

CARES Act Economic Stabilization Package—Oversight Mechanisms & Anti-Fraud Provisions

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was passed by Congress and signed into law by the President. The Act provides over US\$ 2 trillion in emergency aid to deal with the coronavirus pandemic, covering assistance to workers, families, small and large businesses, states and municipalities, and the healthcare system in the United States.

The largest single portion of the Act—a US\$ 500 billion Economic Stabilization package to support financial programs or facilities as well as specified industries—bears a strong resemblance to the Troubled Asset Relief Program (TARP) enacted in 2008 to support financial institutions during the subprime mortgage crisis. The Economic Stabilization package and other CARES Act programs are more targeted at Main Street and individuals, reflecting how the current crisis originates from almost all sectors of the economy, as the country goes into quarantine and shutdowns to slow the spread of the virus. Similar to the TARP, however, the Economic Stabilization package involves oversight from a Special Inspector General and a Congressional Oversight Commission (for the TARP, the body was called the Congressional Oversight Panel), both of which are granted strong audit or investigative powers, as well as specific investigative and reporting responsibilities assigned to the U.S. Comptroller General. Additionally, the Act also creates a Pandemic Response Accountability Committee under the Council of the Inspectors General on Integrity and Efficiency, granting it investigative and subpoena powers to detect fraud, waste, abuse, and mismanagement in relation to all programs under the Act and any other program that forms a part of the federal government’s coronavirus response.

This alert covers an overview of the CARES Act’s oversight mechanisms, its specific anti-fraud provisions, U.S. Department of Justice (DOJ) commitment to pursuing fraud relating to the pandemic, and what the regulated community can expect going forward. Based on the elaborate enforcement that the bill creates, the prior example of enforcement under the TARP, and statements by political actors involved with this process, we believe that aggressive enforcement and oversight are likely.

I. CARES Act Oversight Mechanisms

A. Economic Stabilization Package Oversight

The Economic Stabilization package allows up to US\$ 500 billion of loans, loan guarantees, and other investments at the discretion of the Treasury Secretary. This includes up to US\$ 25 billion appropriated for passenger air carriers, maintenance providers, and ticket agents; up to US\$ 4 billion for cargo air carriers; up to US\$ 17 billion for businesses critical to national security; and up to \$454 billion, as well any amounts not spent on the previous business, for programs or facilities established by the Federal Reserve Board of Governors for the purpose of providing liquidity to the financial system in support of lending to businesses, states, or municipalities.

1. Special Inspector General for Pandemic Recovery

The principal oversight mechanism established for the Economic Stabilization package is the Special Inspector General for Pandemic Recovery, which at § 4018 of the Act is created within the Treasury Department. Specifics of the position are as follows:

- **Appointment & Removal.** Appointment is by the President, with advice and consent of the Senate. Removal is by the President, who according to the referred provisions of the Inspector General Act of 1978 must notify both Houses of Congress of his reasons for such removal no later than 30 days before the removal takes effect.
- **Duties.** The Special Inspector General’s assigned role is to conduct, supervise, and coordinate audits and investigations into the loans, loan guarantees, and other investments made by the

Treasury Secretary under any program pursuant to the Act. Those duties can be performed by collecting and summarizing the following information:

- a description of each category of loan, loan guarantee, and other investment made;
 - a listing of the eligible businesses under each category;
 - an explanation of the Treasury Secretary's reasons for each loan or loan guarantee, including a justification of the price and other associated financial terms;
 - a list and detailed biographical information for each person hired to manage or service each loan, loan guarantee, or other investment; and
 - the total of matured and outstanding amounts of loans, loan guarantees, and other investments, as well as associated interest and fees accrued, and any losses or gains.
- Investigative Powers. The Special Inspector General is granted the power to request information or assistance from any entity of the Federal Government, and the head of that entity is obligated, to the extent practical and consistent with law, to comply. Any refusal to comply or failure to provide the requested information or assistance in a manner assessed reasonable by the Special Inspector General, is to be promptly reported by the Special Inspector General to committees of Congress.
 - Consequences of Audits. The Treasury Secretary is obligated to take action to address deficiencies identified in a report or investigation of the Special Inspector General, or certify to the Committee on Banking, Housing, and Urban Affairs of the Senate, the Committee on Finance of the Senate, the Committee on Financial Services of the House of Representatives, and the Committee on Ways and Means of the House of Representatives that no action is necessary or appropriate.
 - Personnel & Resources. The Special Inspector General has power to appoint officers and employees to assist in his or her work, to engage experts and consultants, and to enter into contracts or other arrangements for audits, studies, and other services necessary for carrying out duties of the office. US \$25 million is appropriated by the Act for his or her work.
 - Reports. The Special Inspector General is required to submit a report summarizing his or her activities to the appropriate Congressional committees within 60 days after appointment, and then quarterly thereafter.

2. Congressional Oversight Commission

The second main oversight mechanism established in connection with the Economic Stabilization package is the Congressional Oversight Commission, which is regulated by § 4020 of the Act. Details of the Commission are as follows:

- Membership. The Commission is comprised of five members, one appointed by each of the Speaker and minor leader of the House, one appointed by each of the majority and minority leaders of the Senate, and one as Chairperson appointed jointly by the Speaker of the House and majority leader of the Senate, after consultation with the minority leaders of the Senate and House. Quorum is four members.
- Role. The body's role is oversight of the Treasury Department's and Federal Reserve Board of Governors' implementation of the Economic Stabilization package.

- Investigative Powers. The Commission, any subcommittee, and any member has power to hold hearings, take testimony, and receive evidence, as well as administer oaths or affirmations. The Commission also has authority to directly obtain official data from any federal department or agency.
- Reports. The Commission is required to submit regular reports to Congress covering, among other details:
 - the Treasury Secretary’s and Federal Reserve Board of Governors’ exercise of authority over the Economic Stabilization package;
 - the impact of loans, loan guarantees, and investments on the financial well-being of individuals and the U.S. economy, financial markets, and financial institutions; and
 - the effectiveness of loans, loan guarantees, and investments made under the Economic Stabilization package of minimizing long-term costs to taxpayers and maximizing benefits for taxpayers.
- Personnel & Resources. The Commission has authority to appointment any personnel it considers appropriate, to engage the services of experts and consultants, to request secondment of personnel from any federal department or agency, and to enter into contracts to fulfill its duties. Funding for the Commission is authorized in equal shares from the applicable account of the House and the contingent fund of the Senate.

3. Comptroller General Study & Reporting Responsibilities

Under § 4026(f) of the Act, the Comptroller General of the Government Accountability Office is obligated to conduct studies of the loans, loan guarantees, and other investments provided under the Economic Stabilization package, and to submit reports on them to Congress—specifically, to the House’s Committee on Financial Services, Committee on Transportation and Infrastructure, Committee on Appropriations, and Committee on the Budget of the House of Representatives, as well as the Senate’s Committee on Banking, Housing, and Urban Affairs, Committee on Commerce, Science, and Transportation, Committee on Appropriations, and Committee on the Budget of the Senate—within nine months after the CARES Act’s enactment and then annually thereafter. The Act allocates US\$ 20 million to the Government Accountability Office primarily for audits and investigations.

B. General Mechanism—Pandemic Response Accountability Committee

Separate from the specific oversight mechanisms, the Act establishes a general Pandemic Response Accountability Committee, falling under the Council of the Inspectors General on Integrity and Efficiency, with a mandate to prevent and detect fraud, waste, abuse, and mismanagement in connection with any loans or other funds under the Act, as well as other Congressional legislation in response to the coronavirus. The Committee is established by § 15010 of the Act, which provides for details as follows:

- Membership. The Committee is comprised of the Inspectors General of the Departments of Defense, Education, Health and Human Services, Homeland Security, Justice, Labor, and the Treasury, as well as 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 involved in the coronavirus response. The Chairperson is appointed by the Chairperson of the Council of the Inspectors General on Integrity and Efficiency.
- Role & Functions. The Committee’s role is to conduct and coordinate oversight of funds and the coronavirus response, and support Inspectors General in the oversight of the same, in order to: (1) detect and prevent fraud, waste, abuse, and mismanagement; and (2) identify

major risks that cut across programs and agency boundaries. Functions of the Committee include, among others:

- auditing or reviewing covered funds;
 - reviewing whether the reporting of contracts and grants using covered funds meets applicable standards and specifies the purpose of the contract or grant and measures of performance;
 - reviewing the economy, efficiency, and effectiveness in the administration of, and the detection of fraud, waste, abuse, and mismanagement in, coronavirus response programs and operations; and
 - reviewing whether competition requirements applicable to contracts and grants using covered funds have been satisfied.
- **Investigative Powers.** The Committee is authorized to conduct independent investigations, audits, and reviews of programs relating to the coronavirus response, and to collaborate with the audits and reviews of any agency Inspector General. It is obligated to coordinate its activities with a relevant Inspector General to avoid unnecessary overlap of work, and to coordinate with the Comptroller General. The Committee is also granted subpoena power to compel testimony of persons who are not federal officers or employees and to conduct public hearings. Under its auditing powers, the Committee may conduct randomized audits to identify fraud.
 - **Reports.** The Committee is obligated to submit alerts to the President and Congress on urgent management, risk, and funding problems, as well as reports on its work at least biannually.
 - **Recommendations to Agencies.** The Committee is empowered to make recommendations to agencies on measures to prevent or address fraud, waste, abuse, and mismanagement, and to mitigate risks that cut across programs and agency boundaries, relating to the coronavirus response. Within 30 days after receipt of such recommendations, the agency is obligated to submit a report to the President and Congress as to whether the agency agrees with the recommendations and any actions to be taken to implement them.

C. Comparison with the TARP's Oversight Mechanisms

In addition to a special inspector general and Congressional oversight body, the TARP's Emergency Economic Stabilization Act of 2008 (EESA) established a Financial Stability Oversight Board—comprised of the heads of the Federal Reserve, Treasury, Federal Housing Finance Agency, SEC, and Department of Housing and Urban Development—to monitor the TARP's operation, watch for fraud and misrepresentation, and make recommendations to the Treasury. Though not directly parallel to the CARES Act's Pandemic Response Accountability Committee (it involved appointees more narrowly focused on financial system regulation, reflecting the then nature of subprime mortgage crisis), it was in any event a third specific oversight body with a purview for monitoring fraud and abuse. As to the Comptroller General's duties under both Acts, it is of note that under EESA his or her duties were more detailed and Congressional reporting obligations more frequent (at least once every 60 days in connection with the TARP activities and performance, as well as annual audit statements).

To place the similarities in context, Neil Barofsky—the first Special Inspector General appointed for the TARP—in a March 27, 2020 interview with the *The National Law Journal*, stated, “when you look at the primary oversight bodies for the Treasury fund, which is about \$500 billion of the overall package, it's pretty much a direct lift-out from the TARP legislation.”²¹

II. CARES Act's Specific Anti-Fraud Provisions

The Act contains no anti-fraud provisions specifically in connection with the Economic Stabilization package, though the sections relating to the Pandemic Response Accountability Committee do, as outlined above, contain general anti-fraud investigative powers that apply to all programs. This legislative approach is broadly similar to the EESA. There were two anti-fraud provisions in that Act: it granted the Financial Stability Oversight Board authority to report suspected fraud, misrepresentation, or malfeasance to the Special Inspector General for the TARP and U.S. Attorney General; and it also contained a provision obligating all federal financial regulatory agencies to cooperate with the FBI and other law enforcement agencies in investigating fraud, misrepresentation, and malfeasance in connection with the development, advertising, and sale of financial products.

Beyond the Economic Stabilization package, the CARES Act contains a few specific anti-fraud provisions relating to certain of its other programs:

- **Liability for Fraud in Connection with Unemployment Compensation.** Various sections of the Act regulating emergency unemployment compensation contain anti-fraud provisions which stipulate that knowingly making a false statement or failing to disclose a material fact in connection with an application, will subject an ineligible person to a prohibition on receipt of any further emergency unemployment compensation, potential criminal prosecution, as well as government clawback. Specifically, these provisions are located at:
 - Section 2104(f) relating to an emergency increase in unemployment compensation,
 - Section 2105(f) relating to temporary full federal funding of the first week of compensable regular unemployment for states with no waiting week, and
 - Section 2107(e) relating to pandemic emergency unemployment compensation.
- **Waiver of Liability in Connection with Direct Payments to Individuals and Families, Except in Cases of Fraud (and Reckless Neglect).** A section of the Act regulating direct payments to individuals and families in the form of tax rebates contains at § 2201(f) an amendment to the Internal Revenue Code waiving liability for payment of advance rebates and credits, except in cases of fraud or reckless neglect.
- **Medicare Hospital Accelerated Payment Program Anti-Fraud Safeguards.** A section of the Act regulating expansion of the Medicare hospital accelerated payment program—specifically, § 3719—contains an amendment to the Social Security Act, which states that Secretary of Health and Human Services should provide accelerated payments to qualifying hospitals, subject to appropriate safeguards against fraud, waste, and abuse.

III. U.S. Department of Justice Commitment to Continued Focus on Fraud Relating to the Pandemic

Prior to passage of CARES Act, on March 16, 2020, the U.S. Attorney General William Barr sent a memorandum to all U.S. Attorneys asking them to remain vigilant in detecting, investigating, and prosecuting wrongdoing related to the crisis, specifically identifying the issue of fraud.ⁱⁱ On March 23, the DOJ also released a coronavirus information webpage, which indicates that it will continue to rely upon the National Center for Disaster Fraud run from its Criminal Division in partnership with various law enforcement and regulatory agencies across the country as a national coordinating agency, in order to detect and prosecute fraud.ⁱⁱⁱ

Individual U.S. Attorneys are also following suit. Following release of Attorney General Barr's memorandum, numerous U.S. Attorney offices have issued specific releases warning the public about the

growing number of fraud schemes associated with the coronavirus, including the touting of fake cures, other healthcare frauds, cyber-enabled fraud, identity fraud, and securities fraud. The public has been requested to be wary and report these schemes to law enforcement authorities.

It should be noted that healthcare fraud has been an enforcement priority for DOJ in recent years. This may be best illustrated by the fact that over half of the recoveries in fiscal year 2019 under the False Claims Act were from drug companies and healthcare service providers.^{iv} This enforcement focus can be expected to continue in the context of the healthcare system aid provisions of the CARES Act.

IV. What the Regulated Community Can Expect

Regulatory developments that followed the TARP in 2008—especially the activities of the Office of Special Inspector General for the TARP—perhaps give us the best indication of how enforcement of the CARES Act may play out.

A. Takeaways from the First Special Inspector General for the TARP

The first Special Inspector General for the TARP, Neil Barofsky, was appointed in December 2008, and by the time of his resignation in February 2011:^v

- His Office had grown to a size of 140 staff, including auditors, investigators, attorneys, and other professionals, with a dedicated head office in Washington D.C. as well as field offices in New York, San Francisco, Los Angeles, and Atlanta.
- Office investigations during his tenure had led to criminal conviction of 14 individuals for fraud, more than US\$ 550 million in fraud losses avoided, and the recovery of over US\$ 150 million.¹
- His Office was responsible for the first conviction for fraud against the TARP, a prosecution of Charles Antonucci, Sr., the president and CEO of The Park Avenue Bank, for attempting to defraud the TARP of US\$ 11 million by causing the bank to issue false “round-trip loans” to entities affiliated with him, which funds he then transferred back to the bank and falsely represented to TARP administrators as recapitalization investments he had personally made.^{vi}
- Another signal case his Office investigated led to the prosecution and criminal conviction of Lee Farkas, the former Chairman of mortgage lending company Taylor, Bean & Whitaker, whose US\$ 2.9 billion fraud scheme perpetrated over 2002-2009 contributed to the bankruptcies of Colonial BancGroup and Taylor, Bean & Whitaker in 2009.^{vii}

In his March 27, 2020 interview with *The National Law Journal*, Barofsky noted the following takeaways:^{viii}

- Whereas the TARP involved a finite number of banks as primary beneficiaries, for the CARES Act’s Economic Stabilization package, the potential number of recipients is immense, which will make oversight more complicated. An oversight entity will not be able to look at every loan, and therefore its work will be more process-oriented than individual institution-oriented. The new Special Inspector General and Oversight Commission will have to spend more time on process to ensure fairness and limit opportunities for abuse.

¹ The Office of Special Inspector General for the TARP is still open, and as December 31, 2019, its investigative work has led to enforcement actions against 24 financial institutions, the conviction of 381 individuals, and recovery of US\$ 11 billion to the U.S. Government. Office of the Special Inspector General for the Troubled Asset Relief Program, WWW.SIGTARP.GOV (last visited Mar. 30, 2020), <https://www.sigtar.gov/Pages/Home.aspx>.

- The CARES Act’s bailout will trigger many legal issues. While Special Inspector General for the TARP, his Office initiated a large amount of investigative work and Barofsky believes the new Special Inspector General will be triggering a similarly large number of investigations. Further, the government will have to bring out a raft of new regulations and policies, which in turn will need to be analyzed. Companies will need assistance in making their applications for assistance, and they will also need to ensure that their compliance regimes are up to standard to deal with whatever requirements the government announces.
- Barofsky also noted that the legislation is incomplete insofar as giving the new Special Inspector General and other oversight bodies a chance to succeed. He anticipates that many of the mechanical and infrastructure questions will have to be addressed by Congress “pretty quickly.” Indeed, after passage of the EESA in late 2008, in May 2009 Congress enacted the Fraud Enforcement and Recovery Act (FERA), providing for an injection of funds for anti-fraud enforcement and strengthening of several financial fraud statutes.^{ix}

Given the relative size of the CARES Act in comparison to the TARP, it is likely that the enforcement efforts that follow its enactment will be more comprehensive and longer-lasting.

B. Potential Political Impacts on Oversight

In a statement released by the President in connection with his signing of the CARES Act on March 27, 2020, the President stated that his Administration intends to limit various provisions of the Act relating to oversight, for instance:^x

- In relation to the Pandemic Response Accountability Committee, and the Act’s requirement for the Chairperson of the Council of the Inspectors General on Integrity and Efficiency to consult with Congress regarding the selection of the Committee’s Executive Director and Deputy Executive Directive, the President stated that he intends to treat this requirement as advisory and not mandatory, on grounds that it violates the separation of powers.
- In relation to the Special Inspector General for Pandemic Recovery’s authority to request information from other government agencies, and the Act’s requirement that the Inspector General report to Congress “without delay” any refusal of such a request that in his or her judgment is unreasonable, the President has stated that his Administration will not treat this provision as allowing the Inspector General to issue reports to Congress without presidential supervision, pursuant to the Take Care Clause of the Constitution.

Commentators have noted that the signing statement is an early indication from the White House that the Trump Administration may seek to aggressively cabin or otherwise guide the activities of the Special Inspector General and the Pandemic Response Accountability Committee—arguing they fall under Executive and not Congressional control. Countermanding pull between Congress and the President is therefore to be expected, as has already been indicated in a press release on March 26 from the Chairwoman of the House’s Committee on Oversight and Reform, Rep. Carolyn Maloney, which commends the oversight mechanisms in the then draft Act.^{xi}

Political impetus for oversight may also change depending on the outcome of the November presidential election. Democratic presidential candidate Joe Biden on March 25 issued a statement calling for “meticulous oversight” of the package.^{xii} Previously, leading Democrats in Congress such as Senate minority leader Chuck Schumer also pushed for establishment of independent oversight mechanisms similar to TARP as part of their agreeing to support the CARES Act, after an initial version of the bill moved by Republicans left oversight powers primarily to the Treasury Secretary.^{xiii}

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Sam Williamson

Email: samwilliamson@quinnemanuel.com

Phone: +1 212 849 7455

Christopher Tayback

Email: christophertayback@quinnemanuel.com

Phone: +1 213 443 3170

Kristin Tahler

Email: kristintahler@quinnemanuel.com

Phone: +1 213 443 3615

Christopher Porter

Email: chrisporter@quinnemanuel.com

Phone: +1 713 221 7007

Jonathan Bunge

Email: jonathanbunge@quinnemanuel.com

Phone: +1 312 705 7476

Mike Lyle

Email: mikelyle@quinnemanuel.com

Phone: +1 202 538 8166

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ⁱ C. Ryan Barber, “It’s Going to Be Extraordinary”: Predictions and Advice from Neil Barofsky for Coronavirus Recovery Oversight, THE NATIONAL LAW JOURNAL (Mar. 27, 2020), <https://www.law.com/nationallawjournal/2020/03/27/its-going-to-be-extraordinary-predictions-and-advice-from-neil-barofsky-for-coronavirus-recovery-oversight/>.

ⁱⁱ U.S. Att’y Gen., Memorandum for All United States Attorneys: COVID-19 – Department of Justice Priorities, OFFICE OF THE ATT’Y GEN. (Mar. 16, 2020), <https://www.justice.gov/ag/page/file/1258676/download>.

ⁱⁱⁱ Coronavirus (COVID-19), DEP’T OF JUSTICE (last visited Mar. 30, 2020), <https://www.justice.gov/coronavirus>.

^{iv} Justice Department Recovers over \$3 Billion from False Claims Act Cases in Fiscal Year 2019, DEP’T OF JUSTICE (Jan. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>.

^v Letter from Neil M. Barofsky to President Barack Obama (Feb. 11, 2011).

^{vi} Elkan Abramowitz and Barry A. Bohrer, *Prosecutions Arising Out of Troubled Asset Relief Program*, N.Y.L.J. (Nov. 2, 2010); *Former President of The Park Avenue Bank Sentenced to 30 Months in Prison for Role in Fraud of Government Relief Funds, Self-Dealing, Bank Bribery, Embezzlement of Bank Funds, and Fraud Involving an Insurance Company*, DEP’T OF JUSTICE (Aug. 20, 2015), <https://www.justice.gov/usao-sdny/pr/former-president-park-avenue-bank-sentenced-30-months-prison-role-fraud-government>.

^{vii} *Former Chairman of Taylor, Bean & Whitaker Convicted for \$2.9 Billion Fraud Scheme That Contributed to the Failure of Colonial Bank*, DEP’T OF JUSTICE (Apr. 19, 2011), <https://www.justice.gov/opa/pr/former-chairman-taylor-bean-whitaker-convicted-29-billion-fraud-scheme-contributed-failure>.

^{viii} Barber, *supra* note i.

^{ix} Abramowitz and Bohrer, *supra* note vi.

^x Statement by the President, WHITE HOUSE (Mar. 27, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/>.

^{xi} Carolyn B. Maloney, *Coronavirus Package Includes Oversight and Accountability Measures*, COMMITTEE ON OVERSIGHT AND REFORM (Mar. 26, 2020), <https://oversight.house.gov/news/press-releases/coronavirus-package-includes-oversight-and-accountability-measures>.

^{xii} Joe Biden, *Joe Biden delivers remarks on the impact of the Coronavirus on Young Americans*, YOUTUBE (Mar. 25, 2020), <https://www.youtube.com/watch?v=JfBVHeZkVFs>; Alexandra Jaffe and Bill Barrow, *Biden calls for “meticulous oversight” of virus aid package*, ABC4 NEWS (Mar. 26, 2020), <https://abcnews4.com/news/nation-world/biden-calls-for-meticulous-oversight-of-virus-aid-package>.

^{xiii} Emily Cochrane and Nicholas Fandos, *Democrats Near Deal with White House on Stimulus Package*, THE NEW YORK TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/us/politics/coronavirus-stimulus-bill.html>.