



# OVERSIGHT IS BETTER THAN HINDSIGHT

Anti-Corruption Recommendations  
for the CARES Act

Coalition for Integrity



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# I. Introduction

Since their establishment in the 1970s, inspectors general have played a critical role in rooting out fraud and mismanagement in the federal government. As employees of government departments, who have no responsibility to operate programs and often report directly to the head of the department, inspectors general are uniquely situated to have the independence necessary to focus on rooting out problems. Inspectors general inspect, evaluate, and audit actions performed by government agencies, and in doing so save taxpayers millions of dollars every year. They are able to do this thanks to broad authority to access government records, request assistance from other government agencies, and subpoena documents and testimony from the private sector. Their independence is further supported by the power to issue reports to Congress on the findings of investigations and audits.

In just the last few years, inspectors general have uncovered waste, fraud, and abuse in various government agencies. For example, the Special Inspector General for the Troubled Assets Relief Program (SIGTARP), charged with overseeing the stimulus in response to the 2008 financial crisis, has led to hundreds of criminal charges and convictions of scammers looking to profit off of a national crisis. Other investigations uncovered grave threats to public health and safety, such as a Health and Human Services Inspector General report finding that the FDA's food recall efforts were sorely lacking— often leaving dangerous food on the shelves for months after it was determined to be unsafe. These are just two examples of the ability of inspectors general to call attention to issues in government.

Inspectors general represent not only a vital tool to ensure honest governance, but a sound financial investment. SIGTARP reports a recovery of \$11 billion worth of taxpayer dollars in one decade, and its recovery in 2019 alone of \$900 million with a budget of \$23 million represents a thirty-nine times return on investment.

The structure of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act” or “Act”) places inspectors general in a critical role. First, at over \$2 trillion, the CARES Act provides a truly unprecedented amount of money. Even a fraction of this amount lost to fraud would be a tremendous loss for taxpayers – a one percent rate of fraud is \$20 billion of wasted taxpayer money. Inspectors general can help keep this rate as low as possible. Second, the CARES Act creates the Office of Special Inspector for Pandemic Recovery (SIGPR) as one of three new oversight entities, along with the Pandemic Response Accountability Committee (PRAC) and the Congressional Oversight Commission. The SIGPR and Congressional Oversight Commission oversee approximately \$500 billion authorized in Treasury loans, including \$46 billion directed toward air carriers and other industries necessary for national security (the “Subtitle A Lending Program”), while PRAC has a much broader set of funds under its responsibilities. In addition, the House and Senate have created oversight bodies and the Government Accountability Office was also granted oversight responsibility.

The discretionary nature of the Treasury loans make them the most glaring opportunity for fraud, as they could be distributed with little consistency. The special inspector general oversees these loans, but also must establish a reporting system to inform Congress of the loan terms, recipients, and rationale. This means the special inspector general is charged not only with fraud prevention but also with proactive transparency requirements.

The data required to make accurate reports will largely come from the Treasury Department and the Federal Reserve. The Federal Reserve, however, is empowered by the CARES Act to conduct meetings without adhering to the Government in Sunshine Act requirements, in cases where an emergency public notice of meetings may not be feasible. To maintain a balance between the need for transparency and expediency, minutes and records of the discussions should be preserved and made available to the public. Access to these records by inspectors general is all the more important to ensure transparency and the ability to perform their duties.

Inspectors general have worked effectively for years to protect public safety and taxpayer money. Given the proper authority, tools, and support, the inspectors general charged with overseeing the COVID-19 stimulus can do the same, but they cannot do it alone. Effective oversight requires that the White House and Congress make oversight a priority. The administration and Congress should want every dollar of this stimulus package to go to those who need it the most. Inspectors general are allies in this crusade, not adversaries, and they should be treated accordingly.

This project is meant to demonstrate the importance of government oversight, the positive work that has been done in previous crises, and the risks we all run when we neglect to provide for oversight of major programs. In particular, we will discuss prior actions taken by inspectors general, and the powers and support that they have historically been given. We focus on four case studies of oversight in times of great crisis: the SIGTARP, the American Recovery and Reinvestment Act of 2009, and the Special Inspectors General for Iraq and Afghanistan Reconstruction (SIGIR and SIGAR)

Our hope is that the lessons from these four oversight efforts – and the recommendations we make – will guide implementation by the SIGPR, PRAC, and the Congressional Oversight Commission and help them be more effective in their oversight role. The full potential of government oversight can only be reached if Congress statutorily provides oversight officials with the resources and powers to fulfill their mandate.

This report provides a comprehensive review of the oversight provisions in the CARES Act, examples of effective oversight in the past, identification of areas that must be fixed legislatively, and recommendations for SIGPR and the administration. The current administration should draw inspiration from this report so that it can ensure the benefit of the stimulus reaches the intended parties.



## II. Overview

Together, the CARES Act and the follow-on Paycheck Protection Program and Health Care Enhancement Act<sup>1</sup> authorized or appropriated approximately \$2.7 trillion for the COVID-19 recovery and related economic stimulus. That funding includes, among other areas: the approximately \$500 billion Subtitle A Lending Program;<sup>2</sup> \$697 billion appropriated for the Small Business Administration (“SBA”) Paycheck Protection Program (“PPP”); \$339.8 billion in assistance to state and local governments; and \$176 billion for healthcare initiatives.<sup>3</sup>

This aid package is unparalleled in both scope and size.<sup>4</sup> It dwarfs the 2009 stimulus package in response to the 2008-2009 global financial crisis, which amounted to \$840 billion.<sup>5</sup> Indeed, CARES Act funding alone equals more than 75 percent of the \$3.5 trillion the federal government expects to collect in taxes this year.

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<sup>1</sup> The Paycheck Protection Program and Health Care Enhancement Act provided funding to replenish the Small Business Administration’s Paycheck Protection Program, created by the CARES Act, as well as additional funding for health care providers, among other things. *Coronavirus Live Updates: House Passes \$484 Billion Aid Package*, N.Y. Times (Apr. 23, 2020 3:38 p.m. PT), <https://www.nytimes.com/2020/04/23/us/coronavirus-live-news-coverage.html#link-7d1db07b>.

<sup>2</sup> The Subtitle A Lending Program is described in Division A, Title IV, Subtitle A of the Cares Act. The Coronavirus Aid, Relief, and Economic Security Act (hereinafter “The CARES Act”), Pub. Law No. 116-136 § 4003; see also About the CARES Act’s \$500 Billion Emergency Economic Stabilization Funds: The First Report of the Congressional Oversight Commission 5 (May 18, 2020), [https://hill.house.gov/uploadedfiles/coc\\_1st\\_report\\_05.18.2020.pdf](https://hill.house.gov/uploadedfiles/coc_1st_report_05.18.2020.pdf). The Subtitle A Lending Program does not account for all \$58 billion of air carrier-specific relief under the CARES Act. Half of such relief is in the form of loans, and it is, therefore, included in the \$500 billion Subtitle A Lending Program (The CARES Act § 4003(b)(1)-(2)); the other half is in grants for employee wages and benefits, which are not part of the billion Subtitle A Lending Program (id. § 4112(a)(1)-(2)).

<sup>3</sup> The CARES Act § 1102; see also *Coronavirus Live Updates: House Passes \$484 Billion Aid Package*, N.Y. Times (Apr. 23, 2020, 3:38 p.m. PT), <https://www.nytimes.com/2020/04/23/us/coronavirus-live-news-coverage.html#link-7d1db07b>.

<sup>4</sup> \$2 Trillion Coronavirus Stimulus Bill Is Signed Into Law, N.Y. Times (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/us/politics/coronavirus-house-voting.html>.

<sup>5</sup> Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output in 2014, Cong. Budget Off. (Feb. 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49958-ARRA.pdf> (last visited May 6, 2020).

Traditional estimates calculate that five to seven percent of large government funding measures are lost to fraud.<sup>6</sup> That measure can be reduced through effective oversight. For example, SIGTARP—which oversaw \$475 billion of government funding<sup>7</sup>—reported that its investigations from 2010 to 2019 directly led to approximately \$11 billion in recoveries, representing more than two percent of the original appropriation.<sup>8</sup> Further, a 2010 estimate of fraud and waste in the 2009 stimulus package found fraud associated with less than 0.2 percent of the total number of contracts, grants, or loans under that program.<sup>9</sup>

Given that Congress has authorized \$2.7 trillion in spending—and potentially enabled an even greater impact on government revenue through tax credits—there is a risk that a substantial amount of government funds could be lost to waste, fraud, and abuse. Indeed, there were early reports of concerns regarding the recipients of PPP funding. The initial PPP program consisting of \$349 billion in funding—which includes forgivable loans of up to \$10 million for small businesses to cover up to eight weeks of payroll costs, including benefits—was depleted within two weeks, and multiple reports indicate that some of the loans went to large businesses, such as sandwich chain Potbelly and Ruth Hospitality Group, owner of the Ruth’s Chris Steakhouse chain.<sup>10</sup> When such loans

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6 Adam Zagorin, He Oversaw \$787 Billion in Stimulus Spending. Here Are His Lessons on Spending Coronavirus Recovery, POGO (Apr. 1, 2020) (interview with Earl E. Devaney, chairman of the Recovery Accountability and Transparency Board from February 23, 2008 to December 31, 2011), <https://www.pogo.org/analysis/2020/04/he-oversaw-787-billion-in-stimulus-spending-heres-his-lessons-on-spending-coronavirus-recovery-effectively>; Michael Cooper, On the Lookout for Stimulus Fraud, N.Y. Times (Sept. 17, 2009), <https://www.nytimes.com/2009/09/18/us/18fraud.html>.

7 About TARP: Where Did the Money Go?, U.S. Dep’t of the Treasury, (last updated Aug. 8, 2018), <https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/where-did-the-money-go.aspx>.

8 SIGTARP Investigations By the Numbers, Office of the Special Inspector General for the Troubled Asset Relief Program (hereinafter “SIGTARP”), <https://www.sigtarp.gov/Pages/Home.aspx> (last visited May 20, 2020).

9 2010 Fiscal Year End Report to the President on Progress Implementing the American Recovery and Reinvestment Act of 2009 25, AARA (Sept. 2010) [https://obamawhitehouse.archives.gov/sites/default/files/recovery\\_act\\_report\\_9-30-2010.PDF](https://obamawhitehouse.archives.gov/sites/default/files/recovery_act_report_9-30-2010.PDF) (last visited May 6, 2020).

10 The Department of Justice’s criminal division has announced plans to closely scrutinize PPP Loans, looking in particular for companies that might inflate payroll numbers or claim that they spent money on payroll in order to improperly receive loan forgiveness. U.S. Firms May Face Probes Over Payroll Loans, Treasury, DOJ Officials Warn, N.Y. Times (Apr. 22, 2020), <https://www.nytimes.com/reuters/2020/04/22/business/22reuters-health-coronavirus-usa-economy.html>. On April 23, 2020, the SBA announced new guidance explaining that if a business can access other avenues of funding, it would not be appropriate to seek SBA loans. It gave businesses that had inappropriately taken SBA loans two weeks to return the funds, under a presumption that businesses had acted in good faith.

were publicized, some large companies returned loans they had received, underscoring the positive effects of transparency in government spending programs.<sup>11</sup>

To guard against waste, fraud, and abuse, the CARES Act created three separate oversight bodies: the Office of the Special Inspector for Pandemic Recovery (“SIGPR”), the Pandemic Response Accountability Committee (“PRAC”), and the Congressional Oversight Commission (“COC”).<sup>12</sup> In addition, the House of Representatives created the Select Subcommittee on the Coronavirus Crisis to oversee the relief effort, and the Senate has announced an informal oversight structure for CARES Act spending. Finally, by the terms of the Act, Congress’s existing oversight agency—the Government Accountability Office (“GAO”)—is explicitly tasked with reviewing certain CARES Act spending, and individual agencies receiving CARES Act funds are required to publicly disclose their use of certain funds.<sup>13</sup>

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<sup>11</sup> Sarah Hansen, Potbelly, Shake Shack, Axios: Here Are All the Companies Returning PPP Money After Public Backlash, Forbes (Apr. 29, 2020), <https://www.forbes.com/sites/sarahhansen/2020/04/29/potbelly-shake-shack-axios-here-are-all-the-companies-returning-ppp-money-after-public-backlash/#22a225877ea0>.

<sup>12</sup> CARES Act §§ 4018, 15010, 4020.

<sup>13</sup> CARES Act § 4132.

### III. The Office of Special Inspector General for Pandemic Recovery

The CARES Act tasks SIGPR with providing oversight of the \$500 billion Subtitle A Lending Program. Of the \$500 billion, \$46 billion is set aside for the Treasury Department itself to provide loans or loan guarantees to air carriers and businesses “critical for maintaining national security.”<sup>14</sup> The remaining \$454 billion may be used to support emergency lending facilities created by the Federal Reserve.<sup>15</sup> Those lending facilities include, among others: the Main Street Lending Program, which provides loans to small and mid-sized businesses; the Municipal Liquidity Facility, which provides loans to state and local governments; and the PPP Liquidity Facility, which provides credit to financial institutions that underwrite PPP loans.<sup>16</sup>

SIGPR is instructed to conduct “audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments” made through the Subtitle A Lending Program.<sup>17</sup> The Act also requires the Treasury Secretary to “take action to address deficiencies” identified by SIGPR or to “certify” to appropriate Congressional committees “that no action is necessary or appropriate.”<sup>18</sup>

By the terms of the CARES Act, the SIGPR position is filled by presidential appointment, with the advice and consent of the Senate.<sup>19</sup> SIGPR can also be removed by the

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<sup>14</sup> The CARES Act § 4003(b)(1)-(3).

<sup>15</sup> The CARES Act § 4003(b)(4).

<sup>16</sup> Federal Reserve Takes Additional Actions to Provide Up to \$2.3 Trillion in Loans to Support the Economy, Board of Governors of the Federal Reserve, Press Release (Apr. 9, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200409a.htm>.

<sup>17</sup> The CARES Act § 4018(c)(1).

<sup>18</sup> *Id.* § 4018(j).

<sup>19</sup> *Id.* § 4018(b)(1).

President, though the President is required by the Act to provide his reasoning to Congress at least 30 days before removal.<sup>20</sup> The Senate confirmed former White House attorney Brian Miller to the post on June 2, 2020.<sup>21</sup>

To carry out his mandate, SIGPR may hire other staff and contractors.<sup>22</sup> In addition to his salary—set at the standard statutory rate for inspectors general—SIGPR has an appropriated budget of \$25 million.<sup>23</sup>

## A. Powers and Authorities

To conduct required audits and investigations, SIGPR has the broad authorities provided to all inspectors general under the Inspectors General Act of 1978 (“IG Act”), as amended, including directly accessing records; requesting information or assistance from other federal, state, and local government agencies; and issuing subpoenas for information and documents to non-government entities and individuals.<sup>24</sup>

In addition, the CARES Act requires “any department, agency, or other entity of the Federal Government,” to comply with SIGPR’s requests for information and assistance “to the extent practicable and not in contravention of any existing law.”<sup>25</sup> Like other special inspectors general, such as SIGTARP, the Act instructs SIGPR to report to Congress any time an agency unreasonably refuses to provide any requested information.

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<sup>20</sup> *Id.* § 4018(b)(3).

<sup>21</sup> Alan Rappeport, Senate Confirms Inspector General to Oversee Virus Bailout Funds, N.Y. Times (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/politics/virus-bailout-inspector-general.html>.

<sup>22</sup> The CARES Act § 4018(e); *id.* § 4018(b)(5); 5 U.S.C. App.3 § 3.

<sup>23</sup> The CARES Act § 4018(g)(1).

<sup>24</sup> *Id.* § 4018(c)(1); Appendix I at 9–11. The IG Act requires that inspectors general rely on the provision granting power to request information or assistance from federal, state, and local government agencies when seeking information from those sources. See 5 U.S.C. App. § 6(f)(3)-(4).

<sup>25</sup> The CARES Act § 4018(e)(4)(A).

Finally, SIGPR has certain law enforcement powers, including the ability of certain of its personnel to carry a firearm, make arrests without warrants, and seek and execute warrants.<sup>26</sup> Although the IG Act generally permits a special inspector general to exercise these powers only if the Attorney General grants such authority, the CARES Act exempts SIGPR from seeking the Attorney General’s authorization.<sup>27</sup>

## B. Reporting

SIGPR is required to make quarterly reports to Congress. Those reports must contain not only a summary of SIGPR’s activities, but also a description of all loans, loan guarantees, other transactions, obligations, expenditures, and revenues made under the Subtitle A Lending Program, including the businesses receiving the loans, the amount of each loan, the interest accrued, and any gains or losses associated with each loan.<sup>28</sup> SIGPR’s quarterly report must also explain why the Treasury Secretary “determined it to be appropriate to make each loan or loan guarantee, including a justification of the price paid for, and other financial terms associated with, the applicable transaction.”<sup>29</sup>

## C. Potential Gaps / Issues

The role and authorities of SIGPR closely mirror those of SIGTARP, which is generally considered a successful oversight body.<sup>30</sup> However, there are a number of potential gaps in the CARES Act, as well as troubling developments since its enactment, that may undermine the effectiveness of SIGPR’s oversight.

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<sup>26</sup> *Id.* § 4018(d)(2); see also 5 U.S.C. App. § 6(f)(3). Both SIGIR and SIGAR also had these authorities.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* § 4018(f)(1); *id.* § 4018(c)(1)(A), (D)-(E).

<sup>29</sup> *Id.* § 4018(c)(1)(C).

<sup>30</sup> SIGTARP Investigations by the Numbers (Mar. 31, 2020), SIGTARP, <https://www.sigtar.gov/Pages/Home.aspx>.

- **Presidential Signing Statement:** Like his predecessors have done in other contexts,<sup>31</sup> President Trump, in his CARES Act signing statement, rejected the provision of the Act requiring SIGPR to report to Congress on any agency's unreasonable delays or rejections of SIGPR's requests for information. According to the signing statement: "my Administration will not treat this provision as permitting the SIGPR to issue reports to the Congress without the presidential supervision required by the Take Care Clause, Article II, section 3."<sup>32</sup> Signing statements generally are not considered to have the force of law, so this signing statement may be unenforceable—as that could amount to an unconstitutional line-item veto. However, it signals to SIGPR that he should not attempt to exercise without presidential supervision this power conferred by the Act. This may have a particularly troubling impact in light of the experience of the first SIGTARP, who noted that the threat of turning to Congress was a critical tool in convincing agencies to cooperate in audits.<sup>33</sup>
- **Delayed Start:** As noted above, Brian Miller, a White House lawyer, was only recently confirmed as SIGPR.<sup>34</sup> Prior to his confirmation, Miller reportedly interviewed candidates to staff his office.<sup>35</sup> Notwithstanding that it understandably took time during the COVID-19 crisis for SIGPR to be identified, nominated, and confirmed, this delay in beginning SIGPR's oversight suggests that the office will be playing catch up, working to review loans and lending facilities that have already been disbursed or announced without having had a proactive

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31 For example, President Barack Obama rejected certain provisions of the National Defense Authorization Act for Fiscal Year 2013 Statement on Signing the National Defense Authorization Act for Fiscal Year 2013 (Jan. 2, 2013), <https://www.presidency.ucsb.edu/documents/statement-signing-the-national-defense-authorization-act-for-fiscal-year-2013>.

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

33 Erica Werner and Paul Kane, Pelosi Announces New Select Committee to Oversee Coronavirus Response, Setting up Clash with Trump Over \$2 Trillion Law, Wash. Post., Apr. 2, 2020, <https://www.washingtonpost.com/us-policy/2020/04/02/pelosi-trump-coronavirus-oversight/>.

34 See Rappeport, *supra* note 21.

35 Todd Shields et al., As \$2 Trillion Relief Flows, Almost Nobody Is Watching for Abuse, Wash. Post (Apr. 17, 2020), [https://www.washingtonpost.com/business/on-small-business/as-2-trillion-relief-flows-almost-nobody-is-watching-for-abuse/2020/04/17/fc16af92-8089-11ea-84c2-0792d8591911\\_story.html](https://www.washingtonpost.com/business/on-small-business/as-2-trillion-relief-flows-almost-nobody-is-watching-for-abuse/2020/04/17/fc16af92-8089-11ea-84c2-0792d8591911_story.html).

role in building oversight mechanisms as loans are being issued. In addition, SIGPR does not have emergency hiring authority that would accelerate the process of establishing SIGPR's office, which may exacerbate the impact of the delay in confirming the SIGPR.<sup>36</sup>

- **Brian Miller:** Miller has prior experience as an inspector general; for nine years, he served as the Inspector General for the General Services Administration.<sup>37</sup> Democrats have expressed concerns about Miller as the choice for the SIGPR position, however, particularly because he: (a) is coming to the role, which is supposed to be apolitical, directly from the White House; and (b) rebuffed a GAO request for information during Congress' hearings in connection with President Trump's impeachment, which some have concluded reflects Miller's aversion to Congressional oversight, at least in that context.<sup>38</sup> At his confirmation hearing, Miller stated that he would act independently if confirmed to the SIGPR role, but he refused to answer certain questions about the White House's recent termination of other inspectors general, leading to some speculation that Miller would not act independently of the President if confirmed.<sup>39</sup>
- **Reliance on Treasury and Federal Reserve Cooperation:** SIGPR's review and reporting requirements are to be focused on actions taken by the Treasury

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36 Compare The CARES Act § 4010(b) (granting the Department of Housing and Urban Development ("HUD"), the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC") the ability to "recruit and appoint candidates to fill temporary and term appointments within their respective agencies upon a determination that those expedited procedures are necessary and appropriate to enable the respective agencies to prevent, prepare for, or respond to COVID-19").

37 See Benjamin Siegal et al., Trump Abruptly Removes Inspector General Named to Oversee \$2 Trillion in Stimulus Spending, ABC News (Apr. 7, 2020), <https://abcnews.go.com/Politics/trump-abruptly-removes-inspector-general-named-oversee-2t/story?id=70024680>.

38 See Benjamin Siegal et al., Trump Abruptly Removes Inspector General Named to Oversee \$2 Trillion in Stimulus Spending, ABC News (Apr. 7, 2020), <https://abcnews.go.com/Politics/trump-abruptly-removes-inspector-general-named-oversee-2t/story?id=70024680> (noting Democrats had criticized Miller's nomination "given the apolitical nature of the post"); Alan Rappeport, Trump's Inspector General Has Expressed Dim Views of Congressional Oversight, N.Y. Times (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/trump-inspector-general-brian-miller-virus.html>.

39 Erica Werner, Inspector General Nominee for Coronavirus Fund Pledges Independence, Faces Skepticism from Democrats, Wash. Post (May 5, 2020), <https://www.washingtonpost.com/us-policy/2020/05/05/senate-coronavirus-inspector-general/>.



Department and the Federal Reserve. A substantial amount of the data that SIGPR will require likely will be held exclusively by the Treasury Department and the Federal Reserve. If the Treasury Department and the Federal Reserve are unwilling to cooperate in SIGPR's work, it is not clear how SIGPR will be able to accomplish its goals efficiently and effectively; particularly if SIGPR is unwilling to report the lack of cooperation to Congress absent presidential approval. Notably, Section 4009 of the CARES Act permits the Federal Reserve to conduct closed meetings until December 31, 2020, exempting it from the general requirement that agency meetings "be open to public observation."<sup>40</sup> Although not publicly available, Treasury has issued a legal opinion that "the administration is not required to provide the watchdogs with information about the beneficiaries of programs created by the Cares Act" Subtitle A<sup>41</sup> and numerous press reports question the administration's commitment to publicly disclose the beneficiaries of CARES Act money.<sup>42</sup>

- **Funding:** Funding is also a concern. SIGPR's initial budget of \$25 million is half of the amount of SIGTARP's initial funding, despite the fact that amounts appropriated in TARP—\$475 billion—is roughly the same as the amount of the Subtitle A Lending Program.<sup>43</sup> As a result, SIGPR may be constrained in his ability to hire staff, conduct investigations and audits, or execute effectively on SIGPR's other duties and responsibilities.

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40 See 5 U.S.C. § 552b(b)-(c).

41 Inspectors general warn that Trump administration is blocking scrutiny of coronavirus rescue programs, WP (June 16, 2020), <https://www.washingtonpost.com/business/2020/06/15/inspector-general-oversight-mnuchin-cares-act/>.

42 See, e.g., Catherine Rampell, A half-trillion dollar questions of transparency, WP (June 15, 2020), [https://www.washingtonpost.com/opinions/what-has-the-trump-administration-done-with-a-half-trillion-dollars/2020/06/15/eb86ee5a-af30-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/opinions/what-has-the-trump-administration-done-with-a-half-trillion-dollars/2020/06/15/eb86ee5a-af30-11ea-8f56-63f38c990077_story.html).

43 Congress originally authorized \$700 billion in TARP funds in the EESA, but that was reduced to \$475 billion by the Dodd-Frank Act. About TARP: Where Did the Money Go?, Treasury.gov (updated Aug. 8, 2018), <https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/where-did-the-money-go.aspx>. See also Jason Grotto and Todd Shields, Virus-Bailout Watchdogs Face Immense Task with Echoes of TARP, Bloomberg, Apr. 3, 2020, <https://www.bloomberg.com/news/articles/2020-04-03/virus-bailout-watchdogs-face-immense-task-with-echoes-of-tarp>.

- **Limited Timeframe:** The Office of the SIGPR is set to terminate on March 27, 2025, five years after the CARES Act was enacted.<sup>44</sup> This presents an artificially narrow window for SIGPR to conduct audits and investigations, as it is unclear when funding provided by the CARES Act will sunset and how long it will take to identify and investigate any related waste, fraud, and abuse. In contrast, the Office of the SIGTARP terminates only when the last monetary obligation under the program has been closed.<sup>45</sup> Indeed, 12 years after its inception, SIGTARP is still auditing and making quarterly reports to Congress.<sup>46</sup> In FY 2020, SIGTARP recovered \$81.6 million in FY 2020.<sup>47</sup>
- **No Attorney General Referral Mandate:** Unlike PRAC (discussed below), SIGPR is not statutorily required to “expeditiously report to the Attorney General any instance in which [there are] reasonable grounds to believe there has been a violation of Federal criminal law.”<sup>48</sup> Although SIGPR is not prohibited from making such referrals, absent a statutory mandate, SIGPR may decline to do so—a particular area of concern given questions about Miller’s independence, the presidential signing statement suggesting that the President may circumscribe SIGPR’s reporting to Congress, and presidential actions taken recently to remove inspectors general from their posts.

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<sup>44</sup> The CARES Act § 4018(h).

<sup>45</sup> Quarterly Report to Congress, SIGTARP, (October 1, 2019 - December 31, 2019).

<sup>46</sup> See Semiannual Report to Congress: October 1, 2019 - March 31, 2020, SIGTARP (Apr. 30, 2020), [https://www.sig tarp.gov/Quarterly%20Reports/April\\_30\\_2020\\_Report\\_to\\_Congress.pdf](https://www.sig tarp.gov/Quarterly%20Reports/April_30_2020_Report_to_Congress.pdf).

<sup>47</sup> *Id.* at 7.

<sup>48</sup> The CARES Act § 15010(d)(1)(B)(x).

## IV. Pandemic Response Accountability Committee

While the Office of the SIGPR comprises one newly-created inspector general and his staff, PRAC is a committee of sitting inspectors general.<sup>49</sup> By the terms of the Act, PRAC includes, among others: the inspectors general of the Department of Health and Human Services (“HHS”), the Department of Homeland Security, the Department of Labor, the Treasury Department, and the SBA. There are now 21 members of PRAC, including the newly-confirmed SIGPR.<sup>50</sup> In addition, PRAC is staffed by a non-inspector general Executive Director, a Deputy Executive, and other full-time employees.

The CARES Act tasks PRAC with oversight of a much broader set of funds than SIGPR. PRAC must oversee not only loans made by the Treasury Department under the Lending Program, but also any “covered funds,” defined as “any [COVID-19 relief] funds, including loans, that are made available in any form to any non-Federal entity, not including an individual.”<sup>51</sup> This includes PPP loans made by the SBA and other COVID-19 relief spending, such as funding for healthcare initiatives.

Like SIGPR, the CARES Act charges PRAC with “auditing or reviewing” spending, but PRAC is also responsible for ensuring coordination among federal agencies implementing and overseeing CARES Act spending.<sup>52</sup> PRAC is required to develop and publish a “strategic plan to ensure coordinated, efficient, and effective comprehensive

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49 Because the PRAC is composed of sitting inspectors general, it is similar to the Recovery Accountability and Transparency Board (“Recovery Board”) that oversaw the 2009 stimulus package, as opposed to the Financial Stability Oversight Board created under TARP (which comprised agency heads).

50 PRAC Members, Pandemic Response Accountability Committee, <https://pandemic.oversight.gov/about/prac/members> (last visited May 8, 2020).

51 The CARES Act § 15010(a)(6), (d)(1)(A).

52 *Id.* § 15010(d)(1)(B)(ii), (vi), (e)(1), (e)(2)(C).

oversight.”<sup>53</sup> The Act also requires PRAC to maintain a “user-friendly, public facing website” (<https://pandemic.oversight.gov>) to serve as “a portal or gateway to key information” on pandemic response spending.<sup>54</sup> Finally, PRAC is required to “expeditiously” report any violations of Federal criminal law to the Attorney General.<sup>55</sup> The Act grants PRAC \$80 million in initial funding.<sup>56</sup>

## A. Powers and Authorities

The CARES Act grants PRAC, as it does SIGPR, the broad authorities provided to all inspectors general under the IG Act, including the ability to directly access records; request information assistance from other federal, state, and local government agencies; and issue subpoenas for information and documents to non-government entities and individuals.<sup>57</sup>

Also, as with SIGPR, the Act instructs PRAC to report to Congress any time that an agency unreasonably refuses to provide any requested information.<sup>58</sup> PRAC may also hold public hearings, for which agency heads must make officers and employees available to provide testimony.<sup>59</sup>

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<sup>53</sup> *Id.* § 15010(d)(1)(B)(i).

<sup>54</sup> *Id.* § 15010(g)(1).

<sup>55</sup> *Id.* § 15010(d)(1)(B)(x).

<sup>56</sup> Title V, § 15001. In contrast, the Recovery Board was not appropriated a fixed amount of funding. Rather, its enabling statute, the American Recovery and Reinvestment Act of 2009, authorized the appropriation of “such sums as necessary.” Pub. L. No. 111-5, § 1529.

<sup>57</sup> The CARES Act § 15010(e)(3)(A)(i). As noted above, the IG Act requires that inspectors general rely on the provision granting power to request information or assistance from federal, state, and local government agencies when king information from those sources. See 5 U.S.C. App. § 6(f)(3)-(4). However, unlike SIGPR, the CARES Act grants PRAC authority to issue subpoenas to compel the testimony of persons who are not federal officers or employees and to enforce subpoenas in federal court. See The CARES Act § 15010(e)(3)(A). While it is unclear why this additional authority was granted to PRAC, in practice, both SIGPR and PRAC have the power to issue subpoenas under the IG Act.

<sup>58</sup> *Id.* § 15010(e)(3)(C). Notably, this provision mirrors the SIGPR provision that the White House rejected in the presidential signing statement. See *supra* Part II.C. However, the presidential signing statement did not mention the parallel PRAC provision. It is not clear whether this was intentional or an oversight. See Statement by the President, The White House (March 27, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38>.

<sup>59</sup> *Id.* § 15010(e)(4).

Finally, PRAC may make recommendations to agencies on how better to prevent waste, fraud, and abuse.<sup>60</sup> Once PRAC makes such a recommendation, the agency must report to the President within 30 days whether it intends to implement any such recommendations.<sup>61</sup>

## B. Reporting

The Act makes PRAC responsible for maintaining the public website that tracks the federal government’s pandemic recovery spending.<sup>62</sup> According to the CARES Act, this website must include not only PRAC’s own reports and recommendations, but also data and reports regarding pandemic-related funding and oversight from other agencies and their inspectors general. For example, the website must include each agency’s “plan . . . for using covered funds,”<sup>63</sup> as well as “downloadable, machine-readable, open format reports on covered funds obligated by month.”<sup>64</sup> The website is already online and includes a number of reports from individual agencies’ inspectors general regarding pandemic-related funding and oversight. However, as of June 4, 2020, PRAC has not published any of its own reports or recommendations.<sup>65</sup>

In addition, PRAC is required to make biannual reports to the President and Congress, summarizing PRAC’s findings and quantifying the impact of tax expenditures or credits authorized under the CARES Act.<sup>66</sup> The Act also instructs PRAC to issue “management alerts” to the President and Congress regarding any problems “that require immediate

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<sup>60</sup> *Id.* § 15010(d)(3)(A).

<sup>61</sup> *Id.* § 15010(d)(3)(B).

<sup>62</sup> *Id.* § 15010(g)(1).

<sup>63</sup> *Id.* § 15010(g)(3)(A)(ix).

<sup>64</sup> *Id.* § 15010(g)(3)(A)(iv). There is no explicit reference to the 2014 Data Accountability and Transparency Act (“DATA Act”) in the CARES Act, though it appears that some of the format requirements for disclosures in the CARES Act mirror the DATA Act’s requirements.

<sup>65</sup> Reports, Pandemic Response Accountability Committee, <https://pandemic.oversight.gov/oversight/reports>; see also Ongoing Work, Pandemic Response Accountability Committee, <https://pandemic.oversight.gov/oversight/ongoing-work>.

<sup>66</sup> The CARES Act § 15010(d)(2)(B).

attention,”<sup>67</sup> as well as any other reports or updates that PRAC considers appropriate.<sup>68</sup> Those reports also are required to be posted on the PRAC website.<sup>69</sup>

## C. Potential Gaps / Issues

The fundamental issue with PRAC relates to the independence and job protection of the inspectors general who comprise PRAC. Since the enactment of the CARES Act, the President has criticized and removed several inspectors general.

- Glenn Fine, who was serving as the Acting Inspector General of the Department of Defense, was appointed Chairman of PRAC, but the Administration then demoted Fine to his previous role as Principal Deputy Inspector General of the Pentagon, rendering him ineligible to serve as Chairman of PRAC.<sup>70</sup> Following this, Fine resigned from his position as deputy inspector general at the Department of Defense.<sup>71</sup>
- The President is also replacing Christi Grimm, the Principal Deputy Inspector General of HHS who is currently performing the duties of the HHS Inspector General on an acting basis, with a permanent HHS Inspector General.<sup>72</sup> While it is within the President’s authority to appoint a permanent Inspector General, this replacement was announced after Grimm’s office released a report critical of the shortages in testing and personal protective equipment at hospitals during

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<sup>67</sup> *Id.* § 15010(d)(2)(A)(i).

<sup>68</sup> *Id.* § 15010(d)(2)(A)(ii).

<sup>69</sup> *Id.* § 15010(d)(1)(C).

<sup>70</sup> Neil Barofsky, The Coronavirus Stimulus Money Needs Oversight, N.Y. Times (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/opinion/coronavirus-stimulus-oversight.html>.

<sup>71</sup> Zachary Cohen and Barbara Starr, Pentagon deputy inspectorgeneral resigns, becomes latest watchdog to exit administration, CNN (May 26, 2020) <https://www.cnn.com/2020/05/26/politics/glenn-fine-pentagon-resigns/index.html>.

<sup>72</sup> Lisa Rein, Trump Replaces HHS Watchdog Who Found ‘Severe Shortages’ at Hospitals Combating Coronavirus, Wash. Post (May 2, 2020), [https://www.washingtonpost.com/politics/trump-replaces-hhs-watchdog-who-found-severe-shortages-at-hospitals-combating-coronavirus/2020/05/02/6e274372-8c87-11ea-ac8a-fe9b8088e101\\_story.html](https://www.washingtonpost.com/politics/trump-replaces-hhs-watchdog-who-found-severe-shortages-at-hospitals-combating-coronavirus/2020/05/02/6e274372-8c87-11ea-ac8a-fe9b8088e101_story.html).

the coronavirus pandemic. Grimm is currently a member of PRAC, but, like Fine, she will be ineligible to continue to serve in that role after a permanent HHS Inspector General is confirmed.<sup>73</sup>

- The President recently removed the inspectors general for the intelligence community and the Department of State.<sup>74</sup>

Multiple prior inspectors general have commented that this pattern of removing sitting inspectors general sends a “chilling” message to current inspectors general and may impact the tenacity with which they investigate and report waste, fraud, and abuse.<sup>75</sup> The first SIGTARP, Neil Barofsky, noted that inspectors general are being sent a message to “Criticize the programs at your peril, and think twice before even raising your hand for the task of overseeing them.”<sup>76</sup>

- **Transparency of Loans:** As noted with respect to SIGPR, access to information about loans is key to effective oversight. In the case of PRAC, this means information not only from Treasury and the Federal Reserve, but also the Small Business Administration. On June 11, two of the inspectors general within PRAC wrote to four Congressional chairs objecting to Treasury’s stance on releasing information about beneficiaries of Subtitle A money.<sup>77</sup> The Administration resisted releasing information about beneficiaries of PPP loan recipients, but

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73 *Id.* Grimm remains a deputy inspector general at HHS.

74 Hannah Knowles, Top Democrats Launch Investigation into Late-Night Firing of State Department Inspector General, Wash. Post (May 16, 2020), <https://www.washingtonpost.com/politics/2020/05/16/state-department-inspector-general-fired-democrats-decry-dangerous-pattern-retaliation/>.

75 Neil Barofsky, The Coronavirus Stimulus Money Needs Oversight, N.Y. Times (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/opinion/coronavirus-stimulus-oversight.html>; David C. Williams, Trump’s Purge of Inspectors General Is Alarming. His Replacements May Be Worse., Wash. Post (May 21, 2020), <https://www.washingtonpost.com/opinions/2020/05/21/trumps-widespread-removal-inspectors-general-is-alarming-so-are-his-appointments/>.

76 Neil Barofsky, The Coronavirus Stimulus Money Needs Oversight, N.Y. Times (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/opinion/coronavirus-stimulus-oversight.html>.

77 Inspectors general warn that Trump administration is blocking scrutiny of coronavirus rescue programs, WP, (June 16, 2020), <https://www.washingtonpost.com/business/2020/06/15/inspector-general-oversight-mnuchin-cares-act/>.

later reversed course under pressure and agreed to disclose information about loans greater than \$150,000, and it is reported that at least four members of the House of Representatives benefited.<sup>78</sup>

- **Access to data:** PRAC has already run into some roadblocks with regard to obtaining accurate and timely data, as noted by several inspectors general.<sup>79</sup>

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78 “Members of Congress took small-business loans – and the full extent is unknown.” Forbes (June 16, 2020), <https://www.politico.com/news/2020/06/16/congress-small-business-loan-320625>; Mark Niquette, Trump Administration Flips on PPP Disclosure After Backlash, Washington Post (June 22, 2020), [https://www.washingtonpost.com/business/on-small-business/trump-administration-flips-on-ppp-disclosures-after-backlash/2020/06/19/35d7b214-b292-11ea-98b5-279a6479a1e4\\_story.html](https://www.washingtonpost.com/business/on-small-business/trump-administration-flips-on-ppp-disclosures-after-backlash/2020/06/19/35d7b214-b292-11ea-98b5-279a6479a1e4_story.html).

79 Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Efforts, Pandemic Response Accountability Committee (June 2020) [https://www.oversight.gov/sites/default/files/oig-reports/Top%20Challenges%20Facing%20Federal%20Agencies%20-%20COVID-19%20Emergency%20Relief%20and%20Response%20Efforts\\_1.pdf](https://www.oversight.gov/sites/default/files/oig-reports/Top%20Challenges%20Facing%20Federal%20Agencies%20-%20COVID-19%20Emergency%20Relief%20and%20Response%20Efforts_1.pdf).



## V. The Congressional Oversight Commission

Like SIGPR, the COC's mandate is limited to the Subtitle A Lending Program.<sup>80</sup> However, rather than focusing on waste, fraud, and abuse, the Act instructs the COC to investigate generally the "impact" of the program "on the financial well-being of the people of the United States and the United States economy, financial markets, and financial institutions,"<sup>81</sup> as well as the program's "effectiveness" at "minimizing long-term costs . . . and maximizing the benefits for taxpayers."<sup>82</sup>

The COC comprises five members: four appointed by each of the Speaker of the House, the House Minority Leader, the Senate Majority Leader, and the Senate Minority Leader; and a fifth member, who will serve as the chair, appointed jointly by the Speaker of the House and the Senate Majority Leader.<sup>83</sup> Four members of the COC are required for a quorum.<sup>84</sup> At present, four members have been appointed-Rep. French Hill, Rep. Donna Shalala, Sen. Pat Toomey, and Bharat Ramamurti - but there is still no chair.<sup>85</sup>

There is no fixed amount of funding authorized for the COC's activities. Rather, the Act authorizes the appropriation of "such sums as may be necessary" each fiscal year.<sup>86</sup>

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<sup>80</sup> The CARES Act § 4020(b)(1).

<sup>81</sup> *Id.* § 4020(b)(2)(A)(ii).

<sup>82</sup> *Id.* § 4020(b)(2)(A)(iv).

<sup>83</sup> *Id.* § 4020(c)(1).

<sup>84</sup> *Id.* § 4020(c)(5).

<sup>85</sup> Emily Cochran, House Passes Relief for Small Businesses and Aid for Hospital Testing, New York Times (April 23, 2020), <https://www.nytimes.com/2020/04/23/us/politics/house-passes-relief-for-small-businesses-and-aid-for-hospitals-and-testing.html>.

<sup>86</sup> *Id.* § 4020(g)(1).

## A. Powers and Authorities

The COC may “secure” any information it requires for its investigations “directly from” any government agency.<sup>87</sup> It is also authorized to hold hearings, take testimony and administer oaths to witnesses, and “receive evidence.”<sup>88</sup> However, the COC does not have subpoena power.<sup>89</sup>

## B. Reporting

The COC is required to report to Congress every 30 days on the Treasury Secretary’s and the Federal Reserve’s implementation of the Subtitle A Lending Program, including the “impact” and “effectiveness” of the program, as well as the “extent to which the information made available on transactions under this subtitle has contributed to market transparency.”<sup>90</sup> The COC issued its first such report on May 18, 2020.<sup>91</sup>

## C. Potential Gaps / Issues

As is the case with the other oversight bodies created by the Act, there are a number of potential gaps and troubling developments that may undermine the effectiveness of the COC’s oversight.

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<sup>87</sup> *Id.* § 4020(e)(4).

<sup>88</sup> *Id.* § 4020(e)(1).

<sup>89</sup> See *id.*

<sup>90</sup> *Id.* § 4020(b)(2)(A).

<sup>91</sup> About the CARES Act’s \$500 Billion Emergency Economic Stabilization Funds: The First Report of the Congressional Oversight Commission (May 18, 2020), [https://hill.house.gov/uploadedfiles/coc\\_1st\\_report\\_05.18.2020.pdf](https://hill.house.gov/uploadedfiles/coc_1st_report_05.18.2020.pdf). The report summarized the lending facilities that the Treasury and the Federal Reserve have announced that they will use to disburse the \$500 billion in CARES Act loans. It also noted that, although the Treasury Department has expressed its intent to invest certain amounts through each of these facilities, only \$37.5 billion has been disbursed as of May 18.

- **Delayed Start:** There was a delay in appointing COC members. It took several weeks after the enactment of the CARES Act to appoint four members, and it still lacks a chairperson.<sup>92</sup> Like SIGPR, the delay in appointing COC members caused the organization to begin its oversight late.
- **Absent Chairperson:** The COC chairperson is the one position that requires a partisan compromise. Although the COC was able to issue its first report absent a chairperson, it is unclear whether it will be able to continue functioning effectively without a formal leader.
- **Funding:** Funding for the COC is authorized, but it is not clear how much, if any, has been appropriated.<sup>93</sup>
- **Partisanship:** Given the partisan divide in the makeup of the COC, it is possible that the Commission will become bogged down in partisan battles. Indeed, of the four members, three are sitting members of Congress, and the one member not holding elected office, Bharat Ramamurti, is a former aide to Senator Elizabeth Warren.<sup>94</sup>
- **Ambiguous Standard for Oversight:** The COC’s oversight mandate is broad—the “effectiveness” of loans for “minimizing long-term costs to the taxpayers and maximizing the benefits for taxpayers.”<sup>95</sup> It is not clear how the Commission is

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92 Who Is Watching Over Coronavirus Bailout Spending?, NPR (Apr. 19, 2020), <https://www.npr.org/2020/04/19/838073166/who-is-watching-over-coronavirus-bailout-spending-1st-panel-appointee-talks-over>.

93 The CARES Act § 4020(g)(1).

94 Victoria Guida, Fault Lines Emerge in Oversight Body as Toomey, Former Warren Aide Split, Politico (Apr. 28, 2020), <https://www.politico.com/news/2020/04/28/toomey-warren-aide-ramamurti-213074>; Tim Fernholz, Congress Still Hasn’t Picked a Chair for Its Bailout Oversight Commission, Quartz (May 7, 2020), <https://qz.com/1852827/congress-still-hasnt-picked-a-leader-for-bailout-oversight-group>.

95 The CARES Act § 4020(b)(2)(A)(iv).

supposed to evaluate loans under that standard, and thus it remains to be seen how the COC will interpret its charge.

## VI. Other Oversight and Transparency Mechanisms

In addition to these three new oversight bodies, Congress took further steps to monitor CARES Act spending. Both the House of Representatives and Senate announced their own plans to oversee pandemic recovery spending. The CARES Act also tasks the GAO with reviewing the use of particular funds. Finally, the Act requires agencies to publish certain data about their use of CARES Act funds.

### A. House Select Subcommittee on Coronavirus Crisis

In addition to the COC, on April 23, 2020, the House of Representatives created a separate subcommittee to oversee the pandemic recovery.<sup>96</sup> The subcommittee is charged with examining the use of taxpayer funds to address the COVID-19 crisis, potential waste or mismanagement, the effectiveness of new laws meant to address the pandemic, federal preparedness, the economic impact of the crisis, socioeconomic disparities in the impact of the crisis, the Administration's handling of the crisis, the ability of whistleblowers to report waste or abuse, and the Administration's cooperativeness with Congress and other oversight entities.<sup>97</sup> The House voted to create the subcommittee over opposition from Republicans, who characterized it as an attempt to harm President Trump in advance of the November 2020 election.<sup>98</sup> House Democrats responded that the unprecedented size of the CARES Act warranted extra

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<sup>96</sup> The House created similar subcommittees to oversee TARP and the 2009 stimulus after Republicans became the majority party in 2010. Susan Crabtree, Issa, House GOP Create New Oversight Sub-Panels for TARP, Stimulus, The Hill (Dec. 17, 2010), <https://thehill.com/homenews/house/134311-issa-gop-creates-oversight-panels-for-tarp-stimulus>.

<sup>97</sup> H.R. Res. 935, § 3 (Apr. 23, 2020); About, Select Subcommittee on the Coronavirus Crisis, <https://coronavirus.house.gov/about> (last visited May 28, 2020).

<sup>98</sup> Kyle Cheney, House Creates New Select Coronavirus Oversight Committee Over GOP Objections, Politico (Apr. 23, 2020), <https://www.politico.com/news/2020/04/23/house-creates-coronavirus-oversight-committee-204316>.

oversight, beyond the three organizations created by the Act.<sup>99</sup> In addition, House Majority Leader Steny Hoyer noted that the Executive Branch had “undermine[d] its own oversight efforts by threatening the independence of agencies’ inspectors-general,” making Congressional oversight even more important.<sup>100</sup>

## 1. Powers and Authorities

The subcommittee has 12 members; Speaker Nancy Pelosi appointed seven, and Minority Leader Kevin McCarthy appointed five.<sup>101</sup> House Majority Whip Jim Clyburn, who participated in overseeing the federal response to Hurricane Katrina, leads the subcommittee.<sup>102</sup> The subcommittee has an initial budget of \$2 million, and it is authorized to issue subpoenas and take depositions.<sup>103</sup>

## 2. Potential Gaps / Issues

As with the oversight bodies created by the CARES Act, there are two developments since the House’s creation of the subcommittee that may undermine the effectiveness of its oversight.

- **Transparency of Information:** As with SIGPR and PRAC, the Subcommittee has pointed out the lack of transparency of government agencies dispensing CARES Act money. On June 15, 2020, the Subcommittee sent a letter to Secretary of Treasury Steven Mnuchin and Administrator of the Small Business Administration

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99 Cristina Marcos, House Votes to Create Select Committee to Oversee Coronavirus Response, The Hill (Apr. 23, 2020), <https://thehill.com/homenews/house/494340-house-votes-to-create-select-committee-to-oversee-coronavirus-response>.

100 Hoyer Statement on the House Select Subcommittee on the Coronavirus Crisis, Press Release (Apr. 23, 2020), <https://www.majorityleader.gov/content/hoyer-statement-house-select-subcommittee-coronavirus-crisis>.

101 H.R. Res. 935, § 2 (Apr. 23, 2020).

102 Meet the Chair, Select Subcommittee on the Coronavirus Crisis, <https://coronavirus.house.gov/about/meet-the-chair> (last visited May 28, 2020).

103 H.R. Res. 935, §§ 4, 9 (Apr. 23, 2020).

Jovita Carranza seeking document and information, including a list of all PPP applications received and loans issued. The letter urged the Secretary of Treasury and SBA Administrator to “provide more transparency about the administration of this program so American taxpayers can understand whether federal funds are helping vulnerable businesses and saving jobs, or are being diverted to waste, fraud and abuse.” The Treasury Department later reversed course, but this lack of proactive transparency shows a resistance to oversight.

- **Partisanship:** Given that the subcommittee has been a source of partisan debate since it was proposed, it is likely to remain a highly partisan body. Indeed, the subcommittee’s first action was to send letters to large companies that it believed had incorrectly received PPP funding that were signed only by the Democratic members of the subcommittee.<sup>104</sup>
- **Crowded Field:** The subcommittee’s work may largely overlap with the work of the three oversight mechanisms created by the CARES Act. That overlap could lead to inefficiencies, confusion, or redundancy. Even assuming that agencies work to respond to all requests for information in good faith, they may be overwhelmed by competing demands from multiple oversight bodies.

## B. Senate Oversight

There is no Senate subcommittee dedicated to overseeing CARES Act spending. Rather, Senate Majority Leader Mitch McConnell tasked Senate Banking Committee Chairman Mike Crapo with coordinating the Senate’s oversight of the Act.<sup>105</sup> Senator Crapo is to “work closely with the chairs of other [Senate] committees,” ensuring that “they

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<sup>104</sup> In First Official Action, House Coronavirus Panel Demands That Large Public Corporations Return Tax Payer Funds Intended for Small Businesses, House Select Subcommittee on the Coronavirus Crisis, Press Release (May 8, 2020), <https://coronavirus.house.gov/news/press-releases/first-official-action-house-coronavirus-panel-demands-large-public-corporations>.

<sup>105</sup> Crapo to Coordinate Senate-Wide Oversight of Rescue Package, Senator Crapo, News Release (Apr. 17, 2020), <https://www.crapo.senate.gov/media/newsreleases/crapo-to-coordinate-senate-wide-oversight-of-rescue-package>.

supervise their own portions of the CARES Act.”<sup>106</sup>

The Senate Committee on Banking, Housing, and Urban Affairs is holding quarterly hearings on CARES Act funding, with the first such hearing held on May 19, 2020.<sup>107</sup> However, it is not clear what—if any—coordination among Senate committees is occurring with regard to CARES Act oversight.

## 1. Potential Gaps / Issues

As with the House subcommittee, gaps in the Senate Majority Leader’s plan, as well as recent developments, may undermine the effectiveness of the Senate’s oversight.

- **No Formal Structure:** Senate Majority Leader McConnell’s instruction to Senator Crapo is informal—there is no body responsible for overseeing CARES Act spending across Senate committees. Although Senator Crapo may be well positioned to hold oversight hearings through the Committee on Banking, Housing, and Urban Affairs, it is not clear whether the Senate’s informal approach will be effective in facilitating the coordination that will be necessary across separate Senate committees and subcommittees.
- **Crowded Field:** The Senate’s work may largely overlap with the work of the three oversight mechanisms created by the CARES Act, as well as the House subcommittee. As noted above, that may lead agencies responding to overseers’ requests for information to be overwhelmed.

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<sup>106</sup> *Id.*

<sup>107</sup> The Quarterly CARES Act Report to Congress, Full Committee Hearing, Senate Committee on Banking, Housing, and Urban Affairs (May 19, 2020), <https://www.banking.senate.gov/hearings/the-quarterly-cares-act-report-to-congress>.



## C. Role of the Government Accountability Office

The GAO is the Legislative branch’s oversight arm. This means that, generally, the GAO issues reports when requested by Congressional committees, subcommittees, or members of Congress.<sup>108</sup> The GAO also collects reports of fraud from the public through its FraudNet system.<sup>109</sup>

### 1. Powers and Authorities

The CARES Act broadly instructs the GAO to monitor and oversee “the exercise of authorities” and “use of funds” under any Act related to the current pandemic, as well as “the effect of the pandemic on the health, economy, and public and private institutions of the United States, including public health and homeland security efforts by the Federal Government.”<sup>110</sup> The GAO is required to make reports on those findings by June 25, 2020, 90 days after the CARES Act’s passing; then every other month until March 27, 2021, one year after the Act’s passing; then “on a periodic basis” until the President declares that the COVID-19 national emergency has expired.<sup>111</sup> Separately, the CARES Act instructs the GAO to “conduct a study” of the Subtitle A Lending Program and to submit a report to Congress by December 27, 2020, nine months after the Act’s passing, and then annually for as long as those loans remain outstanding.<sup>112</sup> It also provides \$20 million in additional funding to the GAO.

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<sup>108</sup> What GAO Does, U.S. Gov’t Accountability Off., <https://www.gao.gov/about/what-gao-does/for-congress> (last visited May 8, 2020).

<sup>109</sup> FraudNet is GAO’s online tool for the public, government workers, and contractors to report suspected incidents of government waste, fraud, and abuse. What GAO Does: FraudNet, U.S. Gov’t Accountability Off., <https://www.gao.gov/about/what-gao-does/fraudnet> (last visited June 3, 2020); see also GAO’s FraudNet Hotline Ready to Help Combat Fraud Under COVID-19 Assistance, U.S. Gov’t Accountability Off., Press Release (Apr. 10, 2020), [https://www.gao.gov/about/press-center/press-releases/fraudnet\\_coronavirus.htm](https://www.gao.gov/about/press-center/press-releases/fraudnet_coronavirus.htm).

<sup>110</sup> The CARES Act § 19010(b).

<sup>111</sup> The CARES Act § 19010(c).

<sup>112</sup> *Id.* § 4026(f).

## 2. Potential Gaps / Issues

As with the other oversight mechanisms, the GAO's work may largely overlap with the work of the three oversight mechanisms created by the CARES Act, as well as the House subcommittee and the work of the Senate Committee on Banking, Housing, and Urban Affairs. As noted above, that may lead agencies responding to overseers' requests for information to be overwhelmed.

However, unlike the CARES-specific oversight bodies, the GAO is already established and staffed by experienced auditors. It need not wait to begin auditing until its members are appointed, and as a result may serve an important gap-filling role while other oversight mechanisms get set up. Indeed, this work is already ongoing.<sup>113</sup>

### D. Statutory Requirements for Transparency

In addition to creating various bodies to oversee CARES Act spending, the Act also requires agencies to make certain public disclosures about their use of CARES Act funds and requires recipients of CARES Act funding to submit certain reports.

#### 1. Reports to PRAC and the Office of Management and Budget

The Act requires Federal agencies to submit to PRAC and the Office of Management and Budget ("OMB") monthly reports on any expenditures of CARES Act funding over \$150,000.<sup>114</sup> This requirement expires on September 30, 2021.<sup>115</sup> In addition, recipients

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<sup>113</sup> A Watchdog Out of Trump's Grasp Unleashes Wave of Coronavirus Audits, Politico (Apr. 20, 2020), <https://www.politico.com/news/2020/04/20/watchdog-trump-coronavirus-audits-192272>.

<sup>114</sup> The CARES Act § 15011(b)(1)(A).

<sup>115</sup> *Id.*

of the funds are required to submit quarterly reports to PRAC summarizing how those funds are being spent.<sup>116</sup>

## 2. Timely Treasury Reports

The Act created special reporting requirements for the \$46 billion allocated to the Treasury Department as part of the Subtitle A Lending Program to make loans to passenger air carriers, cargo air carriers, or businesses “critical to maintaining national security.”<sup>117</sup> In particular, the Treasury Department must report any such loan on its public website within “72 hours” of the transaction.<sup>118</sup> In addition, it must update such reports every 30 days so long as any such loans are outstanding.<sup>119</sup> The COC reported on May 18, 2020 that the Treasury Department had yet to disburse any loans from the \$46 billion appropriated.<sup>120</sup> As of June 4, 2020, it appears that is still the case, and thus the Treasury Department has not made any such reports.<sup>121</sup>

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116 *Id.* § 15011(b)(1)(B).

117 *Id.* § 4026(a)(1); see *id.* § 4003(b)(1)-(3).

118 *Id.*

119 *Id.*

120 About the CARES Act’s \$500 Billion Emergency Economic Stabilization Funds: The First Report of the Congressional Oversight Commission at 5 (May 18, 2020), [https://hill.house.gov/uploadedfiles/coc\\_1st\\_report\\_05.18.2020.pdf](https://hill.house.gov/uploadedfiles/coc_1st_report_05.18.2020.pdf) (confirming no such loans have been issued). However, the Treasury has made payments to airlines under the related Payroll Support Program. See Treasury Begins Payments to Airlines for Coronavirus-Related Relief, Wash. Post (Apr. 21, 2020), <https://www.washingtonpost.com/transportation/2020/04/20/treasury-officials-finalize-agreements-with-airlines-coronavirus-related-relief/>.

121 See Saleha Mohsin & Ryan Beene, Airlines Leave \$29 Billion Aid Fund Untapped in Bet on Rebound, Bloomberg (May 29, 2020), <https://www.bloomberg.com/news/articles/2020-05-29/mnuchin-s-29-billion-loan-fund-untapped-as-airlines-eye-rebound>; David McLaughlin & Anthony Capaccio, A \$17 Billion Pot of National-Security Stimulus Aid Goes Begging, Bloomberg (May 14, 2020), <https://www.bloomberg.com/news/articles/2020-05-14/a-17-billion-pot-of-national-security-stimulus-aid-goes-begging>.

## VII. Oversight Recommendations

The Coalition for Integrity offers the following recommendations to SIGPR, Congress, and the Administration, to address the gaps and shortfalls identified. These recommendations are based on lessons from prior oversight bodies and are intended to increase transparency and improve the ability to perform the necessary oversight.

### **A. Recommendations for the Special Inspector General for Pandemic Relief**

#### **1. Provide Effective Leadership**

While it may be obvious, an inspector general needs to have good judgment and must lead his or her office in an aggressive, yet fair and balanced, and independent manner. Arnold Fields, the first Special Inspector General for Afghanistan Reconstruction (“SIGAR”), which was tasked with overseeing the reconstruction programs and operations in Afghanistan, reportedly showed poor judgement in several respects, which had a negative effect on SIGAR’s oversight efforts.<sup>122</sup> For instance, at the beginning of his work, Fields reportedly did not sufficiently staff his office to conduct audits and investigations, thereby hampering SIGAR’s ability to detect and prevent waste, fraud, and abuse.<sup>123</sup> While Fields later addressed this staffing shortfall, a peer review that the Council of Inspectors General on Integrity and Efficiency (“CIGIE”) conducted reported that his staff still failed to perform audits and investigations under standards acceptable to Congress, leaving the office open to criticism that undermined its credibility. Members of Congress calling for Fields’ ouster were especially concerned with the possibility that auditees would challenge audit findings due to deficiencies in

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<sup>122</sup> Jason Horowitz, Arnold Fields, charged with targeting Afghan fraud, came under fire himself, Wash. Post., Feb. 10, 2011.

<sup>123</sup> See *id.* at 35.

the audit process, which would in turn delay or prevent the implementation of corrective action.<sup>124</sup> Additionally, Fields awarded a sole-source contract to a former inspector general who had been the subject of allegations of misconduct in an attempt to address issues raised in the peer review report that led to members of Congress to call for Fields' removal.<sup>125</sup> That individual was tasked with independently monitoring SIGAR's efforts to correct the deficiencies identified by the CIGIE.<sup>126</sup> In total, Fields' reported poor judgment—or the perception thereof—led Congress to lose confidence that he could carry out the mandates of his office. Ultimately, Fields resigned in January 2011. As the experience with SIGAR highlights, it will be critical for SIGPR to demonstrate—and be perceived as exercising—effective leadership over his office. To exercise effective leadership, SIGPR should act with integrity at all times and should conduct thorough audits and investigations and be honest and transparent in all reports—even if that means being critical of the administration. In addition, SIGPR should evaluate threats to his office's independence and take any necessary steps to safeguard the office's independence and integrity, including through reporting to relevant stakeholders any such threats and SIGPR's mitigation efforts.<sup>127</sup>

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124 Bipartisan Letter from Senators McCaskill, Coburn, Collins, & Grassley to President Obama, Sept. 23, 2010, <https://www.collins.senate.gov/newsroom/senator-collins-joins-bipartisan-call-safeguard-inspector-general-independence-following>.

125 SIGAR Issues Statement on Completion of Peer Review, SIGAR, Aug. 6, 2010, <https://www.sigar.mil/newsroom/pressreleases/10/2010-aug-06-pr.html> (last visited June 3, 2020); see also Fields Resigns as Special IG for Afghanistan Reconstruction, POGO Blog (Archived), Jan. 11, 2011, <https://pogoblog.typepad.com/pogo/2011/01/fields-resigns-as-special-ig-for-afghanistan-reconstruction.html>; <http://pogoarchives.org/m/go/ig/senate-sigar-letter-20100923.pdf>.

126 CIGIE is the primary oversight and coordinative body for the inspector general community. CIGIE works to “address integrity, economy, and effectiveness issues that transcend individual [g]overnment agencies” and seeks to “increase the professionalism and effectiveness of [OIG] personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce.” Inspector General Reform Act of 2008, Pub. Law No. 110-409, § 11.

127 In a recent report, the GAO highlighted that inspectors general must comply with generally accepted government auditing standards (“GAGAS”). U.S. Gov't Accountability Off., GAO-20-639R, *Inspectors General: Independence Principles and Considerations for Reform*, June 8, 2020, <https://www.gao.gov/assets/710/707412.pdf> (last visited June 10, 2020). GAGAS requires inspectors general to identify threats to independence, take steps to mitigate them, and document such threats and safeguards. *Id.*

## 2. Conduct Early and Aggressive Oversight

SIGPR should begin hiring staff immediately and conducting investigations and audits related to funding that has been distributed from the Subtitle A Lending Program.

Indeed, SIGPR should plan to “hit the ground running.” Brian Miller had reportedly begun to plan for staff hiring and other tasks before being confirmed, which is a positive development.<sup>128</sup>

Beyond staffing and planning, the experiences of other inspectors general have underscored the importance of early and aggressive oversight. For instance, Neil Barofsky, the first SIGTARP, noted how difficult it was to get his bearings when he arrived at the Treasury Department, and he indicated that hiring staff, obtaining office equipment, and navigating unfamiliar government bureaucracy made the initial period of his SIGTARP tenure difficult, with these administrative tasks taking up much of his time.<sup>129</sup> Compounding those initial setup challenges, Barofsky noted that it was difficult to monitor TARP funding that had already been distributed when he was appointed SIGTARP.<sup>130</sup> The same will be true for SIGPR, and early and aggressive oversight will help mitigate some of the effects of delay in getting SIGPR in role.

There are significant risks associated with failing to provide early and aggressive oversight. For example, in Iraq and Afghanistan, the Coalition Provision Authority Office of Inspector General (“CPA-IG”)—the predecessor to the Special Inspector General for Iraq Reconstruction (“SIGIR”)<sup>131</sup>—and SIGAR, respectively, were not deployed on the ground at the onset of U.S.-funded reconstruction programs and were not fully funded

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<sup>128</sup> See Rappeport, *supra* note 21.

<sup>129</sup> C. Ryan Barber, ‘It’s Going to Be Extraordinary’: Predictions and Advice From Neil Barofsky for Coronavirus Recovery Oversight (Mar. 27, 2020), Nat’l Law. J., <https://www.law.com/nationallawjournal/2020/03/27/its-going-to-be-extraordinary-predictions-and-advice-from-neil-barofsky-for-coronavirus-recovery-oversight/>.

<sup>130</sup> Neil Barofsky, *Bailout* 35 (2012).

<sup>131</sup> The CPA-IG was the predecessor of SIGIR, which was created by Congress in 2004 after the sunset of the CPA-IG to oversee reconstruction programs and operations in Iraq.

and operational at that time.<sup>132</sup> During that period in each country, many actors took advantage of the chaos, diverting funds to fraudulent and corrupt causes. Moreover, corruption reportedly was exacerbated by the injection of large sums of money into Iraq and Afghanistan in short periods of time to address counterinsurgency and reconstruction, without proper oversight mechanisms already being in place.<sup>133</sup> This led to the loss of millions of dollars to waste, fraud, and abuse.<sup>134</sup>

Like SIGTARP, SIGIR, and SIGAR, SIGPR will begin its work during a time of crisis after significant amounts of government funding has already been announced and, in many cases, disbursed in a short period of time. Drawing on the lessons learned from these prior special inspectors general, SIGPR should begin planning in order to be in a position to begin early and aggressive oversight immediately.

### 3. Exercise Increased Transparency

SIGPR should make all of its reports publicly accessible by posting them to the office's website. SIGPR should also post all reports to Oversight.gov.<sup>135</sup> While the CARES Act does not require SIGPR to release reports to the public like the Emergency Economic Stabilization Act of 2008 ("EESA") required of SIGTARP, the CARES Act also does not *prohibit* SIGPR from releasing all of its reports to the public.<sup>136</sup> SIGTARP published all 41 of its quarterly reports to Congress on its website.<sup>137</sup> By the time that Barofsky left

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132 Learning From Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction 103, SIGAR (2013).

133 See *id.*

134 See *id.*

135 Oversight.gov was created by the CIGIE to consolidate in one place all public reports from federal inspectors general. The inspector general that issues the report posts the report directly to Oversight.gov, and CIGIE maintains the site. See About Oversight.gov, Oversight.gov, <https://www.oversight.gov/about> (last visited June 3, 2020).

136 The CARES Act restricts the public's access to certain reports: "Nothing in this subsection may be construed to authorize the public disclosure of information that is specifically prohibited from disclosure by any other provision of law; specifically required by Executive order to be protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs; or a part of an ongoing criminal investigation." See The CARES Act § 4018(f)(2). The EESA also prohibited SIGTARP from making such reports public. See 12 U.S.C. § 5231(i)(3); § 5231(i)(5).

137 See Reports, SIGTARP, <https://www.sigtar.gov/Pages/Reports-Testimony-Home.aspx> (last visited May 21, 2020).

SIGTARP in March 2011, SIGTARP’s website had more than 50 million hits and 3.6 million downloads of its quarterly reports, which suggests that it was a widely accessed and successful way to publicize SIGTARP’s work and to increase transparency around such work.<sup>138</sup> SIGPR should similarly release reports to the public to increase transparency.

SIGPR should also establish a database listing all individuals and entities charged with crimes associated with the Subtitle A Lending Program to increase the transparency of SIGPR’s work and to deter fraudulent conduct. SIGTARP created a similar database of financial crimes, which includes all criminal convictions, guilty pleas, and fines secured by SIGTARP or with SIGTARP’s assistance. These actions would not only increase transparency, but also could deter criminal conduct.

#### **4. Use AI and Advanced Data Techniques to Track CARES Act Spending and Identify Fraud**

SIGPR should use advanced data and analysis techniques to identify waste, fraud, and abuse associated with the Subtitle A Lending Program. ARRA, which was passed to preserve and create jobs and assist those most impacted by the recession in 2008-2009 created the Recovery Accountability and Transparency Board (“Recovery Board”) to oversee ARRA spending and to prevent waste, fraud, and abuse.<sup>139</sup> In 2009, the Recovery Board established the Recovery Operations Center (“ROC”), which used advanced data and analysis techniques to identify potential waste, fraud, and abuse in ARRA funding, in some cases before the payments even were made.<sup>140</sup> The ROC improved the speed of fraud detection and flagged suspicious patterns in fund

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<sup>138</sup> Neil Barofsky, *Bailout 160* (2012).

<sup>139</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1521, 123 Stat. 289.

<sup>140</sup> U.S. Gov’t Accountability Off., GAO-14-219, Report to Congressional Requesters: Recovery Act Grant Implementation Experiences Offer Lessons for Accountability and Transparency, <https://www.gao.gov/assets/670/660353.pdf> (Jan. 2014).



disbursement data that previously went undetected.<sup>141</sup> SIGPR should use similar data and analysis techniques to track Subtitle A Lending Program funding and to flag potential fraud. SIGPR should also work with the other CARES Act oversight bodies to partner with technology experts inside and outside of the government to launch a more enhanced version of the ROC that utilizes state-of-the-art technology to track and monitor the Subtitle A Lending Program.<sup>142</sup>

## 5. Adopt Best Practices on Whistleblower Protections

SIGPR should work with offices of inspectors general to ensure that all relevant employees covered by whistleblower protection laws are adequately informed and trained on the rights afforded to whistleblowers under various existing whistleblower protection statutes.<sup>143</sup> Supervisors should understand what constitutes protected conduct and should be trained to identify and prevent retaliation. Relevant employees should also be informed about the available avenues for reporting misconduct or retaliation, and they should understand the remedies available to them.

To help achieve these goals, offices of inspectors general should adopt the best practices developed by the CIGIE, Whistleblower Protection Coordinators (“WPCs”), and the Office of Special Counsel (“OSC”) working groups.<sup>144</sup> For example, SIGPR could work with other stakeholders to develop a website with training materials for office of inspectors general employees who conduct retaliation investigations.<sup>145</sup> SIGPR also should lead efforts to establish a press campaign aimed at informing federal and private employees about mechanisms in place to report suspected misconduct related

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141 Danny Werfel, Fighting Fraud in the CARES Act—Rebuild the ‘ROC’, The Hill, Apr. 22, 2020, <https://thehill.com/opinion/technology/493877-fighting-fraud-in-the-cares-act-rebuild-the-roc>.

142 See Danny Werfel, Fighting Fraud in the CARES Act—Rebuild the ROC, The Hill (Apr. 22, 2020), <https://thehill.com/opinion/technology/493877-fighting-fraud-in-the-cares-act-rebuild-the-roc>.

143 See *infra* VI.B.3 (providing a recommendation to Congress regarding expanding whistleblower protection coverage).

144 Whistleblowing Works: How Inspectors General Respond to and Protect Whistleblowers, Report of the Council of the Inspectors General on Integrity and Efficiency (2019).

145 *Id.*

to the Subtitle A Lending Program and their rights when they report misconduct. SIGPR could also collaborate with other inspectors general and stakeholders on such a campaign. As part of this campaign, SIGPR should provide assurances that that whistleblower confidentiality will be maintained and that whistleblower identities will not be shared, unless the complainant consents to disclosure or if disclosure is unavoidable during the course of SIGPR's work.<sup>146</sup> Overall, SIGPR should take meaningful steps to inform relevant employees covered by whistleblower protection laws of their right to report misconduct and also should adopt best practices that promote transparency and accountability for retaliation.

## **6. Establish Openness to Oversight and Accountability**

SIGPR should be open to a review of its own policies, practices, procedures, audits, and investigations, including permitting (or even encouraging) the CIGIE and inspectors general of sister organizations to conduct peer reviews or audits of its programs and operations. Peer review by CIGIE was instrumental in uncovering suboptimal performance by SIGAR, revealing deficiencies in SIGAR's auditing and investigative practices.<sup>147</sup> This caused SIGAR to implement some of the recommendations but also caught the attention of members of Congress, who called for his ouster.<sup>148</sup> For these reasons, SIGPR should express an openness to review and should comply with any audits or investigations conducted by CIGIE or other oversight bodies.

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146 See U.S. Gov't Accountability Off., GAO-20-639R, *Inspectors General: Independence Principles and Considerations for Reform*, June 8, 2020, <https://www.gao.gov/assets/710/707412.pdf> (last visited June 10, 2020).

147 Jason Horowitz, *Arnold Fields, charged with targeting Afghan fraud, came under fire himself*, Wash. Post. (Feb. 10, 2011), [https://www.washingtonpost.com/lifestyle/style/arnold-fields-charged-with-targeting-afghan-fraud-came-under-fire-himself/2011/02/10/ABHWOrQ\\_story.html](https://www.washingtonpost.com/lifestyle/style/arnold-fields-charged-with-targeting-afghan-fraud-came-under-fire-himself/2011/02/10/ABHWOrQ_story.html).

148 *Id.*

## 7. Coordinate with Other Agencies and Coordination with State and Local Authorities

To ensure thorough audits and investigations and to avoid duplicating work among various oversight bodies, SIGPR should coordinate with federal and state agencies and federal and state attorneys general in overseeing the Subtitle A Lending Program. SIGTARP's collaboration with other federal and state agencies was crucial to its success. In testimony before Congress, Barofsky noted he was focused on "building essential relationships with other law enforcement and prosecutorial agencies."<sup>149</sup> He specifically referenced SIGTARP's coordination with the Federal Bureau of Investigations ("FBI"), the Department of Justice ("DOJ"), the Internal Revenue Services ("IRS"), the Securities and Exchange Commission ("SEC"), and several U.S. Attorney's offices throughout the country, and he credited such coordination as resulting in the ability to better utilize collective investigative resources.<sup>150</sup> By coordinating with federal and state agencies, SIGTARP led investigations that resulted in approximately \$11 billion in recoveries from 2010-2019.<sup>151</sup>

The taskforce approach also worked particularly well in Iraq, where SIGIR and DOJ initiated and implemented the SIGIR Prosecutorial Initiative ("SIGPRO").<sup>152</sup> SIGIR, through this initiative, hired former federal prosecutors and placed them within DOJ's Criminal Division to work exclusively on cases within SIGIR's jurisdiction.<sup>153</sup> SIGPRO resulted in a more efficient and productive way of conducting investigations and prosecutions, resulting in 33 indictments, 27 convictions, and more than \$8.3 million in

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149 Statement of Neil Barofsky Special Inspector General Troubled Asset Relief Program Before the United States Senate Committee on the Judiciary, Feb. 11, 2009, [https://www.sig tarp.gov/Testimony/Testimony\\_Before\\_the\\_Senate\\_Committee\\_on\\_The\\_Judiciary.pdf](https://www.sig tarp.gov/Testimony/Testimony_Before_the_Senate_Committee_on_The_Judiciary.pdf).

150 *Id.*

151 SIGTARP Investigations by the Numbers (Mar. 31, 2020), SIGTARP, <https://www.sig tarp.gov/Pages/Home.aspx>.

152 SIGIR Quarterly Report: Investigations Update (Section 2) 49, SIGIR, (Sept. 2013), [https://cybercemeter y.unt.edu/archive/sigir/20131001090424/http://www.sigir.mil/files/quarterlyreports/September2013/Section2\\_-\\_September\\_2013.pdf](https://cybercemeter y.unt.edu/archive/sigir/20131001090424/http://www.sigir.mil/files/quarterlyreports/September2013/Section2_-_September_2013.pdf)

153 SIGIR Quarterly Report, Investigations Update, Section 2, 49-50 (Sept. 2013), [https://cybercemeter y.unt.edu/archive/sigir/20131001090424/http://www.sigir.mil/files/quarterlyreports/September2013/Section2\\_-\\_September\\_2013.pdf](https://cybercemeter y.unt.edu/archive/sigir/20131001090424/http://www.sigir.mil/files/quarterlyreports/September2013/Section2_-_September_2013.pdf).

finances, forfeitures, recoveries, restitution, and other monetary resolutions by 2013, after just three years in operation.<sup>154</sup> Collaboration and cooperation among inspectors general, law enforcement, and prosecutorial authorities also enhanced the ability to uncover fraud, corruption, and abuse; to convict bad actors; and to save and recover taxpayer money in Afghanistan. In particular, the Joint Strategic Oversight Plan for Afghanistan allowed the inspectors general of four agencies tasked with overseeing Afghanistan reconstruction funds to focus their audits, inspections, and evaluations on the issues of most importance to policy and decision-makers.<sup>155</sup>

SIGPR should coordinate with federal and state agencies, including law enforcement agencies, as part of its effort to oversee the Subtitle A Lending Program. SIGPR should work with those other stakeholders to develop investigative plans and procedures that fully utilize their collective investigative abilities. In addition, SIGPR should communicate regularly with these agencies and should seek recommendations from them regarding how to improve investigative plans and procedures.

## **8. Ensure Open and Regular Communication with Congress**

SIGPR should communicate regularly with Congress regarding its audits and investigations and its requests for information from other agencies. Barofsky noted that “Congress served as an important bipartisan ally, without which SIGTARP would have accomplished little.”<sup>156</sup> When the Treasury Department refused to comply with SIGTARP’s requests for information, Barofsky was often able to get the requested documents from the Treasury Department after threatening to report to members of Congress—on both sides of the aisle.<sup>157</sup> At one point, the Secretary of the Treasury

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<sup>154</sup> *Id.* at 50.

<sup>155</sup> Joint Strategic Oversight Plan for Afghanistan Reconstruction FY13 - Joint Strategic Planning Subgroup for Oversight of Afghanistan Reconstruction 5, SIGAR (2012), <https://www.sigar.mil/pdf/strategicoversightplans/fy-2013.pdf>.

<sup>156</sup> Neil Barofsky, *Bailout 211* (2012).

<sup>157</sup> *Id.* at 211.

refused to meet with Barofsky about an investigation, and Barofsky threatened to report the Secretary's refusal to meet with him to Congress. Only then did the Secretary agree to meet with Barofsky.<sup>158</sup> Leveraging relationships with Congress could similarly assist SIGPR in obtaining access to necessary information from agencies that refuse to comply with SIGPR's requests for information.

## **9. Implement Mechanisms to Provide Real-Time Reporting to Congress**

SIGPR should consider implementing the use of "flash reports" that immediately disclose potential management and funding problems that require Congress's urgent attention. These reports should be submitted separately from and in addition to SIGPR's quarterly Congressional reports. In monitoring spending under the ARRA, the Recovery Board issued "flash reports" to Congress on issues that the Recovery Board determined required urgent attention from Congress.<sup>159</sup> Issuing such "flash reports" on issues that require Congress's immediate attention could increase the likelihood that Congress will act, and it would increase transparency between SIGPR and Congress.

## **10. Adopt Best Practices on Whistleblower Protections**

SIGPR should also leverage the media to put appropriate pressure on agencies that refuse to comply with requests for information and that make it more difficult for SIGPR to audit and investigate fraud related to the Subtitle A Lending Program. Barofsky spoke to Stuart Bowen, who was SIGIR from 2004 to 2013, seeking advice when he was first appointed SIGTARP. Bowen advised Barofsky that, as an inspector general, it is vital to have a good relationship with the press. Bowen told Barofsky that the only way to "make things happen in Washington" is to ensure that Congress and the public are

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<sup>158</sup> *Id.* at 185.

<sup>159</sup> American Recovery and Reinvestment Act of 2009, § 1523(b)(4), Pub. L. No. 111-5, 123 Stat. 291.

aware of problems so that the public can pressure the agency to resolve them.<sup>160</sup> The media can be a powerful tool in putting pressure on agencies to comply with SIGPR's requests and to implement SIGPR's recommendations.

To develop a positive working relationship with the media, SIGPR must be honest and transparent. Barofsky noted the importance of being transparent, which included acknowledging SIGTARP's mistakes.<sup>161</sup> This transparency was crucial in gaining the media's trust.<sup>162</sup> SIGPR should be similarly transparent so that media outlets will be more likely to trust that SIGPR will provide reliable information, and allow the media to publish more accurate information.

## 11. Develop a Tip Hotline

SIGPR should consider developing a tip hotline and should hire a sufficiently-sized staff to oversee its operation and to triage the tips that are received. This effort could be done in conjunction with DOJ's National Center for Disaster Fraud Hotline, which is a hotline for, among other things, individuals who believe that they are victims of scams or attempted fraud involving COVID-19, including healthcare fraud schemes related to testing and treatment, cryptocurrency fraud schemes, and schemes involving calls and emails from individuals claiming to be IRS and Treasury Department employees.<sup>163</sup>

SIGTARP created its hotline in 2009 to receive leads on suspected criminal activity related to TARP.<sup>164</sup> By December 31, 2013, SIGTARP had received 33,334 hotline complaints.<sup>165</sup> Such high call volume suggests that a SIGPR tip hotline could generate

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<sup>160</sup> *Id.*

<sup>161</sup> See Appendix II at 23.

<sup>162</sup> See *id.*

<sup>163</sup> See Coronavirus Response, U.S. Dep't of Justice, <https://www.justice.gov/coronavirus>.

<sup>164</sup> Taxpayer Complaints to Hotline Help SIGTARP Fight Fraud and Highlight Continuing Problems with TARP Housing Programs, SIGTARP (Jan 29, 2014), [https://www.sig tarp.gov/Audit%20Reports/SIGTARP\\_Hotline\\_Report.pdf](https://www.sig tarp.gov/Audit%20Reports/SIGTARP_Hotline_Report.pdf).

<sup>165</sup> *Id.*

complaints that could lead to successful fraud investigations and convictions.

## **B. Recommendations for Congress**

### **1. Extend SIGPR's Term**

Congress should extend SIGPR's term so that it terminates only when the last monetary obligation under the Subtitle A Lending Program has been closed, that is, after the final loan has been repaid or the final contract expired. The current term of five years is much too early, making it possible that SIGPR's office could cease to exist in the middle of ongoing audits and investigations. Extending SIGPR's term to when the last monetary obligation under the Subtitle

A Lending Program has been closed would mirror the term of SIGTARP.<sup>166</sup> Alternatively, Congress could extend SIGPR's term until the office has completed all of its audits and investigations, which may be even later than when the obligation under the Subtitle A Lending Program is repaid or when the final contract expires. Whatever method is chosen, SIGPR must be able to conduct its oversight for a period of time commensurate with the funds over which it has responsibility.

### **2. Appropriate Sufficient Funding**

Congress should adequately fund SIGPR and the other oversight bodies so that they are not limited in their ability to provide effective oversight. SIGPR has received only half of the amount of funding that Congress initially allocated to SIGTARP – SIGTARP received \$50 million in initial operating funds, while SIGPR has only been allocated \$25 million. This is despite the fact that the Subtitle A Lending Program (approximately \$500 billion)

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<sup>166</sup> See Financial Institution Crimes & Fines Database, SIGTARP, <https://www.sig tarp.gov/Pages/wd9er7g.aspx>.

is roughly the equivalent in value to TARP (\$475 billion).<sup>167</sup> Similarly, the ARRA which provided \$494 billion through fiscal year 2011<sup>168</sup>—included \$363.75 million for inspectors general, the GAO, and the Recovery Board to conduct oversight.<sup>169</sup> The amount of funding dedicated to oversight in the CARES Act—approximately \$125 million—pales in comparison.<sup>170</sup> Funding for PRAC is comparable to that for the Recovery Board - \$80 million compared to \$84 million – despite being charged with overseeing three times the funds. More funding should be allocated to SIGPR and other CARES Act oversight bodies to ensure that they have the resources necessary to investigate potential waste, fraud, and abuse.

### 3. Enhance Whistleblower Protections

Congress should ensure that individuals across all relevant sectors and industries, including those employed in the private sector, are afforded whistleblower protections in connection with reporting CARES Act waste, fraud, and abuse. Such provisions should enable all federal employees, contractors, and grantees, as well as private employees, to report waste, fraud, and abuse related to stimulus funds to the appropriate authorities without fear of retaliation.

First, Congress should expand whistleblower protections to all federal contractors and grantees. Currently, whistleblower protections in the False Claims Act (“FCA”) and the

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167 Congress originally authorized \$700 billion in TARP in the EESA, but the Dodd-Frank Act curtailed it to \$475 billion. About TARP: Where Did the Money Go?, Treasury.gov (updated Aug. 8, 2018), <https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/where-did-the-money-go.aspx>.

168 Congressional Budget Office, Actual ARRA Spending Over the 2009-2011 Period Quite Close to CBO’s Original Estimate (Jan. 5, 2012), <https://www.cbo.gov/publication/42682> (last visited May 6, 2020).

169 Clinton T. Brass, Cong. Research Serv., R40572, General Oversight Provisions in the American Recovery and Reinvestment Act of 2009 (ARRA): Requirements and Related Issues (2009), <https://crsreports.congress.gov/product/pdf/R/R40572/3>.

170 The CARES Act provided SIGPR with a budget of \$25 million. See supra note 23. It appropriated to PRAC a budget of \$80 million, and the GAO was appropriated an additional \$20 million. See supra note 56, 108. Note, however, that the PRAC website states that the CARES Act allocated a total of \$75 billion in “federal program administration and oversight,” yet the website does not provide a breakdown of how those funds are calculated or allocated, and the reported figure is far larger than the amounts allocated to oversight bodies under the CARES Act.. See Pandemic Response Accountability Committee, Track the Money, <https://pandemic.oversight.gov/track-the-money> (last visited June 3, 2020).



National Defense Authorization Act (“NDAA”) afford some federal contractors and grantees whistleblower protections, but these protections exclude many federal contractors and grantees.<sup>171</sup> Congress should close this gap by amending the FCA and NDAA, or adopting other legislation, to provide whistleblower protections to all federal contractors and grantees.

Second, Congress should expressly incorporate whistleblower protections into the CARES Act, similar to those afforded to private employee whistleblowers under the

ARRA, Dodd-Frank, and the Sarbanes-Oxley Act.<sup>172</sup> The CARES Act currently contains no whistleblower protections for private employees who work for recipients of CARES Act funding. Such employees should be protected. Third, Congress should expand whistleblower protections to cover any individual who presents evidence of misuse of CARES Act funding whether or not they are direct recipients of or employed by an organization that received CARES Act funds. Moreover, Congress should ensure that the enabling statutes for all offices of inspectors general have a provision mandating the establishment of a whistleblower protection center responsible for educating federal agency employees about whistleblower rights and protections and their recourse for addressing unlawful retaliation.

Finally, to more adequately protect federal whistleblowers, the Senate should confirm board members to the Merit Systems Protection Board (“MSPB”). The Whistleblower Protection Act designates avenues for whistleblowers to receive protection, including the Office of Special Counsel (“OSC”) and the MSPB.<sup>173</sup> For personnel actions for which the whistleblower has an “independent right of action,” such as performance

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<sup>171</sup> National Defense Authorization Act of Fiscal Year 2013, Pub. Law No. 112-239, §§ 827, 828.

<sup>172</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(a), 123 Stat. 297; See Whistleblower Protections, U.S. Consumer Product Safety Commission, <https://www.cpsc.gov/About-CPSC/Inspector-General/Whistleblower-Protection-Act-WPA>.

<sup>173</sup> Questions and Answers about Whistleblower Appeals, U.S. Merit Systems Protection Board <https://www.mspb.gov/appeals/whistleblower.htm>.

evaluations, reassignments, implementation of a nondisclosure agreement, or a significant change in work conditions or duties, the whistleblower must file a complaint with the Office of Special Counsel, and may only appeal to the MSPB themselves if the OSC does not take corrective action.<sup>174</sup> For an “otherwise appealable action” such as removals, furloughs, and demotions, among others, the whistleblower may choose to go through the OSC, or may go to the board themselves.<sup>175</sup> If the OSC receives a complaint, it will attempt to resolve it with the agency itself, and appeal to the MSPB if action is not taken.<sup>176</sup>

Each avenue provides for an appeal to MSPB. This is currently unavailable because MSPB has a backlog of thousands of cases, and no sitting members.<sup>177</sup> As a result the MSPB is unable to issue final decisions on petitions for review.<sup>178</sup> Restoring the MSPB to working capacity will help to ensure that whistleblowers have an avenue for appealing decisions regarding complaints lodged for retaliation.

## 4. Enact For Cause Removal Protections

Congress should amend the IG Act, as well as the enabling statutes for inspectors general falling outside of the IG Act, to ensure that removal of an inspector general by the President or an agency head requires cause. Adding for-cause removal protections

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174 *Id.*

175 *Id.*

176 *Id.*

177 U.S. Merit Systems Protection Board: Frequently Asked Questions about the Lack of Board Quorum and Lack of Board Members, Updated: Mar. 1, 2019, U.S. Merit Systems Protection Board, [https://www.mspb.gov/FAQs\\_Absence\\_of\\_Board\\_Quorum\\_March\\_1\\_2019.pdf](https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_March_1_2019.pdf) (last visited June 3, 2020). President Trump’s nominees for Chairman, Vice Chairman, and Member of the MSPB are pending before the Senate. See Board Members, U.S. Merit Systems Protection Board, <https://www.mspb.gov/About/members.htm> (last visited June 3, 2020); Norah O’Donnell, Appeals board protecting federal workers unable to function because of vacant positions, CBS News (June 14, 2020) <https://www.cbsnews.com/news/merit-systems-protection-board-appeals-backlog-60-minutes-2020-06-14/>.

178 *Id.*

would further increase the independence of inspectors general.<sup>179</sup> The Inspector General for the United States Postal Service (“USPS”) is currently the only inspector general to benefit from a for-cause removal protection.<sup>180</sup> Moreover, Congress should close the loophole that permits the President or an agency head to administratively remove an inspector general prior to the expiration of the required 30 days’ notice period.<sup>181</sup> On at least two occasions, Presidents have bypassed this notice period, although it is mandated by the IG Act and other enabling statutes for inspectors general.<sup>182</sup> Adding for-cause removal protections would bolster the independence of inspectors general and might allow them to make recommendations more freely to Executive agencies while mitigating fears of hasty retaliatory termination.

Sen. Chuck Grassley has introduced a bill that would tighten the safeguards afforded to inspectors general.<sup>183</sup> The advance notification from the President to Congress before removing a Senate-confirmed inspector general would have to now include detailed rationale with case-specific examples.<sup>184</sup> Further, it would require acting inspectors general to be selected from senior ranks in the watchdog community, increasing the likelihood of acting inspectors general who will act with independence. Sen. Elizabeth

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179 In a six-week period from the first week of April through mid-May, President Trump terminated five inspectors general (Michael Atkinson from the Intelligence Community; Mitch Behm from the Department of Transportation; Glenn Fine from the Department of Defense; Christi Grimm from the Note number? Department of Health and Human Services; and Steve Linick from the Department of State.). See Melissa Quinn, The Internal Watchdogs Trump has Fired or Replaced, CBS News (May 19, 2020), <https://www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list/>. These dismissals has the potential to stifle inspectors general and creates a barrier to effective oversight.

180 39 U.S.C. §202(e); Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 12 (2019).

181 In a recent report, the GAO recommended that Congress should amend provisions governing the removal of inspectors general to authorize for-cause removal only. The GAO also recommended that Congress should require the President or agency heads, as applicable, to provide advanced notification of any changes in status of an inspector general beyond removal or transfer, such as placing an inspector general on administrative leave. Finally, the GAO recommended requiring the President or agency heads to provide additional detail on the reasons for any such changes in status. See U.S. Gov’t Accountability Off., GAO-20-639R, Inspectors General: Independence Principles and Considerations for Reform, June 8, 2020, <https://www.gao.gov/assets/710/707412.pdf> (last visited June 10, 2020).

182 See *id.* at 9.

183 Chuck Grassley, Why I’m introducing a bill to help protect inspectors general, Washington Post (June 17, 2020) [https://www.washingtonpost.com/opinions/chuck-grassley-why-im-introducing-a-bill-to-help-protect-inspectors-general/2020/06/17/236897f4-b0d2-11ea-8758-bfd1d045525a\\_story.html](https://www.washingtonpost.com/opinions/chuck-grassley-why-im-introducing-a-bill-to-help-protect-inspectors-general/2020/06/17/236897f4-b0d2-11ea-8758-bfd1d045525a_story.html).

184 *Id.*

Warren has also introduced a bill that would address these issues, but they are part of a much larger bill, which has so far failed to gain bipartisan support.<sup>185</sup>

## **5. Require that the Federal Reserve Comply with the Government Sunshine Act’s Meeting Transcript or Recording Requirements**

Congress should consider amending the CARES Act to require the Federal Reserve to comply with the Government in Sunshine Act’s mandate that agencies keep and make public transcripts or electronic recordings of meetings that are exempt from observation.<sup>186</sup> Alternatively, even if meeting transcripts or recordings are not made available to the public, they should be made available to SIGPR, PRAC, and the COC. If the Chairman of the Board of Governors of the Federal Reserve System determines, in writing, that “unusual and exigent circumstances exist,” the Federal Reserve Board may conduct meetings without regard to the requirements of the Government in Sunshine Act, until December 31, 2020.<sup>187</sup> This exemption will limit the ability of SIGPR, PRAC, the COC, and other oversight bodies from fulfilling their oversight obligations, because it allows the Federal Reserve to conduct closed-door meetings without any public record for oversight bodies to scrutinize. Requiring the Federal Reserve to release transcripts or recordings of agency meetings, at least to these oversight bodies, will allow SIGPR, PRAC, and the COC to fulfill their mandate.

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<sup>185</sup> The CORE Act addresses direct aid to communities hit by the COVID-19 pandemic in addition to oversight. It currently has five sponsors, but all are Democrats.

<sup>186</sup> Under the Government in Sunshine Act, “every portion of every meeting of an agency shall be open to public observation,” unless the meeting qualifies for a limited number of exceptions, for example: law enforcement or national security information; trade secret or privileged commercial or financial information; or information of a “personal nature” that would be an invasion of privacy. 5 U.S.C. § 552b(b)-(c). For those exceptions, the agency must “maintain a complete transcript or electronic recording” of the meeting, and “make promptly available to the public” the portions of the meeting that do not contain any exempted information. 5 U.S.C. § 552b(f). The agency must then report the number of closed meetings to Congress annually. 5 U.S.C. § 552b(j).

<sup>187</sup> The CARES Act § 4009(b).

## **6. Appoint a Chairperson of the Congressional Oversight Commission**

The fifth member of the COC has not been appointed by Congress. The CARES Act requires the chairperson be appointed jointly by the Speaker of the House and the Senate Majority Leader.<sup>188</sup> The Speaker of the House and the Senate Majority Leader should appoint the chairperson of the COC so it can utilize maximum resources to monitor the Subtitle A Lending Program.

### **C. Recommendations for the Administration**

#### **1. Use Contract and Application Commitments to Gain Access to Financial Records, Deter Fraudulent Conduct, and Increase Transparency**

The Treasury Department should ensure that all future contracts and applications related to the Subtitle A Lending Program contain provisions subjecting recipients to SIGPR's oversight and granting SIGPR access to all recipients' financial records related to the loans. The SBA should also ensure that all contracts and applications related to the PPP contain provisions subjecting recipients to the SBA Inspector General's oversight and granting the SBA Inspector General access to recipient's financial records related to the PPP. While the PPP program requires applicants to acknowledge that the SBA can share tax information, it does not state that the SBA Inspector General has access to recipients' financial records.<sup>189</sup> And the Subtitle A Lending Program does not contain any provisions regarding SIGPR's oversight or access to financial records.

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<sup>188</sup> See *supra*, note 84.

<sup>189</sup> See Paycheck Protection Program, Borrower Application Form, <https://www.sba.gov/sites/default/files/2020-06/PPP-Borrower-Application-Form-Fillable-508.pdf>.

While it was important for SIGTARP to investigate criminal conduct associated with TARP funding and to pursue criminal charges in collaboration with DOJ where criminal conduct had occurred, Barofsky noted that he believed “it was far more important . . . to keep fraud out of the [TARP] program in the first place.”<sup>190</sup> To do so, he recommended requiring recipients of TARP funding to acknowledge in their agreements that SIGTARP would have access to their financial records and documents related to the TARP funds. Barofsky believed that a robust compliance regime that put the TARP recipients on notice that SIGTARP would be monitoring their spending would deter fraudulent conduct.<sup>191</sup>

Applications for funding from the SBA’s PPP contain a provision stating that the applicant acknowledges that the SBA can share any tax information that the applicant has provided to SBA representatives with the SBA Inspector General, but it does not state that the SBA Inspector General has access to recipients’ financial records beyond what has already been provided to the SBA.<sup>192</sup> And the Subtitle A Lending Program does not contain any provisions regarding SIGPR’s oversight or access to financial records. At bottom, requiring oversight provisions in Subtitle A Lending Program contracts and applications and more robust provisions in PPP materials will likely help deter fraud and allow oversight bodies to more efficiently and effectively audit covered funds and thereafter investigate improper conduct. For further safeguards against fraud, all contracts related to the lending program and the PPP should include clawback provisions to prevent fraud by contracting companies.

## 2. Fill Vacant Inspectors General Positions

The President should promptly nominate qualified individuals to fill vacant inspectors general positions that are tasked with overseeing CARES Act funding. Acting inspectors

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<sup>190</sup> Neil Barofsky, *Bailout 45*.

<sup>191</sup> *Id.* at 93. (Referencing above missing citation)

<sup>192</sup> See Paycheck Protection Program, Borrower Application Form, <https://www.sba.gov/sites/default/files/2020-06/PPP-Borrower-Application-Form-Fillable-508.pdf>.

general do not always enjoy all of the powers and protections afforded under the IG Act to permanent inspectors general. For instance, acting inspectors general are limited in their ability to set long-term strategic plans for the office that they oversee, and they are also limited in their ability to set investigative and audit priorities.<sup>193</sup> Senator Charles Grassley has noted that “[e]ven the best acting Inspector General lacks the standing to make lasting changes needed to improve his or her office.”<sup>194</sup> Moreover, the absence of a permanent inspector general in an agency may deter whistleblowers from coming forward, as they may lack confidence that the acting inspector general is truly independent.<sup>195</sup> Finally, because acting inspectors general are not as thoroughly vetted as permanent ones, the public may also doubt the accuracy and credibility of audits and investigations.<sup>196</sup>

To address conflicts of interest that arise from replacing permanent inspectors general with acting inspectors general, who are often political appointees, Senator Grassley has recently introduced a bill. The bill would require acting inspectors general to be selected from senior members of the watchdog community. This would help to ensure the continuity and integrity of ongoing investigations.

### **3. Respond to Requests for Information and Recommendations**

Federal agency heads should be responsive to requests for information from SIGPR and other CARES Act oversight bodies and should not interfere with audits. The President

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193 Compare Sec. 4010(b) (granting the HUD, SEC, and Commodity Futures Trading Commission the ability to “recruit and appoint candidates to fill temporary and term appointments within their respective agencies upon a determination that those expedited procedures are necessary and appropriate to enable the respective agencies to prevent, prepare for, or respond to COVID-19”).

194 Al Kamen, GSA scandals shows watchdogs needed, Wash. Post, Blog (Apr. 13, 2012), [https://www.washingtonpost.com/blogs/in-the-loop/post/gsa-scandals-shows-watchdogs-needed/2012/04/13/gIQAjAyJFT\\_blog.html](https://www.washingtonpost.com/blogs/in-the-loop/post/gsa-scandals-shows-watchdogs-needed/2012/04/13/gIQAjAyJFT_blog.html).

195 Josh Rogin, Pompeo’s new acting inspector general is already creating a conflict of interest, Washington Post (May 20, 2020) <https://www.washingtonpost.com/opinions/2020/05/20/pompeos-new-acting-inspector-general-is-already-creating-conflict-interest/>.

196 *Id.*

should encourage agencies to cooperate with the oversight bodies and to respond in a timely manner to requests for information. Regular communication between the oversight bodies and agencies and a quick response by agencies to requests for information—will permit the oversight bodies to conduct more thorough, effective, and efficient audits and investigations. Several inspectors general noted that it is difficult to obtain timely and accurate data.<sup>197</sup>

While the Treasury Department is required to address any deficiencies SIGPR identifies, or certify to Congress that no action is necessary, that requirement does not extend to other agencies' response to other oversight bodies.<sup>198</sup> When inspectors general make recommendations to agencies, the agencies should carefully consider any suggestions from them, including responding in writing about the recommendations and providing explanations for how recommendations were implemented or why certain recommendations were not implemented. Barofsky recounted that SIGTARP made many recommendations to the Treasury Department that were ultimately ignored.<sup>199</sup> The President should encourage agencies to respond to recommendations made by oversight bodies. Even without such encouragement from the President, agencies should prioritize responding to these recommendations and implementing suggestions that oversight bodies provide and which could deter or mitigate waste, fraud, and abuse.

## 4. Exercise Public Transparency

There are news reports indicating that the Treasury Department has a legal opinion which states that they are not required to report key information to PRAC for the \$660

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197 Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Efforts, Pandemic Response Accountability Committee (June 2020) [https://www.oversight.gov/sites/default/files/oig-reports/Top%20Challenges%20Facing%20Federal%20Agencies%20-%20COVID-19%20Emergency%20Relief%20and%20Response%20Efforts\\_1.pdf](https://www.oversight.gov/sites/default/files/oig-reports/Top%20Challenges%20Facing%20Federal%20Agencies%20-%20COVID-19%20Emergency%20Relief%20and%20Response%20Efforts_1.pdf).

198 The CARES Act § 4018(j).

199 Gretchen Morgenson, Into the Bailout Buzz Saw, N.Y. Times, July 21, 2012, <https://www.nytimes.com/2012/07/22/business/neil-barofskys-journey-into-a-bailout-buzz-saw-fair-game.html>.



billion PPP program, or the nearly \$500 billion Treasury lending program.<sup>200</sup> PRAC in turn has reportedly sent a letter to Congress outlining the challenges it has obtaining information from the Treasury Department, and may have done so per its requirement to report to Congress when an agency unreasonably withholds information.<sup>201</sup> Reports indicate that PRAC believes that this information is necessary for it to “provide the breadth and depth of reporting” to adequately carry out its responsibilities. Further, there are reports that businesses owned by members of Congress – many of whom opposed transparency requirements – have received PPP loans, potentially in violation of the CARES Act’s conflict of interest provisions.<sup>202</sup>

It is vital to ensure that pandemic stimulus money goes to those who truly need it. But there is already concern that the information needed to make this determination will not be available. The Treasury Secretary indicated that they would not disclose recipients of PPP loans, before later reversing course.<sup>203</sup> Transparency will be a major tool in this effort. PRAC is required to create a public-facing website on which users can view the disbursement of COVID-related relief funds. This website should be modeled after [recovery.org](https://www.recovery.org), which made all spending and reports publicly available for the ARRA money. Such transparency has real effect on discovering fraud, as it “crowd sources” review of contracts and increases the likelihood that shady dealing will be caught.

## 5. Implement Beneficial Ownership Transparency

All companies contracting with the federal government should be required to provide their beneficial ownership information – the human beings with substantial direct or

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<sup>200</sup> Phil Mattingly, Inspectors General warn Congress that Treasury might be curtailing stimulus oversight abilities, CNN (June 15, 2020) <https://www.cnn.com/2020/06/15/politics/inspectors-general-treasury-oversight/index.html>.

<sup>201</sup> *Id.*

<sup>202</sup> Sarah Ferris, Melanie Zanona, and Zachary Warmbrodt, Members of Congress took small-business loans – and the full extent is unknown, Politico (June 16, 2020) <https://www.politico.com/news/2020/06/16/congress-small-business-loan-320625?cid=apn>.

<sup>203</sup> Aaron Gregg, Trump administration won’t say who got \$511 billion in taxpayer-backed loans, Washington Post (June 11, 2020) <https://www.washingtonpost.com/business/2020/06/11/trump-administration-wont-say-who-got-511-billion-taxpayer-backed-coronavirus-loans/>.

indirect ownership stakes. This is critical to policing conflicts of interest and rooting out corruption, and ensuring that stimulus money is going to those who truly need it. It can be easy to obscure who the true owner of a company is, and in the context of the CARES Act, this represents a glaring opportunity for fraud and shady dealing. Without a contractual provision, criminals would be able to use shell companies to take advantage of the stimulus, and conflicts of interest could be easily covered up. With untold billions of dollars being outlaid by the federal government, it is more important than ever to know exactly with whom they are doing business.

## **D. Recommendations for All Oversight Bodies**

### **1. Coordinate Among the CARES Act Oversight Bodies**

All oversight bodies created by the CARES Act should communicate frequently about their oversight work and should coordinate with one another to avoid duplicating work. There are three oversight bodies created by the CARES Act, in addition to a House subcommittee and an informal oversight mechanism in the Senate. The organizations have different but overlapping mandates.

Without coordination, these bodies may crowd each other out, producing inferior individual results. Likewise, if the groups do not coordinate, there is a risk that oversight over some spending programs—especially the smaller ones—will fall through the cracks. Barofsky noted the importance of building a collaborative relationship with Senator Elizabeth Warren, who was Chairperson the Congressional Oversight Panel tasked with overseeing TARP funding and its impact on financial markets and institutions.<sup>204</sup> Barofsky believed that his positive collaborative relationship with Senator Warren, as well as their collaboration on individual projects, was crucial to the effectiveness of TARP oversight. CARES Act oversight bodies should seek to follow in that model.

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<sup>204</sup> See C. Ryan Barber, 'It's Going to Be Extraordinary': Predictions and Advice From Neil Barofsky for Coronavirus Recovery Oversight, Nat'l Law J. (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/>.

## 2. Engage with State and Local Officials

Federal oversight bodies of CARES Act funding, as well as Executive and Legislative branch stakeholders, should communicate regularly with states and localities to address any concerns from state and local officials to detect and prevent waste, fraud, and abuse. In an example of such coordination, during the aftermath of the 2008-2009 global financial crisis, Vice President Joe Biden regularly communicated with governors and mayors at the time that ARRA funding was being disbursed, provided states and localities the ability to ask questions and to address concerns related to ARRA funding.<sup>205</sup> All stakeholders in CARES Act funding oversight and execution should follow this example and hold regular meetings with state and local officials to address questions and concerns related to CARES Act funding.

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<sup>205</sup> 2010 Fiscal Year End Report to the President on Progress Implementing the American Recovery and Reinvestment Act of 2009 25, AARA (Sept. 2010) [https://obamawhitehouse.archives.gov/sites/default/files/recovery\\_act\\_report\\_9-30-2010.PDF](https://obamawhitehouse.archives.gov/sites/default/files/recovery_act_report_9-30-2010.PDF) (last visited May 6, 2020).

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# I. Appendix I – The Role of Inspectors General

## A. Historical Context

1. The origins of inspectors general date back to 1777, when George Washington recommended that Congress establish an inspector general to the Continental Army, due to the realization that the Army was disorganized at the onset of the Revolutionary War.<sup>1</sup>
2. In the modern context, the establishment of Department of Health, Education, and Welfare (“HEW,” now the Department of Health and Human Services (“HHS”)) and Department of Energy (“DOE”) inspectors general in 1976 and 1977, respectively, laid the groundwork for Congress to create a framework for additional statutory inspectors general through the Inspector General Act of 1978 (the “IG Act”).<sup>2</sup>
3. HEW’s Inspector General was established after congressional investigations uncovered widespread inefficiencies and mismanagement of HEW programs and operations, as well as weaknesses within the department’s audit and investigative units.
4. Congress created the DOE Inspector General to oversee the operations of the DOE after finding that: (a) the U.S. faced increasing shortages of nonrenewable energy resources, and that such shortages and dependence on

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<sup>1</sup> David A. Clary & Joseph W. A. Whitehorn, *The Inspectors General of the United States Army, 1777–1903* (1987), [https://history.army.mil/html/books/070/70-16-1/cmhPub\\_70-16-1.pdf](https://history.army.mil/html/books/070/70-16-1/cmhPub_70-16-1.pdf); Office of Inspector General Equal Employment Opportunity Commission, *About us*, <https://oig.eeoc.gov/about-us>.

<sup>2</sup> Kathryn A. Francis, Cong. Research Serv., R45450, *Statutory Inspectors General in the Federal Government: A Primer 1-2* (2019).

foreign supply seriously threatened national security; and (b) responsibility for energy policy, regulation, research, and development was fragmented in many departments and agencies, preventing comprehensive centralized focus for effective coordination of energy supply and conservation programs.<sup>3</sup>

## **B. The Inspector General Act of 1978 and Subsequent Amendments**

1. The IG Act and its amendments of 1988 established federal inspectors general as permanent, nonpartisan, independent offices in more than seventy federal agencies, boards, commissions, and government-sponsored enterprises. Federal inspectors general are authorized to combat waste, fraud, and abuse within their affiliated federal entities.<sup>4</sup> The overwhelming majority of inspectors general are governed by the IG Act.<sup>5</sup>
2. The Inspector General Reform Act of 2008 (Pub. Law No. 110-409) (the “Reform Act of 2008”) made several amendments to the IG Act. It (a) established a new Council of Inspectors General on Integrity and Efficiency (“CIGIE”) to coordinate and oversee the inspector general community, including an Integrity Committee to investigate alleged inspector general wrongdoing; (b) provided additional authorities and protections to enhance the independence of inspectors general, such as budget protections, access to independent legal counsel, and advanced congressional notification for the removal or transfer of inspectors general; and (c) further amended inspector general semiannual reporting obligations and required websites of offices of

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<sup>3</sup> The Department of Energy Organization Act of 1977, Pub. Law. No. 95-91, § 101.

<sup>4</sup> Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 1 (2019); Wendy Ginsberg, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 1 (2016).

<sup>5</sup> Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 1 (2016).

inspectors general (“OIG”) to include all completed audits and reports.<sup>6</sup>

- a) CIGIE is the primary oversight and coordinative body for the inspector general community. It is also designed to maintain one or more academies for the professional training of auditors, investigators, inspectors, evaluators, and other personnel in inspector general offices. CIGIE is comprised of all inspectors general whose offices are established under Section 2 and Section 8G of the IG Act, including those that are presidentially-appointed / Senate-confirmed and those that are appointed by agency heads.<sup>7</sup> CIGIE works to “address integrity, economy, and effectiveness issues that transcend individual [g]overnment agencies” and seeks to “increase the professionalism and effectiveness of [OIG] personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce.”<sup>8</sup>
  
- b) The Reform Act of 2008 amended the budget process for establishment and “designated federal entity” (“DFE”) (described below) OIGs by including the following key steps: (1) the inspector general submits an annual budget estimate for its office to the affiliated entity head; (2) the affiliated entity head compiles and submits an aggregated budget request for the inspector general to the President; and (3) the President submits an annual budget to Congress that includes (i) the inspector general’s original budget that was transmitted to the entity head, (ii) the President’s requested amount for the inspector general, (iii) the amount requested by the President for

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<sup>6</sup> Kathryn A. Francis, Cong. Research Serv., R45450, *Statutory Inspectors General in the Federal Government: A Primer* 3 (2019).

<sup>7</sup> Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, *Federal Inspectors General: History, Characteristics, and Recent Congressional Actions* 1 (2016); Kathryn A. Francis, Cong. Research Serv., R45450, *Statutory Inspectors General in the Federal Government: A Primer* 3, 26 (2019).

<sup>8</sup> Inspector General Reform Act of 2008, Pub. Law No. 110-409, § 11; Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, *Federal Inspectors General: History, Characteristics, and Recent Congressional Actions* 1 (2016).

training of inspectors general, and (iv) any comments from the inspector general if the President's amount would "substantially inhibit" the inspector general from performing his or her duties.<sup>9</sup>

3. The Inspector General Empowerment Act of 2016 (Pub. Law No. 114-317) aimed to enhance inspector general access to and use of agency records. Among other things, it empowers inspectors general "to have timely access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials available to the applicable establishment which relate to the programs and operations with respect to which that Inspector General has responsibilities."<sup>10</sup>

## C. Types of Inspectors General

1. There are four types of inspectors general: "establishment," DFE, other permanent, and special. The IG Act, as amended, governs establishment (32) and DFE (32) inspectors general.<sup>11</sup> Other permanent (seven) and special (three) inspectors general are governed by separate statutes.
  - a) Establishment inspectors general are appointed to cabinet departments, cabinet-level agencies, and larger agencies in the Executive Branch. Establishment inspectors general oversee the operations of agencies and departments such as, HHS, DOE, DOD, the Department of Justice ("DOJ"), the Treasury Department, the

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<sup>9</sup> Inspector General Reform Act of 2008, Pub. Law No. 110-409, § 8; Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 7 (2016); Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 13 (2019).

<sup>10</sup> The Inspector General Empowerment Act of 2016, Pub. Law No. 114-317, § 5; Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer (2019).

<sup>11</sup> Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 4 (2019).



Department of Homeland Security (“DHS”), and the U.S. Agency for International Development (“USAID”).<sup>12</sup>

- b) DFE inspectors general are appointed to smaller entities, such as boards, commissions, and government-sponsored enterprises, and certain intelligence agencies within the Department of Defense (“DOD”).<sup>13</sup> Affiliated agencies of DFE inspectors general include the Consumer Product Safety Commission, the National Labor Relations Board, the Peace Corps, the International Trade Commission, and the U.S. Postal Service.<sup>14</sup>
  
- c) Other permanent inspectors general are appointed to certain Legislative Branch agencies and certain intelligence agencies outside of DOD.<sup>15</sup> Other permanent inspectors general oversee operations of agencies such as the Government Publishing Office, the Central Intelligence Agency, the Library of Congress, and the Intelligence Community.<sup>16</sup>
  
- d) Special inspectors general are not expressly affiliated with a particular federal entity. Special inspectors general possess express cross-agency jurisdiction and are authorized to evaluate a specific program, operation, or activity irrespective of the agencies implementing them.

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- (1) In addition to SIGPR, the current special inspectors general include those for Afghanistan Reconstruction (“SIGAR”) and the

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<sup>12</sup> *Id.* at 27-28.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> Kathryn A. Francis, Cong. Research Serv., Statutory Inspectors General in the Federal Government: A Primer 29-30 R45450 (2019).

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 30.

<sup>17</sup> *Id.* at 11.

Troubled Asset Relief Program (“SIGTARP”). The Special Inspector General for Iraq Reconstruction (“SIGIR”) was terminated in October 2013.

2. Statutory authorities and requirements can differ among the four types of inspectors general, resulting in varied levels of independence, transparency, and accountability.<sup>18</sup> For example, establishment, DFE, and other permanent inspectors general in the Executive Branch are empowered to propose standalone annual budget estimates that are separate from their affiliated agency’s budget estimates, while there is no similar provision for special and other permanent inspectors general in the Legislative Branch.<sup>19</sup> Additionally, establishment and permanent Executive Branch inspectors general have separate appropriations accounts in the President’s budget, while DFE and other permanent inspectors general in the Legislative Branch are not afforded separate accounts.<sup>20</sup> The authorizing statutes for special inspectors general have no similar provisions, but the President and Congress may choose to fund them through special accounts.<sup>21</sup>
  
3. There are currently 13 inspector general vacancies.<sup>22</sup> Four of these vacancies relate to inspectors general who would be in charge of overseeing the administration of CARES Act programs and operations—namely, the inspectors general for the Department of Education, Treasury Department,

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<sup>18</sup> See generally *id.*

<sup>19</sup> *Id.* at Table B-1. Note that in practice, SIGAR and SIGTARP have compiled and submitted standalone annual budget estimates for their respective offices. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Inspector General Vacancies, Oversight.gov, <https://www.oversight.gov/ig-vacancies> (last visited May 5, 2020). Note that the Federal Communications Commission OIG is now a presidential appointment, as opposed to one by the agency head. As such, the current agency-appointed inspector general will remain in place until the President’s nominee is confirmed by the Senate. *Id.*

Department of Transportation, and HHS. All four would be presidential appointees, confirmed by the Senate.<sup>23</sup>

## D. Appointment and Removal

1. Inspectors general are subject to various methods of appointment and removal. Establishment inspectors general are appointed by the President, with the advice and consent of the Senate.<sup>24</sup> They can be removed or transferred to another position by the President for any reason.<sup>25</sup>
2. DFE inspectors general are appointed and can be removed by their respective agency heads for any reason. Note that DFE inspectors general may be removed or transferred by a board, committee, or commission upon written concurrence of a two-thirds majority of the board, committee, or commission.<sup>26</sup> Additionally, the United States Postal Service (“USPS”) inspector general may be removed upon written concurrence of at least seven out of nine postal governors and only “for cause,” including malfeasance or neglect of duty.<sup>27</sup>
3. Other permanent inspectors general in the Executive Branch are appointed by the President with the advice and consent of the Senate, and they may be removed for any reason by the President.<sup>28</sup> Other permanent inspectors

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<sup>23</sup> See Inspector General Vacancies, Oversight.gov, <https://www.oversight.gov/ig-vacancies> (last visited May 5, 2020).

<sup>24</sup> Inspector General Act of 1978 (IG Act), 5 U.S.C. Appendix, Pub. L. 113-126, § 3(a); Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 11 (2019).

<sup>25</sup> IG Act, 5 U.S.C. Appendix, Pub. L. 113-126, § 3(b).

<sup>26</sup> IG Act, 5 U.S.C. Appendix, Pub. L. 113-126, § 3(a); Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 12 (2019).

<sup>27</sup> 39 U.S.C. §202(e); Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 12 (2019).

<sup>28</sup> *Id.*

4. general in the Legislative Branch are appointed and can be removed by their agency head for any reason.<sup>29</sup> The U.S. Capitol Police (“USCP”) inspector general may be removed upon a “unanimous vote” of all voting members on the Capitol Police Board.<sup>30</sup>
5. Special inspectors general are appointed either by the President alone, or with the advice and consent of the Senate.<sup>31</sup> The enabling statutes for special inspectors general provide that pursuant to Section 3(b) of the IG Act, the President has the authority to remove special inspectors general for any reason.
6. The IG Act, as well as certain enabling statutes for inspectors general not covered by the IG Act, require the President to inform Congress of the reasons for removal of an inspector general at least thirty days before the removal.<sup>32</sup> Note that on some occasions, Presidents have not complied with this requirement. For example, in 2009, President Barack Obama immediately placed the then-AmeriCorps Inspector General on administrative leave and announced plans to terminate him for “lack of confidence.”<sup>33</sup> More recently, President Donald Trump informed Congress of his decision to remove the Intelligence Community inspector general, citing a lack of confidence and immediately placing the inspector general on paid administrative leave.<sup>34</sup> Immediately placing these inspectors general on administrative leave effectively removes them from their position prior to the expiration of the

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Pub. Law No. 110-181, § 1229(c); Pub. Law No. 108–106, § 3001(c); Pub Law. 110-343, § 101(a).

<sup>32</sup> IG Act, (codified at 5 U.S.C. Appendix), Pub. Law No. 113-126, § 3(b). Note that the enabling statutes of special inspectors general, including SIGIR and SIGAR also require a 30-day notice period.

<sup>33</sup> Grassley Leads Bipartisan Call to Safeguard Inspector General Independence Following ICIG Removal, News Release: Chuck Grassley United States Senator for Iowa, <https://www.grassley.senate.gov/news/news-releases/grassley-leads-bipartisan-call-safeguard-inspector-general-independence-following>.

<sup>34</sup> *Id.*

statutorily mandated notice period.<sup>35</sup> In both cases, the required 30-day notice was not given.

## E. Duties, Authorities, and Reporting Requirements

1. **Duties:** that the offices of inspectors general conduct audits, inspections, evaluations, and investigations of agency programs and operations and provide findings and recommendations to improve them.<sup>36</sup>
2. **Authorities:** Under the IG Act, inspectors general have the broad authority to: (a) conduct audits and investigations; (b) access directly the records and information related to the affiliated agency's programs and operations; (c) request information or assistance from other federal, state, and local government agencies; (d) subpoena information and documents; (e) administer oaths when conducting interviews; (f) hire staff and manage their own resources; and (g) receive and respond to complaints from agency employees, whose identity must be protected.<sup>37</sup> Inspectors general not covered by the IG Act generally have similar or identical authorities.<sup>38</sup> For example, the authorizing statutes for SIGPR, SIGIR, and SIGAR afford the special inspectors general the same authorities as inspectors general under Section 6 of the IG Act.<sup>39</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> See IG Act, 5 U.S.C. Appendix (IG Act), Pub. L. 113-126, § 2; *id.* § 4; Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 4-5 (2016); Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 1 (2019).

<sup>37</sup> IG Act, Pub. L. 113-126, § 6; Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 5 (2016).

<sup>38</sup> Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 5 (2016).

<sup>39</sup> Pub. Law No. 110-181, § 1229(g); Public Law 108-106, § 3001(g).

3. Inspectors general have broad powers and protections that support their independence, including the authority to hire their own staff. Their independent status is reinforced in other ways. For instance, many inspectors general are vested with law enforcement powers and their annual budgets are distinct from the budgets of their affiliated entities.

- a) More specifically, establishment inspectors general and permanent inspectors general in the Executive Branch have separate appropriations accounts from their offices, preventing agency heads from limiting or reducing the inspector general's funding.<sup>40</sup> Additionally, establishment and DFE inspectors general submit annual budget estimates to the heads of their agency, who must submit it along with any response to the President. The President in turn must submit to Congress the above, along with his requested amount and any comments from the affected inspector general indicating that the President's budget would "substantially inhibit" the inspector general from performing his or her duties.<sup>41</sup>
- b) Additionally, in most cases, inspectors general determine the priorities and projects for their offices without outside direction. Moreover, inspectors general serve under the "general supervision" of the agency head, reporting exclusively to the head or to the officer next in rank if such authority is delegated.<sup>42</sup>
- c) Notwithstanding their broad powers, inspectors general are not authorized to take corrective action themselves. Consequently, the IG

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40 Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 7 (2016).

41 IG Act, 5 U.S.C. Appendix §6(f)(1)-(3); Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 7 (2016).

42 Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 6 (2016).

Act prohibits the transfer of “program operating responsibilities” to an inspector general, including the enforcement of any recommendations made by the inspector general.<sup>43</sup>

4. **Reporting:** Inspectors general have dual or multifaceted reporting structures: They provide recommendations and findings to their affiliated agency head and to Congress. Additionally, inspectors general may have reporting obligations to the Attorney General and the public. Some reporting requirements are periodic, while others are triggered by a specific event. For example, establishment and DFE inspectors general are required to immediately report to their affiliated entity heads any “particularly serious or flagrant problems, abuses or deficiencies relating to the administration of programs and operations” at their affiliated entities.<sup>44</sup>

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43 IG Act, 5 U.S.C. Appendix, Pub. L. 113-126, § 9; Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, Federal Inspectors General: History, Characteristics, and Recent Congressional Actions 5 (2016); Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 2 (2019).

44 IG Act, 5 U.S.C. Appendix, Pub. L. 113-126, § 5; Kathryn A. Francis, Cong. Research Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 15 (2019).

## II. Appendix II – The Special Inspector General for the Troubled Asset Relief Program ("SIGTARP")

### A. Creation / Funding of SIGTARP

1. **Brief summary of the 2008-2009 global financial crisis:** Credit standards in U.S. mortgage lending were relaxed in the early 2000s, and rising rates of delinquency and foreclosures that ensued "delivered a sharp shock to a range of U.S. financial institutions."<sup>45</sup> This subsequently led to the worst financial crisis since the Great Depression.<sup>46</sup>
2. **Economic Emergency Stabilization Act ("EESA"):** The EESA was enacted into law on October 3, 2008 to respond to the financial crisis of 2008. The EESA's purpose was to "promote the stability and liquidity of the financial system through the authorization of the Troubled Asset Relief Program ("TARP") and other measures."<sup>47</sup> The Treasury Department used TARP funding to make investments, loans, asset guarantees, and purchases in or from a wide range of financial institutions. TARP funding was used in five key areas: the automobile industry, bank investment programs, credit market programs,

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45 Mark Jickling, Cong. Research Serv., R40173, Causes of the Financial Crisis 3 (2010).

46 Heather Stewart, We are in the worst financial crisis since the Great Depression, says IMF, The Guardian, Apr. 8, 2008, <https://www.theguardian.com/business/2008/apr/10/useconomy.subprimecrisis>.

47 What is TARP?, U.S. Department of Treasury, <https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/what-is-tarp.aspx>.



housing, and investment in American International Group (“AIG”).<sup>48</sup>

3. **Purpose of SIGTARP:** Congress created SIGTARP as a law enforcement agency with the primary purpose of investigating financial crimes and eradicating fraud and misuse associated with TARP funding. SIGTARP’s mission statement says it is a “federal law enforcement agency and an independent audit watchdog that targets financial institution crime, and other fraud, waste, and abuse related to TARP. Protecting Americans, taxpayer dollars, and TARP programs drives SIGTARP’s mission.”<sup>49</sup>
  
4. **Budget:** The EESA made \$50 million in initial operating funds available to SIGTARP to carry out its duties.<sup>50</sup> In late spring 2009, SIGTARP determined that its initial resources would be expended during fiscal year 2010 and that additional resources would be needed to fund its operations.<sup>51</sup> The Consolidated Appropriations Act of 2010 provided SIGTARP with an additional \$23.3 million.<sup>52</sup> In fiscal year 2009, SIGTARP expended \$19.6 million, and in fiscal year 2010, SIGTARP expended approximately \$33.5 million.<sup>53</sup> SIGTARP’s budget was \$39 million in 2011, and from 2012 through 2017, its annual budget ranged from approximately \$40 million to \$48 million.<sup>54</sup> SIGTARP’s annual budget for 2018 was \$34 million<sup>55</sup> and was reduced to \$23 million in 2019.

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48 What Did TARP Do?, U.S. Dep’t. of the Treasury, <https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/what-did-tarp-do.aspx>.

49 Congressional Budget Justification and Annual Performance Report and Plan, SIGTARP, (FY 2020).

50 Emergency Economic Stabilization Act, 12 U.S.C. § 5231(j)(1).

51 Quarterly Report to Congress 39, SIGTARP, (Oct. 16, 2010).

52 *Id.*

53 *Id.*

54 See FY 2013 President’s Budget, SIGTARP; FY 2016 President’s Budget, SIGTARP; FY 2019 President’s Budget, SIGTARP.

55 Quarterly Report to Congress 4, SIGTARP (Oct. 30, 2018).

- a) In SIGTARP's most recent Semiannual report (October 2019) to Congress made publicly available, Christy Goldsmith Romero, the current SIGTARP, noted that the approximately \$900 million recovered from SIGTARP's work in 2019 represents a 39 times annual return on investment from SIGTARP's \$23 million budget and stated, "[e]very year, recoveries far exceed our budget.

However, we continue to face significant annual budget reductions that substantially impair our ability to fulfill our Congressionally-mandated mission."<sup>56</sup> Much of the money SIGTARP recovers goes back to the federal government.<sup>57</sup>

5. **Expiration:** Congress designed SIGTARP's term to coincide with the last monetary obligation related to TARP.<sup>58</sup> The EESA states that "[t]he Office of the Special Inspector General shall terminate on the later of (1) the date that the last troubled asset acquired by the Secretary under section 5211 of this title has been sold or transferred out of the ownership or control of the Federal Government; or (2) the date of expiration of the last insurance contract issued under section 5212 of this title."<sup>59</sup> SIGTARP continues to operate.

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56 Semiannual Report to Congress, SIGTARP, Apr. 1, 2019 - Sept. 30, 2019.

57 "Seizures and forfeitures bring money back to victims and the Government and ensure that crime does not pay, as defendants are unable to keep the proceeds of their crime. This money can then be used for other Government spending or to reduce the government budget." Quarterly Report to Congress 20, SIGTARP (Jan. 27, 2017). In FY 2018, SIGTARP recoveries were \$180 million, and \$160 million went back to the federal government. Quarterly Report to Congress 4, SIGTARP (Oct. 30, 2018).

58 12 U.S.C. § 5231(k). See also FY 2016 President's Budget, SIGTARP ("Knowing that criminal investigations take years, as do the prosecutions that follow, from its inception SIGTARP planned that it would continue in a ramp-up stage as it gained expertise in how to uncover and unravel TARP-related crime and not hit steady state until the year 2014 (six years after its creation). It is not SIGTARP's decision how long an investigation may last because it is the prosecutor who must determine when there is sufficient evidence to support criminal charges. SIGTARP does not end its work at the time an investigation results in criminal charges. Given that SIGTARP investigations include assessing documents and interviewing witnesses, in order to ensure a successful prosecution, SIGTARP must support the Department of Justice (DOJ) and the prosecutors from indictment to trial, to sentencing and appeal. DOJ has consistently relied on SIGTARP to ensure success in prosecutions. It is often the case that a SIGTARP agent will testify at a trial. Given the knowledge base learned in its investigations, SIGTARP agents, investigators, attorneys, and analysts will assist DOJ in trial preparation, post-trial briefing for sentencing, and briefing for appeals.").

59 12 U.S.C. § 5231(k).

## B. Duties of SIGTARP / SIGTARP's Office

1. **General Duties:** Neil Barofsky, the first SIGTARP, described SIGTARP as having two roles: “First, it was . . . a full-fledged law enforcement agency, a mini-FBI for the TARP, which would try to catch the inevitable criminal flies that would be drawn to the \$700 billion in government honey. It would also have an audit function, providing Congress with regular reports on how the Treasury Department was carrying out the bailout.”<sup>60</sup>
  - a) While SIGTARP does not have prosecutorial authority, SIGTARP supports DOJ throughout the indictment, trial, sentencing, and appeal process. DOJ relies on SIGTARP to ensure success in prosecutions.<sup>61</sup>
2. **Statutory Duties:** “Conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of Treasury” under any TARP program.<sup>62</sup> “The Inspector General shall establish, maintain, and oversee such systems, procedures, and controls as the Inspector General considers appropriate” to discharge its duties.<sup>63</sup>
3. **Reporting Duties:** SIGTARP must submit reports to Congress at the end of every fiscal quarter. These reports summarize SIGTARP's activities over the quarter and must include a “detailed statement of all purchases, obligations, expenditures, and revenues” associated with any TARP program, as well as SIGTARP's audits and investigations of the purchase, management, and sale

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<sup>60</sup> Neil Barofsky, *Bailout 1* (2012).

<sup>61</sup> FY 2016 President's Budget, SIGTARP.

<sup>62</sup> 12 U.S.C. § 5231(c)(1).

<sup>63</sup> 12 U.S.C. § 5231ac)(2).

of assets by the Secretary of the Treasury under any TARP program.<sup>64</sup>

- a) Congress also required that all SIGTARP reports submitted to Congress “be available to the public,” unless the reports are “specifically prohibited from disclosure by any other provision of law;” “specifically required by Executive order to be protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs;” or “a part of an ongoing criminal investigation.”<sup>65</sup>

4. **SIGTARP’s Office:** “The Special Inspector General may select, appoint, and employ such officers and employees as may be necessary for carrying out the duties of the Special Inspector General.”<sup>66</sup>

- a) The SIGTARP office is divided into four divisions: (i) the Investigations Division, which investigates crime at financial institutions participating in TARP; (ii) the Audit Division, which conducts oversight through audits and evaluations; (iii) the Office of Legal Counsel, which provides legal services and counsel for SIGTARP, including criminal, civil, and administrative investigations, audits, and litigation; and (iv) the Office of Management, which provides operational support and programs for personnel.<sup>67</sup>

- b) Between December 2008 and November 2010, SIGTARP grew in size from two to 140 full-time employees.<sup>68</sup>

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<sup>64</sup> 12 U.S.C. § 5231(i)(1); 12 U.S.C. § 5231(c)(1).

<sup>65</sup> 12 U.S.C. § 5231(i)(3); § 5231(i)(5).

<sup>66</sup> 12 U.S.C. § 5231(e)(1)(A).

<sup>67</sup> SIGTARP Divisions, SIGTARP, <https://www.sig tarp.gov/Pages/careers.aspx>.

<sup>68</sup> Samuel R. Diamant, Neil Barofsky’s SIGTARP: Difficult, Rigorous, and Independent Oversight of the TARP, 15 N.C. Banking Inst. 313, 314 (2011).

## C. Powers / Authority of SIGTARP: To carry out its duties, SIGTARP has the authorities provided in Section 6 of the IG Act.<sup>69</sup>

1. **Access to Information from Other Agencies:** Section 6 of the IG Act grants the inspector general “timely access to all records, reports, audits, reviews, documents, papers, recommendations, and other materials available to the applicable establishment which relate to the programs and operations with respect to which that Inspector General has responsibilities.”<sup>70</sup>

- a) “Upon request of the Special Inspector General for information or assistance from any department, agency, or other entity of the Federal Government, the head of such entity shall, insofar as is practicable and not in contravention of any existing law, furnish such information or assistance to the Special Inspector General, or an authorized designee.”<sup>71</sup>
- b) Whenever information or assistance requested by the special inspector general is, in the judgment of the special inspector general, unreasonably refused or not provided, the special inspector general must report the circumstances to the appropriate committees of Congress without delay.<sup>72</sup>

2. **Information Requests and Subpoena Power:** Section 6 also authorizes the inspector general to request information or assistance to carry out its duties from any federal, state, or local government or agency. It also grants the

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<sup>69</sup> 5 U.S.C. App. § 5231(d)(1).

<sup>70</sup> 5 U.S.C. App. § 6(1)(A).

<sup>71</sup> 12 U.S.C. § 5231(e)(4)(A).

<sup>72</sup> 12 U.S.C. § 5231(e)(4)(B).

subpoena power over “any tangible thing and documentary evidence necessary in the performance of the functions assigned by this Act.” Refusal to comply with the subpoena can be enforced by order of any appropriate district court. The inspector general may also take oaths, affirmations, or affidavits from any person “whenever necessary in the performance of the functions assigned by this Act.”<sup>73</sup>

3. **Warrants and Firearms:** Section 6 of the IG Act enables the Attorney General to grant inspectors general certain law enforcement powers, including the ability to carry a firearm, make arrests without warrants, and seek and execute warrants for arrest, search of premises, or seizure of evidence.<sup>74</sup> The Attorney General never granted SIGTARP these authorities, but Congress passed the Special Inspector General TARP Act of 2009, which added SIGTARP to the list of offices exempt from such initial determination by the Attorney General.<sup>75</sup>

## **D. Removal of SIGTARP: SIGTARP may be removed from office by the President, and the President should communicate the reason for removal to Congress at least thirty days before removal.<sup>76</sup>**

## **E. Other TARP Oversight Mechanisms**

1. **Financial Stability Oversight Board:** Under the EESA, the Financial Oversight Stability Board is responsible for, among other things, “reporting any suspected fraud, misrepresentation, or malfeasance to the Special Inspector

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<sup>73</sup> 5 U.S.C. App. § 6(4).

<sup>74</sup> 5 U.S.C. App. § 6(f)(1)(C).

<sup>75</sup> Special Inspector General for the Troubled Asset Relief Program Act of 2009, 12 U.S.C. 5201.

<sup>76</sup> 12 U.S.C. § 5231(b)(4); 5 U.S.C. App. § 3(b).

General for the Troubled Assets Relief Program or the Attorney General of the United States.”<sup>77</sup>

- a) The Financial Stability Oversight Board is comprised of the Chairman of the Board of Governors of the Federal Reserve Program, the Secretary of the Treasury, the Director of the Federal Housing Finance Agency, the Chairman of the Securities and Exchange Commission (“SEC”), and the Secretary of Housing and Urban Development.<sup>78</sup>
- b) The Financial Stability Oversight Board must also make quarterly reports to Congress assessing the policies implemented by the Secretary of the Treasury regarding “the designation of asset classes to be purchased and plans for the structure of vehicles used to purchase troubled assets and the effect of such actions in assisting American families in preserving home ownership, stabilizing financial markets, and protecting taxpayers.”<sup>79</sup>

2. **Congressional Oversight Panel:** <sup>80</sup> The Oversight Panel is required to make reports every thirty days to Congress.<sup>81</sup> The Oversight Panel shall “review the current state of the financial markets and the regulatory system,” and the reports must include “the use by the Secretary of authority under this chapter . . . ; the impact of purchases made under this chapter on the financial markets and financial institutions; the extent to which the information made available on transactions under the program has contributed to market transparency; the effectiveness of foreclosures mitigation efforts; and the effectiveness of the program from the standpoint of minimizing long-term costs to the

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<sup>77</sup> 12 U.S.C. § 5214(a)(3).

<sup>78</sup> 12 U.S.C. § 5214(b).

<sup>79</sup> 12 U.S.C. § 5214(a)(1).

<sup>80</sup> The CARES Act creates a Congressional Oversight Commission rather than a Panel, but they effectively serve the same purpose.

<sup>81</sup> 12 U.S.C. § 5233(b)(1)(B).

taxpayers and maximizing the benefits for taxpayers.”<sup>82</sup>

- a) The Oversight Panel consists of five members: One member appointed by the Speaker of the House; one member appointed by the minority leader of the House; one member appointed by the majority leader in the Senate; one member appointed by the minority leader of the Senate; and one member appointed by the Speaker of the House and majority leader of the Senate, after consultation with the minority leader of the Senate and minority leader of the House.<sup>83</sup>

3. **Government Accountability Office (“GAO”)**: The subjects of GAO’s oversight include: The performance of the TARP program in achieving its purpose (including foreclosure mitigation, cost reduction, providing stability in the financial markets or banking system, and protecting taxpayers); the financial condition of TARP; characteristics of transactions and commitments to purchase assets under the program; characteristics of acquired assets; efficiency of TARP; compliance with all applicable laws and regulations by TARP and its agents; and the efforts of TARP to prevent conflicts of interest involving any agent or representative performing activities under the authority of TARP.<sup>84</sup> The GAO is required to report its findings to Congress once every 60 days.<sup>85</sup>

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<sup>82</sup> 12 U.S.C. § 5233(a)(1)(A).

<sup>83</sup> 12 U.S.C. § 5233(c)(1).

<sup>84</sup> 12 U.S.C. 5226(a)(1).

<sup>85</sup> 12 U.S.C. 5226(a)(3).



## F. Work of SIGTARP

### 1. Successes:

- a) **Charges, Convictions, and Enforcement Actions:** As of March 31, 2020, SIGTARP investigations led to 443 individuals being criminally charged by DOJ, and to 384 individuals being convicted, with 302 sentenced to prison. This includes 96 homeowner scammers, 92 bank borrowers, 77 bankers, and three Hardest Hit
  
- b) Fund (“HHF”) contractors, program officials, and homeowners. From 2010-2019, SIGTARP reports that its investigations directly led to approximately \$11 billion in recoveries. SIGTARP investigations have also led to enforcement actions against 24 institutions, including Goldman Sachs, Bank of America, JPMorgan Chase & Co., Morgan Stanley, and others.<sup>86</sup>
  - (1) SIGTARP successfully worked with and supported DOJ to secure convictions. SIGTARP supports DOJ throughout the indictment, trial, sentencing, and appeal process of individuals and entities who committed financial crimes related to TARP.<sup>87</sup> SIGTARP also worked with and supported other agencies in their enforcement actions against financial institutions for misuse of TARP funds.
  
  - (2) Of the 24 enforcement actions brought against financial institutions for misuse of TARP funds, 14 were brought by DOJ. The others were brought by the SEC, the Federal Reserve, the

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<sup>86</sup> SIGTARP Investigations by the Numbers (Mar. 31, 2020), SIGTARP, <https://www.sig tarp.gov/Pages/Home.aspx>.

<sup>87</sup> FY 2016 President’s Budget, SIGTARP.

Consumer Financial Protection Bureau (“CFPB”), the Department of Labor, the Federal Deposit Insurance Corporation, and state attorneys general.<sup>88</sup>

- c) **Getting Banks to Report on TARP Funds:** SIGTARP recommended to the Treasury Department that banks be required to report on how they used TARP funding. In response to these recommendations, the Treasury Department began requiring banks to report on how they spend TARP funding.<sup>89</sup>
- d) **Increasing Transparency and Deterring Fraudulent Conduct:** SIGTARP has published 40 congressional reports on its website and has created a “Crimes & Fines” database to increase transparency and serve as a deterrence for fraudulent conduct.<sup>90</sup>

## 2. Challenges:

- a) **Obtaining Information from the Treasury Department:** Barofsky recounted that the Treasury Department regularly refused to provide information his office needed to conduct investigations and audits.<sup>91</sup>
- b) **Lack of Transparency with which the Money was being Distributed and Spent:** In discussing challenges he faced as SIGTARP, Barofsky noted that one of his main concerns was the lack of transparency with which the money was being distributed, and he noted that a number of

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<sup>88</sup> See Financial Institution Crimes & Fines Database, SIGTARP, <https://www.sigtar.gov/Pages/wd9er7g.aspx>.

<sup>89</sup> Neil Barofsky, *Where the Bailout Went Wrong*, N.Y. Times, Mar. 29, 2011, <https://www.nytimes.com/2011/03/30/opinion/30barofsky.html>. The Treasury Department began asking for banks to report on how they spent TARP funds in April 2010. However, Barofsky noted that this was “well after the largest banks had already repaid their loans. It was therefore no surprise that lending did not increase but rather continued to decline well into recovery.” *Id.*

<sup>90</sup> See Financial Institution Crimes & Fines Database, SIGTARP, <https://www.sigtar.gov/Pages/wd9er7g.aspx>.

<sup>91</sup> Neil Barofsky, *Bailout 208* (2012).

senators emphasized that he should investigate how the banks were spending the money they received from TARP.<sup>92</sup>

(1) When describing the Capital Purchase Program (“CPP”), a TARP program that provided capital to financial institutions, Barofsky claimed, “[t]he truth was that there was no real focus on CPP on either increasing lending or helping home owners avoid foreclosure. So when Treasury lawyers drafted the contracts that would govern the injection of cash to the banks, they imposed only a few token restrictions on how the money could be used, and were almost entirely silent on the primary justification provided for the program: increasing lending. Instead of requirements or even incentives to make more loans, all that appeared in the nearly one-hundred-page boilerplate agreements was some aspirational language on the front page that said that the banks would strive to ‘expand the flow of credit to U.S. consumers and business.’”<sup>93</sup>

(2) “In addition to failing to include terms that would provide incentives to increase lending, Treasury didn’t require the banks to report on how they were using TARP funds. Congress had noted this failure of transparency, and senators from both parties repeatedly told me of their discomfort with this policy.”<sup>94</sup>

c) **Money Already Distributed:** The EESA was signed into law by President George W. Bush on October 2, 2008. By the time that Barofsky was nominated for the SIGTARP role by President Bush on

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<sup>92</sup> *Id.* at 35.

<sup>93</sup> *Id.* at 27.

<sup>94</sup> *Id.* at 73.

November 14, 2008, approximately \$290 billion of TARP funding had already been spent.<sup>95</sup> During Barofsky's confirmation hearing on November 19, 2008, Senator Baucus told Barofsky, "You are . . . going to confront the harsh reality that almost half of the \$700 billion is already out the door . . . . For a while, you are going to be playing catch-up. You will be looking back at Treasury's use of about \$290 billion in about 43 days."<sup>96</sup> Senator Dodd, in his opening statement at Barofsky's confirmation hearing, noted that the Treasury Secretary had "already committed. . . some \$250 billion to the capital purchase program, which provides direct equity injections into banks, [and] another \$40 billion to aid AIG."<sup>97</sup>

- d) ***Lack of Cooperation from OMB:*** In early 2009, the Office of Management and Budget ("OMB") mandated that SIGTARP post proposed letters of inquiry to TARP recipients asking them to provide information and documentation related to their use or expected use of TARP funds for 15 days, wait for comments, and then justify to OMB that it has taken into account the public comments in redrafting the inquiry letter before sending any inquiry letters to recipients of TARP funds. Barofsky wrote a letter to Senator Grassley about the OMB's actions, and Senator Grassley wrote a letter to Peter Orszag, the Director of OMB, stating, "[t]he Office of Management and Budget has sent a terrible signal by creating all sorts of red tape for the Special Inspector General to dig in to what's happening with TARP money, the taxpayers' money and, in fact, by even meddling in the Inspector General's work at all. The whole point of an inspector general is to have independent review and assessment of what's going on. We all

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95 See Amit R. Paley, *Bailout Lacks Oversight Despite Billions Pledged*, Wash. Post, Nov. 13, 2008, <https://www.washingtonpost.com/wp-dyn/content/article/2008/11/12/AR2008111202846.html>.

96 Neil Barofsky, *Bailout 35* (2012).

97 U.S. Senate, Committee on Banking, Housing, and Urban Affairs, *Nomination of Neil M. Barofsky*, S. Hrg. 110-885, Nov. 19, 2008, <https://www.congress.gov/110/chrq/shrg50419/CHRG-110shrg50419.htm>.

need the Special Inspector General to be as effective as possible so that everyone can understand the mistakes that have been made in managing the bailout and how to do a lot better job going forward.”<sup>98</sup>

e) ***SIGTARP Recommendations Ignored by the Treasury Department:***

Barofsky recounted that SIGTARP made many recommendations to the Treasury Department that were ultimately ignored. For example, SIGTARP recommended ways to protect against fraud and fix other flaws with the Public-Private Investment Program, a program designed to get troubled mortgages off banks’ balance sheets by encouraging private investors to buy them using mostly taxpayer dollars, but the Treasury Department ignored these recommendations. SIGTARP also recommended certain fraud-prevention measures for the Home Affordable Modification Program, several of which the Treasury Department ignored.<sup>99</sup> Barofsky noted his power as SIGTARP was limited: “In my job as Special Inspector General I could not bring about the changes I thought were needed—I could only make recommendations to the Treasury Department.”<sup>100</sup>

(1) Barofsky also noted that the Treasury Department often refused to consult with SIGTARP before announcing specific programs or policies associated with TARP: “Rather than stonewalling us, Treasury could have consulted with us before the programs were announced and we could have worked together.”<sup>101</sup>

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98 Grassley Urges OMB to get out of the way of Special IG for TARP, Jan. 30, 2009, Press Release: Chuck Grassley United States Senator for Iowa, <https://www.grassley.senate.gov/news/news-releases/grassley-urges-omb-get-out-way-special-ig-tarp>.

99 Gretchen Morgenson, Into the Bailout Buzz Saw, N.Y. Times, July 21, 2012, <https://www.nytimes.com/2012/07/22/business/neil-barofskys-journey-into-a-bailout-buzz-saw-fair-game.html>.

100 Neil Barofsky, Where the Bailout Went Wrong, N.Y. Times, March 29, 2011, <https://www.nytimes.com/2011/03/30/opinion/30barofsky.html>.

101 Neil Barofsky, Bailout 170 (2012).

- f) ***Holding Big Bank Executives Accountable***: The current SIGTARP office acknowledges that “[e]xecutives from medium and small banks have been successfully prosecuted and sentenced to prison for committing crimes. But no big bank executives, who are purposefully insulated from knowing about wrongdoing.”<sup>102</sup> While SIGTARP has worked with DOJ to successfully prosecute small and regional bankers, “[p]rominent Wall Street executives have escaped largely unscathed.”<sup>103</sup>

## G. Unique Challenges to the SIGPR that SIGTARP did not Face

1. ***Less Funding***: While SIGTARP received \$50 million in seed money in 2008 to examine \$434 billion in spending, the CARES Act grants SIGPR \$25 million. Barofsky believes “the organization cannot succeed with \$25 million.”<sup>104</sup> Barofsky noted that most of the money SIGTARP investigated went to banks and financial institutions concentrated in New York City, while SIGPR will have nationwide purview, which will require a large travel budget and expertise in an array of industries.<sup>105</sup>
2. ***President Trump’s Signing Statement to the CARES Act***: President Trump issued a signing statement disputing the authority of SIGPR to notify Congress if the Executive Branch was not providing requested information, a key provision of the CARES Act. In his signing statement, President Trump stated, “[s]ection 4018(e)(4)(B) of the Act authorizes the SIGPR to request

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102 See Bringing Accountability to the Insulated CEO, SIGTARP, <https://www.sig tarp.gov/Pages/Home.aspx>.

103 Victoria Finkle, The Big Fish Seen Escaping an Agency Pursuing Bank Fraud, N.Y. Times, July 27, 2016, <https://www.nytimes.com/2016/07/28/business/dealbook/the-big-fish-seen-escaping-an-agency-pursuing-bank-fraud.html?ref=business&r=0>.

104 Jason Grotto and Todd Shields, Virus-Bailout Watchdogs Face Immense Task with Echoes of TARP, Bloomberg, Apr. 3, 2020, <https://www.bloomberg.com/news/articles/2020-04-03/virus-bailout-watchdogs-face-immense-task-with-echoes-of-tarp>.

105 *Id.*

information from other government agencies and requires ‘the SIGPR to report to the Congress without delay’ any refusal of such a request that ‘in the judgment of the Special Inspector General is unreasonable.’ I do not understand, and my Administration will not treat, this provision as permitting the SIGPR to issue reports to the Congress without the presidential supervision required by the Take Care Clause, Article II, section 3.”<sup>106</sup>

- a) It is not uncommon for presidents to claim that certain provisions of a bill are unconstitutional in signing statements.<sup>107</sup> For example, President Obama, in a signing statement attached to the Omnibus Appropriations Act of 2009, asserted similar restrictions on the ability of inspectors general to communicate directly with Congress.<sup>108</sup> In a letter to President Trump regarding his signing statement to the CARES Act, Senator Grassley noted, “[o]ver time, politicians in both the legislative and the Executive Branches have attempted to politicize IGs and use them for gain.”<sup>109</sup>
  
- b) Note that even if President Trump does not have the authority to oversee or “supervise” SIGPR’s reports to Congress, he does have the ability to terminate the SIGPR. This signing statement could be President Trump’s way of sending a message to the SIGPR that the SIGPR should work closely with him. In early April, President Trump fired Glenn Fine, the Defense Department’s Acting Inspector General.

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106 See Presidential Signing Statement on the CARES Act (Mar. 27, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/>.

107 See Todd Garvey, Cong. Research Serv., RL33667, Presidential Signing Statements: Constitutional and Institutional Implications (2012); Karen Tumulty, Obama Circumvents Laws with ‘Signing Statements’ a tool he promised to use lightly, Wash. Post., June 2, 2014, [https://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a\\_story.html](https://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a_story.html).

108 Presidential Statement on Signing the Omnibus Appropriations Act, 2009, (Mar. 11, 2009); see also Letter from Charles Grassley, U.S. Senator, to Barack Obama, President of the United States, (Mar. 13, 2009), <https://www.grassley.senate.gov/news/news-releases/grassley-holds-president-accountable-promises-make-government-transparent>.

109 Letter from Charles Grassley, U.S. Senator, to Donald Trump, President of the United States (Apr. 21, 2020), <https://www.grassley.senate.gov/sites/default/files/2020-04-21%20CEG%20to%20POTUS%20%28SIGPR%29.pdf>.

Fine had been selected by the CIGIE to lead the Pandemic Response Accountability Committee created by the CARES Act.<sup>110</sup> President Trump's willingness to terminate inspectors general may make the SIGPR wary of not complying with President Trump's signing statement and may urge him or her to seek presidential approval before issuing reports to Congress. President Trump's nomination of Brian Miller, a White House lawyer, further indicates Trump's intent to closely monitor SIGPR's work.<sup>111</sup>

- c) Barofsky said that for him, "it was crucial to have the ability to notify Congress when an Executive Branch agency was failing to cooperate with a request for information." Such a notification, or the threat of such a notification, was a key tool Barofsky had to force Treasury Department officials or others to produce information they were reluctant to divulge. Barofsky claimed that if President Trump does indeed block SIGPR from notifying Congress of resistance from the Executive Branch, "that potentially will hamstring the ability of the IG to be effective" and "[i]f they have no recourse . . . that could be very problematic."<sup>112</sup>

- 3. **Expiration:** The EESA did not tie SIGTARP's expiration to a specific date. Instead, the statute linked the expiration to the Secretary of the Treasury's final transfer of troubled assets or the expiration of the last relevant insurance contract. By contrast, SIGPR terminates five years after enactment of the CARES Act.

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110 Alan Rappeport, Trump's Inspector General Has Expressed Dim Views of Congressional Oversight, N.Y. Times, Apr. 7, 2020, <https://www.nytimes.com/2020/04/07/us/politics/trump-inspector-general-brian-miller-virus.html>.

111 Anjay van Wagtenonk, Trump has Nominated one of his Lawyers to Oversee Coronavirus Relief Funds, Vox, Apr. 5, 2020, <https://www.vox.com/policy-and-politics/2020/4/5/21208934/coronavirus-relief-funds-oversight-trump-inspector-general-nominee-miller>.

112 Erica Werner and Paul Kane, Pelosi Announces New Select Committee to Oversee Coronavirus Response, Setting up Clash with Trump Over \$2 Trillion Law, Wash. Post., Apr. 2, 2020, <https://www.washingtonpost.com/us-policy/2020/04/02/pelosi-trump-coronavirus-oversight/>.



- a) Considering that there are arrests and indictments occurring ten years after SIGTARP's creation, the five-year lifespan Congress gave to SIGPR will likely be insufficient. SIGTARP's "Crimes & Fines" database reflects over 30 criminal convictions in 2018 and 2019.<sup>113</sup> SIGTARP's most recent Quarterly Report submitted to Congress summarized SIGTARP's activities from October 1, 2019 through December 31, 2019. SIGTARP noted that during this quarter alone, it supported DOJ in the arrest and indictment of three individuals, and convictions of three individuals for TARP-related crimes. It also reported that numerous defendants previously convicted for TARP-related crimes had been sentenced during this quarter. The report noted, "[o]ur nation's criminal justice system takes time, with SIGTARP investigations leading to indictments, trials, convictions, and sentencing that occur years after Treasury disbursed TARP dollars."<sup>114</sup>

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113 See Financial Institution Crimes & Fines Database, SIGTARP, <https://www.sigtar.gov/Pages/wd9er7g.aspx>.

114 Quarterly Report to Congress, SIGTARP, (October 1, 2019 - December 31, 2019).

# III. Appendix III – The Special Inspectors General for Iraq and Afghanistan Reconstruction

## A. Historical Context

1. SIGIR was created in October 2004 by an amendment to Public Law 108-106, after its predecessor, the Coalition Provisional Authority Office of Inspector General (“CPA-IG”) was terminated.<sup>115</sup> The Coalition Provisional Authority (the “CPA”) was established in April 2003 to restore conditions of security and stability and to facilitate economic recovery, sustainable reconstruction, and development.<sup>116</sup> SIGIR ceased operating in October 2013. Between 2004 and 2013, total appropriations for reconstruction of Iraq surpassed \$60 billion.<sup>117</sup>
2. SIGAR was established under the authority of Section 1229 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. Law No. 110-181) to provide independent and objective oversight of Afghanistan reconstruction projects and activities.<sup>118</sup> Approximately \$136.97 billion has been appropriated for Afghanistan relief and reconstruction since 2002.<sup>119</sup>

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115 Special Inspector General For Iraq Reconstruction, Fed. Register, <https://www.federalregister.gov/agencies/special-inspector-general-for-iraq-reconstruction> (last visited June 3, 2020).

116 L. Elaine Halchin, Cong. Research Serv., RL32370, The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities 1 (2005).

117 Learning From Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction 9, SIGAR (2013).

118 About SIGAR, SIGAR, [https://www.sigar.mil/about/index.aspx?SSR=1&SubSSR=1&WP=About SIGAR](https://www.sigar.mil/about/index.aspx?SSR=1&SubSSR=1&WP=About%20SIGAR) (last visited June 3, 2020).

119 About SIGAR, SIGAR, <https://www.sigar.mil/about/index.aspx?SSR=1> (last visited June 3, 2020).

## B. Mission, Appointment, and Powers

1. **Mission:** The purpose of SIGIR and SIGAR was / is to detect and prevent waste, fraud, and abuse by supervising, coordinating, and conducting independent and objective audits and investigations as well as making recommendations on policies to promote economy, efficiency, and effectiveness of reconstruction operations.<sup>120</sup>
2. **Appointment:** The enabling statute for SIGAR only required that the President appoint the inspector general, but the statute did not require Senate confirmation. The SIGIR was appointed by the Secretary of Defense, in consultation with the Secretary of State.<sup>121</sup> Both inspectors general could be removed from office by the President, who must communicate the reason to Congress 30 days prior to such removal.<sup>122</sup>
3. Both of these inspectors general report / reported to the Secretaries of State and Defense.<sup>123</sup> Additionally, both inspectors general are / were required to submit quarterly reports to Congress.<sup>124</sup> The SIGIR was also required to provide Congress semiannual reports.<sup>125</sup> These reports summarized the activities of the inspector general, as well as revenues and expenditures associated with reconstruction and rehabilitation activities.<sup>126</sup>

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120 National Defense Authorization Act for Fiscal Year 2008, Pub. Law No. 110-181, § 1229(a); Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. Law No. 108-106, § 3001(a).

121 Pub. Law No. 110-181, § 1229(c); Pub. Law No. 108-106, § 3001(c).

122 IG Act, 5 U.S.C. Appendix, Pub. Law No. 113-126, § 3(b).

123 Pub. Law No. 110-181, § 1229(e); Special Inspector General For Iraq Reconstruction, Fed. Register, <https://www.federalregister.gov/agencies/special-inspector-general-for-iraq-reconstruction>; About SIGIR, SIGIR, <https://cybercemetery.unt.edu/archive/sigir/20131001084048/http://www.sigir.mil/about/index.html> (last visited June 3, 2020).

124 Pub. Law No. 108-106, § 3001(i); Pub. Law No. 110-181, § 1229(i).

125 Pub. Law No. 108-106, § a(i).

126 Pub. Law No. 108-106, § 3001(i); Pub. Law No. 110-181, § 1229(i).

4. The special inspectors general also submit / submitted these reports to the heads of their agencies, who could make comments and submit them to the appropriate congressional committees. For transparency, the inspectors general must post their reports online; the agency heads, upon request, must make the reports and any comments publicly available.<sup>127</sup>
  
5. The enabling statutes for SIGIR and SIGAR provided that the inspectors general have the authorities granted under Section 6 of the IG Act. These include the authority to: (a) conduct audits and investigations; (b) access directly the records and information related to the affiliated agency's programs and operations;<sup>128</sup> (c) request information or assistance from other federal, state, and local government agencies; (d) subpoena information and documents; (e) administer oaths; (f) hire staff and manage their own resources; and (g) have direct and prompt access to the head of the affiliated agencies.<sup>129</sup> Additionally, the enabling statutes of SIGIR and SIGAR gave the Attorney General the authority to grant the inspectors general certain law enforcement powers, including, the ability to carry a firearm, make arrests without warrants, and seek and execute warrants.<sup>130</sup> Consequently, the Attorney General vested SIGAR with such law enforcement powers.<sup>131</sup>
  
6. The enabling statutes for SIGIR and SIGAR both provided that termination of the office shall occur 180 days after the date on which amounts appropriated for the reconstruction of Iraq and Afghanistan, respectively, that are

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127 Pub. Law No. 108–106, § 3001(i), (j), (k); Pub. Law No. 110-181, § 1229(i), (j).

128 Note that special inspectors general possess express cross-agency jurisdiction. Kathryn A. Francis, Cong. Research Serv., R45450, *Statutory Inspectors General in the Federal Government: A Primer* (2019).

129 IG Act, 5 U.S.C. Appendix, Pub. Law No. 113-126, § 8.

130 Pub. Law No. 108–106, § 3001(g); Pub. Law No. 110-181, § 1229(g)(1). See also IG Act, 5 U.S.C. Appendix, Pub. L. 113-126, § 6.

131 IG Act, 5 U.S.C. Appendix §§6(a)(4) and 6(e); Wendy Ginsberg & Michael Greene, Cong. Research Serv., R43814, *Federal Inspectors General: History, Characteristics, and Recent Congressional Actions* 6 (2016); Wendy Ginsberg, Cong. Research Serv., R43722, *Offices of Inspectors General and Law Enforcement Authority: In Brief 1-5* (2014); Investigations Directorate, SIGAR, <https://www.sigar.mil/investigations/index.aspx?SSR=3>.

“unexpended” are less than \$250,000,000.<sup>132</sup> SIGAR is still in operation, while SIGIR, as noted previously, ceased its operation in October 2013.<sup>133</sup>

## C. Successes of SIGIR

1. **High Productivity:** As of the beginning of 2013, SIGIR had conducted approximately 220 audits and 170 inspections, and it secured over 82 convictions achieved through investigations and referrals to / collaboration with the DOJ. Due to SIGIR’s work, out of approximately \$60 billion appropriated for reconstruction programs and projects in Iraq, more than \$1.61 billion were prevented from being wasted thanks to audits and over \$191 million from investigations were recovered.<sup>134</sup> At its peak in 2008, SIGIR had a staff of 150 with 35 auditors and eight investigators permanently stationed in Iraq conducting audits and investigations to root out fraud, waste, and abuse.<sup>135</sup> With billions of taxpayer dollars at stake, the special inspector general took action to expand SIGIR’s oversight capacity and conducted more inspections on the ground, uncovering numerous inadequately designed projects.<sup>136</sup> SIGIR’s investigative work also produced 114 debarments and 98 suspensions of contractors and government personnel for fraud or other corrupt practices.<sup>137</sup>
2. **Collaboration with DOJ and Increased Prosecutions and Convictions:** In 2009, SIGIR partnered with DOJ to implement an unprecedented program dubbed

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132 Pub. Law No. 108-106, § 3001(o); Pub. Law No. 110-181, § 1229(o).

133 See Inspector General Reports, DPC Defense Pricing and Contracting, [https://www.acq.osd.mil/dpap/pacc/cc/inspector\\_general\\_reports.html](https://www.acq.osd.mil/dpap/pacc/cc/inspector_general_reports.html).

134 Learning From Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction 6, SIGAR (2013), <https://www.globalsecurity.org/military/library/report/2013/sigir-learning-from-iraq.pdf>.

135 Iraq Reconstruction: Lessons from Auditing U.S.-funded Stabilization and Reconstruction Activities 2, SIGIR (2012), <https://cybercemetery.unt.edu/archive/sigir/20131001124816/http://www.sigir.mil/files/lessonslearned/AuditingLessonsLearned.pdf>.

136 Learning From Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction 4, SIGAR (2013).

137 *Id.*

the SIGIR Prosecutorial Initiative, or SIGPRO. It involved hiring prosecutors and placing them within DOJ's Fraud Section.<sup>138</sup> SIGPRO yielded a rapid rise in prosecutions and many more convictions. SIGPRO more than doubled its financial results, indictments, and convictions in just over two years.<sup>139</sup>

3. **Coordination with other Oversight Bodies:** SIGIR formed the Iraq Inspectors General Council, which met quarterly for seven years. The body improved planning and coordination among Executive Branch audit and investigative agencies working and providing oversight in Iraq.<sup>140</sup>
4. **Statutory and Policy Changes:** SIGIR also released nine "lessons learned" studies, 36 quarterly reports, a total of more than 20,000 pages of reporting, and 37 appearances before Congress.<sup>141</sup> Some of SIGIR's recommendations were incorporated into laws. For example, as a result of SIGIR's audits, which uncovered that U.S. agencies lacked policies on asset transfers geared towards ministries responsible for sustaining completed projects, Congress responded by requiring U.S. agencies to certify that they had implemented such asset-transfer agreements.<sup>142</sup>

## D. Challenges Faced by SIGIR

1. **Limited Scope:** The enabling statute of SIGIR linked the inspector general's authority to funding, rather than to its mission, which undermined the ability to conduct oversight over all programs and operations aimed at Iraq's

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138 SIGIR Quarterly Report: Investigations Update (Section 2) 49, SIGIR, (Sept. 2013), [https://cybercemetery.unt.edu/archive/sigir/20131001090424/http://www.sigir.mil/files/quarterlyreports/September2013/Section2\\_-\\_September\\_2013.pdf](https://cybercemetery.unt.edu/archive/sigir/20131001090424/http://www.sigir.mil/files/quarterlyreports/September2013/Section2_-_September_2013.pdf).

139 *Id.*

140 See Learning From Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction 2, SIGAR (2013).

141 Neil Gordon, SIGIR Releases its Final Report, POGO, Sept. 12, 2013 <https://www.pogo.org/analysis/2013/09/sigir-releases-its-final-report/>.

142 Learning From Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction 44, SIGAR (2013).

reconstruction.<sup>143</sup> The words “appropriated or otherwise made available for reconstruction” generally limited SIGIR to reviews of projects, leaving out a large amount of the Iraq relief and reconstruction program management and operation that was carried out by State Department and DOD personnel and contractors, who were generally paid out of their agency operating accounts.<sup>144</sup>

2. ***Little Resources Allocated to Combat Corruption:*** Early on, U.S. reconstruction authorities identified corruption as an important issue that threatened the goal of establishing an environment of trust and confidence within the Iraqi government but devoted relatively modest resources to combat the problem.<sup>145</sup>
3. ***Late Start and Insufficient Resources for SIGIR:*** The CPA-IG / SIGIR was not deployed in Iraq at the onset, and once deployed, the office lacked sufficient staff and resources to provide oversight over reconstruction funds and efforts. In part, this exacerbated the existing instability and corruption, and allowed some to take advantage of the chaotic circumstances to enrich themselves.<sup>146</sup>

## E. Successes of SIGAR

1. ***High Productivity:*** From 2008 through December 31, 2017,<sup>147</sup> SIGAR conducted 238 audits and inspections, 475 closed investigative cases, and 51 special projects. SIGAR identified 643 instances of waste, fraud, and abuse

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143 Iraq Reconstruction: Lessons from Auditing U.S.-funded Stabilization and Reconstruction Activities 33, SIGIR (2012).

144 *Id.*

145 Learning From Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction 103, SIGAR (2013).

146 *Id.*

147 SIGAR Report (July 17, 2018), <https://www.sigar.mil/pdf/special%20projects/SIGAR-18-60-SP.pdf>.

valued between \$2.2 billion and \$3.5 billion, as well as \$12 billion wasted on two failed whole-of-government reconstruction efforts (representing in total 29 percent of the \$52.7 billion examined). Over the years, SIGAR's audits and accompanying recommendations, as well as its investigations, led to approximately \$2.1 billion in savings for U.S. taxpayers.<sup>148</sup>

- a) SIGAR's recommendations also led agencies such as the DOD and DOS to identify nearly \$1 billion in funds that could be put to better use for other programs or efforts.

2. ***Innovative Oversight Mechanism:*** SIGAR launched its Suspension and Debarment Program ("SDP") in June 2011, which integrates SIGAR's audit and investigative functions with the administrative remedies of suspension and debarment. It includes an embedded attorney who specializes in this area of law within the Investigations team.<sup>149</sup> This program has dramatically increased the number of suspension and debarment referrals.<sup>150</sup> As of December 2017, SIGAR's investigative work had led to 883 referrals of companies and individuals for suspension or debarment.<sup>151</sup> As of December

2019, these efforts had resulted in 141 suspensions and 563 finalized debarments / special entity designations of individuals and companies engaged in U.S.-funded reconstruction projects.<sup>152</sup>

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148 Letter from John F. Sopko, Special Inspector General for Afghanistan Reconstruction to Walter B. Jones, Tim Walberg & Peter Welch, U.S. House of Representatives, July 17, 2018, <https://www.sigar.mil/pdf/special%20projects/SIGAR-18-60-SP.pdf>.

149 About SIGAR, SIGAR, <https://www.sigar.mil/about/index.aspx?SSR=1> (last visited June 3, 2020).

150 Steven Trent & Brian Persico, Suspension and Debarment Program: A Powerful Tool to Promote Contractor Accountability in Contingency Environments, SIGAR (2011); <https://www.sigar.mil/newsroom/spotlight/2011-suspension-debarment-Article.pdf>.

151 Letter from John F. Sopko, Special Inspector General for Afghanistan Reconstruction to Walter B. Jones, Tim Walberg & Peter Welch, U.S. House of Representatives, July 17, 2018.

152 Quarterly Report to the United States Congress 35, SIGAR, Jan. 30, 2020, <https://www.sigar.mil/pdf/quarterlyreports/2020-01-30qr.pdf>.



3. **Multi-Agency Coordination:** SIGAR and the inspectors general for USAID, DOD, and the State Department have jointly developed and agreed to a strategic plan for oversight, designed to enable the four agencies to focus their audits, inspections, and evaluations on the issues of most importance to policy- and decision-makers.<sup>153</sup> By conducting more focused oversight guided through a common strategic plan, the inspectors general are better able to protect taxpayer dollars, illuminate problems, identify successes and lessons learned, and improve program performance in support of U.S. policy objectives.<sup>154</sup>

- a) Although there is overlap among the mandates of these four OIGs, coordination among the inspectors general has helped to prevent duplication of efforts.<sup>155</sup>

4. **Collaboration with other Bodies:** SIGAR is a primary member of the International Contract Corruption Task Force (“ICCTF”), the principal organization coordinating contract fraud and corruption cases involving U.S. government spending in Afghanistan.<sup>156</sup> The other members of the ICCTF are the Federal Bureau of Investigation, the U.S. Army CID Major Procurement Fraud Unit, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, the DOS Office of the Inspector General and the USAID Office of the Inspector General.<sup>157</sup> By using the taskforce approach, SIGAR has been more effective in conducting criminal investigations.

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153 Oversight Partners, SIGAR, <https://www.sigar.mil/about/oversight/index.aspx?SSR=1&SubSSR=8&WP=Oversight%20Partners>.

154 Joint Strategic Oversight Plan for Afghanistan Reconstruction FY13 - Joint Strategic Planning Subgroup for Oversight of Afghanistan Reconstruction 5, SIGAR (2012), <https://www.sigar.mil/pdf/strategicoversightplans/fy-2013.pdf>.

155 U.S. Gov’t Accountability Off., GAO-18-6, Inspectors General: Documented Agreement of Certain Roles and Responsibilities Could Further Enhance Coordination in Afghanistan, Reissued Nov. 21, 2017, <https://www.gao.gov/assets/690/688119.pdf>.

156 About SIGAR, SIGAR, <https://www.sigar.mil/about/index.aspx?SSR=1> (last visited June 3, 2020).

157 Investigations Directorate, SIGAR, <https://www.sigar.mil/investigations/> (last visited June 3, 2020).

## F. Challenges Faced by SIGAR

1. ***Failed Leadership, Failure to Meet Minimum Standards, and their Negative Effects:*** Arnold Fields, the first inspector general of SIGAR, appointed by President Bush in 2008, resigned from his position in January 2011 in the wake of a scathing peer review and a brutal Congressional hearing at which senators called for his ouster.<sup>158</sup> At Fields's request, CIGIE completed three reviews of SIGAR. CIGIE found multiple deficiencies in SIGAR's performance. The most alarming were SIGAR's failure to meet the applicable minimum standards for conducting investigations.<sup>159</sup> As a result, CIGIE recommended that DOJ revoke SIGAR's law enforcement authority.<sup>160</sup> CIGIE also identified major deficiencies with SIGAR's audits, including the failure to meet minimum standards for quality control, leaving its audit findings ripe for challenges by auditees. SIGAR also focused on producing a high quantity of audits while broadly disregarding the quality of the audits. SIGAR had no meaningful strategic plan for audits or investigations, a substantial flaw in an oversight organization.<sup>161</sup>
2. ***Lack of and Delayed Funding:*** Fields's duties may have been hampered in part at the outset by the fact that SIGAR did not receive its full funding until nearly a year after he was sworn into office. Those funds later allowed the office to

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<sup>158</sup> Jason Horowitz, Arnold Fields, charged with targeting Afghan fraud, came under fire himself, Wash. Post., Feb. 10, 2011.

<sup>159</sup> Bipartisan Letter from Senators McCaskill, Coburn, Collins, & Grassley to President Obama, Sept. 23, 2010, <https://www.collins.senate.gov/newsroom/senator-collins-joins-bipartisan-call-safeguard-inspector-general-independence-following>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

begin aggressively hiring auditors, investigators, writers, and other key staff.<sup>162</sup>

3. **Limited Scope:** As was the case with SIGIR, SIGAR was unable to provide complete oversight over the reconstruction programs and operations in Afghanistan because several agencies have purview over such efforts and SIGAR's mandate is tied to funds appropriated rather than to its mission. As such, SIGAR could neither audit and investigate the entirety of programs and operations relating to reconstruction in Afghanistan nor provide the full picture of the waste, fraud, or abuse that occurred.<sup>163</sup> Other oversight bodies include the Offices of Inspector General for the Departments of Defense, State, Homeland Security, Agriculture, Justice, Treasury, USAID, and the GAO.<sup>164</sup>
4. **Delay in Addressing Suspension and Debarment Referrals:** There is sometimes a backlog of SIGAR suspension and debarment referrals before the agencies tasked with acting upon them. According to a SIGAR 2012 quarterly report, it took federal agencies an average of 323 days to act on its

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162 SIGAR Issues Statement on Completion of Peer Review, SIGAR, Aug. 6, 2010, <https://www.sigar.mil/newsroom/pressreleases/10/2010-aug-06-pr.html> (last visited June 3, 2020). Nonetheless, Fields's judgment and ability to independently and aggressively provide oversight over funds, programs, and operations in Afghanistan came into question on several occasions. There were intense office politics, in the face of accusations of influence-buying, internal debate over whether auditors should put dollar figures on waste, and arguments about which reconstruction projects deserved investigation. See Jason Horowitz, Arnold Fields, charged with targeting Afghan fraud, came under fire himself, Wash. Post., Feb. 10, 2011. Additionally, Fields hired a former Inspector general of the Defense Department, Joseph Schmitz, for a sole-source contract to "independently monitor" SIGAR's efforts to correct the deficiencies documented by CIGIE. This was a questionable choice because Schmitz left the Pentagon amid allegations that he had interfered with investigations and engaged in other misconduct, such as quashing audits and misleading Congress. See Fields Resigns as Special IG for Afghanistan Reconstruction, POGO Blog (Archived), Jan. 11, 2011, <https://pogoblog.typepad.com/pogo/2011/01/fields-resigns-as-special-ig-for-afghanistan-reconstruction.html>; <http://pogoarchives.org/m/go/ig/senate-sigar-letter-20100923.pdf>.

163 See Letter from John F. Sopko, Special Inspector General for Afghanistan Reconstruction to Walter B. Jones, Tim Walberg & Peter Welch, U.S. House of Representatives, July 17, 2018.

164 *Id.*

referrals, which means that suspected bad actors are still receiving taxpayer money.<sup>165</sup>

5. **Lack of Transparency of Periodic Reports:** The Washington Post, through a Freedom of Information Act (“FOIA”) request, was able to obtain from SIGAR more than 2,000 pages of previously unpublished notes of interviews with individuals who played a direct role in the war and reconstruction efforts in Afghanistan.<sup>166</sup> The interview notes revealed that SIGAR’s Lessons Learned reports left out the most stringent criticisms of reconstruction efforts, including that of the amount of waste that occurred since 2008.<sup>167</sup> Once the Post obtained the requested documents, it noticed that the names of more than 90 percent of the people who were interviewed were omitted, thereby preventing the public from knowing the identity of officials who had asserted that the Government had misled the American people regarding the progress of the war and reconstruction efforts.<sup>168</sup>

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165 Neil Gordon, Should SIGAR Have Suspension and Debarment Power?, POGO, Feb. 1, 2013, <https://www.pogo.org/analysis/2013/02/should-sigar-have-suspension-and-debarment-power/>, (citing Quarterly Report to the United States Congress, SIGAR, Oct. 2012).

166 Craig Whitlock, The Afghanistan Papers: A Secret History of the War - At War with the Truth: U.S. Officials constantly said they were making progress. Wash. Post, Dec. 9, 2019, <https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/afghanistan-war-confidential-documents/>.

167 See *id.*

168 See *id.*

## IV. Appendix IV – The American Recovery and Reinvestment Act (“ARRA”) of 2009

### A. Background and Purpose of the ARRA

1. **Background:** President Obama signed the ARRA on February 17, 2009. In his presidential signing statement, President Obama stated, “[t]he Act provides a direct fiscal boost to help lift our Nation from the greatest economic crisis in our lifetimes and lay the foundation for future growth.”<sup>169</sup>
2. **Purpose:** The purpose of the ARRA was, among other things, to “preserve and create jobs and promote economic recovery” and “to assist those most impacted by the recession.”<sup>170</sup>
3. **ARRA Investments / Spending:** Total ARRA spending through fiscal year 2011 was approximately \$494 billion.<sup>171</sup> The total increase in budget deficits between 2009 and 2019, including both spending and revenue effects, was estimated to be \$840 billion.<sup>172</sup> Most of the ARRA spending can be grouped into four categories: (a) funding to states and localities for education,

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169 Presidential Statement on Signing the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (Feb. 17, 2009).

170 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3(a), 123 Stat. 116.

171 Actual ARRA Spending Over the 2009-2011 Period Quite Close to CBO’s Original Estimate, Congressional Budget Office (Jan. 5, 2012) <https://www.cbo.gov/publication/42682>.

172 Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output in 2014, Congressional Budget Office (Feb. 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49958-ARRA.pdf>.

transportation projects, and raising the federal matching rates under Medicaid; (b) support to people in need by increasing and expanding unemployment benefits and increasing benefits under the Supplemental Nutrition Assistance Program (“SNAP”); (c) the purchase of goods and services, such as funding construction projects; and (d) temporary tax relief for individuals and businesses through tax credits and enhanced deductions.<sup>173</sup>

## B. Oversight Provisions in the ARRA

1. ***Establishment of the Recovery Accountability and Transparency Board:*** The ARRA created the Recovery Accountability and Transparency Board (the “Board”) “to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse.”<sup>174</sup> The Board performed oversight of ARRA spending until its termination in September 2015.<sup>175</sup>

a) ***Members:*** The President was responsible for appointing an individual as Chairperson of the Board, with the advice and consent of the Senate.<sup>176</sup> The members of the Board included the inspectors general of the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Homeland Security, Justice, Transportation, Treasury, the Treasury Inspector General for Tax Administration, and “any other Inspector General as designated by the President from any agency that expends or obligates covered funds.”<sup>177</sup>

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<sup>173</sup> *Id.*

<sup>174</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1521, 123 Stat. 289.

<sup>175</sup> Charles S. Clark, Historic Effort to Track Stimulus Spending Wraps Up, Sept. 28, 2015, <https://www.govexec.com/oversight/2015/09/historic-effort-track-stimulus-spending-wraps/122129/>.

<sup>176</sup> *Id.* § 1522(a)(1).

<sup>177</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1522(b), 123 Stat. 290.

- b) **Function:** The Board’s specific functions included reviewing whether reporting regarding contracts and grants using covered funds met applicable standards; auditing and reviewing covered funds to determine whether wasteful spending, poor contract or grant management, or other abuses were occurring; and referring matters it considered appropriate for investigation to the inspector general for the agency that disbursed the covered funds.<sup>178</sup>
- c) **Reporting Requirements:** The Board was required to submit three different types of reports to the President and to Congress: “flash reports,” quarterly reports, and annual reports.<sup>179</sup> All reports were required to be made publicly available and posted on the Board’s website.<sup>180</sup>
- (1) Flash reports addressed “potential management and funding problems that require immediate attention.”<sup>181</sup>
  - (2) Quarterly reports summarized the “findings of the Board and the findings of inspectors general of agencies.”<sup>182</sup>
  - (3) Annual reports consolidated applicable quarterly reports on the use of covered funds.<sup>183</sup>
- d) **Board Recommendations to Agencies:** The Board was responsible for making recommendations to agencies “on measures to prevent fraud,

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<sup>178</sup> *Id.* § 1523(a)(2).

<sup>179</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 26 U.S.C.A. § 1523(b)(1–3), 123 Stat. 290-91.

<sup>180</sup> American Recovery and Reinvestment Act of 2009, § 1523(b)(4), Pub. L. No. 111-5, 123 Stat. 291.

<sup>181</sup> American Recovery and Reinvestment Act of 2009, § 1523(b)(1), Pub. L. No. 111-5, 123 Stat. 290.

<sup>182</sup> American Recovery and Reinvestment Act of 2009, § 1523(b)(2), Pub. L. No. 111-5, 123 Stat. 291.

<sup>183</sup> *Id.* § 1523(b)(3).

waste, and abuse relating to covered funds.”<sup>184</sup> Within 30 days of receiving such reports, the agencies were required to submit a report to the President, the congressional committees of jurisdiction, and the Board addressing whether the agency agrees or disagrees with the recommendation, and any actions the agency would take to implement Board recommendations.<sup>185</sup>

- (1) Federal agencies were also required to comply with requests for information or assistance from the Board, and whenever such requests were denied, the Board was required to report the circumstances to Congress “without delay.”<sup>186</sup>

- e) **Powers and Authorities:** The Board conducted audits and reviews of spending of covered funds and coordinated on such activities with the inspectors general of the relevant agency to avoid duplication and overlap of work.<sup>187</sup> The Board could issue subpoenas to compel the testimony of non-federal officers or employees.<sup>188</sup> The Board also had all of the authorities provided under Section 6 of the IG Act, including subpoena power and the ability to seek search and arrest warrants.<sup>189</sup>

The Board was also authorized to hold public hearings, and the head of each federal agency was required to make all officers and employees of that agency available to provide testimony to the Board and Board personnel.<sup>190</sup>

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184 *Id.* § 1523(c)(1).

185 *Id.* § 1523(c)(2).

186 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1525(b), 123 Stat. 292-93.

187 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1524(a), 123 Stat. 291.

188 *Id.* § 1524(c)(1).

189 *Id.* See *supra*, Appendix II at 13-30.

190 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1524(d), 123 Stat. 292.



f) **Board Website:** The Board was required to establish and maintain a “user-friendly, public-facing website to foster greater accountability and transparency in the use of covered funds” within 30 days of the ARRA’s enactment.<sup>191</sup> The Board was required to post “accountability information, including findings from audits, inspectors general, and the Government Accountability Office.”<sup>192</sup> The website was also required to contain “detailed data on contracts awarded by the Federal Government that expend covered funds, including information about the competitiveness of the contracting process, information about the process that was used for the award of contracts, and for contracts over \$500,000, a summary of the contract.”<sup>193</sup> The website was also required to “provide a means for the public to give feedback on the performance of contracts that expend covered funds.”<sup>194</sup>

(1) The Board’s website, Recovery.gov, no longer exists. Data was removed from the website as early as 2014.<sup>195</sup>

g) **Budget:** Congress allocated \$84 million to the Board to carry out its duties.<sup>196</sup>

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191 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1526(a), 123 Stat. 293.

192 *Id.* § 1526(c)(2).

193 *Id.* § 1526(c)(4).

194 *Id.*

195 “The Recovery Accountability and Transparency Board (Recovery Board) has not renewed its Data Universal Numbering System (DUNS) agreement for displaying recipient information as the program ends, and a large amount of data has been and will be removed from the website.” Kameron Hillstrom, *The American Recovery and Reinvestment Act: A Fitting Future for Recovery Legislation*, 44 *Pub. Cont. L.J.* 285, 305 n. 28 (2015) (citing *Some Recipient Data Being Removed*, RECOVERY.GOV, <http://www.recovery.gov/featured/Pages/Some-Recipient-Data-Being-Removed.aspx> (last visited Dec. 15, 2014)).

196 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 410, 123 Stat. 150.

- h) **Board Termination:** The ARRA stated, “[t]he Board shall terminate on September 30, 2013.”<sup>197</sup> Congress extended the Board’s tenure by two years to cope with Hurricane Sandy spending, and the Board ultimately terminated in September 2015.<sup>198</sup>
- i) **Complaints and Investigations:** “During the Recovery Board’s tenure, 4,388 complaints were filed regarding fraud, waste, or abuse. Of these complaints, 1,625 triggered investigations and 528 ended with some form of government action.”<sup>199</sup> According to a press release the Recovery Board published during its final month, inspectors general whose agencies received recovery funding completed nearly 3,200 audits, inspections, and other reviews during the Board’s tenure. Board-related probes by inspectors general resulted in 1,665 convictions, pleas, and judgments and resulted in \$157 million in recoveries, forfeitures, seizures, and estimated savings.<sup>200</sup>

2. **Establishment of the Recovery Independent Advisory Panel:** The ARRA created the Recovery Independent Advisory Panel (the “Panel”) to assist the Board in preventing fraud and waste associated with ARRA funds, which was comprised of five members appointed by the President.<sup>201</sup> Members were to be appointed “on the basis of expertise in economics, public finance, contracting, accounting, or any other relevant field.”<sup>202</sup>

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197 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1530, 123 Stat. 294.

198 Charles S. Clark, Historic Effort to Track Stimulus Spending Wraps Up, Gov. Exec., Sept. 28, 2015, <https://www.govexec.com/oversight/2015/09/historic-effort-track-stimulus-spending-wraps/122129/>.

199 Kameron Hillstrom, The American Recovery and Reinvestment Act: A Fitting Future for Recovery Legislation, 44 Pub. Cont. L.J. 285, 303 (2015). Hillstrom noted that “[t]his information was retrieved from Recovery.gov as it appeared in December 2013; however, it was removed from the website after the Recovery Board decided not to renew its licensing data. Id. at 305 n. 145.

200 Charles S. Clark, Historic Effort to Track Stimulus Spending Wraps Up, Gov. Exec., Sept. 28, 2015, <https://www.govexec.com/oversight/2015/09/historic-effort-track-stimulus-spending-wraps/122129/>.

201 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1541, 123 Stat. 295.

202 *Id.*

- a) **Duties:** The Panel was required to “make recommendations to the Board on actions the Board could take to prevent fraud, waste, and abuse relating to covered funds.”<sup>203</sup>
  - b) **Powers and Authorities:** The Panel could hold hearings and take testimony to carry out its duties. The Panel also could “secure directly from any agency such information as the Panel consider[ed] necessary” to carry out its duties, and the head of each agency was required to provide such information in response to requests from the Panel.<sup>204</sup>
  - c) **Termination:** The ARRA stated that “[t]he Panel shall terminate on September 30, 2013.”<sup>205</sup>
3. **Increased Funding for Inspectors General:** The ARRA allocated \$254.75 million to 23 inspectors general for oversight and audit of programs, grants, and projects funded by ARRA and administered by their individual agencies.<sup>206</sup>
  4. **Whistleblower Protection Provisions of the ARRA:** The ARRA contained robust protections for non-federal employee whistleblowers. Employees of non-federal employers who received funds under the ARRA could not be “discharged, demoted, or otherwise discriminated against as a reprisal for disclosing . . . to the Board, an inspector general, the Comptroller General, a member of Congress, a state or federal regulatory or law enforcement agency, a person with supervisory authority over the employee . . . a court or grand jury, [or] the head of a federal agency, information that the employee

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203 *Id.* § 1542.

204 *Id.* § 1543.

205 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1545, 123 Stat. 296.

206 Clinton T. Brass, Cong. Research Serv., R40572, General Oversight Provisions in the American Recovery and Reinvestment Act of 2009 (ARRA): Requirements and Related Issues (2009) <https://crsreports.congress.gov/product/pdf/R/R40572/3>.

reasonably believes is evidence of: gross mismanagement of an agency contract or grant related to covered funds; a gross waste of covered funds; a substantial and specific danger to public health or safety related to the implementation or use of covered funds; an abuse of authority related to the implementation or use of covered funds; or a violation of law. . . . related to an agency contract. . . . or grant, awarded or issued relating to covered funds.”<sup>207</sup>

5. **Investigation of Complaints:** An employee who was subjected to a prohibited reprisal could “submit a complaint regarding the reprisal to the appropriate inspector general.”<sup>208</sup> Within 180 days of receiving the complaint, the inspector general must either investigate the complaint and submit a report with the findings of the investigation to the employee, the employer, the head of the appropriate agency, and the Board, or make a determination that the complaint “is frivolous, does not relate to covered funds, or another federal or state judicial administrative proceeding has previously been involved to resolve” the complaint.<sup>209</sup>
  
6. **Agency Action and Relief:** Within 30 days of receiving the inspector general report, “the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-federal employer has subjected the complainant” to a prohibited reprisal and “shall either issue an order denying relief . . . or shall take one or more of the following actions: (A) Order the employer to take affirmative action to abate the reprisal; (B) Order the employer to reinstate the person to the position the person held before the reprisal” with back pay, or “(C) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses . . . that

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<sup>207</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(a), 123 Stat. 297.

<sup>208</sup> *Id.* § 1553(b).

<sup>209</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(b), 123 Stat. 297-98.

were reasonably incurred by the complainant” in connection with bringing the complaint.<sup>210</sup>

## C. Successes

1. **Establishment of the Recovery Operations Center:** In 2009, the Board established the Recovery Operations Center (“ROC”), “which used advanced data analysis techniques to identify potential fraud and errors before and after government payments were made.”<sup>211</sup> The ROC “proved to be a paradigm shift in how big data and forensic analytics are used to track government program spending. . . . The ROC rapidly improved the speed and specificity of fraud detection, flagging suspicious patterns in fund disbursement data that normally eluded federal agencies racing to spend ARRA money to stimulate local economies. For example, addresses flagged as suspicious after receiving multiple stimulus checks could be cross-referenced on an early-stage Google Earth to assess the integrity of their claims without deploying a team to the site.”<sup>212</sup> The ROC helped inspectors general identify high-risk entities and target audit and investigative resources to those entities, and it identified organizations with previous fraudulent conduct that nevertheless received contracts during Hurricane Sandy.<sup>213</sup>
2. **Establishment of Recovery.gov Website:** The Board established Recovery.gov to track government spending and to provide transparency of ARRA funds. According to the GAO, one example of a good practice relating to the

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210 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(c)(2), 123 Stat. 300.

211 U.S. Gov’t Accountability Off., GAO-14-219, Report to Congressional Requesters: Recovery Act Grant Implementation Experiences Offer Lessons for Accountability and Transparency (2014) <https://www.gao.gov/assets/670/660353.pdf>.

212 Danny Werfel, Fighting Fraud in the CARES Act—Rebuild the ‘ROC’, The Hill, Apr. 22, 2020, <https://thehill.com/opinion/technology/493877-fighting-fraud-in-the-cares-act-rebuild-the-roc>.

213 U.S. Gov’t Accountability Off., GAO-15-814, Federal Spending Accountability: Preserving Capabilities of Recovery Operations Center Could Help Sustain Oversight of Federal Expenditures (2016) <https://www.gao.gov/assets/680/672473.pdf>.

transparency of ARRA funds was the creation of the Recovery.gov website.<sup>214</sup> The site demonstrated several leading practices for effective government websites. These included: (a) establishing a clear purpose; (b) using social networking tools to garner interest; (c) tailoring the website to meet audience needs; and (d) obtaining stakeholder input during design.<sup>215</sup>

3. **Regular Communication with Governors and Mayors:** Vice President Joe Biden held regular calls with governors and mayors when ARRA funding was distributed. A 2010 report to President Obama on the implementation of the ARRA stated that, “[w]ith so much Recovery Act funding flowing through state and local governments, the Vice President has regular contact with Governors and Mayors. He has hosted 34 conference calls which have collectively included the governors of all 50 states at least once, 5 representatives from U.S. territories, 119 mayors, and 37 county executives. The Vice President has committed to a 24 hour turn around on any issues or concerns that arise from these calls. This commitment is that, if an answer is not readily available, the interested party will receive a call within the 24 hour window with an estimate of when an answer will be possible.”<sup>216</sup>
  
4. **Monitoring the Money from Day One:** Earl Devaney, Chairman of the Board, told the New York Times that “[t]he IG community has gotten on the front end of Recovery Act spending, monitoring the money from day one and allowing the public to access the same information. . . . IGs no longer have to stumble upon fraud like we usually do. The result . . . has been far less fraud than

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214 U.S. Gov’t Accountability Off., GAO-14-219, Report to Congressional Requesters: Recovery Act Grant Implementation Experiences Offer Lessons for Accountability and Transparency (2014) <https://www.gao.gov/assets/670/660353.pdf>.

215 U.S. Gov’t Accountability Off., GAO-14-219, Report to Congressional Requesters: Recovery Act Grant Implementation Experiences Offer Lessons for Accountability and Transparency (2014) <https://www.gao.gov/assets/670/660353.pdf>.

216 2010 Fiscal Year End Report to the President on Progress Implementing the American Recovery and Reinvestment Act of 2009 25, ARRA (2010), [https://obamawhitehouse.archives.gov/sites/default/files/recovery\\_act\\_report\\_9-30-2010.PDF](https://obamawhitehouse.archives.gov/sites/default/files/recovery_act_report_9-30-2010.PDF).

expected.”<sup>217</sup> In a report Vice President Biden delivered to the President on ARRA progress, Vice President Biden noted there were 196,937 prime and sub contracts, grants, and loans under the ARRA as of June 30, 2010.<sup>218</sup> The 283 open or consequential investigations of fraud associated with those contracts, grants, or loans, represented less than 0.2% of the total number of ARRA awards at that time.<sup>219</sup> GAO acknowledged that levels of fraud associated with ARRA awards were minimal.<sup>220</sup>

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217 Emily Yehle, Interior IG Brings Detective’s Zeal to Stimulus Watchdog Post, N.Y. Times, Sept. 10, 2010, <https://archive.nytimes.com/www.nytimes.com/gwire/2010/09/10/10greenwire-interior-ig-brings-detectives-zeal-to-stimulus-6880.html>.

218 2010 Fiscal Year End Report to the President on Progress Implementing the American Recovery and Reinvestment Act of 2009 24, ARRA (2010), [https://obamawhitehouse.archives.gov/sites/default/files/recovery\\_act\\_report\\_9-30-2010.PDF](https://obamawhitehouse.archives.gov/sites/default/files/recovery_act_report_9-30-2010.PDF).

219 *Id.* at 25.

220 *Id.*

## V. Appendix V – Whistleblower Protections

### A. Whistleblower Protections for Federal Employees and Contractors and Duties of Inspectors General towards Whistleblowers

#### 1. Whistleblower Protection Act

- a) Federal employees are protected under the Whistleblower Protection Act (“WPA”) against retaliation for any disclosure that the employee reasonably believes, among other things, evidences: (i) a violation of any law, rule, or regulation; (ii) a gross mismanagement; (iii) a gross waste of funds; or (iv) an abuse of authority.<sup>221</sup> To trigger the protections of the WPA, personnel action must have been taken because of a protected disclosure made by a covered employee.<sup>222</sup> In general, covered employees include current employees, former employees, or applicants for employment to positions in the Executive Branch.<sup>223</sup> Personnel action includes an appointment; a promotion; a decision concerning pay, benefits, or awards; and any other significant change in duties, responsibilities, or working conditions.<sup>224</sup>

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<sup>221</sup> The Whistleblower Protection Act (WPA) of 1989, 5 U.S.C. 2302.

<sup>222</sup> Paige Whitaker, et al., Cong. Research Serv., RL33918, The Whistleblower Protection Act: An Overview 3-4 (2007).

<sup>223</sup> *Id.*

<sup>224</sup> The Whistleblower Protection Act (WPA) of 1989, 5 U.S.C. 2302.



b) The WPA designates the forums in which whistleblowers may seek protection. One such forum is the Office of Special Counsel (“OSC”).<sup>225</sup> OSC is an independent investigative and prosecutorial federal agency that protects whistleblowers in the federal government from retaliation, promotes whistleblowers, and holds the government accountable by providing a safe and secure channel for whistleblower disclosures. If OSC determines that there is a substantial likelihood that there was a violation of any law, rule or regulation, gross mismanagement, or gross waste of funds, it must inform the agency head, who must conduct an investigation and submit a report to OSC.<sup>226</sup> If the agency fails to take action, OSC may appeal to the Merit Systems Protection Board (“MSPB”). The MSPB is an independent, quasi-judicial agency in the Executive Branch that among other things, hears appeals from agency personnel who have faced retaliation for engaging in protected conduct.<sup>227</sup>

(1) The OSC is a mandatory path for personnel actions for which the whistleblower has an “independent right of action,” such as performance evaluations, reassignments, or significant changes in work conditions or duties. For an “otherwise appealable action,” whistleblowers may go through the OSC, or they may go to the MSPB itself. These actions include removals, furloughs, and demotions. Regardless of the path, both scenarios require an appeal to the MSPB. This is problematic because the MSPB has a backlog of thousands of

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<sup>225</sup> 5 U.S.C. §§ 1211-1215.

<sup>226</sup> 5 U.S.C. § 1213.

<sup>227</sup> About MSPB, U.S. Merit Systems Protection Board, <https://www.mspb.gov/About/about.htm>.

cases and is currently understaffed due to the lack of Senate confirmation of Board members.<sup>228</sup>

- c) The enactment of the WPA represented a significant step in fostering whistleblower protection, but the law contains certain policy gaps, including some affecting OIGs. Some of these gaps were addressed by subsequent legislation. As will be discussed below, later whistleblower protection statutes, for example, clarified the scope of protected disclosures, required the training and education of agency employees on the rights and protections available to whistleblowers, and provided whistleblower protections to employees of certain federal contractors, subcontractors, grantees and subgrantees.

## **2. Whistleblower Protection Enhancement Act (“WPEA”)**

- a) Recognizing the importance of whistleblowers to the work of inspectors general, Congress passed the Whistleblower Protection Enhancement Act (“WPEA”) in 2012 to strengthen protections for federal employees reporting waste, fraud, and abuse.<sup>229</sup> The WPEA clarified the scope of protected disclosures and established that the following circumstances would not exempt a whistleblower from protection: (i) a disclosure to someone, including a supervisor, who participated in the wrongdoing; (ii) the wrongdoing reported had previously been disclosed; (iii) consideration of the employee’s motive for reporting the wrongdoing; (iv) a disclosure made while the employee was off duty; (v) a disclosure made during the employee’s normal course of duty, if the employee could show that the personnel

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<sup>228</sup> See Louis C. LaBrecque, ‘Buckets of Back Pay’ Could Go to Feds Once Appeal Board is back, Bloomberg Law, Sept. 25, 2019, <https://news.bloomberglaw.com/daily-labor-report/buckets-of-back-pay-could-go-to-feds-once-appeal-board-is-back>.

<sup>229</sup> Whistleblower Protection Enhancement Act of 2012, 5 U.S.C. 2302(b)(9); Whistleblowing Works: How Inspectors General Respond to and Protect Whistleblowers, Report of the Council of the Inspectors General on Integrity and Efficiency (2019); Whistleblower Protections, U.S. Consumer Product Safety Commission, <https://www.cpsc.gov/About-CPSC/Inspector-General/Whistleblower-Protection-Act-WPA>.

action was taken in reprisal for the disclosure; or (vi) consideration of the amount of time that has passed since the occurrence of the events described in the disclosure.<sup>230</sup>

- (1) The WPEA also contained a provision for a five-year pilot program, creating a Whistleblower Protection Ombudsman at each OIG, except those having an element of the intelligence community or whose principal function is the conduct of foreign intelligence or counterintelligence activities. These ombudsmen were responsible for educating agency employees about whistleblower rights and protections and their recourse for addressing unlawful retaliation.<sup>231</sup>
- (2) Describing the success of the pilot program, the Deputy Special Counsel of OSC testified at a House hearing that: “OSC has increased the number of favorable outcomes for whistleblowers by 150%, increased disciplinary actions against retaliators by 117%, and taken further steps to strengthen the whistleblower law through our amicus briefs and outreach program.”<sup>232</sup>

### **3. Whistleblower Protection Coordination Act**

- a) In 2018, following the end of the pilot program described above, Congress enacted the Whistleblower Protection Coordination Act (“WPCA”). The WPCA permanently reauthorized a whistleblower

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230 Whistleblower Protections, U.S. Consumer Product Safety Commission, <https://www.cpsc.gov/About-CPSC/Inspector-General/Whistleblower-Protection-Act-WPA>.

231 Whistleblowing Works: How Inspectors General Respond to and Protect Whistleblowers, Report of the Council of the Inspectors General on Integrity and Efficiency (2019).

232 Statement of Eric Bachman, Deputy Special Counsel, U.S. Office of Special Counsel. “Five Years Later: A Review of the Whistleblower Protection Enhancement Act.” Hearing before the House Committee on Oversight and Government Reform, Subcommittee on Government Operations. February 1, 2017. <https://republicans-oversight.house.gov/wp-content/uploads/2017/02/Bachman-OSC-Statement-Whistleblower-2-1.pdf>.

protection role within OIGs and renamed the position from ombudsman to Whistleblower Protection Coordinator (“WPC”).<sup>233</sup> Additionally, the WPCA required CIGIE, in consultation with the WPCs and OSC, to develop best practices for handling protected disclosures and enforcing whistleblower protection laws.<sup>234</sup> In response, these entities have formed a working group that meets quarterly to discuss approaches to education, outreach, and enforcement of whistleblower laws.<sup>235</sup> Congressional and nongovernment stakeholders often join these discussions.<sup>236</sup>

- (1) In recent meetings, the working group has discussed: (a) developing legislative recommendations to ensure effective enforcement of whistleblower laws, such as the extension of whistleblower protections to subcontractors, sub-grantees, and personal service contractors; (b) development of a website with training materials for OIG employees who conduct retaliation investigations; and (c) publishing completed reprisal investigations, and dissemination of such reports to appropriate agency divisions to promote accountability for retaliating officials.<sup>237</sup>
  
- (2) CIGIE and OSC launched a web page at [www.Oversight.gov/Whistleblowers](http://www.Oversight.gov/Whistleblowers) to educate the public and promote lawful disclosures of wrongdoing, and whistleblowers may file a retaliation claim on the site. The site also provides

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233 Whistleblowing Works: How Inspectors General Respond to and Protect Whistleblowers, Report of the Council of the Inspectors General on Integrity and Efficiency (2019).

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

informational resources for individuals in various sectors, including government employees, government contractors and grantees, the military, and private-sector individuals.<sup>238</sup>

#### 4. National Defense Authorization Act

- a) One inherent gap in the WPA is that it protects only certain federal employees. Congress sought to address this gap by enacting, among other statutes, the National Defense Authorization Act of 2013 (“NDAA”).<sup>239</sup>
  
- b) The NDAA was first enacted as a pilot program, which prohibited an employer of a federal contractor, subcontractor, grantee, or sub-grantee working with the Department of Defense and the National Aeronautics and Space Administration (“NASA”) to discharge, demote, or otherwise discriminated against an employee for making a protected whistleblower disclosure.<sup>240</sup> Congress amended the program in 2016 to make those protections permanent.<sup>241</sup> The NDAA protects any disclosure that the employee reasonably believes is evidence of: (i) gross mismanagement of a federal contract or grant; (ii) a gross waste of federal funds; (iii) an abuse of authority relating to a federal contract or grant; (iv) a substantial and specific danger to public health or safety; or (v) a violation of a law, rule, or regulation related to a federal contract.<sup>242</sup>

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<sup>238</sup> *Id.*

<sup>239</sup> See Whistleblower Protections, U.S. Consumer Product Safety Commission, <https://www.cpsc.gov/About-CPSC/Inspector-General/Whistleblower-Protection-Act-WPA>.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> National Defense Authorization Act of Fiscal Year 2013, Pub. Law No. 112-239, §§ 827, 828.

- c) To be protected, the disclosure must be made, among others, to a Member of Congress or a congressional committee, an inspector general, or a federal employee responsible for contract or grant oversight or management at the relevant agency.<sup>243</sup> If an individual files a complaint with an inspector general, the inspector general must investigate and submit a report of the findings of the investigation to the individual, the contractor or grantee concerned, and the head of the agency.<sup>244</sup> If the head of the agency concludes that there is sufficient basis for relief, the head of agency can order the contractor or grantee to (i) take affirmative action to abate the reprisal; (ii) reinstate the person to the position the person held before the reprisal, together with awarding compensatory damages; or (iii) pay the complainant an amount equal to the aggregate amount of all costs and expenses that were reasonably incurred by the complainant for bringing forth the complaint.<sup>245</sup>

## 5. False Claims Act

- a) The False Claims Act (“FCA”) allows private parties to file qui tam actions alleging that defendants defrauded the federal government. The FCA also contains whistleblower protection provisions for employees of government contractors and grantees who engage in protected activity. The FCA protects against discrimination in the form of employees being “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment.”<sup>246</sup>

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<sup>243</sup> *Id.*, § 827.

<sup>244</sup> *Id.*, § 828.

<sup>245</sup> *Id.*

<sup>246</sup> 31 U.S.C. § 3730(h)(1).

b) Protected conduct includes lawful acts undertaken by the employee, contractor, agent, or others in furtherance of an action under the FCA, as well as other efforts to stop FCA violations.<sup>247</sup> Relief for reprisal includes: (i) reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination; (ii) two times the amount of back pay, including interest; and (iii) compensation for any special damages sustained as a result of the discrimination.<sup>248</sup> FCA violations often arise in the medical context, such as in hospitals receiving federal funds. The whistleblower provisions of the FCA can, therefore, prove powerful in combating waste, fraud, and abuse of the funds appropriated under the CARES Act.

## B. Whistleblower Protections for Employees in the Private Sector

1. **Sarbanes-Oxley Act (“SOX”)**: SOX affords robust protection to employees, officers, and agents of publicly-traded companies who report information about securities, bank, and shareholder fraud or any violation of any SEC rule or regulation.<sup>249</sup> Under SOX, employers are prohibited from discharging, demoting, suspending, harassing, or discriminating against an employee engaged in protected disclosures.<sup>250</sup> Protected disclosures may be made to federal regulatory or law enforcement agencies, any members of Congress, any congressional committee, or to a person with supervisory authority over the employee.<sup>251</sup> SOX whistleblower protections also extend to employees of

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<sup>247</sup> *Id.*

<sup>248</sup> 31 U.S.C. § 3730(h)(2).

<sup>249</sup> Sarbanes Oxley Act, 18 U.S.C. U.S.C. § 1514A.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

any subsidiary or affiliate of publicly traded companies and employees of contractors or subcontractors of such companies.<sup>252</sup>

2. **The Consumer Financial Protection Act (“CFPA”)**: The CFPA contains whistleblower protection provisions that enable employees of banking and financial services institutions to disclose fraud related to consumer financial protection services, such as residential mortgages, student loans, credit reporting, and debt collection without fear of retaliation.<sup>253</sup> Employees may disclose such fraudulent conduct to an employer, the CFPB, or any government authority or law enforcement agency.<sup>254</sup> Employers are prohibited from retaliating by taking adverse employment actions against employees for making protected disclosures.<sup>255</sup> Employees who face such discrimination may file a complaint with the Occupational Safety and Health Administration (“OSHA”), which then investigates, and in the event a violation is found, orders appropriate relief to the whistleblower, such as reinstatement or compensatory damages.<sup>256</sup>
  
3. **Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)**: Section 922 of the Dodd-Frank Act protects whistleblowers who provide the SEC with information about securities law violations.<sup>257</sup> More specifically, the Dodd-Frank Act prohibits an employer from taking adverse employment actions against a whistleblower because of any lawful act done by the whistleblower, such as providing the SEC with actionable information, and it empowers individuals facing such adverse actions to bring a cause of

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<sup>252</sup> *Id.*

<sup>253</sup> Dodd-Frank Wall street Reform and Consumer Protection Act, Pub. Law No. 111-203, § 1057.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*, § 922.



action in district court.<sup>258</sup> Relief includes reinstatement, two times the amount of back pay, and compensation for litigation costs.<sup>259</sup>

- a) The SEC has also implemented a whistleblower rewards program that awards eligible whistleblowers ten to thirty percent of the total monetary award collected.<sup>260</sup> Eligible individuals are those who voluntarily provide the SEC with original information that leads to a successful enforcement action resulting in monetary sanctions of over one million dollars.<sup>261</sup> This program together with the Act's anti-retaliation provision discussed above are intended to motivate individuals with knowledge of securities law violations to come forward.

4. **Occupational Safety & Health Act of 1970 ("OSH Act"):** The OSH Act protects employees from retaliation for raising workplace health and safety concerns and for reporting work-related injuries and illnesses.<sup>262</sup> Covered employees include any employee of a person engaged in a business affecting interstate commerce, except employees of the United States, States, or political subdivisions of States.<sup>263</sup> Employees facing retaliation for engaging in protected conduct under the law may file a complaint with the Secretary of Labor, through the Office of the Solicitor of Labor. The Office of the Solicitor of Labor may litigate the case in a U.S. District Court and may seek relief for the employee, such as reinstatement, back pay with interest, compensatory damages, and punitive damages.<sup>264</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Whistleblower Program, Securities and Exchange Commission, <https://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml>.

<sup>261</sup> *Id.*

<sup>262</sup> See Occupational Safety & Health Act of 1970, 29 U.S.C. § 660(c).

<sup>263</sup> See *id.*

<sup>264</sup> See *id.*

# About the Coalition for Integrity

The Coalition for Integrity (C4I) is a 501(c)(3) organization that focuses its leadership and advocacy primarily on ending impunity throughout the world, promoting transparency and accountability in U.S. government and elections, and fostering greater integrity in the private sector.

Highlights of our work include:

- Releasing the report *Leading from the Top: An Ethics Plan for Presidential Candidates*. This report examines holes in current ethics law, including the weakness of the Office of Government Ethics, issues with whistleblower protection, and gaps in federal conflict of interest law.
- Releasing the first-ever “Enforcement of Ethics Rules by State Ethics Agencies” report, which analyzes how U.S. state ethics agencies implement their enforcement and sanctioning powers, and how transparent their implementation is.
- Promoting strong ethics and transparency laws through the “States With AntiCorruption Measures for Public Officials (S.W.A.M.P.) Index,” which garnered national media attention upon its release in the fall of 2018.
- Fostering candidate integrity, greater election transparency, and more disclosure of candidates’ and public officials’ assets and gifts to strengthen the electoral and governance process at every level of U.S. government.
- Promoting ethics reform in Virginia through the Virginia Integrity Challenge.
- Advocating for reforms, including measures requiring transparency in beneficial ownership, to keep the corrupt from enjoying their illicitly acquired wealth.
- Publishing the *Verification of Anti-Corruption Compliance Programs* and other guidance reports that assist companies in adopting effective anti-corruption policies and procedures.
- Hosting private-sector roundtables on business integrity, anti-corruption compliance issues, and best practices. The Coalition for Integrity has gained a reputation over its 25-year history as a leader on global anti-corruption and transparency issues and a reliable, non-partisan, and impartial source of information for policymakers, private sector decision-makers, and the media.

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Coalition for Integrity

