

Cos. Should Keep A Close Watch On SIGPR Enforcement

By **Mark Grider, James Treanor and Cheryl Risell** (February 10, 2021, 5:50 PM EST)

The Coronavirus Aid, Relief and Economic Security, or CARES, Act and the subsequent Consolidated Appropriations Act 2021 constitute the signature pieces of Congress' economic response to the COVID-19 pandemic.

Importantly, the CARES Act created the special inspector general for pandemic recovery to oversee CARES Act programs, implicating a range of corporate CARES Act participants.

As a new administration takes the reins in Washington, company general counsel should keep a close watch on SIGPR.

The office is new and its track record sparse, but its mandate is sweeping, covering the audit and investigation of any loans, loan guarantees and other investments made by the secretary of the U.S. Department of the Treasury under Division A of the CARES Act, as well as "the management by the [s]ecretary of any program established under" the CARES Act.[1]

This means SIGPR will be scrutinizing the compliance processes of a range of companies that have received loans and other funding as a result of the COVID-19 pandemic — and thus there is no better time than now for companies to ensure that they have established the internal controls necessary to document appropriate use of any CARES Act funds.

On June 2, 2020, Brian D. Miller was confirmed by the U.S. Senate as the special inspector general for pandemic recovery.[2] Miller is a former federal prosecutor from the Eastern District of Virginia and was the inspector general of the U.S. General Services Administration.

We continue to expect that SIGPR will be aggressive in its fraud investigations and will refer multitudes of criminal investigations to the U.S. Department of Justice for criminal prosecution.

Companies should recognize the parallels between SIGPR and the special inspector general for the Troubled Asset Relief Program, or SIGTARP, established by the Emergency Economic Stabilization Act to



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investigate the recovery package in the wake of the 2008 financial crisis.

SIGPR appears to be structuring its investigation pattern after that of SIGTARP, meaning that companies are now vulnerable to scrutiny over their eligibility for the loans and other funding they receive as well as their compliance with the terms and conditions of such funds.

SIGPR's investigations will likely mirror those of SIGTARP, as SIGPR turns its attention to the emergency lending facilities administered by the Federal Reserve Board and capitalized by the Department of the Treasury.

Beyond those programs, SIGPR has also signaled its intent to look closely at the direct loans from Treasury to businesses in the airline and national-security industries, the payroll support payments to businesses in the airline industry, and the use of funds under the Coronavirus Relief Fund, which may implicate businesses awarded contracts to perform COVID-19-related work for state and local governments.

SIGPR's reports to Congress make clear that the office is taking an aggressive approach to building cases in partnership with criminal and civil law enforcement agencies.[3]

Companies and lenders involved in any — or multiple — of the several major programs within SIGPR's core jurisdiction are likely to face scrutiny over, among other things, their eligibility for the funds they have received, their compliance with use restrictions, limits on executive compensation, and their candor and consistency across the myriad certifications involved in applying for and disbursing CARES Act funds.

In its Dec. 31, 2020, quarterly report to Congress,[4] SIGPR described how it had already accomplished the following:

- Referred 69 investigative leads to law enforcement partners;
- Initiated five new preliminary investigations;
- Received and vetted 27 complaints, two of which were referred to law enforcement and one that was opened for investigation internally at SIGPR; and
- Developed risk scores for a Main Street Lending Program dataset.[5]

The below sets out helpful information for companies about SIGPR's priorities and how companies can prepare for impending audits and investigations.

SIGPR's Relationships With U.S. Attorney's Offices and Other Government Bodies

SIGPR has already established relationships with U.S. attorney's offices around the country in order to enforce its objectives under the CARES Act. Many offices have signed memoranda of understanding, or MOUs, with SIGPR.

The MOUs have not been made public, but according to the U.S. Department of Justice, they generally cover the following objectives:

(1) To provide a coordinated response to CARES Act funding fraud, with an emphasis on organized criminal activity, as well as criminal and civil fraud affecting federal money, vulnerable victims, and fraud recidivists; (2) To facilitate legal process, case intake, and swift prosecution of CARES Act-related fraud; (3) To link and associate isolated CARES Act-related complaints with larger schemes and related unlawful activity; and (4) To deter future CARES Act funding fraud through an enhanced awareness of successful criminal prosecution and civil enforcement against individuals and companies involved in CARES-related financial fraud.[6]

Therefore, companies that have participated in the CARES Act programs under SIGPR's jurisdiction should be aware that U.S. attorney's offices are considering those programs an enforcement priority.

Moreover, these MOUs send a signal that SIGPR investigators intend to run their investigations similar to the way in which a U.S. attorney's office does; they will pursue their targets quietly, while issuing subpoenas and thoroughly reviewing potential violations prior to making charging decisions.

The following U.S. attorney's offices, among others,[7] have partnered with SIGPR:

- District of Massachusetts;[8]
- District of Nevada;[9]
- Northern District of New York;[10]
- Northern District of Ohio;[11]
- Eastern District of Texas;[12]
- Northern District of Texas;[13]
- Eastern District of Virginia;[14] and
- Middle District of Pennsylvania.[15]

SIGPR also has a formal relationship with the Financial Crimes Enforcement Network, or FinCEN, as outlined in SIGPR's Sept. 30, 2020, report to Congress. SIGPR described its relationship with FinCEN as a productive collaboration[16] and has signed an MOU with the agency.[17]

Further, SIGPR announced it is working closely with the U.S. Securities and Exchange Commission, has received briefings from the Federal Reserve Bank of Boston and has had discussions with special agents at the Federal Reserve and Treasury offices of the inspector general.[18]

It has also entered into an agreement with the Federal Trade Commission to access the FTC's Consumer Sentinel Network,[19] and is collaborating with entities within the Treasury Department.[20]

These relationships demonstrate SIGPR's approach to involve multiple government bodies as it undertakes its enforcement duties. In SIGPR's most recent quarterly report to Congress,[21] it noted that three of the five new preliminary investigations opened are currently being worked on by U.S. attorney's offices.[22]

Phase I Enforcement Focus of SIGPR

In its initial report to Congress, SIGPR conducted an in-depth legal analysis of its statutory jurisdiction.[23] While the vast majority of public reporting has focused on the Paycheck Protection Program, it does not appear Congress granted SIGPR jurisdiction over this popular U.S. Small Business Administration program.

There are myriad other CARES Act programs under SIGPR's jurisdiction however, and CARES Act fund recipients must not be lulled into compliance complacency simply because PPP loans are not within the remit of SIGPR.

The following programs are within SIGPR's core jurisdiction. There are issues within each of these programs that businesses, lenders and executives must keep front of mind as SIGPR looks to build and refer cases for prosecution.

Federal Reserve Lending – Borrower Misrepresentations as Top Focus

The CARES Act initially provided up to approximately \$454 billion for Federal Reserve lending facilities,[24] "designed to support eligible businesses, states and municipalities, and critical financial markets." [25]

In its September report to Congress, SIGPR clarified that it has jurisdiction over and intends to investigate activity in the following facilities: the Main Street Lending Program, the Term Asset-Backed Securities Loan Facility II, the Municipal Liquidity Facility, and the Corporate Credit Facilities.[26]

SIGPR's first report to Congress explicitly stated that those who make misrepresentations in the application process or in financial reporting to the Treasury department will be investigated vigorously,[27] and scrutiny of loan documents is expected to be a top enforcement focus of SIGPR.

Direct Loans and the Payroll Support Program: Focus on Eligibility and Adherence to Program Terms

Direct loans will be another key area that SIGPR will target. As of Dec. 15, 2020, Treasury announced 24 loans to passenger and cargo airlines totaling over \$22 billion and 11 loans totaling nearly \$736 million to various companies that were deemed critical to national security.[28]

The CARES Act has numerous eligibility requirements, however, including borrowers agreeing (1) to maintain certain employment levels, (2) to certain restrictions on employee compensation, (3) not to repurchase outstanding stock, and (4) not to pay dividends or to make other capital distributions with respect to the borrower's common stock until 12 months after the loan has been repaid.

To compensate taxpayers, the CARES Act requires borrowers to provide the Treasury Department warrants or equity interest in public companies, or a senior debt instrument if the borrower is privately held.[29]

As of Nov. 16, 2020, under the so-called Payroll Support Program, Treasury also approved almost \$25 billion in payroll assistance to 352 passenger airlines, \$826 million to 39 cargo airlines and \$2.4 billion to 220 contractors.[30] Any participants receiving more than a certain amount of payroll support must provide financial instruments as appropriate compensation.[31]

SIGPR will look to investigate these direct loans and payments, including borrowers' adherence to the program requirements. Any deviation from eligibility or other ongoing compliance requirements may subject companies to liability.

Coronavirus Relief Fund: Focus on Use of Funds

The CARES Act established the \$150 billion Coronavirus Relief Fund that provided payments to state, local and tribal governments navigating the impact of the COVID-19 outbreak.[32]

The payments from the Coronavirus Relief Fund are to only be used to cover expenses that (1) are necessary expenditures incurred due to the public health emergency with respect to the COVID-19; (2) were not accounted for in the budget approved as of March 27, 2020 — the date the CARES Act was enacted — for the state or government; and (3) were incurred during the period that began on March 1, 2020, and ended on Dec. 30, 2020.[33]

Contractors should expect SIGPR to scrutinize state and local government contracts paid for with Coronavirus Relief Funds. Fraud and waste in performance are likely to be the primary focus here.

Compliance — How Companies Can Protect Themselves

Any company that received funds via the CARES Act programs described above may be subject to scrutiny from SIGPR. These companies therefore should review their internal controls, and specific policies and processes, to ensure that funds are spent consistent with the particular CARES Act program from which funds were awarded.

Indeed, a robust and specific, risk-based compliance program based on data analysis is the most reliable way to prevent misconduct before SIGPR opens an investigation.

One part of those internal controls should be a tracing program. Businesses should ensure they trace their funds to demonstrate how CARES Act funds are spent. It is good practice to create a clear audit trail to document the steps taken after monies were received and to demonstrate the funds were dedicated to appropriate purposes.

This evidence should be saved in companies' records and maintained for a number of years in order to demonstrate to SIGPR that the company is in compliance with the law's requirements.

Companies should also watch out for what is referred to as double-dipping or multiple-dipping. Because of the way the CARES Act programs are structured, some companies may be eligible for, and receive, multiple tranches of loans and other funding.

This may violate the rules of specific coronavirus relief programs and is a potentially serious issue that SIGPR will be investigating throughout 2021.

For example, a company may have obtained loans under the Economic Injury Disaster Loan Program, the PPP and the Main Street Lending Program.

If a company has double-dipped into multiple CARES Act programs, their representations and certifications across programs need to be consistent.

SIGPR recently outlined rules and information on programs relating to capital access and multiple-dipping under the CARES Act.^[34] Companies also should be sure they are not requesting funds more than once for the same purpose.

Finally, business leaders need to be aware that many of these programs place express restrictions on executive compensations, payment of dividends, stock buybacks and other loan forgiveness rules.

Companies should be mindful that the Biden administration has proposed a \$1.9 trillion COVID-19 relief plan — the American Rescue Plan — that will continue direct payments and loans to industries in need.

The American Rescue Plan is large enough to bear comparison to the CARES Act and will continue to keep SIGPR and U.S. attorney's offices busy working to scrutinize those who claim additional funds.

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[1] CARES Act § 4018(c)(1).

[2] See Cadwalader's May 6, 2020 Clients & Friends Memo, "COVID-19 Update: Meet the Special Inspector General for Pandemic Recovery."

[3] See Aug. 3, 2020, Special Inspector General for Pandemic Recovery Initial Report to Congress, https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Initial-Report-to-Congress-August-3-2020_0.pdf; Sept., 30, 2020, SIGPR Quarterly Report to the United States Congress, https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Quarterly-Report-to-Congress-September-30-2020_0.pdf; and Dec. 31, 2020, SIGPR Quarterly Report to the United States Congress, <https://www.sigpr.gov/sites/sigpr/files/2021-02/SIGPR-Quarterly-Report-to-Congress-December-31-2020.pdf>.

[4] Dec. 31, 2020 SIGPR Quarterly Report to the United States Congress, <https://www.sigpr.gov/sites/sigpr/files/2021-02/SIGPR-Quarterly-Report-to-Congress-December-31-2020.pdf>.

[5] *Id.* at 2.

[6] <https://www.justice.gov/usao-nv/pr/us-attorneys-office-announces-partnership-special-inspector->

general-pandemic-recovery

[7] According to the Dec. 31, 2020, Quarterly Report to Congress, SIGPR has signed MOUs with 11 U.S. attorney's offices. See p. 20, Dec. 31, 2020, SIGPR Quarterly Report to the United States Congress, <https://www.sigpr.gov/sites/sigpr/files/2021-02/SIGPR-Quarterly-Report-to-Congress-December-31-2020.pdf>.

[8] <https://www.justice.gov/usao-ma/pr/us-attorney-lelling-announces-mou-special-inspector-general-pandemic-recovery-brian-d>

[9] <https://www.justice.gov/usao-nv/pr/us-attorneys-office-announces-partnership-special-inspector-general-pandemic-recovery>

[10] <https://www.justice.gov/usao-ndny/pr/acting-us-attorney-bacon-announces-partnership-special-inspector-general-pandemic>

[11] <https://www.justice.gov/usao-ndoh/pr/us-attorney-announces-mou-special-inspector-general-pandemic-recovery>

[12] <https://www.justice.gov/usao-edtx/pr/us-attorney-announces-mou-special-inspector-general-pandemic-recovery>

[13] <https://www.justice.gov/usao-ndtx/pr/us-attorney-announces-partnership-special-inspector-general-pandemic-recovery>

[14] <https://www.justice.gov/usao-edva/pr/us-attorney-announces-mou-special-inspector-general-pandemic-recovery>

[15] <https://www.justice.gov/usao-mdpa/pr/acting-us-attorney-brandler-announces-partnership-special-inspector-general-pandemic>

[16] Pg. 3, Sept., 30, 2020 SIGPR Quarterly Report to the United States Congress, https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Quarterly-Report-to-Congress-September-30-2020_0.pdf.

[17] Pg. 7, Sept., 30, 2020 SIGPR Quarterly Report to the United States Congress, https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Quarterly-Report-to-Congress-September-30-2020_0.pdf.

[18] Pg. 7, Sept., 30, 2020 SIGPR Quarterly Report to the United States Congress, https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Quarterly-Report-to-Congress-September-30-2020_0.pdf.

[19] The FTC's Consumer Sentinel Network is an investigative cyber tool that holds consumer reports and other information from more than 45 contributing entities. See p. 20, Dec. 31, 2020, SIGPR Quarterly Report to the United States Congress, <https://www.sigpr.gov/sites/sigpr/files/2021-02/SIGPR-Quarterly-Report-to-Congress-December-31-2020.pdf>.

[20] P. 20, Dec. 31, 2020, SIGPR Quarterly Report to the United States

Congress, <https://www.sigpr.gov/sites/sigpr/files/2021-02/SIGPR-Quarterly-Report-to-Congress-December-31-2020.pdf>.

[21] Dec. 31, 2020 SIGPR Quarterly Report to the United States Congress, <https://www.sigpr.gov/sites/sigpr/files/2021-02/SIGPR-Quarterly-Report-to-Congress-December-31-2020.pdf>.

[22] Pg. 2, Dec. 31, 2020 SIGPR Quarterly Report to the United States Congress, <https://www.sigpr.gov/sites/sigpr/files/2021-02/SIGPR-Quarterly-Report-to-Congress-December-31-2020.pdf>.

[23] https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Initial-Report-to-Congress-August-3-2020_0.pdf, at 10–13.

[24] On Nov. 19, 2020, Treasury Secretary Steven T. Mnuchin sent a letter to Chairman of the Federal Reserve Board of Governors Jerome Powell requesting that the Federal Reserve return unused funds from five programs created under the CARES Act back to the Treasury. <https://home.treasury.gov/system/files/136/letter11192020.pdf>.

[25] Pg. 32, <https://www.oversight.gov/sites/default/files/oig-reports/SIGPR-Initial-Report-to-Congress-August-3-2020.pdf>. For additional information, see Cadwalader's April 24, 2020 Clients & Friends Memo, "COVID-19 Update: Federal Investigators Prepare to Investigate and Prosecute Fraud in Emergency Loan Programs,"

[26] Sept., 30, 2020 SIGPR Quarterly Report to the United States Congress, https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Quarterly-Report-to-Congress-September-30-2020_0.pdf.

[27] Pg. 32, <https://www.oversight.gov/sites/default/files/oig-reports/SIGPR-Initial-Report-to-Congress-August-3-2020.pdf>

[28] See <https://home.treasury.gov/policy-issues/cares/preserving-jobs-for-american-industry/loans-to-air-carriers-eligible-businesses-and-national-security-businesses>.

[29] <https://home.treasury.gov/policy-issues/cares/preserving-jobs-for-american-industry/loans-to-air-carriers-eligible-businesses-and-national-security-businesses>

[30] See <https://home.treasury.gov/policy-issues/cares/preserving-jobs-for-american-industry/payroll-support-program-payments>.

[31] The Participants that are required to provide financial instruments as compensation are: passenger air carriers receiving payroll support of more than \$100 million, cargo air carriers receiving more than \$50 million, and contractors receiving more than \$37.5 million. <https://home.treasury.gov/policy-issues/cares/preserving-jobs-for-american-industry/payroll-support-program-payments>

[32] <https://home.treasury.gov/policy-issues/cares/state-and-local-governments>

[33] <https://home.treasury.gov/policy-issues/cares/state-and-local-governments>

[34] Pp. 39-43, Appendix A, Dec. 31, 2020 SIGPR Quarterly Report to the United States Congress, <https://www.sigpr.gov/sites/sigpr/files/2021-02/SIGPR-Quarterly-Report-to-Congress-December-31-2020.pdf>.