

## Caring for the CARES Act: The New Oversight and Investigations Landscape for COVID-19 Relief Programs

***Economic aid legislation will likely result in increased scrutiny of certain industries, similar to investigations that followed relief efforts in the 2008 financial crisis.***

### Key Points:

- The CARES Act creates multiple new oversight mechanisms for funds provided in connection with its programs, which can be expected to lead to significant investigation activity for those industries set to receive funds.
- Examining oversight mechanisms of government funds associated with the 2008 financial crisis provides insight into how investigative authorities may examine disbursement and use of CARES Act funds.
- Similar relief efforts by governments in other countries may lead to enhanced scrutiny as well.

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) became law. It provides more than US\$2 trillion in emergency relief to address the financial upheaval created by the COVID-19 pandemic and is the largest stimulus package in US history. The CARES Act establishes multiple new oversight bodies with respect to this spending in both the Executive and Legislative branches, which will supplement existing law enforcement mechanisms. These oversight processes will likely generate significant investigation activity in the months and years ahead, targeting fraud, waste, and abuse across the CARES Act's programs and various sectors of the economy.

This *Client Alert* provides an overview of the new oversight mechanisms, compares them to similar oversight efforts from the US\$700 billion Troubled Asset Relief Program (TARP) of 2008, and outlines best practices for companies participating in CARES Act programs to prepare for the new landscape of government investigations and public scrutiny. This *Alert* concludes with an overview of similar relief programs in other countries and the potential for enhanced scrutiny in those jurisdictions.

### Overview of the CARES Act

The CARES Act provides more than US\$2 trillion in emergency relief to individuals, businesses, and hospitals. The relief includes a large number of benefits to businesses through a combination of tax breaks (approximately US\$280 billion) and federally backed loans and grants (approximately

US\$880 billion). Title IV of the CARES Act (titled Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy) includes numerous provisions that provide relief to airlines, financial institutions, and other sectors critical to national security, and also sets aside roughly US\$500 billion in loans and other funding for corporations in these and other impacted industries. Additional measures in the CARES Act provide relief for workers and businesses generally, including by streamlining and increasing access to Small Business Administration (SBA) loans, providing tax credits to employers, and delaying certain income and payroll tax payments. The CARES Act also increases funding and regulatory flexibility for healthcare providers, providing US\$150 billion for states and local governments to respond to the pandemic, and another US\$100 billion for eligible healthcare providers.

To see more Latham & Watkins thought leadership on the CARES Act, click [here](#).

## Oversight Mechanisms for CARES Act Funds

The CARES Act sets forth three new mechanisms for oversight of funds provided in connection with the legislation:

- The Special Inspector General for Pandemic Recovery
- The Pandemic Response Accountability Committee
- The Congressional Oversight Commission

In addition, House Speaker Nancy Pelosi has announced the possible formation of a House Select Committee on the Coronavirus Crisis that may also provide oversight of funds received in connection with the CARES Act. These new oversight bodies supplement existing civil and criminal enforcement mechanisms, including Department of Justice (DOJ) enforcement of federal fraud statutes, and the mandates of financial regulators and other agencies to investigate and oversee activities within their respective areas of authority. For example, given the numerous relief provisions relating to federal tax rules, the Internal Revenue Service (IRS) has announced that it will aggressively investigate fraud associated with claims for CARES Act tax benefits.<sup>1</sup>

The following section provides a roadmap of the new oversight mechanisms created by the CARES Act, together with additional government authorities that may also apply to CARES Act programs. (For a condensed summary of the CARES Act oversight mechanisms, see the Appendix.)

### Special Inspector General for Pandemic Recovery

The Special Inspector General for Pandemic Recovery (SIGPR) is charged with conducting, supervising, and coordinating audits and investigations into the “making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury” under the CARES Act.<sup>2</sup> The SIGPR has a total budget of US\$25 million<sup>3</sup> and broad authority, including under the powers and duties set forth in the Inspector General Act of 1978, to undertake investigations without the Secretary’s approval, including issuing subpoenas, as well as making arrests and seeking arrest and search warrants without first obtaining authorization from the Attorney General.<sup>4</sup> The SIGPR can also refer matters to the DOJ or other agencies for prosecution. The CARES Act provides for the SIGPR to operate for five years, terminating on March 27, 2025.<sup>5</sup>

The SIGPR must submit quarterly reports to Congress, as well as report to Congress any instances when information it seeks has been unreasonably refused or denied.<sup>6</sup> In his signing statement, however, President Donald Trump indicated that his administration does not believe this requirement permits the

SIGPR to issue reports to Congress without “presidential supervision,” setting up the possibility of a future dispute over the SIGPR’s reporting duties.<sup>7</sup>

The role of the SIGPR requires appointment by the President, with the advice and consent of the Senate, of a candidate with integrity and demonstrated ability in auditing, accounting, financial analysis, law, management, public administration, or investigations.<sup>8</sup> On April 6, 2020, President Trump nominated White House lawyer Brian D. Miller to serve as the SIGPR.<sup>9</sup> Miller previously served for nearly 10 years as the Inspector General of the General Services Administration.<sup>10</sup>

### **Pandemic Response Accountability Committee**

The Pandemic Response Accountability Committee (Committee) has oversight of all funds appropriated under the CARES Act, as well as any past or future COVID-19-related measures. It has broad authority to conduct investigations and audits aimed at preventing and detecting fraud, waste, abuse, and mismanagement, including as to private entities.<sup>11</sup> For example, the Committee can hold public hearings<sup>12</sup> and issue subpoenas (including for testimony of individuals in or outside the government).<sup>13</sup> The CARES Act also grants the Committee powers and duties set forth in the Inspector General Act of 1978, such as the power to make arrests and seek arrest and search warrants.<sup>14</sup> In addition, the Committee can refer matters to the DOJ for criminal or civil investigation.

The Committee was established to operate within the Council of Inspectors General on Integrity and Efficiency (Council), whose nine members (excluding the chair) will consist of the inspectors general of various federal agencies, including the Departments of Defense, Justice, and the Treasury.<sup>15</sup> While the Council selected Glenn Fine to chair the Committee on March 30, 2020, President Trump recently removed Fine from his position as acting Inspector General for the Pentagon, rendering him ineligible to chair the Committee.<sup>16</sup> The Council must also select an executive director (within 30 days) and a deputy executive director (within 90 days), in consultation with Congress.<sup>17</sup>

The Committee must submit semiannual reports to Congress.<sup>18</sup> It must also inform the appropriate congressional committees if requested information or assistance is “unreasonably refused or not provided.”<sup>19</sup> The CARES Act appropriates US\$80 million for the Committee’s operations, plus almost US\$120 million in additional funding to inspector general offices at agencies included in the Committee.<sup>20</sup> The Committee will operate for five and a half years, terminating on September 30, 2025.<sup>21</sup>

### **Congressional Oversight Commission**

The Congressional Oversight Commission (Commission) is charged with supervising the government’s implementation of Title IV of the CARES Act and assessing the effectiveness of congressional efforts to provide economic stability in light of the pandemic.<sup>22</sup> The Commission has authority to take testimony, hold hearings, and otherwise receive evidence as it deems appropriate.<sup>23</sup> The Commission will include five members, including a chair chosen by the majority and minority leaders of both houses of Congress, and it must report to Congress every 30 days.<sup>24</sup> The Commission does not have a set budget. Like the Committee, the Commission will terminate on September 30, 2025.<sup>25</sup>

### **House Select Committee on the Coronavirus Crisis**

On April 2, 2020, Speaker Pelosi announced the possible formation of the House Select Committee on the Coronavirus Crisis (House Select Committee), an oversight body that would be distinct and separate from the Congressional Oversight Commission created by the CARES Act.<sup>26</sup> The House Select Committee’s purpose would be to “ensure that the over US\$2 trillion that Congress has dedicated to this battle — and any additional funds Congress provides in future legislation — are spent wisely and

effectively.”<sup>27</sup> The House Select Committee would be “empowered to examine all aspects” of the federal COVID-19 response and have subpoena power to carry out its oversight duties.<sup>28</sup> Speaker Pelosi stated that the House Select Committee would be bipartisan and chaired by House Majority Whip Jim Clyburn.<sup>29</sup>

### Existing Law Enforcement Authorities

In addition to the oversight mechanisms described above, several federal agencies may be able to pursue fraud-related civil and criminal proceedings against individuals and entities believed to have engaged in misconduct in the course of receiving funds under the CARES Act.

For example, the DOJ may use existing wire and mail fraud statutes to prosecute defendants who allegedly engaged in fraud to receive CARES Act funds. In fact, the DOJ has already filed a wire fraud action against a company allegedly engaged in fraud related to COVID-19 vaccine kits.<sup>30</sup> Though this action was not specifically tied to the CARES Act, the DOJ will likely bring similar wire or mail fraud actions against businesses receiving funds under the CARES Act. The DOJ has indicated that investigating and prosecuting COVID-19-related fraud is a top priority, and the Attorney General and Deputy Attorney General have encouraged whistleblowers to report COVID-19-related fraud and have directed all US Attorneys to appoint special coordinators to focus on identifying, investigating, and prosecuting COVID-19-related fraud.<sup>31</sup>

The Securities and Exchange Commission (SEC) also has several enforcement mechanisms that it may use to bring actions against public companies and financial institutions that it believes have engaged in misconduct related to their activities involving receipt of CARES Act funds, including actions based on accounting fraud, misrepresentations in public filings, or other matters. Moreover, a number of industry-specific regulators, such as the Department of Health and Human Services, the Food and Drug Administration, the Department of Education, and the Department of Transportation, may use their regulatory authority to examine industry-specific businesses that receive CARES Act funds.

In addition, the federal government and private individuals have historically used the False Claims Act (FCA) to investigate and litigate actions against companies receiving money from the government. Such claims typically involve allegations that an entity submitted false statements or certifications to the government in exchange for payment. The FCA provides the government with broad investigatory powers and deputizes private individuals and entities to act as whistleblowers who pursue claims on behalf of the government (and such whistleblowers may collect a share of the recovery).<sup>32</sup> The FCA imposes steep financial consequences for companies and individuals found liable for violations, including treble damages and civil penalties between US\$11,665 and US\$23,331 per false claim.<sup>33</sup> In 2019, the government recovered more than US\$3 billion in civil settlements and judgments from defendants under the FCA.<sup>34</sup> That same year, the government initiated 146 new FCA cases, while private individuals brought 636 new FCA cases, known as *qui tam* actions.<sup>35</sup> (By law, the government must investigate the allegations in the underlying *qui tam* case.) Given that FCA actions are often filed by former employees, the economic downturn and resulting layoffs may result in a marked increase in *qui tam* suits. In addition, FCA violations can lead to criminal prosecution and/or suspension and debarment proceedings, which can preclude a company from receiving government contracts for three years.

Further, the CARES Act provisions focusing on tax relief are likely to lead to audits and criminal tax enforcement by the IRS. In addition to providing an estimated US\$290 billion in direct relief to taxpayers in the form of tax rebates, the CARES Act also provides tax relief by loosening caps on interest deductions and operating losses (approximately US\$210 billion), offering payroll tax credits for businesses that retain workers at a loss (approximately US\$55 billion), and allowing employers to delay their 2020 payroll tax payments to 2021 and 2022 (approximately US\$12 billion), among other provisions.

Given the substantial dollar value of the tax-related relief, as well as the IRS' expedited approach to allowing tax refund claims and making advance payments to employers that anticipate claiming tax credits, the IRS is expected to significantly step up its enforcement focus in this area to prevent fraud. However, its efforts may be complicated by the recent depletion of the IRS workforce,<sup>36</sup> as well as the impending cascade of expedited income tax refund claims and the delayed filing of 2019 tax returns to the new July 15, 2020, deadline. Since the IRS may not be able to scrutinize all filings up front — and the CARES Act prioritizes getting relief funds out into the system expeditiously — there may be more pointed retrospective scrutiny of claims by the IRS long after those claims were made. Enforcement is likely to be handled through civil examinations by the IRS and, in some instances, criminal investigations by the IRS Criminal Investigation division.

## Comparisons to 2008 Financial Crisis Oversight

Like the CARES Act, the Emergency Economic Stabilization Act (EESA) of 2008 — which was passed in response to the 2008 financial crisis and established TARP — included several oversight mechanisms, the most notable of which was the Special Inspector General for the Troubled Asset Relief Program (SIGTARP). The role of the SIGPR under the CARES Act seems to have been based in large part on the SIGTARP structure. Thus, looking to the work of the SIGTARP may serve as a helpful guide to understanding how government oversight under the CARES Act may function.

After more than 10 years in operation, the SIGTARP has generated a significant amount of investigative activity and enforcement referrals. The SIGTARP's focus has been the banks and financial institutions that were recipients of TARP funds. To date, the SIGTARP's audits and investigations have resulted in enforcement actions against 24 institutions and convictions of more than 380 individual defendants — 300 of whom received prison sentences — for bank fraud, securities fraud, mortgage fraud, money laundering, and other offenses. Between December 2008 and December 2019, the SIGTARP recovered US\$11 billion in penalties and restitution, including US\$900 million in fiscal year 2019 alone. Today, the SIGTARP is still actively investigating and referring matters for criminal prosecution.

The wide variety of conduct subject to criminal prosecution and enforcement actions demonstrates the SIGTARP's expansive reach. Not all of the SIGTARP's investigations and enforcement actions were ultimately related to the actual receipt of TARP funds. The SIGTARP also pursued some offenses that it uncovered in the process of evaluating TARP applications and certifications. Prominent SIGTARP matters have included:

- Investigation of executives at a bank that received US\$330 million in TARP funds for allegedly making the bank appear healthier than it was by concealing the total quantity of past-due loans on its books
- Investigation of a bank that allegedly made material misrepresentations to homeowners applying for lower interest rates under the Home Affordable Modification Program, which was established in 2009 to help homeowners during the financial crisis
- Prosecution of a bank's CEO for defrauding the bank's shareholders and misleading regulators, resulting in various fines and a 132-month prison sentence; the SIGTARP brought the prosecution in conjunction with the FBI's Omaha Division, the US Attorney's Office for the District of Nebraska, and the DOJ's Criminal Division

- Investigation of an alleged 10-year fraud at a mortgage lender that involved submitting false financial information to, and overdrawing on, the lender's bank; although the fraud had no direct relationship with TARP, the SIGTARP uncovered it after the bank applied for TARP funds

The SIGTARP had a larger budget than that allocated to the SIGPR, with US\$50 million initially allocated to the former and US\$25 million to the latter. But one should not assume that the SIGPR's lower budget will mean that government oversight of CARES Act funds will be less intensive. If the SIGPR follows in the footsteps of the SIGTARP, then it is likely to harness its limited resources by working closely with the DOJ, the SEC, the IRS, and other federal agencies, as well as state authorities, in conducting investigations. Also, the SIGTARP's budget was renewed over the years, and it received funding from other government sources,<sup>37</sup> which may also happen with the SIGPR over time.

Moreover, the Committee will undertake some of the CARES Act oversight that the EESA delegated to the SIGTARP. With US\$80 million of its own funding and similar investigative authority, the Committee may play a significant role in oversight of CARES Act funds. It remains to be seen whether the Committee and the SIGPR will work collaboratively to amplify each other's mandates, or if they will pursue separate agendas and potentially even compete in their oversight efforts.

The 2008 financial crisis and TARP also provide insights on the use of the FCA, as the federal government and private individuals used the FCA aggressively to target fraud related to the housing and mortgage crisis and government aid programs. For example, in 2014, the government obtained a record-setting US\$3.1 billion from settlements with financial institutions related to federally backed mortgages.<sup>38</sup> Other fraud-related FCA actions stemming from the 2008 financial crisis and TARP<sup>39</sup> included the DOJ's pursuit of criminal charges against individuals implicated in fraudulent schemes.<sup>40</sup> Today the government and private individuals are likely to use the FCA similarly to investigate and litigate actions against companies receiving government funds under the CARES Act.

## Potential Targets for Oversight Scrutiny Under the CARES Act

Just as the financial services industry was subject to enhanced oversight by the SIGTARP and other bodies in the years following the 2008 financial crisis, those industries receiving funds and participating in programs under the CARES Act across various sectors of the economy can expect scrutiny as they seek, receive, and deploy relief funds. Indeed, given the broad oversight mandates of the SIGPR, the Committee, and the Commission (as well as the House Select Committee), even companies that do not directly receive federal funds, but interact with those that do, could come within this oversight scrutiny.

The following industries are poised to receive large amounts of funds under the CARES Act, which may trigger heightened oversight attention in the years to come.

### Healthcare

Among other relief measures, the CARES Act appropriates US\$100 billion for the Public Health and Social Services Emergency Fund to reimburse healthcare providers for healthcare expenses or lost revenues attributable to COVID-19.<sup>41</sup> The appropriation allows funds to be used on a pre-paid, prospective, or retrospective basis for surge capacity, construction of temporary structures, retrofitting facilities, property leases, supplies and equipment (including personal protective equipment), and testing supplies, as well as increased workforce and training.<sup>42</sup> Eligible healthcare providers include public, for-profit, and nonprofit entities that "provide diagnoses, testing, or care for individuals with possible or actual cases of COVID-19."<sup>43</sup> For more information, see Latham's *Client Alert* [Expanded Medicare Payment Policy and CARES Act Provide Financial Relief for Healthcare Providers and Suppliers](#).

## Air Carriers and Businesses Critical to National Security

The CARES Act allocates certain funds for air carriers and other businesses critical to maintaining national security. Specifically, it provides for almost US\$50 billion in loans and loan guarantees, including (i) up to US\$25 billion for passenger air carriers, ticket agents, and certain other air-carrier-related businesses; (ii) up to US\$4 billion for cargo air carriers; and (iii) up to US\$17 billion for businesses critical to maintaining national security.<sup>44</sup> The CARES Act also provides more than US\$30 billion in additional financial assistance to passenger air carriers, cargo air carriers, and airline contractors to be used exclusively for the continuation of payment of employee wages, salaries, and benefits to employees.<sup>45</sup> For more information, see Latham's *Client Alert* [FAQs: Loan Programs for Larger Businesses Under Title IV of the CARES Act](#).

## Financial Services

The CARES Act relies heavily on financial institutions to implement its loan and loan guarantee programs. For example, it provides that the Secretary of the Treasury should encourage the Federal Reserve to establish a program to provide financing to banks and other lenders to make direct loans.<sup>46</sup> The CARES Act also expands SBA lending, and envisions that banks will play a significant role in distributing these funds, by providing authority to the Secretary of the Treasury and the SBA Administrator to authorize additional lenders to disburse funds.<sup>47</sup> Even banks that have not previously participated in the SBA's general business loan (7(a) loans) program are eligible to participate in the Paycheck Protection Program (PPP) under the CARES Act.<sup>48</sup> While the SBA's interim rule regarding the PPP indicates that lenders "will be held harmless for borrowers' failure to comply with program criteria," lenders administering the PPP loans are nonetheless responsible for reviewing borrowers' applications and verifying the eligible loan amount based on documentation the borrower submits.<sup>49</sup> Such provisions relating to liability may shape the types of investigations the government may pursue in regard to financial services companies.

## Higher Education

The CARES Act provides US\$14.25 billion for public and private universities to cover costs associated with their closure or significant changes to the delivery of instruction due to COVID-19.<sup>50</sup> Institutions must use 50% of funds received under this program to provide emergency financial aid grants to students for expenses related to the disruption of campus operations. The CARES Act prohibits institutions from using the funds for payments to contractors providing pre-enrollment recruitment activities, endowments, or capital outlays for facilities related to athletics, sectarian instruction, or religious worship.<sup>51</sup>

## Food and Agriculture

The CARES Act provides US\$49 billion for the food and agriculture sector, including funding for crop and livestock producers, nutrition assistance, and support for local producers. This includes a US\$9.5 billion disaster relief program within the Department of Agriculture to provide "support for producers impacted by the coronavirus,"<sup>52</sup> as well as US\$14 billion to increase the borrowing authority of the Farm Bill's Commodity Credit Corporation, which funds specialty programs such as Price Loss Coverage, Dairy Margin Coverage, and the Market Facilitation Program.<sup>53</sup>

## Supply Chain and Logistics

The CARES Act provides broad funding for businesses that supply products and services that support the federal government's response to the pandemic. This includes US\$1 billion for purchases under the Defense Production Act, which could be relevant to companies involved in supply chain and logistics for a number of industries.<sup>54</sup> Such funding is in addition to funding earmarked for the medical device manufacturing supply chain and air transportation.

## Small and Mid-Sized Businesses in All Industries

The CARES Act makes more than US\$350 billion available to eligible small business concerns to streamline and increase their access to the SBA's 7(a) loans under the PPP and economic injury disaster loans (EIDLs) and related grants.<sup>55</sup> These loan programs are only available to certain eligible businesses that qualify as small — typically businesses with fewer than 500 employees, although the CARES Act provides certain exceptions.<sup>56</sup> In determining size, the CARES Act and related guidance still require businesses to comply with the SBA's affiliation rules, which require businesses to calculate the number of employees by taking into account the employees of the business and the employees of its affiliates. In applying for SBA loan programs under the CARES Act, businesses certify that they are eligible and meet the size restrictions of these programs. The PPP also requires applicants to make a number of other certifications regarding the need for the loan funds, the accuracy and truthfulness of information submitted with the loan application, and the use of funds. For more information, see Latham's *Client Alert* [FAQs: Small Business Loans Under the CARES Act](#).

The CARES Act also made more than US\$454 billion available for programs or facilities to be established by the Board of Governors of the Federal Reserve System (Federal Reserve).<sup>57</sup> The Federal Reserve recently announced details regarding the terms and conditions of two Main Street lending facilities to support small and mid-sized businesses that were "in good financial standing" prior to the pandemic, which will be funded by a portion of the US\$454 billion.<sup>58</sup> Additional programs or facilities may be established in the months ahead. For more information, see Latham's *Client Alerts* [FAQs: Loan Programs for Larger Businesses Under Title IV of the CARES Act](#) and [FAQs: Federal Reserve's Main Street Lending Facilities for Small and Mid-Sized Businesses](#).

## Private Equity and Venture Capital Firms and Portfolio Companies

Members of Congress, including Speaker Pelosi, have suggested that private equity and venture capital-backed businesses should be eligible to receive CARES Act funds.<sup>59</sup> Exactly which funds may be available to these types of businesses, however, has been hotly debated both pre- and post-CARES Act, with the debate in large part focused on what requirements these types of businesses would have to meet to satisfy eligibility requirements for certain loan programs. While most private equity and venture capital-backed businesses are not currently specified as recipients of CARES Act funds, they could be poised to receive funds from CARES Act programs, including (i) the approximately US\$350 billion set aside for loans to small businesses,<sup>60</sup> depending on their eligibility under applicable affiliation rules, and (ii) the US\$454 billion set aside for programs or facilities the Federal Reserve recently established, as discussed above, or additional programs or facilities that may be established by the Federal Reserve in the months to come, subject to any eligibility requirements the Federal Reserve sets for businesses to participate in these programs.<sup>61</sup> For more information about the eligibility requirements for small business loans under the CARES Act, see Latham's *Client Alert* [FAQs: Small Business Loans Under the CARES Act](#).

## Preparing for Enhanced Oversight and Scrutiny

As the programs discussed above indicate, various sectors of the economy may now receive relief funds or participate in programs under the CARES Act, which may subject them to oversight. Companies applying for and receiving funds or other benefits can take certain steps now to prepare for oversight audits and investigations and the enhanced public scrutiny they may face in the future. Depending on a company's circumstances and the particular CARES Act program at issue, prudent steps may include any or all of the following:

- **Internal Oversight.** Establish a responsible person or committee to oversee the company's application for and management of relief funds, and consider whether that responsibility will



reside with senior management, the board of directors, or a specially appointed committee. The role of the person/committee should include determining if additional compliance programs, such as trainings and updates to internal business operating procedures, may be necessary to ensure compliance with the CARES Act, and creating specific plans for the use of relief funds that outline steps for complying with any specific statutory restrictions imposed on companies that accept relief funds under the relevant provisions of the CARES Act. It may also be prudent to segregate relief funds to the extent possible, in order to enhance auditing and risk controls, while keeping in mind that cash is fungible, and therefore a company could potentially be investigated or questioned based on its use of other sources of funds while in possession of relief funds.

- **Documentation and Record-Keeping.** Maintain and enforce a document retention policy for communications and information relating to CARES Act funds or programs, and keep organized files of any relevant materials in order to facilitate responding to requests for information from the SIGPR, the Committee, or congressional oversight bodies. Such materials should include documentation demonstrating that the company meets the criteria for receiving relief funds or benefits, supporting the company's certifications made in connection with applying for and receiving funds, and showing how the company has used relief funds, including compliance with any restrictions on the use of funds. Keep in mind that certain programs under the CARES Act may require companies to provide such documentation in order to be eligible for benefits like loan forgiveness under the PPP.
- **External Communications.** Proceed cautiously and diligently in responding to requests for information relating to CARES Act funds or programs, in consultation with counsel when appropriate, in order to provide accurate and timely information. All communications with the SIGPR, the Committee, and congressional bodies, as with other government officials, may be subject to federal statutes that criminalize false statements made to federal officials in connection with official matters. Requests from the CARES Act oversight bodies should be treated with the same diligence as requests from other regulators and law enforcement agencies. Unintentionally incorrect or incomplete responses could raise questions that give rise to a further investigation, as occurred with some financial institutions engaging with the SIGTARP.<sup>62</sup> Also, review all company statements, press releases, and disclosures to avoid comments that could inadvertently cast a negative light on the company's use of relief funds or participation in CARES Act programs.

In sum, companies will be well-served by devoting the resources necessary to demonstrate compliance with CARES Act requirements and to respond effectively to oversight inquiries.

## Global Perspectives

Outside the US, other governments are also taking steps to address the financial uncertainty caused by COVID-19. Those governments may scrutinize the use of their relief funds as well.

### United Kingdom

The United Kingdom has enacted an array of programs aimed at addressing all sectors of the economy, from large corporations to small and medium-sized enterprises (SMEs) to individuals. Larger corporations will be able to take advantage of the COVID-19 Corporate Financing Facility, under which the UK government will purchase newly issued commercial paper from eligible companies, as well as the Coronavirus Large Business Interruption Loan Scheme, which provides government-guaranteed bank loans. SMEs may look to the Coronavirus Business Interruption Loan Scheme for government-backed bank loan assistance in weathering the economic impacts of the coronavirus on their businesses. In

addition, certain sector-specific initiatives, such as the Retail and Hospitality Grant Scheme, as well as cross-market programs, provide business rate holidays, statutory sick pay relief, and certain tax deferrals. For information on the full range of UK schemes, available as of April 5, 2020, see Latham's [Client Alert COVID-19: Key UK Business Measures — Current State of Play](#).

The UK has not created any bespoke functions to address abuses of these programs. Instead, the investigation and enforcement of any violations will be addressed by existing agencies, meaning Her Majesty's Revenue & Customs; the National Crime Agency (and associated police forces); the Serious Fraud Office, with respect to criminal offenses; and the Financial Conduct Authority, the Prudential Regulatory Authority, the Financial Reporting Council, the Information Commissioner's Office, and the Competition and Markets Authority, with respect to regulatory supervision and enforcement. Each of those regulatory agencies has issued some form of guidance as to their expectations in respect to the pandemic;<sup>63</sup> in contrast, none of the criminal agencies has thus far provided any situation-specific guidance on their approach to enforcement of COVID-19-related offenses, and it must be assumed that their approach will be in line with existing operating models.

## European Union

The European Union has introduced a broad range of measures through the EU budget and the European Investment Bank. These have included the Coronavirus Response Investment Initiative that has made €37 billion available to SMEs and labor markets,<sup>64</sup> and the Temporary Support to mitigate Unemployment Risks in an Emergency (SURE) program, which makes €100 billion available to EU Member States to cover the costs of short-time work schemes.<sup>65</sup> Separately, the European Central Bank established the Pandemic Emergency Purchase Programme (PEPP), which is a €750 billion private and public sector asset purchase program designed to stimulate economies. The European Central Bank also increased its risk tolerance so that higher-risk organizations and entities, such as the Greek government, could take advantage of its programs, and loosened capital requirements on banks, allowing them to lend more.<sup>66</sup>

## China

The Chinese government has carried out comprehensive economic incentive policies in response to the pandemic, including pandemic control credit funds and interest subsidies, tax preferential treatment, and cross-border financing convenience. In early February, the People's Bank of China (PBOC) set aside CNY300 billion (US\$43 billion) for a pandemic control credit fund and interest subsidy for "pandemic control related backbone companies," namely companies that make drugs, medical devices, and other necessities and essentials. The fund is provided under the oversight of the Ministry of Finance of the People's Republic of China (MoF) and its local supervision bureaus, according to several notices published by the MoF from February to March. Companies can only use the fund for pandemic control-related businesses and must obey the Chinese government's orders on the distribution of certain products. If any companies misuse the fund by repaying other debts or making financial investments, the fund will no longer be available to them. According to a notice published in January by the PBOC, MoF, and State Administration of Foreign Exchange (SAFE), the Chinese government will also provide tax preferential treatment to key pandemic control-related companies, as well as other companies and individuals seriously affected by the pandemic. Also, SAFE will simplify the procedures of pandemic-related importation and loosen restrictions on foreign exchanges, such as canceling the ceiling on overseas debts of certain companies.

Some local governments of China, typically on the municipal level, have provided consumption coupons for Chinese residents. These local programs usually run around CNY100 million (US\$14 million). The coupons can be used for carting, entertainment, and sports businesses at both online or retail stores. No

local laws or regulations have been promulgated to supervise provision and distribution of consumption coupons, although any misappropriation of consumption coupons would likely lead to criminal or administrative liabilities under existing laws and regulations.

## Hong Kong

The Hong Kong government has introduced a number of relief packages as an economic stimulus to help businesses and individuals through the COVID-19 pandemic. These include a HK\$120 billion (US\$15.4) relief package in the 2020-21 Budget<sup>67</sup> and a HK\$30 billion (US\$4 billion) anti-epidemic fund to provide relief to affected industries and enhance local COVID-19 combat measures; and an additional HK\$137.5 billion (US\$18 billion) financial relief package.<sup>68</sup>

The financial relief packages focus on job retention, providing subsidies to support SMEs and hard-hit industries (such as the airline, construction, and hotel and tourism sectors), and easing cash flow pressures on businesses and individuals to alleviate the financial burden on the local community.

Hong Kong has not created any new mechanism to oversee the use of these stimulus packages. Potential misuse will likely be subject to investigation and enforcement by existing enforcement agencies, such as the Hong Kong Police Force, the Independent Commission Against Corruption, and the Securities and Futures Commission.

## Singapore

On April 7, 2020, the Singapore Parliament passed the COVID-19 (Temporary Measures) Act (the Act) offering temporary relief to businesses and individuals who are unable to fulfill their contractual obligations because of COVID-19 and providing temporary amendments to bankruptcy and insolvency laws. The measures under the Act apply for six months and may be extended for an additional six months.

In light of the extraordinary circumstances caused by COVID-19, the Act applies retroactively and covers contractual obligations to be performed on or after February 1, 2020 and contracts entered into or renewed before March 25, 2020. To safeguard against fraud and abuse, professionals such as accountants and lawyers will be appointed by the Ministry for Law as assessors (Assessors) to decide if the inability to perform contractual obligations was materially caused by COVID-19 and will have the powers to grant relief that is just and equitable in the circumstances. The Assessors may take into account the ability and financial capacity of the defaulting party to perform the obligation that is the subject of the application, among other prescribed factors. The process will take no more than five days at no cost to either party. Parties will not be allowed to be represented by lawyers, and the Assessors' decisions will be final and not appealable.

The Act also amends bankruptcy and insolvency laws by increasing the debt thresholds for individuals and businesses and extending the statutory period for individuals and businesses to respond to demands from creditors from 21 days to six months. Company directors will also receive temporary relief through the suspension of the prohibition against trading while the company is insolvent if debts are incurred in the ordinary course of business. Directors remain criminally liable, however, if the debts are incurred fraudulently under the Companies Act. For more information regarding the types of contracts covered by the Act and amendments to the bankruptcy and insolvency laws, available as of April 7, 2020, see Latham's blog post [Relief in the Time of COVID-19 – Temporary Measures](#).

The Singapore government to date has also issued two supplementary budgets — the Resilience Budget<sup>69</sup> and the Solidarity Budget<sup>70</sup> — that provide a variety of relief, including sector-specific relief for

the airline industry, tourism industry, maritime industry, land transport sector, and arts and culture sector. The various ministries will be providing more details on these measures in the coming months. While there is no specific mention of investigative powers on the use of grants and funds provided under the various relief schemes, it is expected that the usual enforcement provisions, as well as the prevention of bribery provisions, will continue to apply.

## Appendix: New Oversight Mechanisms Established by the CARES Act

	Special Inspector General for Pandemic Recovery (SIGPR) <sup>71</sup>	Pandemic Response Accountability Committee (Committee) <sup>72</sup>	Congressional Oversight Commission (Commission) <sup>73</sup>
Mandate	Conduct, supervise, and coordinate audits and investigations into the “making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury” under the CARES Act	Oversee all funds appropriated under the CARES Act and any past or future COVID-19-related measures	Supervise implementation by the Treasury Department and Federal Reserve Board of Title IV of the CARES Act, and assess effectiveness of congressional efforts to provide economic stability in light of the pandemic
Scope of Authority	Undertake investigations, without the Treasury Secretary’s approval; issue subpoenas; administer oaths to take testimony; make warrantless arrests and seek arrest and search warrants, without first obtaining authorization from the Attorney General; and refer matters to the DOJ or other agencies for prosecution	Conduct independent investigations, audits, and reviews; hold public hearings; issue subpoenas (including for testimony of individuals in or outside government); administer oaths to take testimony; make warrantless arrests and seek arrest and search warrants, after first obtaining authorization from the US Attorney General; and refer matters to the DOJ for criminal or civil investigation	Take testimony; hold hearings; and otherwise receive evidence as it deems appropriate
Who’s In Charge	Presidential appointment requiring Senate confirmation; President Trump has nominated Brian D. Miller to serve as the SIGPR	Nine members consisting of the inspectors general of various federal agencies, including the Departments of Defense, Justice, and the Treasury, who will select a chair for the Committee  While the Council selected Glenn Fine to chair the Committee, President Trump later removed Fine from his position as acting Inspector General for the Pentagon, rendering him ineligible to chair the Committee  The Council also selects an executive director (within 30 days) and a deputy executive director (within 90 days), in consultation with Congress	Five members, including a chair, chosen by the majority and minority leaders of both houses of Congress
Reporting	Quarterly reports to Congress  The SIGPR must also report to Congress any instances when it is unreasonably refused or denied information it has sought; President Trump has indicated that any reports to Congress will be subject to “presidential supervision” <sup>74</sup>	Twice yearly reports to Congress  When requested information or assistance is “unreasonably refused or not provided, the Committee shall immediately report the circumstances to the appropriate congressional committees”	Reports to Congress every 30 days
Budget	US\$25 million	US\$80 million  The CARES Act also appropriates almost US\$120 million in additional funding to inspector general offices at agencies included in the Committee, ranging from US\$35 million to the Treasury inspector general to US\$750,000 to the Department of Agriculture inspector general	“[S]uch sums as may be necessary for any fiscal year”
End Date	March 27, 2025	September 30, 2025	September 30, 2025

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## Endnotes

- <sup>1</sup> See Press Release, Internal Revenue Serv., *Criminal Investigation (IRS-CI) Cautioned Taxpayers Today To Be Alert for Possible Scams Relating to COVID-19 Economic Impact Payments* (Apr. 3, 2020), <https://www.irs.gov/compliance/criminal-investigation/criminal-investigation-irs-ci-cautioned-taxpayers-today-to-be-alert-for-possible-scams-relating-to-covid-19-economic-impact-payments>.
- <sup>2</sup> See CARES Act, Pub. L. No. 116-136, § 4018(c)(1), 134 Stat 281 (2020) [hereinafter, the “CARES Act”].
- <sup>3</sup> See *id.* § 4018(g)(1).
- <sup>4</sup> See *id.* § 4018(d)(1)-(2).
- <sup>5</sup> See *id.* § 4018(h).
- <sup>6</sup> See *id.* § 4018(e)(4).
- <sup>7</sup> Presidential Statement on Signing the CARES Act (Mar. 27, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/>.
- <sup>8</sup> See CARES Act § 4018(b)(1).
- <sup>9</sup> *President Donald J. Trump Announces Intent to Nominate Individuals to Key Administration Posts* (Apr. 3, 2020), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-individuals-key-administration-posts-27/>.
- <sup>10</sup> See *id.*
- <sup>11</sup> See CARES Act § 15010(b).
- <sup>12</sup> See *id.* § 15010(e)(4)(A).
- <sup>13</sup> See *id.* § 15010(e)(3)(A)(i) (providing that the Committee shall have the authorities provided under section 6 of the Inspector General Act of 1978); *id.* § 15010(e)(3)(A)(ii) (providing that the Committee may issue subpoenas to compel the testimony of persons who are not Federal officers or employees).
- <sup>14</sup> See *id.* § 15010(e)(3)(A)(i) (providing that the Committee shall have the authorities provided under section 6 of the Inspector General Act of 1978); see Inspector General Act of 1978, 5 U.S.C. App. 3, § 6(f)(1)(B), (C).
- <sup>15</sup> See CARES Act § 15010(c).
- <sup>16</sup> See Press Release, Council of the Inspectors Gen. on Integrity & Efficiency, *Glenn Fine Appointed Chair of CIGIE’s Pandemic Response Accountability Committee* (Mar. 30, 2020), <https://ignet.gov/sites/default/files/files/PRAC-press-release.pdf>; see also Ellen Nakashima, *Trump Removes Inspector General Who Was to Oversee \$2 Trillion Stimulus Spending*, Wash. Post (Apr. 7, 2020), [https://www.washingtonpost.com/national-security/trump-removes-inspector-general-who-was-to-oversee-2-trillion-stimulus-spending/2020/04/07/2f0c6cb8-78ea-11ea-9bee-c5bf9d2e3288\\_story.html](https://www.washingtonpost.com/national-security/trump-removes-inspector-general-who-was-to-oversee-2-trillion-stimulus-spending/2020/04/07/2f0c6cb8-78ea-11ea-9bee-c5bf9d2e3288_story.html).
- <sup>17</sup> See CARES Act § 15010(c).
- <sup>18</sup> See *id.* § 15010(d)(2)(B).
- <sup>19</sup> See *id.* § 15010(e)(3)(C).
- <sup>20</sup> See *id.* § 15010.
- <sup>21</sup> See *id.* § 15010(k).
- <sup>22</sup> See *id.* § 4020(a).
- <sup>23</sup> See *id.* § 4020(e).
- <sup>24</sup> See *id.* §§ 4020(b)(2)(B)-4020(c).
- <sup>25</sup> See *id.* § 4020(f).
- <sup>26</sup> See Press Release, Nancy Pelosi, Speaker, House of Reps., *Dear Colleague to All Members Announcing House Select Committee on the Coronavirus Crisis* (Apr. 2, 2020), <https://speaker.gov/newsroom/4220>.
- <sup>27</sup> See *id.*
- <sup>28</sup> See *id.*
- <sup>29</sup> See *id.*
- <sup>30</sup> See Press Release, Dep’t of Justice, *Justice Department Files Its First Enforcement Action Against COVID-19 Fraud* (Mar. 22, 2020), <https://www.justice.gov/opa/pr/justice-department-files-its-first-enforcement-action-against-covid-19-fraud>.
- <sup>31</sup> See Press Release, Dep’t of Justice, *Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud* (Mar. 20, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>.
- <sup>32</sup> See 31 U.S.C. §§ 3733, 3730.
- <sup>33</sup> See Civil Monetary Penalties Inflation Adjustment, 85 Fed. Reg. 1832, 1832 (Jan. 13, 2020).



- <sup>34</sup> See Press Release, Dep't of Justice, *Justice Department Recovers over \$3 Billion from False Claims Act Cases in Fiscal Year 2019* (Jan. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>.
- <sup>35</sup> See *id.*
- <sup>36</sup> See, e.g., IRS, IRS Data Book— Budget and Workforce (Mar. 19, 2020), <https://www.irs.gov/statistics/irs-budget-and-workforce>.
- <sup>37</sup> See, e.g., SIGTARP, Quarterly Report to Congress (Apr. 20, 2010), [https://www.finance.senate.gov/imo/media/doc/April2010\\_Quarterly\\_Report\\_to\\_Congress.pdf](https://www.finance.senate.gov/imo/media/doc/April2010_Quarterly_Report_to_Congress.pdf).
- <sup>38</sup> See Press Release, Dep't of Justice, *Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014* (Nov. 20, 2014), <https://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>.
- <sup>39</sup> See, e.g., Press Release, Dep't of Justice, *United States Settles False Claims Act Action against Estates and Trusts of Layton P. Stuart for \$4 Million* (Oct. 16, 2015), <https://www.justice.gov/opa/pr/united-states-settles-false-claims-act-action-against-estate-and-trusts-layton-p-stuart-4>.
- <sup>40</sup> See Press Release, Dep't of Justice, *Former Onebanc Senior Vice President Indicted on Bank Fraud Charges* (Apr. 2, 2014), <https://www.justice.gov/usao-edar/pr/former-onebanc-senior-vice-president-indicted-bank-fraud-charges>.
- <sup>41</sup> See CARES Act, div. B, tit. VIII (Department of Health and Human Services, Office of the Secretary).
- <sup>42</sup> See *id.*
- <sup>43</sup> See *id.*
- <sup>44</sup> See CARES Act § 4003(b). The CARES Act did not define which businesses are “critical to maintaining national security.” The Treasury Department has recently issued guidance defining a business “critical to maintaining national security” as one that is (1) performing under a “DX”-priority rated contract or order under the Defense Priorities and Allocations System regulations; or (2) operating under a valid top secret facility security clearance under the National Industrial Security Program regulations. A business that does not meet either of these two criteria may nonetheless be eligible for CARES Act funds if the Secretary of the Treasury determines that the business is critical to maintaining national security, based upon a recommendation and certification by the Secretary of Defense or the Director of National Intelligence. See Dep't of Treas., Q&A: *Loans to Air Carriers and Eligible Businesses and National Security Businesses*, <https://home.treasury.gov/system/files/136/CARES-Airline-Loan-Support-Q-and-A-national-security.pdf> (last updated Apr. 10, 2020).
- <sup>45</sup> See CARES Act § 4112.
- <sup>46</sup> See *id.* § 4003(c)(3)(D)(1).
- <sup>47</sup> See *id.* § 1109(d)(1)(A).
- <sup>48</sup> See *id.* § 1109(b).
- <sup>49</sup> See Interim Final Rule, 85 Fed. Reg. 20811 (Apr. 15, 2020), [federalregister.gov/documents/2020/04/15/2020-07672/business-loan-program-temporary-changes-paycheck-protection-program](https://www.federalregister.gov/documents/2020/04/15/2020-07672/business-loan-program-temporary-changes-paycheck-protection-program).
- <sup>50</sup> See *id.* §§ 18001(b)(c), 18004(a).
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- <sup>53</sup> See *id.* § 11002.
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- <sup>56</sup> See, e.g., *id.* §§ 1110(a)(2), (b).
- <sup>57</sup> See *id.* § 4003(c)(4).
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- <sup>59</sup> See Press Release, Nancy Pelosi, Speaker, and Ro Khanna, Member, House of Reps., *Pelosi, Khanna Urge Sec. Mnuchin and SBA Admin. Carranza to Support Startups* (Mar. 31, 2020), <https://www.speaker.gov/newsroom/33120-0>.
- <sup>60</sup> See CARES Act §§ 1107(a)(1), (6).
- <sup>61</sup> See CARES Act § 4003(c)(4).
- <sup>62</sup> After his initial appointment, the first SIGTARP sent requests to every TARP recipient asking for certifications related to their TARP funds. Many of the responses to these certifications served as the impetus for investigations. See SIGTARP, Quarterly Report to Congress (Apr. 21, 2009), [https://www.sig tarp.gov/Quarterly%20Reports/April2009\\_Quarterly\\_Report\\_to\\_Congress.pdf](https://www.sig tarp.gov/Quarterly%20Reports/April2009_Quarterly_Report_to_Congress.pdf).
- <sup>63</sup> See, e.g., Fin. Conduct Auth., *FCA Expectations Regarding Funds in Light of Coronavirus (Covid-19)* (Apr. 15, 2020), <https://www.fca.org.uk/firms/fca-expectations-regarding-funds-coronavirus>; Competition & Mkts. Auth., *CMA Approach to*

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- <sup>73</sup> See *id.* § 4020.
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