get up and running. Collectively, they have been given an additional \$140 million, and they are already hard at work.

Just to cite a few examples, the SBA IG is auditing the much-talked-about Payroll Protection Program (PPP), and he says that he has “dozens” of criminal fraud investigations underway. The Health & Human Services IG is auditing the Provider Relief Program that provides Covid-19-related money to hospitals. And, the Treasury IG is auditing the Air Carrier Worker Support Program that provides money to passenger airlines, cargo carriers, and their contractors to enable them to keep paying workers’ wages, salaries, and benefits.

There is likely to be competition between and among these new and old IG mechanisms, and between them and the congressional mechanisms discussed below to justify their existence and their budgets.

Oversight by Congress

The Congressional Oversight Commission is intended to be Congress's 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 is 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 U.S., 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.

To date, four members of the commission have been nominated: Bharat Ramamurti, a former staff member for Sen. Elizabeth Warren (D-Mass.); Sen. Pat Toomey (R-Pa.); Rep. Donna Shalala (D-Fla.), and Rep. French Hill (R-Ark.). The chair, to be jointly appointed by Speaker of the House Nancy Pelosi and Senate Majority Leader Mitch McConnell, has not yet been named.

The House of Representatives has also established a new investigative subcommittee of the Committee on Oversight and Reform called the Select Subcommittee on the Coronavirus Crisis. The subcommittee, which is chaired by Majority Whip Jim Clyburn (D-S.C.), has subpoena power and a broad mandate to examine any issues related to the coronavirus crisis.

The subcommittee has already begun sending letters and holding hearings. The body sent letters to five publicly-traded corporations demanding that they return PPP proceeds. Hearings have focused on topics like how to reopen the economy safely, the plight of frontline workers, and the need for more federal support for localities.

There are multiple other standing congressional committees, not to mention individual members, who are also conducting oversight related to the coronavirus and in some cases have already begun holding hearings. There will likely be oversight related to private and public sector activity during the coronavirus from every congressional committee.

And, with its additional \$20 million in funding from the CARES Act, the GAO, Congress' investigative and auditing arm, plans to focus its auditors, investigators, and other experts on conducting reviews related to the pandemic.

The congressional mechanisms and the IG mechanisms will be working closely together to further oversight. For example, members of Congress are calling up IGs to investigate a wide range of topics that they believe are ripe for review, and IG reports will no doubt be the subject of congressional hearings and those reports can lead to legislative changes.

DOJ Lack of Capacity

The significant oversight activity to be expected from the congressional and inspector general mechanisms detailed above raises the question of whether DOJ has the capacity to act on referrals for criminal prosecution or civil litigation. In certain respects, DOJ as currently configured is poorly equipped to respond to the nature and volume of work that these oversight mechanisms contemplate. A reallocation of resources within the department is, therefore, foreseeable.

To be sure, DOJ generally and individual U.S. attorneys have expressed eagerness to pursue criminal cases relating to the Covid-19 pandemic and to the fraudulent receipt or use of pandemic-related money in particular. For example, in March 2020, the attorney general directed the U.S. Attorneys' offices "to prioritize the detection, investigation, and prosecution of all criminal conduct related to the pandemic." Many U.S. attorneys have announced partnerships with state attorneys general to further that goal. As noted above, federal criminal cases relating to the coronavirus have already been brought, and many more are sure to follow.

One could argue that the cases brought to date have been based on brazen, obvious acts of fraud that require little, if any, investigative work to establish criminal intent. One can expect referrals that resemble those one sees in traditional white collar fraud matters, where there is some reason to be suspicious of facially valid paperwork and apparently legally compliant expenditures, and which therefore requires the investment of significant time and resources.

Such cases typically require extensive grand jury work to digest and understand the universe of documents associated with whatever transactions prompt suspicion and to obtain the testimony of knowledgeable witnesses. Not only is the pre-trial phase time and resource-intensive, so is the trial phase since triable issues of intent are often at the heart of the case.

Currently, DOJ is not well-positioned to handle such cases across the country because it has allocated resources to priorities other than white collar crime over the last several years. Total white collar prosecutions by U.S. attorneys' offices throughout the country reflect the shift in priorities. In 2014 there were well over 5,000 cases initiated, involving well over 8,000 defendants. By 2018 the total cases filed had declined by over 1,000 and concerned 2,000 fewer defendants.

Broad numbers like this of course do not reflect the significance of particular efforts, but they do reflect at a macro level the diminution of resources—both prosecutorial and investigative—allocated to white collar crime. Relatedly, in 2018 the department created over 300 new assistant U.S. attorney positions throughout the country and allocated them according to its then-current priorities. Meanwhile, the number of prosecutors working in the unit of the Criminal Division's Fraud Section with responsibility for corporate fraud declined.

Also, there is not currently an investigative structure designed to receive and process referrals related to suspected CARES Act malfeasance. By way of illustration, major federal criminal narcotics investigations flow through the Organized Crime Drug Enforcement Task Forces program, which organizes agents and prosecutors nationwide to focus on priority targets, manages and coordinates multi-agency efforts, and leverages intelligence across investigative platforms. Similarly, the department has established and led multi-agency health care fraud strike forces in certain cities across the country and, more recently, prescription opioid strike forces on the same model. Coordinated task forces have existed for fraud or white collar matters in the past, including, for example, the Enron Task Force, but not on a national scale.

Conclusion

In sum, there is a significant gap between the size and scope of the CARES Act and the oversight mechanisms established to monitor it, on the one hand, and the capacity of DOJ to pursue fraud-related prosecutions on the other. The unprecedented size and scale of the government funding suggest that the department will need to reorder its priorities, reallocate resources, and develop new organizational structures to meet its responsibilities.