



Office of the Special Inspector General for  
Pandemic Recovery

# **Quarterly Report to the United States Congress**

January 1, 2021 - March 31, 2021





## MISSION

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SIGPR strives to ensure that the American taxpayer gets the best return on investment by promoting the economy, efficiency, effectiveness, and integrity of CARES Act funds and programs.

## VISION

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To safeguard CARES Act funds and programs.

## VALUES

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### Accountability

SIGPR will hold itself and others to the highest personal, professional, and ethical standards.

### Integrity

SIGPR will demonstrate the highest levels of professionalism, independence, fairness, and quality in its work and operations.

### Independence

SIGPR will maintain its independence by objectively following the facts and the law.

### Effectiveness

SIGPR will leverage strategic partnerships to protect funds and programs from fraud and promote best practices in the management of program operations.

### Fidelity to the Law

SIGPR will follow and apply the law fairly.

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# INTRODUCTORY MESSAGE

## Message from the Special Inspector General

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Writing from Valley Forge 243 years ago today, George Washington asked Congress to confirm Friedrich A. W. von Steuben to the brand-new “Office of Inspector General” for the Continental Army.<sup>1</sup> A Prussian immigrant and experienced soldier, von Steuben reduced waste of arms and ammunition, imposed military discipline, and represented Washington before Congress.<sup>2</sup> Congress later recognized von Steuben for promoting “a spirit of order and [e]conomy” in the Army resulting in “immense savings” during the War of Independence.<sup>3</sup>

SIGPR hopes to emulate von Steuben’s dedication and tenacity. At SIGPR, that means we will bring to justice anyone who has taken advantage of emergency relief and sought to wrongfully profit from the pandemic.

Our mission is simple: make federal cases. All SIGPR investigative efforts are driving toward the goal of proving violations of federal law that can be used to obtain convictions and civil judgments. Our audits are aimed at improving the efficiency, effectiveness, and economy of CARES Act programs. During this quarter, I am pleased to report that SIGPR has:

- Assisted the U.S. Attorney’s Office for the District of South Dakota in a recently indicted case involving multiple fraud counts regarding pandemic relief programs;
- Uncovered and developed 35 new investigative leads relating to suspected fraud under various CARES Act programs;
- Initiated new investigations in addition to continuing those previously reported;
- Compiled and developed a data set including more than 50 million rows of data, covering more than \$150 billion in CARES Act funding;
- Received and vetted 363 hotline complaints;
- Initiated new audit projects about the Direct Loan Program, the Main Street Lending Program, and the CARES Act funds given to the U.S. Postal Service; and
- Continued work on our “multiple dipping” project, highlighted in previous reports.

None of this would have been achieved without the dedicated assistance of our partners in the inspector general and law enforcement community. I am privileged and honored to work with such professional and diligent partners, as well as the growing number of public servants at SIGPR. Even as I am proud to report these achievements, I must also report that we will need to discontinue many ongoing oversight efforts and transfer others, including criminal investigations and leads. The jurisdictional issue raised in our reports since the very first report has been resolved by the executive branch, limiting SIGPR’s oversight. We disagree that this is what Congress intended when it created SIGPR just one year ago. To that end, this report

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<sup>1</sup> See Letter from George Washington, Commander in Chief of the Continental Army, to Henry Laurens, President of the Continental Congress (Apr. 30, 1778) in 14 *The Papers of George Washington, Revolutionary War Series, March 1778–30 April 1778* at 681–83 (David R. Hoth ed. 2004). Congress established the first “Office of Inspector General” the previous December. See David A. Clary & Joseph W. A. Whitehorne, *The Inspectors General of the United States Army 1777–1903* at 36 (“*Army Inspectors General*”) (1987).

<sup>2</sup> Clary & Whitehorne, *Army Inspectors General*, *supra* note 1, at 38–39, 47.

<sup>3</sup> Continental Congress Report on the Claim of Baron von Steuben, 30 December 1782 in 3 *The Papers of Alexander Hamilton, 1782–1786*, at 231–33 (Harold C. Syrett ed. 1962).

includes a special update explaining what happened and calling upon Congress to give us more oversight of the trillions of pandemic relief dollars.

In addition to seeking this congressional action, our report proposes legislation to make inspector general criminal investigations more efficient and effective. We also suggest ways Congress could enhance inspector general information access in any subsequent nationwide relief programs. In main, Congress should:

- condition participation in any future emergency relief program on making records and other information available to inspectors general;
- amend the federal wire fraud statute to permit venue in any district where the defendant committed an act in furtherance of the fraud scheme; and
- align the confidentiality of criminal investigations into financial crime conducted by inspectors general with grand jury investigations.

Congress established SIGPR during the height of our nation's battle against the coronavirus pandemic. We will continue to fight for the American people and to protect tax dollars from fraud, waste, and abuse. This is a task of duty to our country, as well as of gratitude to those inspectors general who faithfully served our nation during days of trial and turmoil. Whatever challenges lay ahead, we will pursue our mission with resilience and honesty.

Respectfully,



Brian D. Miller  
Special Inspector General  
April 30, 2021



# OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR PANDEMIC RECOVERY

## Special Update from the Special Inspector General

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Last night, the Department of Justice's Office of Legal Counsel (OLC) issued an opinion that SIGPR's jurisdiction is narrowly limited to programs established under title IV, subtitle A of the CARES Act. According to the OLC opinion, Treasury's direct loans and the Federal Reserve's lending programs fall within SIGPR's compass, but the Coronavirus Relief Fund, Payroll Support Program, and Paycheck Protection Program do not. The consequence is permanently reduced oversight of these programs. Congress can pass legislation to clarify SIGPR's mandate to provide oversight of the Coronavirus Relief Fund, Payroll Support Program, and other pandemic-related programs managed by the Secretary of the Treasury. We ask Congress to do so.

Over the last several months, SIGPR's efforts to provide important oversight have been met with resistance from the Department of the Treasury and the Treasury Inspector General (OIG) due to their skepticism that SIGPR had jurisdiction to oversee the Coronavirus Relief Fund and Payroll Support Program. Early on, SIGPR had worked cooperatively with Treasury to understand Payroll Support Program functions and to obtain certain data relating to program participants, even as the Treasury Office of General Counsel (OGC) maintained its position that SIGPR lacked jurisdiction over that program. Later, SIGPR began discussing the possibility of gaining direct access to Treasury's Payroll Support database. In late January 2021, however, Treasury OGC informed SIGPR that access to that database had not been approved by Treasury OGC, despite Treasury OGC facilitating conversations as early as December 2020 between SIGPR and the appropriate contacts about what that access would look like.

It is helpful to take a step back. Treasury OGC had asked SIGPR to channel all oversight requests through their office and to seek data relating to the Coronavirus Relief Fund and Payroll Support Program through Treasury OGC. SIGPR endeavored to accommodate those requests. Unfortunately, Treasury OGC declined SIGPR's overtures and refused to partner with SIGPR, even in a task-force model. While Treasury was aware of this posture, it declined to give SIGPR access to mission-critical data, repeatedly responding that SIGPR should pursue such requests with Treasury OGC.

Matters came to a head in late December and early January, when SIGPR asked Treasury OGC to join an evaluation of the Coronavirus Relief Fund. Treasury OGC declined and instead formally requested Treasury OGC issue a legal opinion that Treasury OGC, not SIGPR, had jurisdiction over that program as well as the Payroll Support Program.

All special inspectors general share concurrent jurisdiction with their counterparts and must partner with agency inspectors general to achieve their respective statutory oversight missions. There is nothing more frustrating to achieving these missions than turf battles. Hardworking taxpayers are far better served when government resources are devoted to the public. Yet one agency cannot force another to cooperate, and public servants must be faithful to the law. SIGPR thus had no realistic option other than to move the matter to OLC's review—rather than Treasury's—to preserve SIGPR's independence and avoid the appearance of impropriety. Treasury should not conclusively determine jurisdiction over programs in which it has a vested interest, and, to its great credit, Treasury OGC did not endeavor to do so. In fact, it agreed to an

OLC review. If anything, Treasury OIG’s decision to ask Treasury OGC to determine SIGPR’s jurisdiction compromised inspector general independence. If the dispute had to be resolved in the executive branch, it had to be done so by a disinterested party with the authority to issue a binding answer on all parties, all of whom would abide by OLC’s decision.

On March 17, as OLC was reviewing and finalizing its opinion, it invited additional comments on a question that had not been addressed by the parties. The White House’s Office of Management and Budget (OMB) then also formally weighed in against SIGPR’s jurisdiction. OLC ultimately decided what it described as a “close” question against SIGPR,<sup>4</sup> based in large part on the submissions it received in response to its March 17 question, including from OMB. OLC’s opinion limiting SIGPR’s jurisdiction comes despite the fact that, in OLC’s words, “prior opinions of this Office and of the Comptroller General, relying upon section 3 of the CARES Act or identical express-reference provisions in consolidated appropriations statutes, have described certain references to ‘this Act’ as meaning the division within which the reference appeared”<sup>5</sup>—that is, the interpretation SIGPR advocated.

Despite these challenges, I want to recognize the hard work and perseverance of my staff, who have continued marching forward this the past quarter to identify and redress fraud despite an array of distractions and roadblocks. None of the accomplishments highlighted in this report would have been achieved without my staff and the dedicated assistance of other public servants in the inspector general and law enforcement community willing to embrace the possibilities of partnership. Unfortunately, many of these promising developments, including criminal investigations and leads, will now need to be closed or transferred.

Five days from today will mark the first anniversary of my confirmation hearing before the U.S. Senate, held on May 5, 2020. My hearing occurred on the first day of Senate business since the Senate had shut down for COVID-19. It was a difficult time, and Congress had been working fervently to provide the relief programs it believed the nation needed. Part of the expectation was that SIGPR would play a crucial role in overseeing many of those programs, and that expectation was at the forefront of my confirmation hearing. Senator Sherrod Brown noted, for example, that the magnitude of the role is “why I fought for this Office of the Special Inspector General for Pandemic Re[covery].” Senator Brown also asked directly if I would view my “job expansively,” and I told him, “Absolutely.” I also explained to Senator Mike Rounds that the CARES Act was “such an important program and it is so important that this money gets to the right people that I think we should be willing to look at how we can improve it in real time.” I promised to be thorough and truthful in alerting Congress “if we find out that things are not working well in a particular area” and expressed my hope that, in such a situation, “the Senate should be willing to change it so that it can work better.”

One year later, SIGPR’s jurisdiction has come to be viewed narrowly, not expansively, and my only conclusion is that “things are not working well.” One of SIGPR’s core values is fidelity to law, and SIGPR will faithfully execute its mission as it is now defined by OLC. The result,

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<sup>4</sup> See Memorandum for Laurie S. Schaffer, Acting General Counsel, Department of the Treasury, and Brian D. Miller, Special Inspector General for Pandemic Recovery, from Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel 3 (Apr. 29, 2021).

<sup>5</sup> *Id.* at 7.

however, is reduced oversight over the Payroll Support Program and the Coronavirus Relief Fund, which continue in expanded form under new legislation.

While OLC’s decision ensures the Executive Branch the greatest amount of flexibility, it does not ensure the robust oversight that Congress intended. But that decision can be overturned by legislation that ensures greater oversight rather than reduced oversight. Why did Congress fight for SIGPR less than a year ago? Is it true, as noted by Public Citizen, that the “temperature has cooled on oversight” just when we need it most?<sup>6</sup>

It is up to Congress to decide.

## Statutory Authority

Section 4018 of The Coronavirus Aid, Relief, and Economic Security (CARES) Act established The Office of the Special Inspector General for Pandemic Recovery (SIGPR).<sup>7</sup> As with other inspectors general, the CARES Act gives SIGPR the powers and duties contained in section 6 of the Inspector General Act of 1978, including the power to obtain documents and other materials relating to the programs and operations within its oversight jurisdiction.<sup>8</sup> The CARES Act vests SIGPR with authority to conduct audits and investigations into (1) “the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under any program established by the Secretary under this Act” and (2) “the management by the Secretary of any program established under this Act.”<sup>9</sup> The CARES Act also requires SIGPR to summarize its activities in a report to Congress each calendar quarter.<sup>10</sup>

## SIGPR in Action

SIGPR continues to produce results through its audit and investigative work. Specifically, it has:

- Uncovered and developed 35 new investigative leads for referral to law enforcement partners relating to suspected fraud under various CARES Act programs;
- Initiated three new investigations, while continuing to investigate three others, including:
  - Four investigations with U.S. Attorney’s Offices;
  - One investigation with the Department of Justice Fraud Section;
- Received and vetted 363 hotline complaints during this quarter, referring 14 to other agencies; and
- Initiated three new projects about the Direct Loan Program, the Main Street Lending Program, and the CARES Act funds given to the U.S. Postal Service, while continuing

<sup>6</sup> Yeganeh Torbati & Erica Werner, *A year after passage of Cares Act, watchdogs struggle to oversee trillions in coronavirus spending*, Wash. Post (Apr. 4, 2021), <https://www.washingtonpost.com/business/2021/04/04/cares-act-oversight-spending/>.

<sup>7</sup> Pub. L. No. 116-136, § 4018, 134 Stat. 281, 482 (2020), *codified at* 15 U.S.C. § 9053.

<sup>8</sup> Inspector General Act of 1978, Pub. L. 95-452 § 1–13, 92 Stat. 1101, *codified as amended at* 5 U.S.C. app. 3.

<sup>9</sup> CARES Act § 4018(c).

<sup>10</sup> *Id.* § 4018(f).

to develop “risk scores” for datasets and identify potential leads for further review and referrals.

## SIGPR in Context: Jurisdictional Updates

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### Executive Branch Jurisdictional Determination

“The most effective weapon against crime is cooperation.” These words, inscribed on the FBI Headquarters courtyard façade, serve as a reminder that only criminals benefit from turf wars within law enforcement. Driven by this ethos, SIGPR has consistently sought to avoid jurisdictional standoffs by taking a task-force approach to pandemic oversight.

In its August 2020 Initial Report to Congress and September 2020 Quarterly Report to Congress, SIGPR presented its best, good-faith legal analysis of its jurisdiction. That analysis was necessary for several reasons. First, SIGPR was a new special inspector general’s office whose duties are defined by the CARES Act. Second, SIGPR was not the only oversight entity Congress created under the CARES Act, so an assessment of SIGPR’s jurisdiction was necessary for both coordination and deconfliction—two sides of the same coin. SIGPR thus needed to consider carefully its place in a complex oversight architecture to give notice of its views and ensure its efforts would be maximally effective. Relatedly, SIGPR’s analysis highlighted potential ambiguities in the CARES Act’s jurisdictional provisions and thus provided an opportunity for Congress to legislate further on the structure of pandemic-recovery oversight. Notably, Congress never legislatively corrected SIGPR’s interpretation of its own jurisdiction.

SIGPR qualified its analysis as “our best reading of the text,” allowing “that others may disagree.”<sup>11</sup> SIGPR received a great deal of feedback on that analysis—much of it positive, some of it critical. In particular, the Department of the Treasury’s Office of Inspector General (OIG) disagreed with SIGPR’s position that SIGPR has jurisdiction over all Treasury programs in division A of the CARES Act. Instead, Treasury OIG opined that SIGPR was narrowly limited to overseeing those programs in division A, title IV, subtitle A—Treasury’s direct loans and its investments in Federal Reserve facilities. The Department of the Treasury’s Office of General Counsel (OGC) shared Treasury OIG’s view, despite elsewhere interpreting section 3 of the CARES Act in a manner not inconsistent with the approach undergirding SIGPR’s view of its jurisdiction.<sup>12</sup>

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<sup>11</sup> SIGPR, *Initial Report to Congress* at 2 (Aug. 2020).

<sup>12</sup> See Memorandum from Treasury OIG to the Dep’t of the Treasury (May 27, 2020), attach. 1 at 3–4 (letter from Dep’t of the Treasury Office of Gen. Counsel to Treasury OIG (May 7, 2020)), [oversight.gov/sites/default/files/oig-reports/OIG-20-036.pdf](https://oversight.gov/sites/default/files/oig-reports/OIG-20-036.pdf). Treasury has elsewhere issued guidance equating the phrase “this Act” with the entire “CARES Act,” not just the nearest short title. CARES Act section 4002, located in the “Coronavirus Economic Stabilization Act of 2020” subtitle, limits Treasury loans and loan guarantees to businesses that have not “otherwise received adequate economic relief . . . under this Act,” which Treasury interpreted to mean “under the CARES Act.” See Q&A: Loans to Air Carriers and Eligible Businesses and National Security Businesses (April 10, 2020).

Treasury OIG, OGC, and SIGPR initially agreed to disagree,<sup>13</sup> but ultimately Treasury OIG decided that its view of SIGPR's jurisdiction did not permit cooperation on matters related to the Payroll Support Program or Coronavirus Relief Fund. Treasury OIG's disagreement took on practical significance in late December 2020, when SIGPR sought to open an evaluation into the Coronavirus Relief Fund. SIGPR invited Treasury OIG's Office of Audits to participate in the evaluation under the direction of SIGPR's Office of Audits. Treasury OIG declined the offer, citing legal and coordination concerns. Then, on December 31, 2020, Treasury OIG submitted a legal memorandum to Treasury OGC, asserting that SIGPR's jurisdiction was confined to programs under title IV, subtitle A of the CARES Act and asking Treasury OGC to opine on SIGPR's jurisdiction to oversee other Treasury programs. SIGPR sent Treasury OIG and Treasury OGC a responsive memorandum on January 7, 2021, with this preface from Special Inspector General Miller: "I felt obligated to present a memorandum justifying SIGPR's jurisdiction, but I really want to work together with Treasury OIG. . . . I am used to taking a 'task force approach.' I would prefer to take that approach here." Special Inspector General Miller also stated that, if formal resolution was unavoidable, the Department of Justice's Office of Legal Counsel (OLC), not Treasury OGC, was the appropriate forum.

SIGPR again reached out to Treasury OIG a few days later to discuss partnering on the Coronavirus Relief Fund, but Treasury OIG did not respond to SIGPR's request. Consequently, and because Treasury OIG had raised appropriations concerns with SIGPR's continued work, SIGPR requested OLC's opinion on January 14. The next day, Treasury OIG raised SIGPR's efforts to provide oversight with the Government Accountability Office (GAO), seeking an opinion on whether SIGPR's assertion of jurisdiction presented an Anti-Deficiency Act issue. Ten days later, Treasury OIG raised SIGPR's efforts to provide oversight with the Council of Inspectors General on Integrity and Efficiency (CIGIE), asking for CIGIE mediation in the absence of a legislative solution from Congress. But CIGIE's authority under the Inspector General Act is limited to mediating disputes between offices with concurrent jurisdiction; it has no authority to determine jurisdiction in the first instance.<sup>14</sup> On February 5, Treasury's OGC stated that it had no objection to OLC's review.

SIGPR's *modus operandi* since its inception has been to partner with all relevant agencies, inspectors general, and law enforcement to facilitate meaningful oversight and to protect taxpayer dollars. For that reason, every one of SIGPR's reports to Congress to date has highlighted SIGPR's partnerships. Unfortunately, jurisdictional issues have caused difficulties in SIGPR's partnerships with Treasury OIG and Treasury itself.

Treasury OGC's preference from the start has been that SIGPR channel all its oversight requests through Treasury OGC first. But even after it knew that Treasury OIG had refused to cooperate with SIGPR on the contested programs, Treasury OGC directed SIGPR to consult with and obtain

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<sup>13</sup> In one instance in the fall, with a disclaimer about jurisdiction, Treasury OGC did provide SIGPR data relating to the Payroll Support Program in response to a narrow request. SIGPR had also been working cooperatively with Treasury to gain access to Treasury's Payroll Support database, but Treasury OGC later informed SIGPR that access to the database had not been approved by Treasury OGC and was never approved thereafter.

<sup>14</sup> See 5 U.S.C. app. 3 § 11(c)(1)(H) (authorizing CIGIE to "receive, review, and mediate any disputes submitted in writing to the Council by an Office of Inspector General regarding an audit, investigation, inspection, evaluation, or project that involves the jurisdiction of more than one Office of Inspector General").

information from Treasury OIG on the Coronavirus Relief Fund and the Payroll Support Program. And after SIGPR was forced to seek an opinion from OLC, Treasury OGC formally took the position that, until the jurisdictional issue was resolved, Treasury would answer only general questions about the Payroll Support Program and Coronavirus Relief Fund but would not give SIGPR access to data. Of course, it is data, not general information, that is needed to identify and redress fraud perpetrated in those programs.<sup>15</sup> Treasury also declined SIGPR's invitation to begin an audit of the Coronavirus Relief Fund until the jurisdictional issue was resolved.

In sum, as it relates to SIGPR's efforts to protect the Coronavirus Relief Fund and the Payroll Support Program, Treasury OGC directed SIGPR to Treasury OIG and Treasury OIG directed SIGPR to stand down. As a result, despite allowing for the best of intentions, SIGPR faced both an agency and an inspector general unwilling to partner on these programs.

Absent congressional action, resolution by OLC was the only way forward, for several reasons. *First*, the questions posed to CIGIE and GAO were premature. As mentioned, CIGIE is statutorily authorized to mediate disputes regarding overlapping jurisdiction between inspectors general but not to determine jurisdiction in the first instance. Similarly, GAO would not be in a position to address the appropriations question before OLC rendered the jurisdictional decision. And, as a practical matter, all parties agreed to abide by OLC's jurisdictional decision.

*Second*, SIGPR sought OLC's review rather than Treasury OGC's to preserve inspector general independence. SIGPR works cooperatively, to the extent permitted, with Treasury and its Office of General Counsel—but SIGPR and Treasury OIG are also both charged with identifying waste, fraud, and abuse in Treasury's programs. There are unavoidable tensions and incentives in that relationship. Thus, it would have been suboptimal for Treasury to determine conclusively SIGPR's jurisdiction over programs Treasury itself administers. Thus, Treasury OIG's decision to ask Treasury OGC to determine SIGPR's jurisdiction compromised inspector general independence. If the dispute were to be resolved in the executive branch, it needed to be adjudicated by a disinterested party with the institutional authority to provide a binding answer.

*Third*, there is a centuries-long bipartisan tradition of the Department of Justice providing legal advice for the executive branch, including on matters involving inspectors general.<sup>16</sup> Congress codified that practice in 1966,<sup>17</sup> and President Carter in 1979 issued an executive order encouraging agencies to submit their legal disputes, expressly including jurisdictional disputes, to the Department of Justice.<sup>18</sup> Since OLC's establishment within the Department of Justice

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<sup>15</sup> In April, Special Inspector General Miller and Treasury's Acting General Counsel Laurie Schaffer exchanged letters concerning the status of information sharing, provided in Appendix D.

<sup>16</sup> See Judiciary Act of 1789, § 35, 1 Stat. 73, 93; see, e.g., *Case of Nelson H. Davis*, 14 U.S. Op. Att'y Gen. 117 (1872) (interpreting a federal statute to determine the War Department Inspector General's rank).

<sup>17</sup> See Pub. L. No. 89-554, § 4(c), 80 Stat. 378, 611–21 (1966) *codified as amended at* 28 U.S.C. §§ 501–530D, including 28 U.S.C. § 512.

<sup>18</sup> Exec. Order 12146 § 1-401, 44 Fed. Reg. 42657 (July 18, 1979).

over four decades ago, and in presidential administrations since then, OLC has been relied upon to resolve legal questions concerning agencies and their inspectors general.<sup>19</sup>

*Fourth*, SIGPR believed OLC’s advice would be helpful because the Justice Department would ultimately have to defend SIGPR subpoenas if they were challenged on jurisdictional grounds. Thus, it made sense to ascertain the Department of Justice’s views in advance of such an event.

Accordingly, SIGPR provided OLC with two detailed memoranda explaining its legal position. The first memorandum, initially prepared for Treasury OGC, offered SIGPR’s longstanding arguments for its jurisdictional conclusions. That memorandum was attached to the January 14 letter to OLC requesting an opinion.<sup>20</sup> In March, at OLC’s request, all parties, including the Office of Management and Budget within the Executive Office of the President, submitted their views to OLC on the correct reading of section 3 of the CARES Act. SIGPR’s interpretation, laid out in a second memorandum, provides its most fulsome justification for its jurisdiction over the disputed programs.<sup>21</sup> Both SIGPR memoranda are provided in Appendix E.

OLC issued a written opinion on April 29, advising that, “although the question is close, the phrase ‘this Act’ in section 4018 refers to” the Coronavirus Economic Stabilization Act of 2020 (CESA), the short title for CARES Act title IV, subtitle A.<sup>22</sup> They add, “Section 4018 accordingly limits the SIGPR’s jurisdiction to oversight of programs established under the CESA.”<sup>23</sup> Therefore, OLC’s opinion is that SIGPR does not have legal authority to conduct audits or investigations into the Coronavirus Relief Fund, the Payroll Support Program, or the Paycheck Protection Program. Under this view, SIGPR’s oversight is narrowly cabined to CARES Act title IV, subtitle A.

Congress can clarify SIGPR’s jurisdiction through legislation to not only ensure SIGPR is able to serve as an effective oversight partner with respect to the Coronavirus Relief Fund, the Payroll Support Program, and the Paycheck Protection Program, but also to ensure SIGPR has access to the data and information needed to conduct such oversight.

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<sup>19</sup> See, e.g., *Access of Department of Justice Inspector General to Certain Information Protected from Disclosure by Statute*, 39 Op. O.L.C. 12 (2015); *Authority of the Former Inspector General for the Federal Housing Finance Board to Act as Inspector General for the Federal Housing Finance Agency*, 33 Op. O.L.C. 318 (2009); *Application of the Appointments Clause to a Statutory Provision Concerning the Inspector General Position at the Chemical Safety and Hazard Investigation Board*, 30 Op. O.L.C. 92 (2006); *Legality of Fixed-Price Intergovernmental Agreements for Detention Services*, 26 Op. O.L.C. 235 (2002); *Investigative Authority Vested in the Inspector General of the Department of Transportation*, 13 Op. O.L.C. 377 (1989); *Department of Energy—Appointment of Interim Officers—Department of Energy Organization Act (42 U.S.C. § 7342)*, 2 Op. O.L.C. 405 (1978).

<sup>20</sup> See Memorandum for the General Counsel, Department of the Treasury, from Brian D. Miller, Special Inspector General for Pandemic Recovery, *Re: Response to the Treasury OIG’s Request for a Decision Establishing Exclusive Jurisdiction: If Intervention is Needed to Resolve SIGPR’s Invitation to Jointly Work Programs with Concurrent Jurisdiction Under a Task Force Model, the Office of Legal Counsel Should Decide Jurisdiction* (Jan. 7, 2021), <https://www.sigpr.gov/sites/sigpr/files/2021-04/sigpr-memo-to-treasury-general-counsel-jan-7-2021.pdf>.

<sup>21</sup> See Memorandum from the Office of the Special Inspector General for Pandemic Recovery, *Re: Response to OLC’s Inquiry Regarding SIGPR’s Jurisdiction* (Mar. 26, 2021), <https://www.sigpr.gov/sites/sigpr/files/2021-04/sigpr-letter-to-doj-office-of-legal-counsel-mar-26-2021.pdf>.

<sup>22</sup> See Memorandum for Laurie S. Schaffer, Acting General Counsel Department of the Treasury, and Brian D. Miller, Special Inspector General for Pandemic Recovery, from Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel 3 (Apr. 29, 2021).

<sup>23</sup> *Id.*

SIGPR therefore respectfully asks that Congress consider legislation granting SIGPR jurisdiction over all pandemic-related federal programs managed by the Treasury Department.

### New Legislation

Congress has continued to provide pandemic relief through new programs and spending in the Consolidated Appropriations Act, 2021 (CAA),<sup>24</sup> and the American Rescue Plan Act of 2021 (ARP).<sup>25</sup> The CAA rescinded the remaining funding for the loan, loan guarantee, and investment programs established under division A, title IV, subtitle A of the CARES Act.<sup>26</sup> Thus these programs are no longer accepting new applicants.

The CAA maintained SIGPR's funding and instructed SIGPR to use that funding to continue its duties under the CARES Act to monitor those programs.<sup>27</sup> Neither the CAA nor the ARP added any new programs to SIGPR's oversight portfolio, although it amended the following programs:

- The CAA extended the Coronavirus Relief Fund's spending dates, permitting governments to cover costs through the end of 2021.<sup>28</sup>
- The CAA relieved the U.S. Postal Service of its obligation to repay any funds borrowed under the CARES Act.<sup>29</sup>
- The CAA established a new program, the "Air Transportation Payroll Support Program."
- The ARP established a new program, "Coronavirus State and Local Fiscal Recovery Funds," which authorizes the Treasury Secretary to allocate about \$350 billion to state, territorial, Tribal, and local governments.<sup>30</sup>

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<sup>24</sup> Pub. L. No. 116-260 (2020).

<sup>25</sup> Pub. L. No. 117-2 (2021).

<sup>26</sup> See CAA, div. N § 1003.

<sup>27</sup> See *id.* § 1003(a)(2)(C)(ii).

<sup>28</sup> See *id.* § 1001.

<sup>29</sup> See *id.* § 801.

<sup>30</sup> See ARP § 9901.



# SIGPR OFFICES AND ACTIVITIES

## SIGPR Offices

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SIGPR employs proactive efforts to prevent, detect, and investigate fraud, waste, and abuse involving CARES Act funds and programs within SIGPR's jurisdiction. Below is a summary of SIGPR's activities during the reporting period:

- The Office of Audits, started three new projects, sent a survey to all 35 Direct Loan Program borrowers, and continued to analyze large volumes of data for audit and evaluative work of CARES Act programs;
- The Office of Investigations received and vetted 363 hotline tips, and opened three new investigations while continuing work on three others; and
- SIGPR developed 35 leads to be referred to agencies with jurisdiction.

### Audits

The Office of Audits conducts audits and evaluations of loans, loan guarantees, and other investments made by the U.S. Department of the Treasury under programs within SIGPR's jurisdiction under the CARES Act.<sup>31</sup>

#### Engagements

The Office of Audits has started work on the following projects:

**Audit of the Direct Loan Program.** Sections 4003(b)(1)–(3) of the CARES Act authorized Treasury to provide loans, loan guarantees, and other investments to passenger air carriers and related businesses, cargo air carriers, and businesses critical to maintaining national security. To assess the program's effectiveness, the Office of Audits sent a survey to all 35 Direct Loan Program borrowers. Responses to the survey should provide information necessary to make recommendations for any future programs of a similar nature. Furthermore, the office will analyze the survey responses for any information that may warrant future oversight work. Survey responses are due by the end of April.

**Evaluation of the Main Street Lending Program (MSLP).** The Office of Audits is also preparing to issue surveys to MSLP lenders and borrowers. The Federal Reserve established the MSLP to support lending to small and mid-sized businesses. With CARES Act funding, the Treasury Department originally contributed \$75 billion in equity to the MSLP, of which more than \$17.4 billion was issued as loans to the program's 1,830 borrowers. The results of the surveys will be used to help determine (1) the overall ease and efficiency that lenders and borrowers experienced with the administration of the MSLP and (2) compliance with the requirements set forth in the CARES Act. The Office of Audits expects to receive feedback that will allow it to reach sound conclusions and guide future audit work.

**Audit of CARES Act Funding Appropriated to the U.S. Postal Service.** The Office of Audits notified Treasury about its evaluation of CARES Act funding for a Treasury loan to the U.S. Postal Service. In April, the Office of Audits held entrance conferences with Treasury and the

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<sup>31</sup> CARES Act § 4018(c)(1).

Postal Service to discuss this evaluation. As part of the CARES Act, later amended by the Consolidated Appropriations Act, 2021, the Postal Service can receive up to \$10 billion in funding from Treasury for operating expenses. The purpose of this evaluation was to determine if the Postal Service has a system in place to identify COVID-19 related expenses and to track its use of the additional funding in compliance with the CARES Act requirements. SIGPR's evaluation cannot continue absent legislation due to the jurisdictional challenge discussed above.

**Evaluation of State and Local Governments' Use of Coronavirus Relief Fund.** On December 28, 2020, the Office of Audits notified Treasury's Office of General Counsel (OGC) and Treasury OIG of its evaluation of state and local governments' use of the Coronavirus Relief Fund. This evaluation had been pending because of the jurisdictional challenges discussed above and cannot continue without congressional action.

### *Data Analysis*

The Office of Audits continues to identify and merge relevant datasets, populating a database system with CARES Act funding and recipient information. These datasets were derived from several programs, including the MSLP, the Coronavirus Relief Fund, section 4003 loans, and other relevant federal data sources containing both sensitive and public information. The supporting datasets, as compiled and developed by the Office of Audits, has expanded to more than 50 million rows of data, covering billions of dollars in CARES Act funding.

The Office of Audits has developed "risk scores" to identify areas of potential vulnerabilities and financial risk in CARES Act programs. Thus far, the Office of Audits had developed risk-score metrics for the MSLP. It is working to complete a risk-score metric for section 4003 loans.

SIGPR will continue these efforts within its newly defined jurisdictional boundaries.

In addition, the Office of Audits has collaborated with other SIGPR offices to develop risk metrics for their respective offices.

### *Ongoing Activities*

The Office of Audits is developing an audit plan that will identify high priority projects. These projects will assess relevant financial assistance programs under the CARES Act.

Currently, the Office of Audits is reviewing numerous alleged instances of abuse, as reported both publicly and through confidential sources. In accordance with the OLC decision constricting SIGPR's jurisdiction, it will continue these efforts, but will also refer reported allegations on which it had been working to appropriate entities.

The Office of Audits continues in close partnership with the Pandemic Response Accountability Committee (PRAC), the Treasury's Office of Fiscal Systems, the Treasury's Office of the Chief Information Officer, other inspectors general, and other federal government entities.

### *Policy and Procedure Development*

The Office of Audits has issued policies and procedures to ensure its audits, evaluations, and other services comply with Generally Accepted Government Auditing Standards (GAGAS) and CIGIE Quality Standards for Inspection and Evaluation, as appropriate.

Additionally, the Office of Audits has developed a curriculum of mandatory continuing professional education courses. The Office of Audits also issued its writing and style guide, which establishes the standards to be followed by SIGPR audit teams when drafting and issuing audit reports.

### *Staffing and Recruitment Efforts*

The Office of Audits is continuing to recruit and build a diverse organization. As of this quarter, it is staffed with ten professional staff members out of an authorized total of twenty. The Office of Audits consists of an Assistant Inspector General for Auditing, a Deputy Assistant Inspector General for Auditing, a Senior Audit Advisor, one Senior Quality Control Review & Assurance Auditor, two Senior Auditors, two Auditors, a Program Analyst, and a Senior Advisor.

## **Investigations**

The Office of Investigations conducts criminal and civil investigations regarding allegations of fraud, abuse, or misconduct involving CARES Act funds and programs within SIGPR's jurisdiction. In addition, the office manages SIGPR's hotline, which serves as a primary avenue for reporting fraud, waste, abuse, or misconduct.

To effectively carry out its responsibilities, the Office of Investigations routinely collaborates with the rest of the SIGPR team, including auditors, analysts, and attorneys, to vet complaints, develop proactive initiatives, and pursue investigations.

### *Investigative Activities*

During this reporting period, the office continued its investigative and proactive efforts to uncover and vigorously pursue wrongdoing related to CARES Act funding under SIGPR's authority. The following table highlights SIGPR's investigative activities for this reporting period.

**SIGPR Investigative Activity—January 1, 2021 through March 31, 2021**

|                                             |     |
|---------------------------------------------|-----|
| Hotline Complaints Received                 | 363 |
| Referrals to Other Agencies                 | 14  |
| <b>Preliminary Inquiries</b>                |     |
| Opened                                      | 4   |
| Closed (or Converted to Full Investigation) | 3   |
| Ongoing                                     | 2   |
| <b>Investigations</b>                       |     |
| Opened                                      | 3   |
| Closed                                      | 0   |
| Ongoing                                     | 6   |

As indicated in the table above, three preliminary inquiries were opened and then converted into full investigations during this quarter. In furtherance of our investigations, the Office of Investigations has partnered with U.S. Attorney's Offices (USAOs), the Department of Justice (DOJ), and other federal law enforcement partners. In addition, all ongoing investigations focus on SIGPR's oversight priorities under division A of the CARES Act.

### *Outreach Efforts*

The Office of Investigations also continued its coalition building efforts. The office participates in several working groups throughout the federal law enforcement and inspector general communities, including the PRAC's investigation subcommittees.

### *Policy and Procedures*

The Office of Investigations worked to complete its policies and procedures related to carrying out SIGPR's investigative mission. The established policies and procedures ensure our compliance with SIGPR's authorities and responsibilities under section 4018 of the CARES Act and the Inspector General Act of 1978 (as amended); CIGIE Quality Standards for Investigations; Attorney General guidelines, including Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority; and other applicable laws, rules, and regulations.

### *Staffing and Recruitment Efforts*

The Office of Investigations continues to proactively recruit staff. During this quarter, the office added a new Assistant Inspector General for Investigations, a Deputy Assistant Inspector General for Investigations, a senior special agent, and an investigative research specialist. These four individuals bring to SIGPR more than 80 years of law enforcement experience, including more than 40 years in the federal inspector general community.

The office plans to hire 10 additional investigative positions, primarily special agents, bringing the Office of Investigations to a staff of 15. These positions are critical for SIGPR to aggressively pursue complex investigations pertaining to CARES Act programs and funds.

## **Administration**

The Office of Administration provides comprehensive administrative support to all components within SIGPR.

### *Budget Update*

Congress appropriated \$25 million to SIGPR for the entirety of SIGPR's five-year term, which essentially gives SIGPR \$5 million per year.<sup>32</sup> SIGPR expects this funding to sustain operations through Fiscal Year (FY) 2022. To fund ongoing operations beyond FY 2021, SIGPR has asked for a \$25 million annual appropriation. As of the date of this report, SIGPR is not in the annual appropriations cycle.

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<sup>32</sup> See CARES Act § 4018(g)(1)–(2).

*Facilities and Space Management*

On March 1, 2021, SIGPR executed an occupancy agreement with the General Services Administration (GSA) to assume the role of primary tenant at its office space in Alexandria, VA. Prior to this, SIGPR subleased space from the U.S. Patent and Trademark Office. Acquisition of this space has allowed SIGPR to continue its mission without invoking a costly and disruptive office move and will provide the space necessary for SIGPR to accommodate its projected full-time equivalent employees (FTEs).

*Recruitment and Staffing*

SIGPR remains committed to recruiting highly qualified and talented staff with the knowledge, skills, and abilities to support its critical oversight mission. As of this quarter, SIGPR increased the number of FTEs to 40. By September 30, 2021, SIGPR projects to have 66 FTEs.

## Building Partnerships

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SIGPR continues to build partnerships to strategically leverage resources and capabilities in support of lead-development, audits, investigations, and case referrals.

**Leads, Audits, Investigations, and Prosecutions**

SIGPR established new relationships and strengthened existing ones with USAOs, DOJ, and law enforcement agencies for lead-development, audits, investigations, and prosecutions. SIGPR continued building upon its formal partnerships with the Financial Crimes Enforcement Network (FinCEN) and the Securities and Exchange Commission (SEC).

SIGPR is especially grateful to the DOJ Fraud Section, led by Daniel Kahn, for its leadership in working with SIGPR to ferret out large-scale fraud, including fraudulent double dippers of CARES Act programs, such as the MSLP, Paycheck Protection Program (PPP) and Economic Injury Disaster Loans (EIDL), despite a particularly challenging environment. Through our combined efforts, we plan to find fraud before fraudsters default on taxpayer-funded CARES Act loans.

As noted in past reports, FinCEN and the Federal Reserve OIG have been and continue to be critical partners to SIGPR. In addition, the U.S. Secret Service, Federal Deposit Insurance Corporation (FDIC) OIG, Federal Bureau of Investigation, and the Department of Transportation (DOT) OIG also deserve commendation. These dedicated public officials have moved lead-development and investigations forward, and even if the details of their efforts cannot yet be made public, they should be noted.

Additionally, during this quarter, SIGPR joined forces with the DOJ National Unemployment Insurance Fraud Task Force and the Department of Labor OIG to combine law enforcement efforts and ferret out fraudulent double-dipping in CARES Act programs.

SIGPR also worked with the new Coronavirus Fraud/White Collar Crime Coordinator from the Executive Office of U.S. Attorneys (EOUSA) and its members to assist with CARES Act prosecutions. SIGPR is grateful to EOUSA for providing an opportunity for it to offer a webinar in May 2021 to the Assistant U.S. Attorneys (AUSAs) in these working groups on how SIGPR might augment their already tremendous efforts through SIGPR's expertise on CARES Act programs and other resources.

SIGPR's agreement with the Federal Trade Commission to access its Consumer Sentinel Network and its relationship with the Fusion Center have also yielded critical investigative leads.

SIGPR is thankful for all these relationships. And they continue to produce results:

- SIGPR is working with four USAOs on investigations and prosecutions and one investigation with the DOJ Fraud Section. Most of these were generated by SIGPR's proactive efforts.
- SIGPR is also providing assistance to the U.S. Attorney's Office for the District of South Dakota in a recently indicted case involving multiple fraud counts regarding pandemic relief programs, including the MSLP. SIGPR offers a special thanks to the extremely dedicated AUSA and agents there for their graciousness and diligence in pursuing justice.
- At least four of SIGPR's internally developed leads for referral are now under investigation by other agencies, including one involving almost \$28 million dollars and 98 subjects.
- SIGPR developed 35 leads this quarter for referral.
- SIGPR's Office of Audits is working with the U.S. Postal Service OIG on an evaluation of a Treasury-U.S. Postal Service CARES Act program and began developing a partnership with the Department of Defense OIG to assess loans that were considered critical to national security interests.

### **Formative and Enduring Partnerships**

Regarding SIGPR's continued formative efforts during its first year, particular recognition and appreciation belong to Treasury's Office of the Deputy Assistant Secretary for Privacy, Transparency, and Records; as well as Treasury's Deputy Assistant Secretary for Management and Budget. Their persistent, tireless efforts have helped SIGPR in crucial ways.

Finally, SIGPR continues to participate in numerous working groups with Treasury, CIGIE, and the PRAC. Each of these groups have worked hard to improve transparency and protect taxpayer dollars by preventing and detecting waste, fraud, and abuse. They too deserve acknowledgement and appreciation.



# SIGPR FINDINGS AND REPORTABLE DEVELOPMENTS

The CARES Act requires SIGPR to include in its regular reports to Congress “a detailed statement of all loans, loan guarantees, other transactions, obligations, expenditures, and revenues associated with any program established by the Secretary under section 4003, as well as the information collected under subsection (c)(1).”<sup>33</sup> Accordingly, below are the categories of loans and other investments made by the Secretary under CARES Act § 4003,<sup>34</sup> including, where applicable and known, a list of the loans and investments made under each category and the eligible businesses to which loans were made. In addition, a short section below provides updates regarding three letters SIGPR sent to Treasury as part of its oversight activities.

## Direct Loans and Other Investments

### Introduction

CARES Act section 4003(a) authorized the Secretary “to make loans, loan guarantees, and other investments in support of eligible businesses, States, and municipalities that do not, in the aggregate, exceed \$500,000,000,000.” The CARES Act further divided these loans and investments into four categories. The first three, described in sections 4003(b)(1)–(3), cover loans and loan guarantees to passenger air carriers and related businesses (\$25 billion), cargo air carriers (\$4 billion), and businesses critical to maintaining national security (\$17 billion).<sup>35</sup> The fourth category, described in section 4003(b)(4), authorized the Secretary to invest in various liquidity programs established by the Federal Reserve under section 13(3) of the Federal Reserve Act (\$454 billion). The Consolidated Appropriations Act, 2021 (CAA), amended the CARES Act to rescind unobligated balances of funds (\$429 billion) in these programs.<sup>36</sup> It also specified that after December 31, 2020, the Federal Reserve “shall not make any loan, purchase any obligation, asset, security, or other interest, or make any extension of credit” through the liquidity programs or facilities in which Treasury had invested CARES Act funds, except for facilities in the Main Street Lending Program, discussed further below, that were authorized to purchase loans until January 8, 2021 for applications submitted by December 14, 2020.<sup>37</sup>

An overview of the relevant categories and amounts of Treasury’s obligations remaining under CARES Act § 4003(b)(1)–(4) through March 31 is reflected in the following table:

<sup>33</sup> CARES Act § 4018(f)(1)(B).

<sup>34</sup> Treasury did not establish a program for “loan guarantees” under CARES Act § 4003.

<sup>35</sup> Treasury has posted on its website the contracts it has entered in connection with the administration of loans under section 4003(b)(1), (2), and (3). See U.S. Dep’t Treasury, Other Programs, <https://home.treasury.gov/data/other-programs>.

<sup>36</sup> See Consolidated Appropriations Act, 2021, Pub. L. 116-260, div. N §§ 1003, 1005.

<sup>37</sup> *Id.* § 1005.

| Funding Program                                                                           | Obligation Amount as of March 31, 2021 |
|-------------------------------------------------------------------------------------------|----------------------------------------|
| Direct Loans to Passenger Air Carriers and Related Businesses                             | \$21,152,937,504                       |
| Direct Loans to Cargo Air Carriers                                                        | \$2,111,656                            |
| Direct Loans to Businesses Critical to Maintaining National Security                      | \$735,934,400                          |
| Main Street Lending Program (MS Facilities, LLC)                                          | \$16,587,000,601                       |
| Term Asset-Backed Securities Facility (TALF II, LLC)                                      | \$3,500,000,000 (plus interest)        |
| Primary and Secondary Market Corporate Credit Facility (Corporate Credit Facilities, LLC) | \$13,897,154,074                       |
| Municipal Liquidity Facility (Municipal Liquidity Facility, LLC)                          | \$6,300,000,000 (plus interest)        |

## Direct Loans

On March 30, 2020, Treasury first announced guidelines for businesses interested in applying for loans under CARES Act § 4003(b)(1)–(3).<sup>38</sup> Those guidelines incorporated several mandatory loan terms and conditions, with many designed to protect American taxpayers. Before making each loan, Treasury was required to determine, or the borrower must have agreed to, the following:

- *Unavailable Credit Elsewhere.* Credit is not otherwise “reasonably available” for the borrower at the time of the loan, § 4003(c)(2)(A);
- *Prudent Borrowing.* The loan is “prudently incurred” by the borrower, § 4003(c)(2)(B);
- *Sufficient Security or Rate.* The loan is “sufficiently secured” or “made at a rate” that both “reflects the risk of the loan” and, “to the extent practicable, not less than an interest rate based on market conditions for comparable obligations prevalent prior to the outbreak” of COVID-19, § 4003(c)(2)(C);
- *Term.* The term of the loan must be “as short as practicable and in any case not longer than five years,” § 4003(c)(2)(D);
- *No Purchases of Borrower’s Stock.* Until a date 12 months after the loan has been repaid, neither the borrower nor any affiliate may purchase the borrower’s (or any parent company’s) stock that is listed on a national securities exchange, unless required by a preexisting contractual obligation, § 4003(c)(2)(E);

<sup>38</sup> U.S. Dep’t Treasury, Procedures and Minimum Requirements for Loans to Air Carriers and Eligible Businesses and National Security Businesses under Division A, Title IV, Subtitle A of the Coronavirus Aid, Relief, and Economic Security Act (Mar. 30, 2020), <https://home.treasury.gov/system/files/136/Procedures%20and%20Minimum%20Requirements%20for%20Loans.pdf>.

- *No Dividends.* Until a date 12 months after the loan has been repaid, the borrower may not pay a dividend or other capital distribution on its common stock, § 4003(c)(2)(F);
- *Maintain Employment Levels.* The borrower, until September 30, 2020, “shall maintain its employment levels as of March 24, 2020, to the extent practicable, and in any case shall not reduce its employment levels by more than 10 percent of the levels on such date,” § 4003(c)(2)(G);
- *U.S. Business.* The borrower certifies “that it is created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States,” § 4003(c)(2)(H);
- *Covered Losses.* The borrower must have “incurred or is expected to incur covered losses such that the continued operations of the business are jeopardized, as determined by the Secretary,” § 4003(c)(2)(I);
- *Equity Interest or Senior Debt Provided to the Government.* Treasury must receive “a warrant or equity interest” in the borrower if the borrower “has issued securities that are traded on a national securities exchange,” otherwise, Treasury must receive “a warrant or equity interest” in the borrower or “a senior debt instrument” from the borrower. Issuance of the warrant, equity, or debt “shall be designed to provide for a reasonable participation by the Secretary, for the benefit of taxpayers, in equity appreciation in the case of a warrant or other equity interest, or a reasonable interest rate premium, in the case of a debt instrument,” § 4003(d)(1)–(2);
- *No Loan Forgiveness.* The principal amount of any loan cannot be reduced through loan forgiveness, § 4003(d)(3);
- *Limitation on Employee Compensation.* CARES Act § 4004 requires a borrower to limit compensation for certain employees during the period beginning on the date the loan agreement is executed and ending one year after the loan is repaid, as follows:
  - No officer or employee of the borrower “whose total compensation exceeded \$425,000 in calendar year 2019,” may receive annual “total compensation which exceeds” the amount the officer or employee received in calendar year 2019, and such officer or employee shall not receive “severance pay or other benefits upon termination of employment” with the borrower “which exceeds twice the maximum total compensation received by the officer or employee from the eligible business in calendar year 2019;”
  - No officer or employee of the borrower “whose total compensation exceeded \$3,000,000 in calendar year 2019,” may receive “total compensation in excess of the sum of . . . \$3,000,000” and “50 percent of the excess over \$3,000,000 of the total compensation received by the officer or employee from the eligible business in calendar year 2019.”

- *Continuation of Air Service.* If the borrower is an air carrier, it must maintain scheduled air services deemed necessary by the Secretary of Transportation to ensure service to any location served by the borrower before March 1, 2020, § 4005; and
- *Conflicts of Interest.* Direct loans, like all transactions described in CARES Act § 4003, may not be made to “covered entities” under the CARES Act’s conflict of interest provision in section 4019. The provision defines a “covered entity” as one where the President, Vice President, head of an Executive Department, member of Congress, or certain family members hold 20% or more of any class of equity interest in the entity receiving the loan or involved in the section 4003 transaction.

On April 14, 2020, Treasury entered into an agreement with The Bank of New York Mellon (BNYM) to perform custodian and infrastructure services, and to act as a financial agent, in connection with Treasury’s loans under section 4003(b)(1)–(3).<sup>39</sup> Under the agreement, BNYM does not provide credit analysis nor is it responsible for certain matters related to borrower performance.

Treasury has managed risk and exercised oversight of these loans through the following means:<sup>40</sup>

- Adherence to an underwriting guide that defines a credit review process, involving key elements of the underwriting, credit analysis, and approval process, including legal and financial due diligence. More specifically, in accordance with the advice of financial and legal advisors, Treasury followed a process to consider loan applications that included the following: (a) designing and applying credit standards that were uniformly applied to all loan applicants; (b) conducting due diligence on loan applications; and (c) forming credit committees that consisted of senior Treasury officials to consider each potential loan.
- Treasury also exercised oversight of loans made under section 4003(b)(1)–(3) by monitoring submissions and communications from the debtor, including between the debtor and BNYM; monitoring public borrowers’ filings with the Securities and Exchange Commission; engaging directly with borrowers as appropriate; and monitoring other relevant public sources of information.
- Treasury’s CARES Act Operations has created an Asset Management group, responsible for monitoring Treasury’s investments, including the debt, equity, and warrants issued to Treasury.
- Treasury has created a portal through which all 4003 borrowers are required to submit information on a quarterly basis, including financial statements, financial forecasts,

<sup>39</sup> U.S. Dep’t Treasury, Financial Agency Agreement for Custodian and Infrastructure Services for Programs Under the Coronavirus Aid, Relief, and Economic Security Act <https://home.treasury.gov/system/files/136/BNY-Mellon-Custodian-FAA-for-CARES-Act-Custodian-EXECUTED-04-14-2020.pdf>.

<sup>40</sup> At SIGPR’s request, Treasury provided SIGPR access to nonpublic information on applicants to Treasury’s loan programs under section 4003. SIGPR’s review of this nonpublic information revealed several application rejections and withdrawals that SIGPR may review further to identify any patterns of conduct that may indicate fraudulent or other illicit activity on the part of program applicants and participants.

certificates evidencing compliance with financial ratios (such as debt service ratios and collateral coverage ratios), and information regarding major events. Asset Management reviews this financial information and regularly communicates and receives updates from borrowers.

### *Air Carrier Loan Program*

CARES Act section 4003(b)(1)–(2) allocated \$25 billion for loans and loan guarantees to passenger air carriers, aviation-maintenance facilities certified under 14 C.F.R. Part 145, and air-transportation ticket agents, as well as \$4 billion for cargo air carriers.

The following table summarizes the section 4003(b)(1) –(2) loans current through this quarter.<sup>41</sup> Of note, American Airlines Inc., Hawaiian Airlines Inc., Ovation Travel Group Inc., and Sun Country Inc. paid in full all outstanding principal and interest.

| Recipient                                               | Loan Date                                       | Maturity Date | Total Anticipated Loan Amount | Disbursements <sup>42</sup> | Total Outstanding Loan Amount <sup>43</sup> | Cash Interest Receipts |
|---------------------------------------------------------|-------------------------------------------------|---------------|-------------------------------|-----------------------------|---------------------------------------------|------------------------|
| <a href="#">Aero Hydraulics, Inc.</a>                   | 10/26/2020                                      | 10/24/2025    | \$450,000                     | \$450,000                   | \$465,686                                   | \$0                    |
| <a href="#">Alaska Airlines, Inc.</a>                   | 9/28/2020<br>(amended 10/30/2020 and 1/15/2021) | 9/26/2025     | \$1,928,000,000               | \$135,000,000               | \$135,000,000                               | \$0                    |
| <a href="#">Allflight Corporation</a>                   | 11/5/2020                                       | 11/5/2025     | \$4,721,260                   | \$4,721,260                 | \$4,721,260                                 | \$102,265              |
| <a href="#">American Airlines, Inc.</a>                 | 9/26/2020<br>(amended 10/21/2020 and 1/15/2021) | 6/30/2025     | \$7,500,000,000               | \$550,000,000               | \$0                                         | \$10,257,500           |
| <a href="#">American Jet International Corp</a>         | 11/5/2020                                       | 11/5/2025     | \$1,162,124                   | \$1,162,124                 | \$1,181,648                                 | \$6,300                |
| <a href="#">Aviation Management &amp; Repairs, Inc.</a> | 11/5/2020                                       | 11/5/2025     | \$4,026,705                   | \$4,026,705                 | \$4,116,551                                 | \$0                    |
| <a href="#">Bristin Travel, LLC</a>                     | 10/26/2020                                      | 10/24/2025    | \$549,651                     | \$549,651                   | \$554,773                                   | \$9,320                |
| <a href="#">Caribbean Sun Airlines, Inc.</a>            | 11/5/2020<br>(amended 12/7/2020)                | 11/5/2025     | \$6,768,749                   | \$6,768,749                 | \$6,892,757                                 | \$0                    |
| <a href="#">Eastern Airlines, LLC</a>                   | 10/28/2020                                      | 10/28/2025    | \$15,000,000                  | \$15,000,000                | \$15,388,658                                | \$0                    |
| <a href="#">Elite Airways, LLC</a>                      | 11/9/2020<br>(amended 12/1/2020)                | 11/7/2025     | \$2,630,274                   | \$2,630,274                 | \$2,681,462                                 | \$0                    |
| <a href="#">Frontier Airlines, Inc.</a>                 | 9/28/2020<br>(amended 1/15/2021)                | 9/26/2025     | \$574,000,000                 | \$150,000,000               | \$150,000,000                               | \$0                    |

<sup>41</sup> U.S. Dep’t Treasury, Loans to Air Carriers, Eligible Businesses, and National Security Businesses

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

<sup>42</sup> “Disbursements” includes all loan disbursements.

<sup>43</sup> “Total Outstanding Loan Amount” includes all loan disbursements and increases of loan principal amount arising from payment-in-kind (PIK) interest, less any repayments of principal.

| Recipient                                     | Loan Date                                               | Maturity Date | Total Anticipated Loan Amount | Disbursements <sup>42</sup> | Total Outstanding Loan Amount <sup>43</sup> | Cash Interest Receipts |
|-----------------------------------------------|---------------------------------------------------------|---------------|-------------------------------|-----------------------------|---------------------------------------------|------------------------|
| <a href="#">Hawaiian Airlines, Inc.</a>       | 9/25/2020 (amended 10/23/2020 and 1/15/2021)            | 6/28/2024     | \$622,000,000                 | \$45,000,000                | \$0                                         | \$450,450              |
| <a href="#">Island Wings, Inc.</a>            | 11/5/2020                                               | 11/5/2025     | \$294,350                     | \$294,350                   | \$300,750                                   | \$0                    |
| <a href="#">Jetblue Airways Corporation</a>   | 9/29/2020 (amended 11/3/2020 and 1/15/2021)             | 11/29/2025    | \$1,948,000,000               | \$115,000,000               | \$115,000,000                               | \$0                    |
| <a href="#">Legacy Airways, LLC</a>           | 10/20/2020                                              | 10/25/2025    | \$1,817,306                   | \$1,817,306                 | \$1,881,996                                 | \$0                    |
| <a href="#">Mesa Airlines, Inc.</a>           | 10/30/2020                                              | 10/30/2025    | \$195,000,000                 | \$195,000,000               | \$197,525,164                               | \$0                    |
| <a href="#">Ovation Travel Group, Inc.</a>    | 10/15/2020                                              | 10/15/2025    | \$20,000,000                  | \$20,000,000                | \$0                                         | \$181,881              |
| <a href="#">Republic Airways, Inc.</a>        | 11/6/2020                                               | 11/6/2025     | \$58,000,000                  | \$58,000,000                | \$58,000,000                                | \$569,447              |
| <a href="#">Skywest Airlines, Inc.</a>        | 9/29/2020 (amended 10/28/2020 and 1/15/2021)            | 9/29/2025     | \$725,000,000                 | \$60,000,000                | \$60,000,000                                | \$0                    |
| <a href="#">Southern Airways Express, LLC</a> | 10/28/2020                                              | 10/28/2025    | \$1,838,501                   | \$1,838,501                 | \$1,838,501                                 | \$47,360               |
| <a href="#">Sun Country, Inc.</a>             | 10/26/2020                                              | 10/24/2025    | \$45,000,000                  | \$45,000,000                | \$0                                         | \$77,125               |
| <a href="#">Thomas Global Systems, LLC</a>    | 11/9/2020                                               | 11/7/2025     | \$1,400,000                   | \$1,400,000                 | \$1,431,237                                 | \$0                    |
| <a href="#">Timco Engine Center, Inc.</a>     | 11/5/2020                                               | 11/5/2025     | \$8,390,240                   | \$8,390,240                 | \$8,577,447                                 | \$0                    |
| <a href="#">United Airlines, Inc.</a>         | 9/28/2020 (amended 11/6/2020, 12/8/2020, and 1/15/2021) | 9/26/2025     | \$7,491,000,000               | \$520,000,000               | \$520,000,000                               | \$0                    |

### *Businesses Critical to National Security*

CARES Act section 4003(b)(3) allocated \$17 billion for loans and loan guarantees to “businesses critical to maintaining national security.” The CARES Act does not define the term “businesses critical to maintaining national security,” but Treasury established criteria for making this determination in its Frequently Asked Questions guidance issued in April 2020:

A business critical to maintaining national security is one that, unless otherwise approved as set forth below, is at the time of the business’s application:

- (1) performing under a “DX”-priority rated contract or order under the Defense Priorities and Allocations System regulations; or
- (2) operating under a valid top secret facility security clearance under the National Industrial Security Program regulations.

Applicants that did not satisfy either of these two criteria could be considered for loans if, based on a recommendation and certification by the Secretary of Defense or the Director of National Intelligence that the applicant business is critical to maintaining national security, the Secretary of the Treasury determined that the applicant business was critical to maintaining national security.<sup>44</sup>

The following table summarizes the section 4003(b)(3) loans current through this quarter.<sup>45</sup>

| Recipient                                            | Loan Date  | Maturity Date | Total Anticipated Loan Amount | Disbursements <sup>46</sup> | Total Outstanding Loan Amount <sup>47</sup> | Cash Interest Receipts |
|------------------------------------------------------|------------|---------------|-------------------------------|-----------------------------|---------------------------------------------|------------------------|
| <a href="#">Channel Logistics, LLC</a>               | 11/12/2020 | 11/12/2025    | \$2,500,000                   | \$2,500,000                 | \$2,500,000                                 | \$57,400               |
| <a href="#">Core Avionics &amp; Industrial, Inc.</a> | 11/5/2020  | 11/5/2025     | \$6,000,000                   | \$6,000,000                 | \$6,130,800                                 | \$58,133               |
| <a href="#">Map Large, Inc.</a>                      | 11/2/2020  | 10/31/2025    | \$10,000,000                  | \$10,000,000                | \$10,324,304                                | \$0                    |
| <a href="#">Meridian Rapid Defense Group, LLC</a>    | 10/30/2020 | 10/30/2025    | \$7,100,000                   | \$7,100,000                 | \$7,254,780                                 | \$79,019               |
| <a href="#">Ovio Technologies, Inc.</a>              | 11/2/2020  | 10/31/2025    | \$1,186,900                   | \$1,186,900                 | \$1,225,392                                 | \$0                    |
| <a href="#">Semahtronix, LLC</a>                     | 11/13/2020 | 11/13/2025    | \$1,999,100                   | \$1,999,100                 | \$2,042,930                                 | \$0                    |
| <a href="#">Semantic AI, Inc.</a>                    | 11/13/2020 | 11/13/2025    | \$506,300                     | \$506,300                   | \$517,881                                   | \$0                    |
| <a href="#">SpinLaunch, Inc.</a>                     | 11/13/2020 | 11/13/2025    | \$2,519,200                   | \$2,519,200                 | \$2,519,200                                 | \$55,019               |
| <a href="#">Visual Semantics, Inc.</a>               | 10/30/2020 | 10/30/2025    | \$1,053,200                   | \$1,053,200                 | \$1,076,160                                 | \$11,722               |
| <a href="#">Wiser Imagery Services, LLC</a>          | 10/30/2020 | 10/30/2025    | \$3,069,700                   | \$3,069,700                 | \$3,171,528                                 | \$0                    |
| <a href="#">Yellow Corporation</a>                   | 7/8/2020   | 9/30/2024     | \$700,000,000                 | \$551,300,000               | \$555,701,619                               | \$4,053,497            |

## Other Investments

CARES Act section 4003(b)(4) allocated at least \$454 billion for “loans and loan guarantees to, and other investments in, programs or facilities established by the Board of Governors of the Federal Reserve System for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States, or municipalities” by “purchasing obligations or other interests” directly from the issuer or through secondary markets, and “making loans, including loans or other advances secured by collateral.”

The Federal Reserve established several liquidity programs (Federal Reserve facilities) using its emergency lending powers under section 13(3) of the Federal Reserve Act.<sup>48</sup> That provision, used extensively during the 2008 financial crisis and amended by the Dodd-Frank Wall Street

<sup>44</sup> U.S. Dep’t Treasury, Q&A: Loans to Air Carriers and Eligible Businesses and National Security Businesses 1 (Apr. 10, 2020) (citations omitted), <https://home.treasury.gov/system/files/136/CARES-Airline-Loan-Support-Q-and-A-national-security.pdf>.

<sup>45</sup> YRC Worldwide changed their name to Yellow Corporation.

<sup>46</sup> “Disbursements” includes all loan disbursements.

<sup>47</sup> “Total Outstanding Loan Amount” includes all loan disbursements and increases of loan principal amount arising from payment-in-kind (PIK) interest, less any repayments of principal.

<sup>48</sup> See 12 U.S.C. § 343(3).

Reform and Consumer Protection Act,<sup>49</sup> allows the Federal Reserve to lend money in “unusual and exigent circumstances” to participants in “any program or facility with broad-based eligibility” who are “unable to secure adequate credit accommodations from other banking institutions.”<sup>50</sup> The Federal Reserve, however, may not lend to insolvent entities, and its programs must be approved by the Secretary of the Treasury.

In November 2020, Federal Reserve Chair Jerome H. Powell agreed to return Treasury's unobligated CARES Act funds in the Federal Reserve facilities after receiving a request from then-Secretary of the Treasury Steven Mnuchin.<sup>51</sup> According to a letter sent from Treasury to SIGPR on January 19, 2021, any concerns that the CARES Act did not require the discontinuation of these Federal Reserve facilities was rendered moot following enactment of the CAA,<sup>52</sup> which rescinded unobligated CARES Act funds for the Federal Reserve facilities and terminated the Federal Reserve's authority to make new loans, asset purchases, or modifications through facilities in which Treasury had invested using funds under section 4003. The letter was transmitted to SIGPR by the prior administration on its final full day, January 19, 2021. According to Treasury, the letter does not necessarily reflect the views of the current administration, and the enactment of the CAA rendered this issue moot.

Before the CAA, Treasury had invested \$102.5 billion of CARES Act funds to support the Federal Reserve facilities. These included the Main Street Lending Program (MSLP), the Primary and Secondary Corporate Credit Facilities, the Municipal Liquidity Facility, and the Term Asset-Backed Securities Loan Facility. For each program, Treasury invested in a limited liability company, known as a special purpose vehicle (SPV), which purchased specified assets or made loans to borrowers and is managed by one of the individual Federal Reserve Banks.

Treasury contributed nearly all the equity in the Federal Reserve SPVs to protect the Federal Reserve from losses.

The Federal Reserve Bank responsible for a given facility lent funds to each SPV to finance specific transactions. When structuring a given facility, the Secretary and the Federal Reserve had decided on a “gearing ratio” of Federal Reserve lending to Treasury loss-absorbing capital. For each facility, application of the gearing ratio to the amount invested by the Secretary thus reflected the agencies' calculation of the amount of lending the facility could support without a likelihood of capital losses beyond the amount invested by the Secretary. The basic functioning of this “gearing ratio” is explained in the agencies' responses to questions from the

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<sup>49</sup> Pub. L. 111-203, 124 Stat. 1375.

<sup>50</sup> See 12 U.S.C. § 343(3); 12 C.F.R. § 201.4(d).

<sup>51</sup> Letter from Chair Jerome H. Powell, Chair of the Federal Reserve, to Steven Mnuchin, Secretary of the Department of the Treasury (Nov. 20, 2020), <https://www.federalreserve.gov/foia/files/mnuchin-letter-20201120.pdf>; Letter from Steven Mnuchin, Secretary of the Department of the Treasury, to Jerome H. Powell, Chair of the Federal Reserve (Nov. 19, 2020), <https://home.treasury.gov/system/files/136/letter11192020.pdf>.

<sup>52</sup> Letter from James Stern, Deputy General Counsel, Department of the Treasury, to Brian Miller, Special Inspector General for Pandemic Recovery (Jan. 19, 2021).

Congressional Oversight Commission, which are disclosed in that commission’s July 20, 2020 report.<sup>53</sup>

On its website, the Federal Reserve Board provides information about its SPVs and facilities, including terms and conditions for loans and other transactions. The Federal Reserve Board also provides information about each transaction in spreadsheet form so that one can evaluate the individual loans made by a section 13(3) facility’s SPV.<sup>54</sup> The Federal Reserve regularly updates this information, posting it under the “Policy Tools” section of its website.<sup>55</sup>

The following table summarizes the total amount of remaining CARES Act funds that Treasury invested in each SPV as of March 31, 2021.<sup>56</sup>

| Recipient                         | Treasury Investment Remaining as of March 31, 2021 |
|-----------------------------------|----------------------------------------------------|
| Corporate Credit Facilities, LLC  | \$13,897,154,074                                   |
| Municipal Liquidity Facility, LLC | \$6,300,000,000 (plus interest)                    |
| TALF II, LLC                      | \$3,500,000,000 (plus interest)                    |
| MS Facilities, LLC                | \$16,587,000,601                                   |

The following table summarizes the portfolio holdings of the facilities as of the April 1, 2021 release of the Federal Reserve’s balance sheet.<sup>57</sup>

| Facility                          | Outstanding Amount of Purchased Loan Participations, Notes, and Other Securities | Treasury Contributions and Other Assets | Total            |
|-----------------------------------|----------------------------------------------------------------------------------|-----------------------------------------|------------------|
| Corporate Credit Facilities, LLC  | \$13,788,000,000                                                                 | \$12,246,000,000                        | \$26,034,000,000 |
| Municipal Liquidity Facility, LLC | \$6,058,000,000                                                                  | \$5,498,000,000                         | \$11,556,000,000 |
| TALF II, LLC                      | \$2,135,000,000                                                                  | \$3,147,000,000                         | \$5,282,000,000  |
| MS Facilities, LLC                | \$14,107,000,000                                                                 | \$16,846,000,000                        | \$30,953,000,000 |

The following paragraphs describe the functioning of these facilities, which have terminated.

<sup>53</sup> The Third Report of the Congressional Oversight Commission, Treasury and Federal Reserve Answers to Tier 2 Questions, at 3 (July 20, 2020), [https://coc.senate.gov/sites/default/files/2020-08/20200720 Congressional Oversight Commission 3rd Report.pdf](https://coc.senate.gov/sites/default/files/2020-08/20200720%20Congressional%20Oversight%20Commission%203rd%20Report.pdf).

<sup>54</sup> See, e.g., Board of Governors of the Federal Reserve System, TALF Transaction-specific Disclosures (Dec. 11, 2020), <https://www.federalreserve.gov/monetarypolicy/talf.htm>; Board of Governors of the Federal Reserve System, Main Street Lending Program, <https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm> (providing tables for MSLP transaction-specific disclosures) (last updated Apr. 12, 2021); Board of Governors of the Federal Reserve System, Secondary Market Corporate Credit Facility (Dec. 11, 2020), <https://www.federalreserve.gov/monetarypolicy/smccf.htm>; Board of Governors of the Federal Reserve System, MLF Transaction-specific Disclosures (Dec. 11, 2020), <https://www.federalreserve.gov/monetarypolicy/muni.htm>.

<sup>55</sup> Board of Governors of the Federal Reserve System, Policy Tools, <https://www.federalreserve.gov/monetarypolicy/policytools.htm>.

<sup>56</sup> See Periodic Report: Update on Outstanding Lending Facilities Authorized by the Board under Section 13(3) of the Federal Reserve Act (“April Periodic Report”) (Apr. 9, 2021), <https://www.federalreserve.gov/publications/files/pdca-mmllf-cpff-pmccf-smccf-talf-mlf-ppplf-msnlf-mself-msplf-nonlf-noelf-04-12-21.pdf>.

<sup>57</sup> See Board of Governors of the Federal Reserve System, Factors Affecting Reserve Balances - H.4.1, <https://www.federalreserve.gov/releases/H41/>.

### *Corporate Credit Facilities, LLC*

Corporate Credit Facilities, LLC, was formed by the Federal Reserve Bank of New York on April 31, 2020, to operate the Primary Market Corporate Credit Facility (PMCCF) and the Secondary Market Corporate Credit Facility (SMCCF). The facilities were structured to purchase up to \$750 billion in debt securities under these programs. Treasury originally indicated it would invest up to \$50 billion to support the PMCCF and \$25 billion to support the SMCCF;<sup>58</sup> Treasury's remaining investment in the facilities is \$13.9 billion.<sup>59</sup>

The PMCCF was intended to purchase corporate bonds as the sole investor in a bond issuance. The facility was also able to purchase syndicated loans or bonds at issuance. The bonds and loans must have had a maturity of four years or less, and the facility was limited to purchasing 25 percent of any syndicated loan or bond. To be eligible for the program, an issuer must have had an investment-grade credit rating as of March 22, 2020. The facility ceased purchasing securities on December 31, 2020. As of December 31, 2020, the PMCCF did not close any transactions.<sup>60</sup>

The SMCCF was authorized to purchase the following debt securities on the secondary market:

- Individual corporate bonds having a remaining maturity of five years or less that were issued by businesses with investment-grade credit ratings as of March 22, 2020;
- Corporate bond exchange-traded funds (ETFs) whose objective is to provide broad exposure to the U.S. corporate bond market, including exposure to both investment-grade and high-yield bonds; and
- Individual corporate bonds with a remaining maturity of five years or less that would create a bond portfolio reflecting a broad market index of the U.S. corporate bond market.

The facility ceased purchasing securities on December 31, 2020. Detailed transaction information for the SMCCF's purchases is available on the Federal Reserve's website.<sup>61</sup>

### *Municipal Liquidity Facility, LLC*

Municipal Liquidity Facility, LLC, was formed by the Federal Reserve Bank of New York on May 1, 2020, to operate the Municipal Liquidity Facility (MLF). The facility was structured to offer up to \$500 billion to support state and local governments and related entities. Treasury originally indicated it would invest up to \$35 billion to support the Municipal Liquidity Facility;<sup>62</sup> Treasury's remaining investment in the facility is \$6.3 billion and interest earned thereon.<sup>63</sup>

<sup>58</sup> Term Sheet, Primary Market Corporate Credit Facility (July 28, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200728a9.pdf>.

<sup>59</sup> April Periodic Report, *supra* note 56, at 4 n.3.

<sup>60</sup> *Id.*

<sup>61</sup> Board of Governors of the Federal Reserve System, Secondary Market Corporate Credit Facility, <https://www.federalreserve.gov/monetarypolicy/smccf.htm>.

<sup>62</sup> Board of Governors of the Federal Reserve System, Term Sheet, Municipal Liquidity Facility 1 ("Municipal Liquidity") (Aug. 11, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200811a1.pdf>.

<sup>63</sup> April Periodic Report, *supra* note 56, at 6 n.9.

The facility was able to purchase various revenue, tax, and bond anticipation notes issued by states, the District of Columbia, large cities and counties, multi-state entities, and revenue bond issuers. The notes must have matured within three years of issuance, and the issuing entity generally must have had an investment-grade credit rating at the time of issuance. Issuers were required to use the proceeds of the notes to alleviate cash flow problems resulting from reduced tax revenue, increased expenses, or similar financial problems related to the COVID-19 pandemic. The facility ceased purchasing notes on December 31, 2020.<sup>64</sup> Transaction-specific details for the MLF are available on the [Federal Reserve's website](#).<sup>65</sup>

As of March 31, 2021, the Federal Reserve reported four transactions for the MLF. They are described in the following table.

| Issuer Name                                | Closing Date | Value of note<br>[\$ value] | Current<br>outstanding<br>amount of note | Maturity date<br>of note | Interest<br>rate |
|--------------------------------------------|--------------|-----------------------------|------------------------------------------|--------------------------|------------------|
| State of Illinois                          | 6/5/2020     | \$1,200,000,000             | \$700,000,000.                           | 6/5/2021                 | 3.36%            |
| State of Illinois                          | 12/17/2020   | \$2,000,000,000             | \$2,000,000,000                          | 12/15/2023               | 3.42%            |
| Metropolitan Transportation Authority (NY) | 8/26/2020    | \$450,720,000               | \$450,720,000                            | 8/1/2023                 | 1.93%            |
| Metropolitan Transportation Authority (NY) | 12/17/2020   | \$2,907,280,000             | \$2,907,280,000                          | 12/15/2023               | 1.33%            |

### *TALF II, LLC*

TALF II, LLC, was formed by the Federal Reserve Bank of New York on April 13, 2020, to operate the Term Asset-Backed Securities Loan Facility, or TALF. (The original TALF, LLC, was established during the 2008 financial crisis.) Treasury's remaining investment in the facility is \$3.5 billion and interest earned thereon.<sup>66</sup> The facility was structured to offer up to \$100 billion in TALF lending.

TALF II, LLC, made three-year, nonrecourse loans to borrowers who issued asset-backed securities to serve as collateral for the loans. An asset-backed security is one composed of a pool of debt obligations. The security's value and performance depend on the value and performance of the underlying pool of debt. Asset-backed securities that were eligible to serve as collateral for a TALF loan included asset-backed securities based on auto loans and leases, student loans, credit card receivables, floorplan loans, commercial mortgages, collateralized loan obligations, and other common credit arrangements. TALF accepted as collateral only those asset-backed securities with the highest investment-grade rating.<sup>67</sup>

<sup>64</sup> See Municipal Liquidity, *supra* note 62, at 3.

<sup>65</sup> Board of Governors of the Federal Reserve System, Policy Tools, Municipal Liquidity Facility (Aug. 11, 2020), <https://www.federalreserve.gov/monetarypolicy/muni.htm>.

<sup>66</sup> April Periodic Report, *supra* note 56, at 5 n.5.

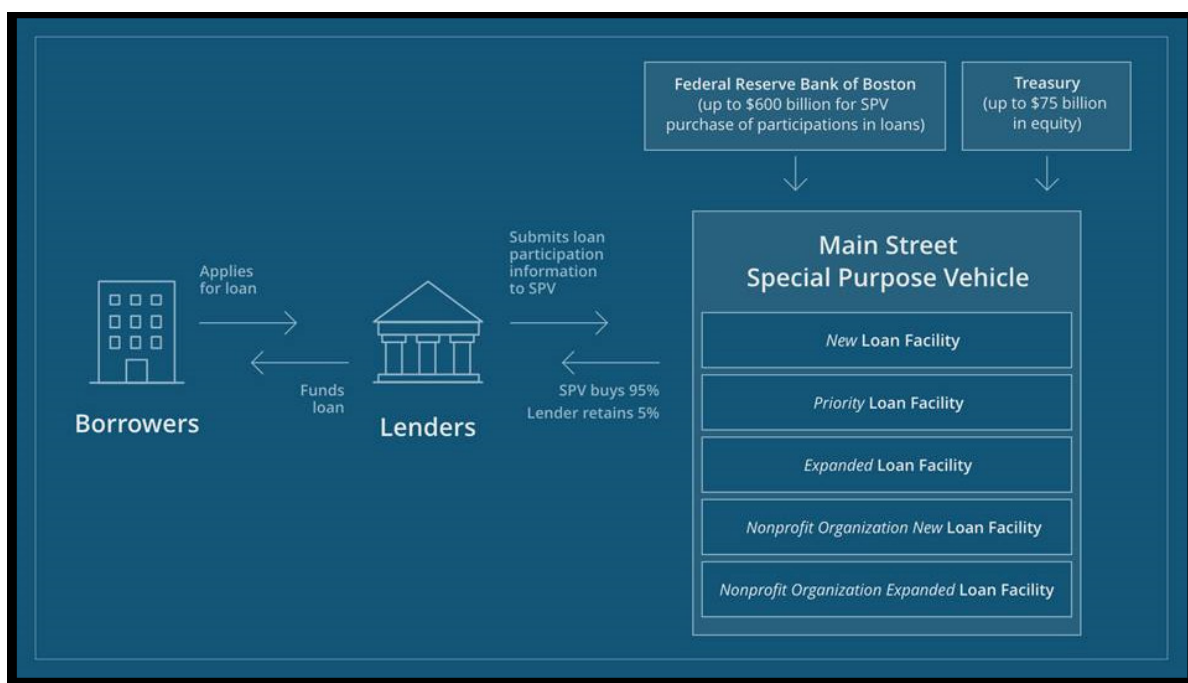
<sup>67</sup> See Board of Governors of the Federal Reserve System, Term Sheet, Term Asset-Backed Securities Loan Facility (July 28, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200728a6.pdf>.

TALF stopped making loans on December 31, 2020. Transaction-specific details for the TALF are available on the [Federal Reserve's website](#).<sup>68</sup>

### *MS Facilities, LLC*

MS Facilities, LLC, was formed by the Federal Reserve Bank of Boston on May 18, 2020, to operate the Federal Reserve's various facilities under the MSLP. MSLP was structured to offer up to \$600 billion in lending. Treasury originally indicated it would invest up to \$75 billion to support the MSLP;<sup>69</sup> Treasury's remaining investment in the facility is \$16.6 billion and interest earned thereon.<sup>70</sup>

The MSLP supported private lending to medium-sized and small businesses, as well as non-profit organizations, by purchasing 95 percent participations in loans that conformed to the terms of an MSLP program. The private lender retains a five percent participation in the loan. Loans may be secured or unsecured. The Federal Reserve Bank of Boston has published the following graphic showing the operation of the MSLP.<sup>71</sup>



Transaction-specific details for the MSLP are available on the [Federal Reserve's website](#) and updated regularly.<sup>72</sup>

<sup>68</sup> Board of Governors of the Federal Reserve System, Policy Tools, Term Asset-Backed Loan Facility, <https://www.federalreserve.gov/monetarypolicy/talf.htm> (last updated Apr. 12, 2021).

<sup>69</sup> Board of Governors of the Federal Reserve System Term Sheet, Main Street New Loan Facility (July 28, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200728a3.pdf>.

<sup>70</sup> April Periodic Report, *supra* note 56, at 8 n.11.

<sup>71</sup> The Federal Reserve's Main Street Lending Program, Federal Reserve Bank of Boston, <https://www.bostonfed.org/supervision-and-regulation/credit/special-facilities/main-street-lending-program/main-street-lending-program-overview.aspx>.

<sup>72</sup> Board of Governors of the Federal Reserve System, Policy Tools, Main Street Lending Program, <https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm> (last updated April 12, 2021).

The CAA clarified that the Federal Reserve facilities in which Treasury had made investments of CARES Act funds could make no loans or purchase obligations after December 31, 2020, and rescinded unobligated funds. However, Congress permitted the five Main Street facilities to purchase loan participations until January 8, 2021 for applications submitted by December 14, 2020.<sup>73</sup> Authority for the MSLP then terminated. Additional terms for each program applied as follows.

#### *Loans to for-profit businesses*

The MSLP offered three loan programs to for-profit business: the Main Street New Loan Facility (MSNLF), Main Street Priority Loan Facility (MSPLF), and Main Street Expanded Loan Facility (MSELF). Each program had the following basic terms:

|                              |                                                                                 |
|------------------------------|---------------------------------------------------------------------------------|
| <b>Loan Term</b>             | Five years                                                                      |
| <b>Employees and Revenue</b> | Either 15,000 or fewer employees, or 2019 revenue of \$5 billion or less        |
| <b>Rate</b>                  | Adjustable Rate of LIBOR (one month or three months) plus 3%                    |
| <b>Interest Deferral</b>     | Deferred for one year                                                           |
| <b>Principal Deferral</b>    | Deferred for years 1 and 2, 15% due in each of years 3 and 4, 70% due in year 5 |

The MSNLF and MSPLF differed in the size of loans available and in additional terms to compensate for the greater exposure to loss in the larger MSPLF loans. Both programs offered new loans, as opposed to expanding existing ones such as the third facility did, discussed below. From October 30, 2020 on, the MSNLF and the MSPLF had a minimum loan amount of \$100,000.<sup>74</sup>

The maximum MSNLF loan was the lesser of \$35 million or an amount that would not cause the borrower's total outstanding and undrawn debt to exceed four times the borrower's 2019 earnings before adjusted interest, taxes, depreciation, and amortization (EBITDA). The new loan needed not be senior to the borrower's other debt, but it could not be contractually subordinated to the borrower's other debt.<sup>75</sup>

The maximum MSPLF loan was the lesser of either \$50 million or an amount that would not cause the borrower's total outstanding and undrawn debt to exceed six times the borrower's 2019 adjusted EBITDA. The MSPLF compensated for the higher loan amount by requiring the loan to be either *pari-passu* (on equal footing) or senior in priority to the borrower's other debts, except for mortgage debt. Unlike MSNLF loans, MSPLF loans had some level of

<sup>73</sup> Consolidated Appropriations Act, 2021, §§ 1003, 1005.

<sup>74</sup> The minimum loan amount for MSNLF and the MSPLF was decreased from \$250,000 to \$100,000 on October 30, 2020. See Press Release, Federal Reserve Board, Federal Reserve Board adjusts terms of Main Street Lending Program (Oct. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20201030a.htm>; see also Periodic Report: Update on Outstanding Lending Facilities Authorized by the Board under Section 13(3) of the Federal Reserve Act (Nov. 6, 2020), <https://www.federalreserve.gov/publications/files/pdcf-mmlf-cpff-pmccf-smccf-talf-mlf-ppplf-msnlf-mself-msplf-nonlf-noelf-11-9-20.pdf#page=7>.

<sup>75</sup> See Board of Governors of the Federal Reserve System, Term Sheet, Main Street New Loan Facility (Dec. 29, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201229a1.pdf>.

repayment preference among the borrower's various debts in the event the borrower became insolvent.<sup>76</sup>

While MSNLF and MSPLF supported new loans, MSELF loans allowed businesses to expand existing loans or revolving credit facilities. The MSELF portion of the refinancing must have been a term loan and senior or *pari-passu* in priority to the borrower's other debt, except for mortgage debt. The minimum MSELF loan was \$10 million. The maximum was the lesser of \$300 million or an amount that would not cause the borrower's total outstanding and undrawn debt to exceed six times the borrower's 2019 adjusted EBITDA.<sup>77</sup>

### *Loans to nonprofit organizations*

MSLP offered two loan programs to nonprofit organizations: the Nonprofit Organization New Loan Facility (NONLF) and the Nonprofit Organization Expanded Loan Facility (NOELF). Like the MSLP programs available to for-profit businesses, the MSLP programs available to nonprofit organizations offered support for both new loans (NONLF) and the expansion of existing loans (NOELF). Also, like the MSLP loans to for-profit business, MSLP loans to nonprofit organizations had some common terms:

|                              |                                                                                                                                                                                                                                                                                                                                                                                  |
|------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Loan Term</b>             | Five years                                                                                                                                                                                                                                                                                                                                                                       |
| <b>Minimum Employees</b>     | At least 10 employees                                                                                                                                                                                                                                                                                                                                                            |
| <b>Employees and Revenue</b> | Either 15,000 or fewer employees, or 2019 revenue of \$5 billion or less                                                                                                                                                                                                                                                                                                         |
| <b>Financial Conditions</b>  | <ul style="list-style-type: none"> <li>• Total non-donation revenues of at least 60% of expenses for 2017 through 2019</li> <li>• At least a 2% operating margin for 2019</li> <li>• At least 60 days current cash on hand</li> <li>• Ratio of cash, investments, and other repayment resources to outstanding debt and certain other liabilities of greater than 55%</li> </ul> |
| <b>Endowment Cap</b>         | Less than \$3 billion                                                                                                                                                                                                                                                                                                                                                            |
| <b>Rate</b>                  | Adjustable Rate of LIBOR (one month or three months) plus 3%                                                                                                                                                                                                                                                                                                                     |
| <b>Interest Deferral</b>     | Deferred for one year                                                                                                                                                                                                                                                                                                                                                            |
| <b>Principal Deferral</b>    | Deferred for years 1 and 2, 15% due in each of years 3 and 4, 70% due in year 5                                                                                                                                                                                                                                                                                                  |

From October 30, 2020 on, the NONLF minimum loan amount was \$100,000.<sup>78</sup> The maximum loan amount was the lesser of \$35 million or the borrower's average quarterly revenue in 2019. The new loan did not need to be senior to the borrower's existing debt but could not be contractually subordinated to that debt.<sup>79</sup>

<sup>76</sup> See Board of Governors of the Federal Reserve System, Term Sheet, Main Street Priority Loan Facility (Dec. 29, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201229a2.pdf>.

<sup>77</sup> See Board of Governors of the Federal Reserve System, Term Sheet, Main Street Expanded Loan Facility (Dec. 29, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201229a3.pdf>.

<sup>78</sup> The minimum loan amount for the NONLF was decreased from \$250,000 to \$100,000 on October 30, 2020. See Press Release, *supra* note 74.

<sup>79</sup> See Board of Governors of the Federal Reserve System, Term Sheet, Nonprofit Organization New Loan Facility (Dec. 29, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201229a4.pdf>.

NOELF loans, like MSELF loans, allowed borrowers to refinance existing loans or revolving credit facilities. The NOELF portion of the refinancing must have been a term loan and senior or *pari-passu* in priority to the borrower's other debt, except for mortgage debt. The minimum NOELF loan was \$10 million. The maximum was the lesser of \$300 million or the borrower's average quarterly revenue in 2019.<sup>80</sup>

## Letters of Inquiry: Updates

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In SIGPR's previous quarterly report, SIGPR described three formal requests for information that SIGPR transmitted to Treasury officials in the prior administration.<sup>81</sup> As described below, SIGPR received updates from Treasury pertaining to these inquiries.

In December, SIGPR had requested a briefing and asked specific questions relating to the then-Secretary's request that the Federal Reserve return unused Treasury funds appropriated by the CARES Act for the Federal Reserve facilities. SIGPR followed up on that request with a second letter in December, requesting that Treasury identify the specific CARES Act provisions and any related legal analysis underlying the then-Secretary's requested return of the unused funds. On January 19, 2021, Treasury responded to one of SIGPR's letters. As discussed in the previous quarterly report, however, Treasury later noted that this response was sent to SIGPR on the last full day of the previous administration and did not necessarily represent the views of the new administration, and that in any event, the CAA rendered these issues moot. During this quarter, Treasury confirmed that it did not intend to provide any additional response to SIGPR's December letters as they pertained to moot issues.

In January, SIGPR had also transmitted a letter to Treasury requesting information about changes to the rules governing the MSLP, which had been discussed in news reports. In response to SIGPR's inquiry concerning the Secretary's role in adopting the changes, Treasury noted that the Secretary was involved in decision-making generally. Treasury confirmed it had no additional information with respect to the remaining questions, except that, as noted on the Secretary's publicly released calendars, the then-Secretary had a telephone call scheduled with Senator Ted Cruz on April 18, 2020.

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<sup>80</sup> See Board of Governors of the Federal Reserve System, Term Sheet, Nonprofit Organization Expanded Loan Facility (Dec. 29, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201229a5.pdf>.

<sup>81</sup> See Special Inspector General for Pandemic Recovery, Quarterly Report to the United States Congress 37 & App. C (Dec. 31, 2020).



# CHALLENGES

As with all inspectors general, SIGPR has the responsibility to recommend improvements that promote “prevention and detection of fraud” in programs under its oversight.<sup>82</sup> There are several challenges unique to smoking out and prosecuting crime in CARES Act programs. Detecting fraud requires access to voluminous amounts of complex data for analysis. In the status quo, obtaining this information while not undermining the criminal investigation is unnecessarily difficult. Moreover, technological changes in the past two decades have made establishing proper venue law to prosecute federal wire fraud needlessly complicated and time-consuming. Specifically, SIGPR recommends that Congress:

- require participants in any future emergency relief program to agree to provide the appropriate inspectors general with information to aid audits and investigations;
- amend the federal wire fraud statute so that judicial venue will lie in any district where the defendant committed an act in furtherance of the fraud scheme, not just those districts in which the transmission was issued or terminated; and
- amend financial privacy laws to prohibit financial institutions from notifying customers that they are subjects of an inspector general criminal investigation, just as they are barred from tipping off the subjects of grand jury investigations.

## Detection: Data Access and Verification

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CARES Act oversight agencies face challenges gathering and vetting relevant information. To get relief under the CARES Act programs, individuals, businesses, and governments applied for loans or aid. These applications often asked for extensive financial disclosures concerning profitability, assets and liabilities, ownership, and payroll. Recipients, moreover, must often make certain covenants and periodic reports about the use of money or other matters during the life of the loan. The decision to disburse millions of dollars to a single recipient can turn on the accuracy the information supplied. Yet because the pandemic created an urgent need to disburse money, many programs accepted certifications at little more than face value, while deferring payments of interest and principle. Fraudulent information on an application can cause significant loss to taxpayers through the disbursement of funds that the recipient is not entitled to and would not have received but for the submission of fraudulent information.

### Access to Applications in Multiple Public Entities and Private Entities

Congress should condition participation in federally funded programs on providing inspectors general with access to information. By law, SIGPR may only request the cooperation of other governmental offices or subpoena non-Federal entities for predicated records.<sup>83</sup> As a result, SIGPR audits and investigations rely on other entities to provide information in the first instance. Though this is not unusual for inspectors general, the information needed to evaluate an application for CARES Act relief resides in multiple governmental, quasi-governmental, and private organizations. For example, a loan under the Main Street Lending Program (MSLP) involves multiple entities—the borrower, the lender, the Federal Reserve Board, and the

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<sup>82</sup> 5 U.S.C. app. 3 § 4(a)(4).

<sup>83</sup> 5 U.S.C. app. 3 § 6.

Federal Reserve Bank of Boston. Information, truthful or otherwise, originates with the borrower and passes through various recipients, who in turn rely on it to make lending decisions. Without ready access to the facts at each stage of this process, it will be nearly impossible for SIGPR to form a complete factual picture concerning any given loan or the lending program as a whole, a task critical to completing sound audits and investigations.

Subpoenas are not an effective means to obtain the bulk information necessary to audit and investigate fraud in CARES Act programs like MSLP. Subpoenas are an ad hoc and time-consuming tool. For instance, the Department of Labor subpoenaed all fifty states for unemployment insurance information in support of a proactive effort to detect fraud in the distribution of enhanced unemployment benefits under the CARES Act.<sup>84</sup> Though critical to Labor's anti-fraud efforts, those subpoenas burdened state agencies at a time when they were consumed by the task of distributing much-needed unemployment aid. Had the states been aware of the eventual need for this large-scale data project, they could have established their systems and planned accordingly, instead of reacting to a subpoena—with its accompanying deadline—at a time many state agencies were overburdened.

Congress should statutorily impose affirmative reporting obligations on private entities participating in subsequent taxpayer-funded programs. In order to receive loans or benefits, recipients should agree to submit relevant information not only to the agencies that make the loans or grant the benefits but also to the offices of any inspector general with oversight jurisdiction. That way, an inspector general would have immediate access to the information it needs to detect waste, fraud, and abuse. Suggested statutory language is provided in Appendix A.

Statutory covenants are not new. The CARES Act imposed several covenants on borrowers, elevating what would otherwise be routine contract terms to statutory commands.<sup>85</sup> Adding an additional covenant—specifying that participating borrowers and lenders must provide relevant inspectors general with access to information possessed by the lenders and borrowers concerning their receipt of federal funds—is a small burden to further the crucial interest of detecting fraud, waste, and abuse. Indeed, SIGPR requested this disclosure covenant be included in the CARES Act Direct Loan Program, and Treasury agreed.<sup>86</sup> All but one CARES Act direct loan thus requires recipients to provide SIGPR access to information, alleviating the need for a subpoena.<sup>87</sup>

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<sup>84</sup> Ben Penn, "Labor Department Watchdog Subpoenas Jobless-Aid Data From States," Bloomberg Law (July 10, 2020), <https://news.bloomberglaw.com/daily-labor-report/labor-department-watchdog-subpoenas-jobless-aid-data-from-states>.

<sup>85</sup> See CARES Act § 4003(c).

<sup>86</sup> Special Inspector General for Pandemic Recovery, Initial Report to Congress 49 (Aug. 3, 2020), [https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Initial-Report-to-Congress-August-3-2020\\_0.pdf](https://www.sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Initial-Report-to-Congress-August-3-2020_0.pdf).

<sup>87</sup> See, e.g., Loan and Guarantee Agreement Among Alaska Airline, Inc., United States Department of the Treasury, and The Bank of New York Mellon, Section 5.11, "Inspection Rights" (requiring the borrower to "permit . . . the Special Inspector General for Pandemic Recovery to visit and inspect any of its properties (including all Collateral), to examine its corporate, financial and operating records, and make copies thereof or abstracts therefrom, and to discuss its affairs, finances and accounts with its directors, officers, and independent public accountants . . . at such reasonable times during normal business hours and as often as may be reasonably requested . . ."), <https://home.treasury.gov/system/files/136/Alaska--Airlines--Transaction-Documentation.pdf>.

## Enforcement: Reforming Wire Fraud Venue

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Beyond the difficulty with gathering sufficient data to detect CARES Act fraud, obtaining indictments and prosecuting cases face their own unique challenges. One of the most common forms of interstate fraud is fraud transmitted by electronic communication or “wire,” such as an email, text message, or electronic funds transfer.<sup>88</sup> Wire fraud cases have already emerged from federal oversight of the PPP. Prosecutors will undoubtedly prosecute those who commit fraud when they obtained loans from the MSLP for wire fraud.

One challenge unique to prosecuting wire fraud is establishing proper judicial venue. Generally speaking, the Constitution requires the government to prosecute crimes where they “shall have been committed.”<sup>89</sup> Federal law implements the Constitution’s standard by requiring that prosecutions shall “be in the district and division” where the offense was committed.<sup>90</sup> By default, multidistrict offenses may be “prosecuted in any district in which such offense was begun, continued, or completed.”<sup>91</sup> Some federal criminal statutes supplement (or supplant) default venue rules with offense-specific provisions about proper venue. For example, Congress has given special instructions for how to establish proper venue in money laundering cases, and the courts have inferred venue limitations in mail fraud cases.<sup>92</sup>

The wire fraud statute does not define the venue of the offense. The default venue rules therefore restrict venue to districts in which the fraudulent interstate transmission was “begun, continued, or completed”—that is, in any district “in which an interstate or foreign transmission was issued or terminated.”<sup>93</sup>

It can be difficult to determine the geographic location of an interstate wire communication, especially if investigators do not become aware of fraud scheme until years later. These difficulties could seriously hamper prosecutions of MSLP borrowers who committed fraud when obtaining loans if the fraud is not identified before the deferred interest and principal payments come due.

A more efficient and effective approach would be to supplement the default venue rules by permitting prosecution of wire fraud in any district where the defendant committed an overt act for the purpose of furthering the fraud scheme.

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<sup>88</sup> 18 U.S.C. § 1343.

<sup>89</sup> See U.S. Const. art. III, § 2, cl. 3 (trials “shall be held in the State where the said Crimes shall have been Committed”; amend. VI (guaranteeing trial “in the State and district wherein the crime shall have been committed”).

<sup>90</sup> 18 U.S.C. § 3232; Fed. R. Crim. P. 18 (same).

<sup>91</sup> 18 U.S.C. § 3237.

<sup>92</sup> See 18 U.S.C. § 1956(i) (money laundering); *Travis v. United States*, 364 U.S. 631, 636–37 (1961) (“[V]enue should not be made to depend upon the chance use of the mails, when Congress has so carefully indicated the locus of the crimes.”); 18 U.S.C. § 1341 (mail fraud).

<sup>93</sup> U.S. Dep’t of Justice, The Justice Manual § 967 (venue in wire fraud) (last updated January 21, 2020). See *United States v. Jefferson*, 674 F.3d 332, 367–68 (4th Cir. 2012) (holding that the Eastern District of Virginia is improper venue for a wire fraud prosecution predicated on a telephone call that took place outside the district); *United States v. Pace*, 314 F.3d 344, 349–50. (9th Cir. 2002). The Seventh Circuit has held that wire fraud venue is proper so long as conduct that “provided critical evidence of the ‘intent to defraud,’” occurred in the venue district, even if the wire transmission itself was outside the district. See *United States v. Pearson*, 340 F.3d 459 (7th Cir. 2003), *vacated on other grounds*, *Hawkins v. United States*, 543 U.S. 1097 (2005).

## Wire Fraud Statute and the Main Street Lending Program

Because of the repayment terms, the wire fraud statute will be particularly important in prosecutions of MSLP borrowers who committed fraud. As background, between July 15, 2020, and January 1, 2021, the MSLP purchased 95 percent of the value of approximately 1,830 loans made by private financial institutions to for-profit businesses under the terms of the program. During that period, the Federal Reserve Bank of Boston provided a \$16.5 billion Special Purpose Vehicle to make the purchases. Under the terms of the loans, borrowers do not have to repay any of the principal until the end of the third year of the loan when they must repay 15 percent. Borrowers must repay another 15 percent at the end of the fourth year but have until the end of the fifth year to repay the remaining 70 percent.

The fraud committed when a lender approved a loan may not become apparent until the loan goes into default. The default, however, may not happen for four or five years—potentially concealing the fraud that was committed past the usual five-year statute of limitations.<sup>94</sup> After five years, the statute may bar prosecutions for false statements made by the borrowers,<sup>95</sup> money laundering offenses committed soon after the loan originations,<sup>96</sup> and conspiracy to defraud the United States.<sup>97</sup>

True, the offense of wire fraud affecting a financial institution, like the bank fraud statute, has a ten-year statute of limitations. But the wire fraud statute is a more important tool for the government to prosecute MSLP borrowers who committed fraud when they obtained their loans. The wire fraud statute allows prosecutors to allege multiple victims as the victims of a single fraud scheme: the government can allege in one count of an indictment not only the lending bank as the victim, but also the Federal Reserve Bank of Boston and the United States Treasury. Moreover, MSLP authorizes subsidiaries of financial institutions to make loans, but the federal bank fraud statutes do not apply to fraud against such subsidiaries. The wire fraud statute, therefore, will be critical in such cases. In addition, if a defendant who commits fraud to obtain his loan uses the money to develop a Ponzi scheme to fleece investors, prosecutors may want to charge that fraud scheme under the wire fraud statute in the same indictment that charges the Main Street loan fraud.

## Reforming Wire Fraud Venue

The wire fraud statute provides, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures,

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<sup>94</sup> 18 U.S.C. § 3282.

<sup>95</sup> 18 U.S.C. § 1001.

<sup>96</sup> 18 U.S.C. §§ 1956–57.

<sup>97</sup> 18 U.S.C. § 371.

or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years . . . .”<sup>98</sup>

Prosecuting wire fraud requires the government to prove that the defendant knowingly either designed or participated in a scheme to defraud a victim and used an interstate or foreign wire transmission in furtherance of the scheme. Finally, the government must prove that the offense occurred in the federal district where a grand jury returns an indictment.

It is increasingly difficult to show the district where an interstate wire transmission occurred. Wire fraud charges 25 years ago were often based on telephone calls and later transmissions from facsimile (fax) machines. The location of the person sending or receiving either a call or a fax usually was shown by the area code. The locations of electronic financial transactions were easier to prove because they usually began or ended at the physical site where one of the parties banked.

But today, most fraud schemes arise out of communications by mobile phone, email, text message, or some other electronic means. Money transfers can be initiated by mobile phone. Most documents are transferred electronically, rather than FedEx or UPS.<sup>99</sup> Proving the transmissions began or ended in a particular location is often difficult. For example, a victim may recall sending an email to initiate a wire transfer, but the person years later does not recall whether it was from work, home, or while on the road. Cell tower location data is usually unavailable by the time that the fraud is uncovered and law enforcement can obtain a search warrant. If a victim used a computer, the person may not recall exactly where she was, and their internet service provider may no longer have that information.

It can also be difficult to identify where financial institutions received requests to make transfers, initiated the transfers, received the transfers, and credited customers’ accounts. These processes occur on bank computer servers. These servers are usually not located at the branch where a customer has an account. Sometimes banks use different servers for different stages of the transfer process, and sometimes banks have more than one server handling one stage of the process for multiple branches. When a fraud scheme does not become apparent for a few years, it can be difficult, if not impossible, for a financial institution to be able to state with certainty where the server was located that processed a particular transaction.

If it is discovered in five years that a Main Street borrower committed fraud when obtaining a loan, the Federal Reserve Bank of Boston likely will have evidence that would prove venue for some wire transmissions that were part of the fraud scheme. The government, however, should not have to prosecute all such defendants in Boston. There may be good reasons in a case to want to bring the charges where the lending institution is located or where the borrower lived at the time. For instance, the witnesses who helped assemble the information needed for a Main Street loan application are likely to recall where they were when they worked on that

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<sup>98</sup> 18 U.S.C. § 1343.

<sup>99</sup> Until recent years, documents were generally transferred by the United States Postal Service or an interstate commercial carrier. When those transfers were in furtherance of a scheme to defraud, defendants were charged under the mail fraud statute, 18 U.S.C. § 1341. Again, the important evidence about the locations of the parties sending or receiving the documents was often clear from the documents themselves and corroborated by carrier records.

task. An employee from a large bank may recall the branch in which he or she reviewed the borrower's electronic application, even if no one is sure where the server was located that contained the application at the time. Under current venue law, however, proof of the locations of these two acts would not establish venue in either of the respective judicial districts, unless there was also proof that an interstate wire transmission occurred in the district.

To address these concerns, SIGPR recommends adding to the wire fraud statute a new subsection (b) authorizing prosecution in any district where a participant in the scheme committed an act for the purpose of executing the scheme to defraud, as follows:

**“§ 1343. Fraud by wire, radio, or television**

**“(b) Venue.** A prosecution for an offense under this section may be brought in—

“(1) any district in which a prosecution could be brought under sections 3232 and 3237; or

“(2) any district in which a participant in the wire fraud scheme committed, or caused to be committed, an act for the purpose of executing the alleged scheme or artifice.

The draft venue rule supplements the general venue provisions (18 U.S.C. §§ 3232, 3237) by clarifying that wire fraud is committed not only where a wire transmission was sent or received, but also where any act in furtherance of the fraud scheme occurred. Devising a scheme to defraud is a critical element of this offense and legislation permitting venue in a district where the defendant committed an act to further the scheme is consistent with the Constitution's venue provisions.

Expanding venue for wire fraud offenses involving schemes to defraud is consistent with the venue provisions for the related offense of criminal conspiracy.<sup>100</sup> The Supreme Court “has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense.”<sup>101</sup>

Moreover, Congress has broadened venue provisions for a criminal offense before. Take, for example, the venue amendments to the federal money laundering offense enacted after the Supreme Court's decision in *United States v. Cabrales*.<sup>102</sup> In *Cabrales*, the Court interpreted default venue rule under section 3237 and held that a state (where tainted money was generated through drug trafficking) was not the proper venue to prosecute money laundering offenses that took place “wholly within” a different state.<sup>103</sup> Because *Cabrales* was only charged

<sup>100</sup> See *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir.1992) (“Because an essential element of these offenses is a fraudulent scheme, mail and wire fraud are treated like conspiracy in several respects”); *United States v. Wormick*, 709 F.2d 454, 461 (7th Cir. 1983) (“[C]onspiracy doctrines apply to a multi-member mail fraud scheme even if the indictment does not formally charge conspiracy.”).

<sup>101</sup> *Whitfield v. United States*, 543 U.S. 209, 218 (2005); see, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 251 (1940); see also *Hyde v. United States*, 225 U.S. 347, 354 (1912).

<sup>102</sup> 524 U.S. 1 (1998).

<sup>103</sup> *Id.* at 7–10.

with money laundering, not conspiracy or the anterior narcotics activity, the offense had begun, continued, and been completed outside the district that brought the charges.<sup>104</sup>

Congress subsequently added subsection (i) to 18 U.S.C. § 1956(i).<sup>105</sup> Under the special venue provision, the government can bring money laundering cases in the district where the tainted money was generated if the government can show that the defendant participated in the transfer of the money to the district where the money laundering offense occurred.<sup>106</sup>

Wire fraud venue rules should be similarly amended. It would be more effective and efficient to permit wire fraud charges in any district where the government can show that the defendant committed an overt act in execution of the fraud scheme.<sup>107</sup> The proposed amendment would enhance the government's ability to effectively prosecute persons who fraudulently obtained loans in the MSLP and defendants who victimized people in other wire fraud schemes. Whether a defendant scams the MSLP or steals money from a church or daycare center, prosecutors and investigators could focus on identifying and prosecuting fraud schemes, not on developing evidence to prove appropriate venue. Moreover, the proposed statute could be applied as soon as it becomes law.<sup>108</sup>

## Enforcement: Don't Tip Off the Target

In *United States v. Miller*, the Supreme Court held that a bank customer has no protected Fourth Amendment interest in the bank's records of his transactions and finances.<sup>109</sup> Congress aimed to restore financial privacy in the Right to Financial Privacy Act (RFPA) of 1978.<sup>110</sup> Enacted one month after the Inspector General Act, the RFPA requires federal authorities to notify the customers of banks and other financial institutions when seeking their records. The statute also provides a means for the customer to oppose disclosure and challenge the government's authority to request their records.<sup>111</sup>

<sup>104</sup> *Id.* ("In the counts at issue, the Government indicted Cabrales for transactions which began, continued, and were completed only in Florida. Under these circumstances, venue in Missouri is improper.")

<sup>105</sup> See USA PATRIOT Act of 2001, Pub. L. No. 107-56, Title X, § 1004, 115 Stat. 392 (Oct. 26, 2001).

<sup>106</sup> 18 U.S.C. § 1956(i)(1)(B).

<sup>107</sup> The proposed statute would not eliminate the government's requirement that it prove the federal jurisdictional element of a wire fraud offense: the interstate wire transmission. That element can be easier to prove, however, than the exact location of the beginning or end of a wire transmission. For instance, there may be evidence that proves that a defendant was in California when he sent an email, but the evidence is not clear enough to show which district he was in. Similarly, there may be evidence that a bank received the email on its servers, but the bank may only know a server in Florida or Virginia received it but is unsure which one. Nevertheless, that evidence would be sufficient to show an interstate wire communication, but insufficient to prove venue in a particular district.

<sup>108</sup> Venue is not an element of a crime, so the Constitution's Ex Post Facto Clause permits changes in venue law to apply retroactively. See *Gut v. State of Minnesota*, 76 U.S. 35, 36 (1869). New procedural law can be applied retroactively unless a "manifest injustice" results. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974). Changes in venue law are "wholly procedural." *Denver & R. G. W. R. Co. v. Bhd. of R. R. Trainmen*, 387 U.S. 556, 563 (1967) (venue "amendment does not change the substantive law applicable to this lawsuit. It is wholly procedural."); *Moore v. Agency for Int'l Development*, 994 F.2d 874 (D.C. Cir. 1993) (same).

<sup>109</sup> 425 U.S. 435 (1976); accord *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (telephone company's records of customer calls).

<sup>110</sup> Pub. L. 95-630, Stat. (1978), codified as amended at 12 U.S.C. §§ 3401–23. The House Report accompanying RFPA chastised the *Miller* Court for failing to "acknowledge the sensitive nature of these records . . ." See H.R. Rep. No. 1383, 95th Cong., 2d Sess., 34.

<sup>111</sup> 12 U.S.C. § 3410.

RFPAs customer notice rule contains numerous exceptions, including for grand jury subpoenas.<sup>112</sup> Inspectors general, however, are not exempt. If SIGPR ever issues a subpoena to a financial institution to obtain personal finance records, SIGPR must first notify the person whose records are sought by the subpoena. That person can then challenge the subpoena in court, consent to disclosure of the records, or ignore the notice, which works as a waiver with the passage of time. Once this notice process is complete, SIGPR can then notify the financial institution that the RFA's notice provisions have been complied with, and the financial institution can respond to the subpoena.<sup>113</sup>

If SIGPR must notify the target of an investigation in order to seek his records, the implications to a successful investigation are obvious. The subject is provided an opportunity to destroy or tamper with evidence, flee, or intimidate witnesses. Premature disclosure can also prevent legitimate undercover work and inhibit recovery of misspent funds. These financial transactions can be complicated to trace and unravel. And advance notice can impede the government's forfeiture and other civil remedies that are designed to ensure the minimization of unlawful losses of federal dollars.

Notification is particularly burdensome on inspectors general. The RFA requires notification to the target within 14 days when records obtained under the RFA are transferred to another agency, which happens when inspectors general transfer records to DOJ in furtherance of a criminal investigation.

These issues are addressed in the following draft language:

**"§ 3413. Exceptions**

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**"(i) Disclosure pursuant to issuance of subpoena or court order respecting grand jury proceeding or law enforcement investigation.**

Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpoena or court order issued in connection with (1) proceedings before a grand jury, or (2) a law enforcement investigation by an Inspector General under the Inspector General Act of 1978, as amended; except that a court shall have authority to order a financial institution, on which a grand jury or Inspector General subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information that has been furnished to the grand jury or in response to the Inspector General subpoena, under the circumstances and for the period specified and pursuant to the procedures established in section 3409 of this title.

Indeed, financial institutions should be affirmatively barred from notifying targets of SIGPR criminal investigations, just as they are barred from tipping off the subjects of grand jury investigations in some circumstances under the RFA.<sup>114</sup> Inspectors general often work cases at a nascent stage and build evidence against a particular suspect before transferring material to

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<sup>112</sup> 12 U.S.C. § 3413(i).

<sup>113</sup> 12 U.S.C. § 3404(b)

<sup>114</sup> See 12 U.S.C. § 3420(b)(1) (prohibiting financial institutions from notifying a person named in a grand jury subpoena about the existence of the subpoena if the subpoena relates to certain financial or controlled substance offenses).

the appropriate United States Attorney's Office (USAO). The USAO, in turn, will resume the investigation through a grand jury. But because the evidence was first uncovered by an inspector general, the RFPA mandates that SIGPR tip off the target. Inspector general subpoenas should be protected from disclosure in the same way grand jury subpoenas are protected.

A better approach is to treat grand jury investigations and criminal investigations initiated by inspectors general alike. Inspectors general are rightly subject to the RFPA when it comes to routine audits and inspections. Criminal investigations, however, are of a different dye and deserve greater protection against tipping off the target.

The following draft language addresses this concern:

**"§ 3420 Grand jury information; notification of certain persons prohibited**

"(a) Financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of a Federal grand jury or by an Inspector General as part of a law enforcement investigation—

(1) in the case of a grand jury subpoena, shall be returned and actually presented to the grand jury unless the volume of such records makes such return and actual presentation impractical in which case the grand jury shall be provided with a description of the contents of the records;

(2) in the case of a grand jury subpoena, shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure, or for a purpose authorized by section 3412(a) of this title;

(3) in the case of an Inspector General subpoena, shall be used only for a legitimate law enforcement purpose, and any subsequent disclosure or transfer or records obtained pursuant to that subpoena to the Department of Justice shall be exempt from the provisions of sections 3412(a) and (b) of this title;

(4) shall be destroyed or returned to the financial institution if not used for one of the purposes specified in paragraph (2); and

(5) shall not be maintained, or a description of the contents of such records shall not be maintained by any Government authority other than in the sealed records of the grand jury, unless such record has been used in the prosecution of a crime for which the grand jury issued an indictment or presentment or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure.

(b)(1) No officer, director, partner, employee, or shareholder of, or agent or attorney for, a financial institution shall, directly or indirectly, notify any person named in a grand jury or Inspector General subpoena served on such institution in connection with an investigation relating to a possible—

- (A) crime against any financial institution or supervisory agency or crime involving a violation of the Controlled Substance Act<sup>2</sup>, the Controlled Substances Import and Export Act, section 1956, 1957, or 1960 of Title 18, sections 5313, 5316, 5322, 5324, 5331, and 5332 of Title 31, or section 6050I of Title 26; or
  - (B) conspiracy to commit such a crime, about the existence or contents of such subpoena, or information that has been furnished to the grand jury or Inspector General in response to such subpoena.
- (2) Section 1818 of this title and section 1786(k)(2) of this title shall apply to any violation of this subsection.

These statutory revisions are presented in Appendix C.



# APPENDICES

## Appendix A

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### Statutory Covenant for Information Access

While the programs under SIGPR's oversight have concluded disbursing funds and making loans, we propose amendments to the CARES Act to provide a model in case of future emergency relief legislation. To ensure inspectors general have access to needed information, CARES Act section 4003 could have been written to include a subsection (i), as follows:

“(i) INFORMATION ACCESS.—Any borrower receiving funds described in this section must permit the Office of Inspector General for the Department of the Treasury and the Special Inspector General for Pandemic Recovery to visit and inspect any of its properties (including property pledged as collateral), to examine its corporate, financial and operating records, and make copies thereof or abstracts therefrom, and to discuss its affairs, finances and accounts with its directors, officers, and independent public accountants at such reasonable times during normal business hours and as often as may be reasonably requested. Any lending institution participating in a loan or loan guarantee program under this section must permit the Office of Inspector General for the Department of the Treasury and the Special Inspector General for Pandemic Recovery to examine its corporate, financial and operating records relating to any loan or loan guarantee made under this section, and make copies thereof or abstracts therefrom, and to discuss its related affairs, finances and accounts with its directors and officers at such reasonable times during normal business hours and as often as may be reasonably requested.

## Appendix B

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### Venue

Congress could remedy the identified challenges in wire fraud prosecutions by amending the wire fraud statute with the underlined language as follows:

Existing Text:

**“§ 1343. Fraud by wire, radio, or television**

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Revised Text:

**“§ 1343. Fraud by wire, radio, or television**

**“(a)** Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

**“(b) Venue. A prosecution for an offense under this section may be brought in—**

(1) any district in which a prosecution could be brought under sections 3232 and 3237; or

(2) any district in which a participant in the wire fraud scheme committed, or caused to be committed, an act for the purpose of executing the alleged scheme or artifice.

## Appendix C

### Proposed amendments to 12 U.S.C. §§ 3413, 3420

#### Redlined Comparison

##### Existing Text:

##### **“§ 3413. Exceptions**

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##### **“(i) Disclosure pursuant to issuance of subpoena or court order respecting grand jury proceeding**

Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpoena or court order issued in connection with proceedings before a grand jury, except that a court shall have authority to order a financial institution, on which a grand jury subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information that has been furnished to the grand jury, under the circumstances and for the period specified and pursuant to the procedures established in section 3409 of this title.

##### **§ 3420 Grand jury information; notification of certain persons prohibited**

“(a) Financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of a Federal grand jury—

##### Revised Text:

##### **“§ 3413. Exceptions**

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##### **“(i) Disclosure pursuant to issuance of subpoena or court order respecting grand jury proceeding or law enforcement investigation.**

Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpoena or court order issued in connection with (1) proceedings before a grand jury, or (2) a law enforcement investigation by an Inspector General under the Inspector General Act of 1978, as amended; except that a court shall have authority to order a financial institution, on which a grand jury or Inspector General subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information that has been furnished to the grand jury or in response to the Inspector General subpoena, under the circumstances and for the period specified and pursuant to the procedures established in section 3409 of this title.

##### **§ 3420 Grand jury information; notification of certain persons prohibited**

“(a) Financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of a Federal grand jury or by an Inspector General as part of a law enforcement investigation—

(1) shall be returned and actually presented to the grand jury unless the volume of such records makes such return and actual presentation impractical in which case the grand jury shall be provided with a description of the contents of the records;

(2) shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure, or for a purpose authorized by section 3412(a) of this title;

(3) shall be destroyed or returned to the financial institution if not used for one of the purposes specified in paragraph (2); and

(4) shall not be maintained, or a description of the contents of such records shall not be maintained by any Government authority other than in the sealed records of the grand jury, unless such record has been used in the prosecution of a crime for which the grand jury issued an indictment or presentment or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure.

(b)(1) No officer, director, partner, employee, or shareholder of, or agent or attorney for, a financial institution shall, directly or indirectly, notify any person named in a grand jury subpoena served on such institution in connection with an investigation relating to a possible—

(A) crime against any financial institution or supervisory agency or crime involving a violation of the Controlled Substance Act<sup>2</sup>, the Controlled Substances Import and Export Act, section 1956, 1957, or 1960 of Title 18,

(1) in the case of a grand jury subpoena, shall be returned and actually presented to the grand jury unless the volume of such records makes such return and actual presentation impractical in which case the grand jury shall be provided with a description of the contents of the records;

(2) in the case of a grand jury subpoena, shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure, or for a purpose authorized by section 3412(a) of this title;

(3) in the case of an Inspector General subpoena, shall be used only for a legitimate law enforcement purpose, and any subsequent disclosure or transfer or records obtained pursuant to that subpoena to the Department of Justice shall be exempt from the provisions of sections 3412(a) and (b) of this title;

(4) shall be destroyed or returned to the financial institution if not used for one of the purposes specified in paragraph (2); and

(5) shall not be maintained, or a description of the contents of such records shall not be maintained by any Government authority other than in the sealed records of the grand jury, unless such record has been used in the prosecution of a crime for which the grand jury issued an indictment or presentment or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure.

(b)(1) No officer, director, partner, employee, or shareholder of, or agent or attorney for, a

sections 5313, 5316, 5322, 5324, 5331, and 5332 of Title 31, or section 6050I of Title 26; or

(B) conspiracy to commit such a crime, about the existence or contents of such subpoena, or information that has been furnished to the grand jury in response to such subpoena.

(2) Section 1818 of this title and section 1786(k)(2) of this title shall apply to any violation of this subsection.

financial institution shall, directly or indirectly, notify any person named in a grand jury or Inspector General subpoena served on such institution in connection with an investigation relating to a possible—

(A) crime against any financial institution or supervisory agency or crime involving a violation of the Controlled Substance Act<sup>2</sup>, the Controlled Substances Import and Export Act, section 1956, 1957, or 1960 of Title 18, sections 5313, 5316, 5322, 5324, 5331, and 5332 of Title 31, or section 6050I of Title 26; or

(B) conspiracy to commit such a crime, about the existence or contents of such subpoena, or information that has been furnished to the grand jury or Inspector General in response to such subpoena.

(2) Section 1818 of this title and section 1786(k)(2) of this title shall apply to any violation of this subsection.

## Appendix D

### Correspondence between SIGPR and Treasury regarding information sharing



#### Office of the Special Inspector General for Pandemic Recovery

April 9, 2021

BY ELECTRONIC MAIL

Laurie Schaffer  
Acting General Counsel  
Office of the General Counsel  
U.S. Department of Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Dear Ms. Schaffer:

I write to confirm my understanding of the Department of the Treasury's (Treasury) position on sharing information with the Special Inspector General for Pandemic Recovery (SIGPR) relating to programs over which the Treasury Office of Inspector General (TIG) as well as Treasury dispute SIGPR's jurisdiction under Section 4018 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act—namely, any program in Division A that falls outside of Title IV, Subtitle A of that Act, including the Payroll Support Program (PSP) (Title IV, Subtitle B), Coronavirus Relief Fund (CRF) (Title V), and U.S. Postal Service CARES Act funding (Section 6001) (collectively, "Disputed Programs").

Specifically, I understand that all requests to obtain information must be routed through Treasury's Office of General Counsel (OGC) to ensure proper vetting for privileges and other potential grounds for withholding the information. I also understand from counsel's discussion that Treasury OGC will not share "a lot of data" concerning the Disputed Programs while a decision on SIGPR's jurisdiction is pending with the Department of Justice Office of Legal Counsel (OLC). This information includes the following:

- Providing SIGPR documents that three PSP recipients provided to Treasury, including applications, agreements, certifications, financial information, and reports;
- Providing records to allow SIGPR to respond to a complaint received about a PSP recipient;
- Granting SIGPR access to Salesforce data on PSP recipients; and
- Allowing SIGPR to run the PSP EINs, which Treasury gave SIGPR in October, through Treasury's "Do Not Pay" resource to verify recipients' eligibility.

I appreciate that Treasury OGC agreed to participate in an engagement conference with SIGPR's Office of Audits on a SIGPR evaluation of U.S. Postal Service funds (requested March 10), at least to listen, *albeit* without answering questions. And I also appreciate that Treasury OGC is considering whether to participate in an engagement conference on the same terms with SIGPR's Office of Audits on a SIGPR evaluation of CRF recipients (requested December 28). It is disappointing, however, that SIGPR's Office of Audits has been prohibited from engaging Treasury personnel or receiving any information until the OLC decision.

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[www.sigpr.gov](http://www.sigpr.gov)

I further understand that Treasury's concern over sharing this information with SIGPR rests on its belief that SIGPR lacks jurisdiction over the Disputed Programs<sup>1</sup> and that because TIG has jurisdiction, SIGPR can coordinate with TIG. As you know, however, SIGPR has attempted to coordinate with TIG on these programs but cannot control TIG's response to SIGPR's overtures.

Treasury has had notice of this posture since December 31, 2020, when instead of accepting SIGPR's invitation to work jointly on an evaluation, TIG filed a memorandum with Treasury, asking Treasury to resolve the jurisdictional dispute. As I stated in my email on January 7, "I felt obligated to present a memorandum justifying SIGPR's jurisdiction, but I really want to work together with Treasury OIG. As a former AUSA, I am used to taking a 'task force approach.' I would prefer to take that approach here. If an official resolution needs to be obtained, I believe that the Office of Legal Counsel (OLC) in the Department of Justice is the appropriate forum." The memorandum SIGPR provided to Treasury with that email explained that OLC, rather than the Treasury OGC, was best suited to preserve the independence of TIG and SIGPR in conducting audits, and in detecting and preventing fraud and abuse in Treasury programs, since resolution of the jurisdictional issue would decide which or both offices may lawfully exercise oversight of those very same Treasury programs. Unfortunately, Treasury's posture now effectively renders a decision on this question in favor of TIG.

I appreciate that in the past, despite disagreement over SIGPR's jurisdiction, Treasury still answered questions relating to the Disputed Programs on January 20, 2021, provided the PSP EINs to SIGPR on October 26, 2020, and worked with SIGPR on gaining access to the Salesforce database for PSP information between December 2020 and January 2021.

Unfortunately, instead of continuing in that posture, and welcoming as much oversight as possible over billions of taxpayer dollars—while agreeing to disagree until OLC decides between reasonable legal positions—Treasury now opts for less oversight.

The Inspector General Act, Section 6(c)(2), requires an Inspector General to report the circumstances to the head of the establishment when information or assistance is unreasonably refused or not provided. *See also* CARES Act, Section 4018(e)(4)(B) ("Whenever information or assistance requested by the Special Inspector General is, in the judgment of the Special Inspector General, unreasonably refused or

<sup>1</sup> This position contradicts two public positions that Treasury has taken on related issues. Section 3 of the CARES Act provides that "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act shall be treated as referring only to the provisions of that division." In interpreting Section 15011 of the CARES Act, Treasury has said "this Act" refers only to provisions in Division B, in accordance with Section 3. *See* Letter from Office of General Counsel, U.S. Department of Treasury, to Office of the Inspector General, U.S. Department of Treasury, at 4 (May 7, 2020), found at [Oversight.gov/Sites/OIG-Reports/OIG-20-036](https://www.oversight.gov/sites/OIG-Reports/OIG-20-036). In interpreting Section 4002, Treasury has said "this Act" refers to all of the CARES Act. *See* Q&A: Loans to Air Carriers and Eligible Businesses and National Security Businesses (April 10, 2020) (applying rule to Section 4002 and describing "eligible businesses" to include "U.S. businesses that have not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the CARES Act . . .") (emphasis added); *Procedures and Minimum Requirements for Loans to Air Carriers and Eligible Businesses and National Security Businesses under Division A, Title IV, Subtitle A of the CARES Act*, at 2 (March 30, 2020) (similar). Yet in interpreting Section 4018 (providing SIGPR's jurisdiction), Treasury appears to take the narrow view that "this Act" refers only to Division A, Title IV, Subtitle A—rather than, as Section 3 specifies, all of Division A.

not provided, the Special Inspector General shall report the circumstances to the appropriate committees of Congress without delay”).

SIGPR respectfully renews all oversight requests made concerning the Disputed Programs. Treasury should at least admit that it is unreasonable to prevent SIGPR from scheduling participation in the “Do Not Pay” resource to review eligibility of PSP recipients, using the EINs that Treasury provided to SIGPR in October. The queue can be lengthy, and SIGPR used the slot it had previously been allocated to review Direct Loan recipients rather than delay oversight. SIGPR looks forward to hearing whether Treasury will proceed with the engagement conference on the CRF but requests that it be given access to Treasury staff and information needed to conduct its audit work. In addition, I would appreciate your clarifying a previous response to our information requests regarding the tracking of spending and reporting requirements for the CRF. Your response referred us to TIG, which implied either that Treasury does not have the information or would need to obtain it from TIG. Does Treasury have information in its possession that is responsive?

Finally, please let me know if I have misunderstood any of Treasury’s positions, as we have renewed these requests so as not to delay investigative leads, criminal investigations, and other oversight. While I understand the situation is awkward, I appreciate your office’s continued commitment to being helpful. Your responsiveness and assistance in other areas has always been highly valued. In the end, I am hopeful that Treasury will opt for more oversight rather than less.

Sincerely,



Brian D. Miller  
Special Inspector General for Pandemic Recovery



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.

April 27, 2021

Brian Miller  
Special Inspector General for Pandemic Recovery  
1500 Pennsylvania Avenue NW, Suite 4428  
Washington, D.C. 20220

Dear Mr. Miller,

I write in response to your letter of April 9, 2021, regarding requests for information by the Office of the Special Inspector General for Pandemic Recovery (SIGPR). SIGPR and Treasury's Office of Inspector General (TIG) currently disagree as to whether SIGPR's jurisdiction covers the information requested, and this dispute has been referred to the Office of Legal Counsel (OLC) at the Department of Justice for resolution.

Treasury is dedicated to the prevention of waste, fraud, and abuse, and we are committed to being responsive and helpful to SIGPR. Attorneys in Treasury's Office of General Counsel have traditionally acted as the primary point of contact for oversight requests, including those from our inspectors general. This helps ensure that we provide complete, accurate, and timely responses to oversight requests, as well as protect privileged information. While SIGPR's letter suggests that Treasury is electing whether to opt for more or less oversight, in fact every program Treasury is implementing is subject to oversight by at least one of Treasury's four inspectors general, as well as the Government Accountability Office, relevant Congressional committees, and, in some cases, the Congressional Oversight Commission. We provide each of these oversight bodies with the information within its jurisdiction. For example, over the last three months, Treasury staff have met with SIGPR or TIG to assist with their oversight inquiries more than 10 times and provided more than 40 written submissions to SIGPR and TIG in response to their requests. We continue to make ourselves available to ensure that SIGPR is able to fulfill its statutory oversight responsibilities.

As your letter notes, SIGPR and TIG are currently engaged in a dispute regarding the scope of SIGPR's jurisdiction. While SIGPR views its authority as covering a number of programs established under Division A of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), TIG has stated that SIGPR's jurisdiction is limited to the programs established under the subtitle of the CARES Act that created SIGPR, Subtitle A of Title IV of Division A. Treasury has hoped that SIGPR and TIG could resolve their disagreement.

On September 14, 2020, SIGPR requested information related to the Payroll Support Program (PSP). SIGPR's request sought program participants' tax identification numbers, bank account information, and other details. On September 29, 2020, Treasury noted to SIGPR that Treasury believed that the PSP was within TIG's jurisdiction, not SIGPR's. Nonetheless, in an effort to be responsive, on October 26, 2020, Treasury provided a subset of the requested information,

expressly stating that it was doing so due to the limited nature of SIGPR's request. SIGPR subsequently asked four additional questions regarding the PSP and another program subject to the jurisdictional dispute, the Coronavirus Relief Fund (CRF), in response to which Treasury provided short answers on January 20, again in an effort to be responsive. Two of those answers referred SIGPR to TIG for responses to questions regarding the CRF. As the CARES Act specifies that TIG is responsible for monitoring and overseeing the CRF, TIG is best positioned to provide the information you requested.

On January 14, 2021, SIGPR submitted a request to OLC asking OLC to opine on the scope of SIGPR's jurisdiction. Treasury will abide by any opinion OLC issues on this question. In the meantime, Treasury has continued to provide SIGPR with general information about programs that OLC may conclude are outside SIGPR's jurisdiction. Most recently, on April 11, we provided responses to SIGPR's questions about the Paycheck Protection Program for SIGPR's upcoming April 2021 quarterly report. On April 8, Treasury participated in an entrance conference that SIGPR requested regarding financial assistance Treasury provided to the U.S. Postal Service under the CARES Act. As is typical during an audit entrance conference, SIGPR's questions focused on procedural rather than substantive matters, and Treasury answered every question that was asked.

We note that SIGPR's inquiries regarding both the PSP and CRF relate to programs that the CARES Act expressly provides TIG with responsibility for reviewing, raising the risk that two separate offices of inspectors general may exercise overlapping and duplicative oversight authorities. Out of respect for both oversight bodies and the process currently underway with OLC, we would propose proceeding with those inquiries after OLC has resolved this dispute.

Your letter also inquires about accessing the "Do Not Pay" system for a review of certain PSP participants. We do not object to SIGPR using that PSP data for a scan in the Do Not Pay system.

We look forward to continuing to engage with SIGPR to ensure that it can conduct its important oversight work as provided under the CARES Act.

Sincerely,



Laurie Schaffer

## Appendix E

### Correspondence SIGPR sent to the Department of Justice Office of Legal Counsel



#### Office of the Special Inspector General for Pandemic Recovery

January 7, 2021

MEMORANDUM FOR THE GENERAL COUNSEL  
THE UNDERSECRETARY FOR INTERNATIONAL AFFAIRS  
THE COUNSELOR TO THE SECRETARY

FROM: Brian D. Miller *BDM*  
Special Inspector General for Pandemic Recovery

SUBJECT: Response to the Treasury OIG's Request for a Decision Establishing Exclusive Jurisdiction: If Intervention is Needed to Resolve SIGPR's Invitation to Jointly Work Programs with Concurrent Jurisdiction Under a Task Force Model, the Office of Legal Counsel Should Decide Jurisdiction

#### 1. Introduction

In March 2020, Congress reached a bipartisan agreement that provided relief to Americans suffering during this historic pandemic, passing the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116-136. The CARES Act established an intensive oversight framework with jurisdictional overlap. As part of this framework, Congress created the Office of the Special Inspector General for Pandemic Recovery (SIGPR) to primarily oversee specific programs involving Department of the Treasury (the Treasury) funds and management. Given SIGPR's focus on the Treasury's activities, Congress could have simply assigned SIGPR's mandate to the Office of the Inspector General for the Department of the Treasury (TIG). This could have been a sensible choice, given TIG's institutional and resource advantages as an existing oversight body within the Treasury. Instead, however, Congress chose to create a new body to reinforce TIG's pre-existing oversight presence and ensure additional transparency and integrity for specific programs established under the CARES Act.

Regrettably, instead of accepting SIGPR's invitation to partner with SIGPR to oversee CARES Act programs over which Congress provided concurrent jurisdiction, TIG has objected to SIGPR investigating and, by extension, reporting to Congress on both the Payroll Support Program (PSP) and the Coronavirus Relief Fund (CRF). See Memorandum from R. Delmar to the General Counsel, U.S. Department of the Treasury (December 31, 2020) (TIG Memorandum to the General Counsel). TIG has filed a memorandum formally seeking approval from the Treasury's Office of General Counsel—which, as noted below, already has rejected the premise of TIG's interpretation—by which it seeks to exercise exclusive jurisdiction over these programs. *Id.* Although we would rather partner with TIG to ensure a robust bulwark against fraud, waste, and

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abuse, we respond because we respectfully disagree with TIG’s interpretation of the relevant provisions.

Recognizing that reasonable people may disagree about the CARES Act’s jurisdictional lines, our continued hope is to move beyond differing opinions to join forces with *any* office that exercises concurrent jurisdiction to achieve our common goal to act in the public’s interest. As a former federal prosecutor, I have seen the best cases brought when agencies with overlapping jurisdiction set turf aside and work together in a task force. The American people deserve the government’s best collective efforts devoted to them and the important mission Congress sometimes entrusts to multiple Executive agencies. For that reason, SIGPR invited TIG to work on an evaluation that neither duplicates nor conflicts with any efforts publicized by TIG. Our invitation sought not only to leverage resources to achieve a common mission but also to deconflict any non-public efforts by TIG. We hope to resolve these issues without need for intervention, but if we cannot, SIGPR suggests that the Office of Legal Counsel at the Department of Justice is the appropriate forum for resolution.

## 2. Jurisdictional Background and Summary

In its first report to Congress on August 3, 2020 ([SIGPR Initial Report](#)), SIGPR offered its best, objective understanding of the jurisdictional contours of the CARES Act and invited Congress to clarify areas in which potential ambiguities remained. SIGPR concluded that it had core jurisdiction over CARES Act Division A loans, loan guarantees, and other investments by the Secretary of the Treasury, and any other Division A programs managed by the Secretary. Congress did not clarify or correct any of SIGPR’s lengthy legal analysis and made no changes to SIGPR’s jurisdiction under the recently enacted Consolidated Appropriations Act, 2021, which specifically preserved SIGPR’s appropriations and duties. *See e.g.* § 1003(a)(2)(C)(ii), H.R. 133, Public Law 116-260.

In its first quarterly report to Congress on September 30, 2020 ([SIGPR First Quarterly Report](#)), SIGPR reaffirmed its jurisdictional analysis and explained that, under that analysis, four Division A programs clearly fell within SIGPR’s core jurisdiction:

1. Loans, loan guarantees, and other investments by the Secretary of the Treasury under Division A, Title IV, Subtitle A, Section 4003;
2. The Payroll Support Program under Division A, Title IV, Subtitle B;
3. The Coronavirus Relief Program under Division A, Title V; and
4. Loans by the Secretary to the United States Postal Service under Division A, Title VI.

SIGPR again invited Congress to clarify any lingering ambiguities or incorrect legal conclusions. [SIGPR First Quarterly Report at 6](#). Yet, under the newly enacted coronavirus legislation, Congress

did not clarify or correct any of SIGPR's legal analysis; neither did it amend SIGPR's jurisdiction. See H.R. 133(a)(2)(C)(ii), Public Law 116-260.

3. SIGPR has Jurisdiction Over CARES Act Division A Loans, Loan Guarantees, and Other Investments by the Secretary of the Treasury, and Programs Managed by the Secretary

Section 4018 of the CARES Act, which falls under Division A, Title IV, Subtitle A, provides:

It shall be the duty of the Special Inspector General to . . . conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under any program established by the Secretary under this Act, and the management by the Secretary of any program established under this Act . . . .

CARES Act § 4018(c)(1). Thus, the CARES Act establishes three elements to SIGPR's jurisdiction:

1. An activity element: This limits SIGPR's jurisdiction to the making, purchase, management, and sale of loans, loan guarantees, and other investments, as well as the management of programs;
2. An institutional element: This limits SIGPR's jurisdiction to only those activities described above that are carried out by the Secretary of the Treasury; and
3. A divisional element: This limits SIGPR's jurisdiction to only those activities described above that are done pursuant to a program established under "this Act." *Id.*

The "divisional" element forms the core disagreement between SIGPR's and TIG's understanding of the CARES Act. We disagree on what Congress meant in giving SIGPR jurisdiction over programs established under "this Act." In its initial report to Congress, SIGPR previously published a legal analysis of what this term meant. See [SIGPR Initial Report](#) at 11–12. For the reasons set forth in that report and below, Congress's reference to "this Act" is a reference to Division A of the CARES Act—not merely Subtitle A of Title IV, which is titled the Coronavirus Economic Stabilization Act of 2020 (CESA), as TIG's Memorandum to the General Counsel advocates. That is why SIGPR has jurisdiction over CARES Act Division A loans, loan guarantees, and other investments by the Secretary of the Treasury, as well as programs managed by the Secretary, including the PSP and CRF.

a. “This Act” Means Division A of the CARES Act

Plain text confirms that SIGPR’s jurisdiction extends to all relevant activity carried out by the Secretary of the Treasury pursuant to programs established under Division A of the CARES Act. Section 3 of the CARES Act states, “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act shall be treated as referring only to the provisions of that division.” CARES Act § 3. Section 4018(c)(1), which defines SIGPR’s duties to audit and investigate loans, guarantees, and investments made by the Secretary under any program the Secretary establishes under “this Act,” and the management by the Secretary of any program established under “this Act,” is “contained in” Division A.<sup>1</sup> Therefore, applying Section 3’s definitional rule to Section 4018(c)(1)’s reference to “this Act,” SIGPR’s duties must “be treated as referring only to the provisions of” Division A of the CARES Act.

As noted above, in TIG’s view, references to “this Act” in Section 4018(c)(1) refer specifically to Title IV, Subtitle A, and not to Division A of the CARES Act. TIG rests its interpretation largely on the short title given to Title IV, Subtitle A—where Section 4018 appears—namely, the “Coronavirus Economic Stabilization Act of 2020.” *Id.* § 4001. But several textual clues support the plain-reading conclusion that Section 3’s definitional rule governs, so that the words “this Act” refer to Division A of the CARES Act and not simply Title IV, Subtitle A.

For example, throughout Title IV, Subtitle A, Congress repeatedly used the phrase “this subtitle,” rather than “this Act,” when referring only to the provisions of Subtitle A. In Section 4001, Congress gave “[t]his subtitle” the short title “Coronavirus Economic Stabilization Act of 2020.” *Id.* In the very next section, Congress wrote, “[i]n this subtitle,” followed by a list of definitions for terms appearing in Subtitle A. *Id.* § 4002. Under TIG’s theory, had Congress meant “this Act” to mean Title IV, Subtitle A, it would have used the term “this Act” to describe Subtitle A definitions, not “this subtitle.” But here, where Congress specifically differentiated references to the Coronavirus Economic Stabilization Act (Title IV, Subtitle A)—when it used “this subtitle”—from references to the CARES Act—when it used “this Act”—we must presume that Congress meant what it said. See *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (explaining that “[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”) (citations omitted).

This is made even more evident by Congress’s creation of the Congressional Oversight Commission. In Section 4020, Congress established the Congressional Oversight Commission—yet another instance of overlapping oversight under the CARES Act—and charged it with “conduct[ing] oversight of the implementation of *this subtitle* by the Department of the Treasury

<sup>1</sup> A review of the uses of the term “division” within the CARES Act confirms that such term refers to “Division A” or “Division B” and not some smaller section thereof. A contrary interpretation would render at least one provision unintelligible. See CARES Act § 6002.

and the Board of Governors of the Federal Reserve System,” *id.* § 4020(b)(1)(A) (emphasis added), and “review[ing] the implementation of *this subtitle* by the Federal Government,” *id.* § 4020(b)(1)(C) (emphasis added). Put plainly, Section 4020 reads exactly how TIG would prefer to read SIGPR’s jurisdictional statement in Section 4018. Yet the statements intentionally deploy different words.

Accordingly, Sections 4001, 4002, and 4020 of the CARES Act show that when Congress intended to refer to only Title IV, Subtitle A, it appropriately used the phrase “this subtitle,” not “this Act,” as TIG would argue. TIG’s argument therefore fails. Congress could not have intended the defined term “this Act” to refer only to Title IV, Subtitle A when used in defining SIGPR’s duties and jurisdiction in Section 4018(c)(1), while elsewhere Congress used the phrase “this subtitle” to do that.

In addition, reading the defined term “this Act” to convey the same meaning as the undefined phrase “this subtitle” would result in impermissible surplusage. The surplusage canon holds that, “[i]f possible, every word and every provision is to be given effect.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012). This “canon is well known.” *Id.* at 179. For this reason, the Supreme Court has consistently expressed a “reluctance to treat statutory terms as surplusage.” *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995); *see also Williams v. Taylor*, 529 U.S. 362, 364 (2000) (calling it “the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute”).

Finally, Section 3 may be overridden only where “*expressly* provided otherwise.” CARES Act § 3 (emphasis added). Nothing about Section 4001 giving a short title to Subtitle A *expressly* abrogates Section 3’s plain definitional rule.<sup>2</sup> As the Supreme Court stated over 70 years ago, a legal text’s titles and headings “cannot undo or limit that which the text makes plain.” SCALIA & GARNER, *supra*, at 221 (quoting *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528–29 (1947)). In other words, “a title or heading”—like the short title given Subtitle A—“should never be allowed to override the plain words of a text,” such as Section 3’s definitional rule. *Id.* at 222. This is especially true here, where Congress used the phrase “this subtitle” several times in Subtitle A to refer to Subtitle A. If Congress understood Section 4001 to expressly abrogate Section 3’s definitional rule, using the phrase “this subtitle” would have been unnecessary.

<sup>2</sup> For similar reasons, TIG reads far too much into Congress’s decision to codify the CRF alongside other provisions of the Social Security Act. TIG notes that the CRF “has been codified to 42 U.S.C. 801, a title and section that is entirely unresponsive” of SIGPR’s position. But the CRF is a program managed by the Secretary of the Treasury that is established under Division A of the CARES Act. Under the express and plain text of the CARES Act, SIGPR has jurisdiction over the CRF. *See* CARES Act §§ 3 (defining the meaning of “this Act” and 4018(c) (defining SIGPR’s jurisdiction).

In sum, the phrase “this Act” in Section 4018(c)(1) that defines SIGPR’s jurisdiction must be read as referring to Division A of the CARES Act.<sup>3</sup> First, Section 3 provides the definitional rule that “any reference to ‘this Act’ contained in any division of [the CARES Act] shall be treated as referring only to the provisions of that division,” and Section 4018 is “contained in” Division A. Second, Congress repeatedly used the phrase “this subtitle” within Title IV, Subtitle A to refer to Subtitle A, indicating Congress would have used “this subtitle” rather than “this Act” if it had wanted to refer to Subtitle A rather than Division A.<sup>4</sup> Third, neither Section 4001 nor any other provision of Title IV “expressly” abrogates Section 3’s general definitional rule.

b. The Department of the Treasury has Rejected TIG’s Counter-Textual Interpretation of “this Act”

The Department of the Treasury has twice rejected the approach TIG offers for interpreting the phrase “this Act”—once explicitly and once implicitly. First, on May 27, 2020, TIG published its “Interim Audit Update [on CRF] Recipient Reporting,” at [Oversight.gov/Sites/OLG-Reports/OLG-20-036](https://www.oversight.gov/sites/olig-reports/olig-20-036). Attached to that report is a letter from the Treasury Office of General Counsel responding to an earlier draft of TIG’s interim report. See *id.* at 7 (Letter from Department of the Treasury Office of General Counsel to Department of the Treasury Office of the Inspector General, at 4 (May 7, 2020)). In its letter, the Office of General Counsel “disagree[d] with the legal analysis underlying OIG’s draft memorandum” and carefully explained that an interpretation of the phrase “this Act” in the CARES Act must be guided by Section 3’s definitional rule, just as SIGPR believes. *Id.* at 7-12.

<sup>3</sup> TIG also bases its interpretation on a note by the Office of Law Revision Counsel that supposes the term “this Act” in CARES Act § 4018(c)(1) “probably means subtitle A.” TIG Memorandum to the General Counsel at 3 (emphasis added). The cited note offers no legal analysis. The Office of Law Revision Counsel is not staffed by members of Congress, and its notes are subordinate to statutory text enacted by Congress and signed into law by the President. This note, therefore, does not rise to the level of legislative history, which itself would be relevant only in the case of ambiguous text—and the text is unambiguous here. Further, because the note is not statutory text, it cannot serve to “expressly provide[]” an exception to Section 3’s default definitional rule. An admitted guess in a note by an administrative body neither triggers the exception to Section 3 nor offers insight into the intent of Congress. The proper interpretation of “this Act” can be comfortably gleaned from the plain text of the CARES Act.

<sup>4</sup> The only uses of “this Act” in Subtitle B are as part of the broader phrase “enactment of this Act” as used to set deadlines or establish other temporal cutoffs. See CARES Act §§ 4113(b)(1)(B), 4113(b)(2), 4116(a), and 4118(b). Indeed, most of the instances of “this Act” within the CARES Act are contained within a larger phrase, such as “the date of enactment of this Act,” a particular numbered section “of this act,” or “under this heading in this Act.” These uses do not call into question the plain-text conclusion that the use of “this Act” in Section 4018(c)(1) of Subtitle A is subject to the definitional rule of Section 3.

TIG's draft had recommended that the Treasury require CRF recipients to comply with the reporting requirements of CARES Act § 15011. But Section 15011's requirements apply only to certain "covered funds," which is a defined term, employing the phrase "this Act," in Division B of the CARES Act. "Accordingly," the Treasury correctly explained, "the reference to 'this Act' in the definition of covered funds in Division B can only be construed to refer to funds made available under provisions within that division." *See id.* at 7. Like the Office of General Counsel, SIGPR believes TIG's jurisdictional "conclusion[s] rest[] on a misunderstanding of the relevant provisions of the CARES Act." *Id.* at 9. And just as Section 3's definitional rule compels the conclusion that "this Act" refers to Division B when used to define "covered funds" in a Division B provision, the rule likewise compels the conclusion that the same phrase refers to Division A when used to describe SIGPR's duties and jurisdiction in Division A provisions.

Second, the Treasury has implicitly rejected the constrained interpretation TIG offers now by publicly issuing legal guidance that interprets "this Act"—as used in Division A, Title IV, Subtitle A—to mean the CARES Act, as opposed to limiting that definition to Title IV, Subtitle A, as TIG advocates.

Section 4002(4)(B) of the CARES Act defines an "eligible business" as "a United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act." CARES Act § 4002(4)(B) (emphasis added). In its publicly posted legal guidance to air carriers and eligible businesses, the Treasury defines "eligible businesses" to include "U.S. businesses that have not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the CARES Act . . . ." *See CARES-Airline-Loan-Support-Q-and-A-National-Security* (April 10, 2020) (emphasis added); *see also Procedures and Minimum Requirements for Loans to Air Carriers and Eligible Businesses and National Security Businesses under Division A, Title IV, Subtitle A of the CARES Act* (March 30, 2020). In other words, in defining eligibility criteria for the public, the Treasury had the opportunity to interpret the phrase "this Act" as Title IV, Subtitle A. It could have, but did not, limit eligibility exclusions only to those businesses that received adequate assistance from programs established by Title IV, Subtitle A, the "Coronavirus Economic Stabilization Act of 2020"—as TIG would have it. The Treasury instead recognized that "this Act" encompasses far more of the CARES Act than simply Title IV, Subtitle A, a view contrary to TIG's.<sup>5</sup>

<sup>5</sup> The Treasury's rejection of TIG's interpretive approach with respect to Section 4002 is especially instructive because TIG suggests that one reason SIGPR's jurisdiction should be read as limited to Subtitle A is the consistency between SIGPR's mandate to focus on loans, loan guarantees, and other investments and the fact that Subtitle A involves loans, loan guarantees, and other investments. But the definition of "eligible business" in Section 4002 similarly speaks of businesses that have "not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act," and the Treasury rejected TIG's constrained interpretation with respect to that provision. More importantly, the premise of TIG's argument—that limiting SIGPR to overseeing Title IV, Subtitle A is the right fit—is mistaken. Congress gave SIGPR jurisdiction over "the making, purchase, management, and sale of loans,

c. SIGPR has Jurisdiction Over the PSP and CRF Because They are Division A Programs Managed by the Secretary

It is undisputed that SIGPR has jurisdiction over loans, loan guarantees, and other investments by the Secretary of the Treasury under Division A, Title IV, Subtitle A, Section 4003. But TIG's interpretation of "this Act," as limited to that Subtitle, leads it to conclude that SIGPR lacks jurisdiction over the PSP and CRF. SIGPR disagrees for the reasons discussed above. SIGPR more specifically discussed its jurisdiction over the PSP and CRF in its First Quarterly Report. See [SIGPR First Quarterly Report](#) at 13–15. That analysis was also included in TIG's Memorandum to the General Counsel and is summarized but not repeated here. See TIG Memorandum to the General Counsel at 1–3. In short, SIGPR has concurrent jurisdiction over the PSP and the CRF because they are programs established under Division A of the CARES Act that are managed by the Secretary of the Treasury.

TIG, moreover, is mistaken in asserting that it has "exclusive" jurisdiction over the CRF. See TIG Memorandum to the General Counsel at 4. The word "exclusive" appears nowhere in the relevant CARES Act provisions, and TIG offers nothing in its memorandum to either support or explain its conclusion that any assignment of CARES Act oversight is necessarily exclusive. To the contrary, the CARES Act specifically disclaims giving exclusive oversight authority to TIG for the CRF. See CARES Act § 5001(a), SSA § 601(f)(4) (explaining that "[n]othing in this subsection"—namely, the subsection granting TIG authority to monitor, oversee, and recoup funds—"shall be construed to diminish the authority of any Inspector General . . .") (emphasis added). Thus, the paragraph assigning TIG oversight of the CRF expressly allows other Inspectors General with jurisdiction, including SIGPR, to exercise oversight.

Further, with respect to the PSP, Congress expressly charged TIG to audit certifications made under one subsection, namely, Subsection 4113(a). See CARES Act § 4113(d) (authorizing the Treasury IG to "audit certifications made under subsection (a)" of Section 4113). It did not assign an express role for TIG to oversee other important agreements, certifications, and conditions, for example, those required by Section 4114(a)(1) (requiring agreements or certifications to refrain from conducting involuntary furloughs or reducing pay rates), Section 4114(a)(3) (requiring agreements or certifications not to pay dividends or make capital distributions), Section 4116(a) (requiring agreements to executive compensation limits) or those required by the terms of any PSP Agreement. SIGPR's jurisdiction therefore *at least* covers these additional certifications and requirements, which present opportunities for fraud and other illegal conduct.

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loan guarantees, and other investments made by the Secretary of the Treasury under any program established by the Secretary under this Act, *and the management by the Secretary of any program established under this Act.*" CARES Act § 4018(c)(1). The second prong of SIGPR's jurisdiction is not limited to loans, loan guarantees, or other investments, and the fact that Congress deliberately divided SIGPR's jurisdiction into two prongs establishes that point.

In summary, SIGPR maintains concurrent jurisdiction with TIG over the CRF and PSP because they are programs established by Division A of the CARES Act that are managed by the Secretary of the Treasury over which Congress did not grant TIG exclusive jurisdiction.

#### 4. SIGPR's Evaluation of CRF Recipients Would Not Duplicate or Conflict with TIG's Efforts

In SIGPR's first quarterly report to Congress, see [SIGPR First Quarterly Report](#) at 15, it recognized that because of TIG's active work on the CRF, SIGPR's emphasis on deconfliction, and the need for oversight of other CARES Act funding, SIGPR did not then intend to prioritize limited resources on CRF efforts. But it did not disclaim any role, either.

On December 28, 2020, SIGPR invited TIG to join SIGPR's Office of Audits in an evaluation of the use and distribution of the CRF by state and local recipients to identify potential fraud, waste, abuse, and compliance issues. TIG's publicly stated audit objective had focused on the "Treasury's implementation activities," as opposed to recipients. See Engagement Memorandum – Audit of the Department of the Treasury's Implementation of "Coronavirus Relief Fund" Under Title VI of the CARES Act (A-FA-20-039) (March 30, 2020), at [OIG Engagement Memorandum Audit of Coronavirus Relief Fund Payments to States Tribal Governments and Units of Local Governments](#) (TIG's Engagement Letter). Further, nothing that TIG made publicly available provided any notice or indication that it was performing proactive audits or evaluations of recipients' compliance with CRF criteria. SIGPR nonetheless asked TIG to identify any ongoing efforts in that area for the purposes of deconfliction.

TIG's Engagement Letter stated that its audit objective was "to assess Treasury's implementation activities to include the establishment of policies, procedures, and other terms and conditions for making such payments to States and Tribal governments and to units of local governments that are required to certify use of funds." *Id.* (emphasis added). The letter further described the audit scope as including but "not limited to, any applicable Treasury Directive(s), policies, procedures, payment terms and conditions, and other documentation governing Treasury's administration of Coronavirus Relief Fund payments." *Id.* As part of TIG's audit, it was anticipated that the audit staff would interview key officials and staff responsible for administering payments to States, Tribal governments, and units of local governments and review documentation, among other things. *Id.* Nowhere did the engagement letter discuss or even anticipate that TIG would audit or evaluate the conduct of state, tribal, and local governments and their adherence to CARES Act criteria or Treasury guidance.

TIG has also published three products on its website. The first was the "Interim Audit Update," discussed above, that set forth six actions taken as part of TIG's CRF audit. See "Interim Audit Update [on CRF] Recipient Reporting" (May 27, 2020), at [Oversight.gov/Sites/OIG-Reports/OIG-20-036](#). All six actions were aimed internally at the Department of the Treasury's actions in

implementing the CRF. None were directed to CRF recipients, which is the planned focus of SIGPR's effort. *Id.* TIG did identify one weakness with reporting requirements but faulted the Treasury specifically for not notifying recipients of reporting requirements and not providing user-friendly means to meet those requirements. *Id.*

The other two products TIG publicized were letters to individual CRF recipients. The first, issued July 14, 2020, concerned the use of the CRF by America Samoa that had "come to [TIG's] attention." [American Samoa Uses of Coronavirus Relief Fund Payment \(OIG-CA-20-023\)](#) (July 14, 2020). This letter did not include any reference to audit standards, audit work performed by TIG or audit results, but rather was an opinion letter that concluded that it was improper for America Samoa to use the CRF for certain telework expenses and the leasing of building/office space. *Id.* The last published product was also an opinion letter by TIG, dated December 14, 2020, concerning Iowa's use of the CRF for an accounting and HR management system. [State of Iowa's Noncompliance with Uses of Coronavirus Relief Fund Requirements \(OIG-CA-21-011\)](#) (December 14, 2020). TIG's letter was in response to an inquiry by the Iowa State Auditor (found at [Auditor.Iowa.Gov/Media/CMS/CARES Act Funds](#)). Again, there was no reference to audit work, methodology or scope of the audit, standards or audit results: TIG offered an opinion letter in response to an Iowa state official.

In contrast to TIG's focus on the Treasury's actions, SIGPR instead will evaluate recipients' usage of the CRF to identify potential fraud, waste, abuse, and compliance issues. It will not focus on the Treasury's implementation actions, and therefore, it does not conflict with TIG's publicized audit. SIGPR's evaluation will further constitute a proactive programmatic effort, as opposed to responding to specific<sup>6</sup> matters brought to the attention of TIG or SIGPR. While SIGPR appreciates TIG sharing a bit of information about the work it has been doing (because SIGPR has no intention of duplicating any of its efforts), we again respectfully request that, using a task force model, it set aside disagreements about jurisdiction, join SIGPR's efforts, and deconflict any of its ongoing or concluded efforts that have not been made public.

##### 5. SIGPR Oversight of the CRF Could Fill Gaps

In addition to working with TIG, SIGPR's oversight of the CRF could fill gaps. In the CARES Act, Congress provided TIG with a special recoupment role in overseeing the CRF. Specifically, if TIG determines that a state, tribal government, or unit of local government has failed to comply with CARES Act use requirements, "the amount equal to the amount of funds used in violation . . . shall be booked as a debt of such entity owed to the Federal Government [, and] [a]mounts recovered

<sup>6</sup> SIGPR will evaluate recipients' adherence to CARES Act criteria, namely that (1) necessary expenditures were incurred due to the public health emergency with respect to COVID-19; (2) those expenditures were not accounted for in the state or local budget most recently approved as of the date the CARES Act was enacted; and (3) the expenditures were incurred during the period permitted under the CARES Act.

... shall be deposited into the general fund of the Treasury.” CARES Act § 5001(a), SSA § 601(f)(2).

According to TIG, in fulfilling these duties, it “work[s] with Treasury management daily and ha[s] resolved approximately 500 questions posed by recipients on allowable uses of CRF proceeds.” See TIG Memorandum to the General Counsel at 6. SIGPR lacks insight into what that exactly means. But if in so doing, TIG has provided prospective advice to CRF recipients, those actions could impact its ability to independently and objectively conduct audits in accordance with Generally Accepted Government Auditing Standards (GAGAS). See GAGAS, Yellow Book, Sections 3.18–22, 3.26, 3.30(f), and 3.66–67 (explaining that an auditor’s taking on the role of management or otherwise performing management functions on behalf of the audited entity could lead an auditor to take a position that is not objective); *but see* Sections 3.25, 3.64 and 3.72(f). Further, if TIG’s advice on allowable uses of the CRF has been incorporated into guidance for all CRF recipients, that impact may extend even further. *Id.*

Perhaps it was precisely because Congress gave TIG special oversight and recoupment authorities respecting the CRF that it also expected—and provided a role for—other Inspectors General to exercise oversight. CARES Act § 5001(a), SSA § 601(f)(4) (providing that nothing in the subsection granting TIG’s authorities “shall be construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978 . . .”). If TIG has joined the Treasury in management action to resolve recipients’ questions on the prospective allowable uses of the CRF, SIGPR could provide audit work that TIG cannot.

## 6. Conclusion

In conclusion, we respectfully disagree with TIG’s legal analysis of jurisdiction under the CARES Act. We welcome partnering with TIG in a task force type model to deconflict where we need to and join forces where we do not. If we regretfully find ourselves in a posture of seeking third-party resolution of our respective jurisdictions, we submit that the Office of Legal Counsel (OLC) is the appropriate forum to do so.

OLC provides legal advice to executive branch agencies in response to requests. “Such requests typically deal with legal issues of particular complexity and importance *or those about which two or more agencies are in disagreement.*” See <https://www.justice.gov/olc> (emphasis added); see also Management of Federal Legal Resources, Exec. Order No. 12146, 3 C.F.R. 409, 411 (1980), reprinted in 28 U.S.C. § 509 (1982) (providing “[w]henver two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the

agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere”).

That TIG and SIGPR both fall within the Department of the Treasury does not change this analysis. OLC can and has decided “intra-agency disputes.” Farber & Joseph O’Connell, *Agencies as Adversaries*, 105 Cal. L. Rev. 1375, 1412 (2017), at <http://www.californialawreview.org/wp-content/uploads/2017/10/3-Farber-OConnell.pdf> (citing Dep’t of Justice Inspector Gen.’s Access to Info. Protected by the Fed. Wiretap Act, Rule 6(e) of the Fed. Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act, 39 Op. O.L.C. (July 20, 2015)), at <https://www.justice.gov/sites/default/files/opinions/attachments/2017/05/18/2015-07-20-doi-oig-access-ed-note.pdf>); see also e.g. Summary of Systemic Procurement Issues within GSA’s National Capital Region, Audit Memorandum Number A120171 (November 7, 2013) at 3 n4, at [GSA Audit National Capital Region 2013](#) (noting that when management of the General Services Administration (GSA) did not agree with the GSA Inspector General’s audit findings, GSA requested an OLC opinion and OLC issued a final opinion).

Of course, within an Executive agency, disputes between program offices often may be resolved through escalation to higher-level officials, but that is not the situation here. Offices of Inspectors General were established in relevant part for the purpose of creating “*independent and objective units . . . to conduct and supervise audits and investigations . . . to promote economy, efficiency, and effectiveness in the administration of, and . . . to prevent and detect fraud and abuse in . . . programs and operations . . .*” See Inspector General Act of 1978 (5 U.S.C. App.) § 2 (emphasis added). Preserving the independence of TIG and SIGPR in conducting audits and in detecting and preventing fraud and abuse in programs of the Department of the Treasury is best served by asking OLC to resolve which (or both) offices may lawfully exercise oversight of those very same programs. OLC has the authority to resolve intra-agency legal disputes, has done so in the past, and is the most appropriate body to determine this legal, jurisdictional question.



## Office of the Special Inspector General for Pandemic Recovery

March 26, 2021

BY ELECTRONIC MAIL

Daniel L. Koffsky  
Deputy Assistant Attorney General  
Office of Legal Counsel  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Mr. Koffsky:

I attach our memorandum responding to the question that the Office of Legal Counsel (OLC) asked concerning the jurisdiction provided to my office by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, specifically about the meaning of Section 3.

In brief, the CARES Act grants SIGPR jurisdiction over (1) “the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under this Act” and (2) “the management by the Secretary of any program established under this Act.” The relevant “Act,” we argue, is division A of the CARES Act, including the Coronavirus Relief Fund (CRF) and the Payroll Support Program (PSP), not just Title IV, Subtitle A of that Act.

“Except as expressly provided otherwise,” the CARES Act instructs that “any reference to ‘this Act’ contained in any division of this Act shall be treated as referring only to the provisions of that Division.” CARES Act, § 3. Read naturally, section 3 creates a default rule that “this Act” means the whole of the provisions of either division A or B.

When ordinary speakers refer to a group, they typically refer to the entirety of that group. It would be strange to say that “only to the provisions of that Division” refers to a tacit, varying subset of division A or B, just as it would be strange to hear the remark, “He’s the best hitter in the League” and think the speaker means “the best hitter in the NL East Division,” rather than the American League or National League. The best interpretation is simply to accept section 3 at face value: references to “this Act” really refer to “this division”—all of it.

This natural reading of section 3 comports with the CARES Act as a whole, congressional drafting conventions, judicial precedent, and OLC’s own opinions. The alternative suggested interpretation runs contrary to ordinary usage and injects confusion, inviting variations in meaning of “this Act,” depending on context. But the “context indicates” standard differs from the “expressly provides” standard, and Congress purposely chose the “expressly provides” standard for section 3. Section 3’s job is to serve as a firewall between two divisions. It asks too much of it to demand that it contextually vary the meaning of the phrase “this Act.” And even if “this Act” were to be defined contextually, context makes clear SIGPR’s jurisdiction would include programs outside of Title IV, Subtitle A, including the CRF and PSP.

Cabining SIGPR’s jurisdictional mandate to a single subtitle would diminish the oversight over government funds in the hundreds of billions of dollars. Through creating oversight bodies such as my Office, Congress purposed that the CARES Act’s unprecedented economic investment would be protected by an unprecedented

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level of oversight. We are eager to work with the rest of the oversight community to ensure that American taxpayer funds are protected from fraud, waste, and abuse.

Sincerely,



Brian D. Miller  
Special Inspector General for Pandemic Recovery

CC: Richard Delmar  
Deputy Inspector General  
The U.S. Department of Treasury

Laurie Schaffer  
Acting General Counsel  
The U.S. Department of Treasury

Heather Walsh  
Deputy General Counsel  
The U.S. Office of Management and Budget

## Response to OLC's Inquiry Regarding SIGPR's Jurisdiction

### INTRODUCTION

Section 3 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act provides that, “[e]xcept as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act shall be treated as referring only to the provisions of that division.”<sup>1</sup> Your Office has asked for SIGPR’s views on the proper interpretation of this section:

Does section 3 establish a rule that ‘this Act,’ absent an express exception, *means all of the provisions in the division* or does it instead establish a *restrictive* rule that references to ‘this Act’ refer *at most* (‘only’) to the provisions in the division, but not necessarily to *all* of the provisions in the division?

The answer is the former. Section 3 is read most naturally to mean that, unless explicitly stated otherwise, “this Act” refers to exactly all the provisions of the division in which it is located. “Only the teams in the American League East Division” means the New York Yankees, the Boston Red Sox, the Baltimore Orioles, the Toronto Blue Jays, and the Tampa Rays, but not the Detroit Tigers. That natural reading of section 3 also comports with the CARES Act as a whole, congressional drafting conventions, judicial precedent, and your Office’s opinions.

The alternative reading is strained. No one would say “only the teams in the American League East Division” to mean up to all five teams in the division, but possibly, depending on context, just the Yankees, just the teams with a winning record, or just the division’s

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<sup>1</sup> Pub. L. No. 116-136, § 3, 134 Stat. 281, 285 (2020) (appended at 1 U.S.C. § 1 note).

pitchers. That would be contrary to ordinary usage and inject confusion. The alternative reading should not be followed.

We note, however, that resolving this question should not affect SIGPR's jurisdiction. Even if "this Act" were to be defined contextually, context makes clear SIGPR's jurisdiction over the Payroll Support Program and the Coronavirus Relief Fund.

## ARGUMENT

### **1. Section 3 establishes a rule that "this Act" refers to the whole of the division in which the phrase is found.**

#### **1.1. The most natural reading of section 3 treats "this Act" as referring to the whole of the relevant division.**

Major League Baseball (MLB) is an association of 30 professional baseball teams, divided into the American League and the National League. Sometimes people call the entire MLB organization "the league"; sometimes they use "the league" to refer only to the National or American League. What "the league" would never mean, however, is just some of the teams in it. If someone said, "he's the best hitter in the league," she might mean the best hitter in the MLB, or only in the National League. But she certainly would not mean, "he's the best hitter in the NL East Division."

As this example shows, people typically do not use grouping words like *league*—or *division*—to mean just some of what is inside that group, whether teams in a baseball league or subtitles in a statutory division. Rather, people naturally use the word *only* in this sense to mean the whole of a subpart within a greater grouping.

Section 3 should be read in the same way.<sup>2</sup> "[A]ny reference to 'this Act' contained in any division ... shall be treated as referring

<sup>2</sup> See, e.g., *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634 (2012) ("it is normal usage that, in the absence of contrary indication, governs our interpretation of texts").

only to the provisions of that division.” “This Act” does not refer to the entire CARES Act; instead, it refers to the provisions of either division A or B—and not further to a tacit subset of division A or B.

Section 3 can be taken in parts to show why this natural reading of it flows so easily. The key phrase is “referring only to the provisions of that division.” The word *only* is used here as an adverb modifying the verb *referring*. Definitions of *only* when used that way include “[a]t the very least,” “[a]nd nothing else or more; merely; just,” and “[e]xclusively; solely.”<sup>3</sup> *Only* “is a word that connotes exclusivity.”<sup>4</sup> But it is a not word connoting that the thing being excluded should be further divided up. *Only* is a word of precision: “at the very least” and “nothing else or more.”

The rest of the phrase, “the provisions of that division,” supports this commonsense understanding. The word *the*, as used here, “is a function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context.”<sup>5</sup> Thus “*the* alien” is a particular alien who has been released from custody;<sup>6</sup> “*the* person who has custody” is a particular person who is the proper respondent in a habeas proceeding;<sup>7</sup> and “*the* remedies and procedures” of the Americans with Disabilities Act is a defined universe of rules that excludes others that would supplement them.<sup>8</sup> Similarly here, “*the* provisions” means a specific set of provisions: those “of that division” in which the phrase “this Act” is found.

This clause leaves no room to distinguish some part of the provisions from the whole. One would not say “the members of that team”

<sup>3</sup> *American Heritage Dictionary of the English Language* (5th ed. 2020) (definition of *only*), [ahdictionary.com/word/search.html?q=only](https://ahdictionary.com/word/search.html?q=only).

<sup>4</sup> *Farrell v. Commissioner*, 136 F.3d 889, 895 (2d Cir. 1998).

<sup>5</sup> *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (ellipsis and brackets in original) (quoting *Merriam-Webster's Collegiate Dictionary* 1294 (11th ed. 2005)).

<sup>6</sup> *See id.*

<sup>7</sup> *See Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004).

<sup>8</sup> *See Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 4–5 (D.C. Cir. 2000).

to mean just the outfielders. Nor would one say “the provisions of that division” to mean one subtitle among that division’s provisions. Had Congress meant to convey this meaning, it could have used different words. For example: “any reference to ‘this Act’ contained in any division of this Act shall be treated as referring only to the *relevant* [or *some* or *at most the*] provisions of that division.” Congress could have even simply omitted *the*: “only provisions of that division.” Indeed, with due respect to our colleagues, that is how the Treasury Office of Inspector General (OIG) must rephrase section 3 to support its alternative reading: “reference to ‘this Act’ refers to *provisions of the divisions*, which specifically contain individually enacted titles of law.”<sup>9</sup>

But that is not what Congress did. To the contrary, it began section 3 with the phrase, “except as *expressly* provided otherwise.” And *express* means “[c]learly and unmistakably communicated; stated with directness and clarity.”<sup>10</sup> Congress required a clear textual signal before varying the meaning of “this Act” in the CARES Act, which necessarily excludes a context-driven analysis.<sup>11</sup>

Congress’s choice in section 3 was not due to a lack of legislative imagination. Congress has said so when it wants a contextual rule of construction.<sup>12</sup> Indeed, even the Dictionary Act states that “[i]n

<sup>9</sup> Memorandum from Amy J. Altemus, Acting Counsel, to Richard Delmar, Acting Inspector General, Department of the Treasury, at 2 (Mar. 24, 2021) (emphasis in original) [hereinafter “Treasury OIG Response”].

<sup>10</sup> *Black’s Law Dictionary* (11th ed. 2019) (definition of *express*).

<sup>11</sup> See *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 696 (2003) (“‘Express provision’ must mean something more than any verbal hook for an argument.” (brackets omitted) (quoting 28 U.S.C. § 1441(a)); see also *Toussie v. United States*, 397 U.S. 112, 115 (1970) (when a statute of limitations should be extended “[e]xcept as otherwise expressly provided by law,” an offense should not be treated as continuing “unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one”).

<sup>12</sup> See, e.g., 28 U.S.C. § 963 (“As used in this chapter, unless the context indicates otherwise, the words ‘court’ and ‘courts’ include the Supreme Court of the United States and the courts enumerated in section 610 of this title.”); 33 U.S.C. § 511

determining the meaning of any Act of Congress, unless the context indicates otherwise,” various definitions and conventions apply.<sup>13</sup> The “context indicates” standard is different from the “expressly provides” standard,<sup>14</sup> and we can assume Congress chooses one or the other (or both, as in Dodd–Frank<sup>15</sup>) on purpose.<sup>16</sup>

**1.2. Reading section 3 to treat “this Act” as referring to the whole of the relevant division comports with the CARES Act’s structure.**

This natural reading of section 3 accords with the CARES Act “as a whole.”<sup>17</sup> The CARES Act consistently relies upon section 3’s rule of construction to cross-reference provisions located within the same division. The phrase “this Act” appears 408 times within the CARES Act.<sup>18</sup> In each case, these cross-references apply only to provisions

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(“[w]hen used in this subchapter, unless the context indicates otherwise,” certain terms mean certain things).

<sup>13</sup> 1 U.S.C. § 1.

<sup>14</sup> See *Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 200 (1993) (“contextual ‘indication’ bespeaks something more than an express contrary definition”).

<sup>15</sup> See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 2, 124 Stat. 1376, 1386 (2010) (codified at 12 U.S.C. § 5301) (“As used in this Act, the following definitions shall apply, except as the context otherwise requires or as otherwise specifically provided in this Act.”).

<sup>16</sup> See, e.g., *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016) (“Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says.”).

<sup>17</sup> *United States v. Morton*, 367 U.S. 822, 828 (1984); see, e.g., *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (it is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”).

<sup>18</sup> Over 150 of these uses refer to the timing of the act. See, e.g., CARES Act § 3226(d) (referring to “the date of enactment of this Act.”). Because division A and division B were enacted simultaneously, these provisions are unaffected by the distinction at issue. There are also over 150 references to appropriations made under this “heading in this Act.” These references are always to appropriations made within the same division.

located within the same division.<sup>19</sup> In contrast, where Congress intended to specify a narrower unit, it used a narrower term.<sup>20</sup> The CARES Act also uses specific section numbers to reference specific sections.<sup>21</sup>

“These statutory features show that Congress knows how to” specify what it intends.<sup>22</sup> The best interpretation, therefore, is to read references to units at a particular level of organization as referring to the whole of those units—not as referring, potentially, only to a subset of them. Where Congress intended to limit a reference to anything less than the entire unit identified, it did so. But in section 3, “this Act” means the entire division—not just a subtitle, section, or other subset.

The structure of the CARES Act reinforces this whole-division interpretation. The CARES Act consists of two distinct legislative efforts united by a common theme and amalgamated into one bill for

<sup>19</sup> For example, in division B on page 235, the CARES Act provides “[t]hat for purposes of this Act, the Legal Services Corporation shall be considered an agency of the United States Government.” All six uses of “Legal Services Corporation” also appear in division B. Similarly, there are 152 references to appropriations made under this “heading in this Act.” *E.g., id.* at 226. All of the cross-referenced appropriations are in the same division.

There are also miscellaneous usages where the phrase “this Act” is inserted along with other language into other acts. *See, e.g., id.* §§ 2113 (amending Railroad Unemployment Insurance Act), 3211 (amending Public Health Service Act), 3611 (amending Emergency Family and Medical Leave Expansion Act), 3581 (amending Food Drug, and Cosmetic Act), 4001 (amending Federal Credit Union Act), 4027(b) (similar). In these rare cases, context makes clear that “this Act” refers to the statute in which the language is being inserted, as they are expressly introduced as amendments to these statutes and appear in quotation marks.

<sup>20</sup> *See, e.g., id.* §§ 4018(f)(2) (“Nothing in this subsection ...”), 3701(c) (referring to “[t]he amendments made by this section”), 4002(4) (defining term for purposes of “this subtitle”), 18001(b) (referring to sections 18002, 18003, and 18004 “of this title”), *id.* (referring to “funds appropriated under this heading in this Act”) (emphases added).

<sup>21</sup> *See, e.g., id.* § 1106(a)(8) (referring to “section 1102 of this Act”); *see also id.* §§ 1107, 1109, 2301, 2302(a)(3) (cross-referencing provisions in division A); *id.* § 20014 (referring to “sections 20003 through 20013 of this title in this Act”).

<sup>22</sup> *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021).

passage. Division A creates government programs aimed at keeping workers paid and employed, enhancing the nation's healthcare system, and stabilizing the economy. Its table of contents taxonomizes division A into six titles, eleven subtitles, eleven parts, six subparts, and 186 sections. In contrast, division B concatenates emergency appropriations for the coronavirus response and agency operations across thirteen titles and 102 subsections, employing headers as the primary organizing unit; the table of contents only identifies division B as a whole. The face of the statute, as well as the context of its rapid passage, suggest that Congress drafted two discrete pieces of legislation separately and glued them together before voting.<sup>23</sup> Section 3's purpose, evidently, is to firewall each division from the other's use of "this Act."

This can happen when Congress compiles multiple stand-alone bills into a single act.<sup>24</sup> Congress has used the exact words of section 3 in at least two dozen annual appropriations statutes,<sup>25</sup> as well as other major emergency legislation, including the American Recovery and Reinvestment Act<sup>26</sup> and, most recently, the Consolidated Appropriations Act, 2021.<sup>27</sup>

<sup>23</sup> Portions of the CARES Act with short titles also appear as modules in other pieces of draft legislation. Compare CARES Act, division A, title III, subtitle B ("COVID-19 Pandemic Education Relief Act of 2020"), with H.R. 6379, 116th Cong., division J, and S. 3548, 116th Cong., division D, title II.

<sup>24</sup> See James V. Saturno & Jessica Tollestrup, Cong. Res. Serv., *Omnibus Appropriations Acts: Overview of Recent Practices* (2016); see also M. Douglass Bellis, Fed. Judicial Ctr., *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges* at 10 (2008) ("Occasionally, several different 'Acts' of Congress are combined, each Act being called something like a 'division.' This is, thankfully, rare, and in most cases it is obvious from the labeling. So it causes little confusion even if it is aesthetically questionable."), [fjc.gov/sites/default/files/2012/DraftCon.pdf](https://www.fjc.gov/sites/default/files/2012/DraftCon.pdf).

<sup>25</sup> See 1 U.S.C. § 1 note.

<sup>26</sup> See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 4, 123 Stat. 115, 116 (appended at 1 U.S.C. § 1 note).

<sup>27</sup> See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 3, 134 Stat. 1182, 1185 (2020) (appended at 1 U.S.C. § 1 note).

The practice is also useful. For example, CARES Act § 23004, in division B, cross-references “title VI of this Act.”<sup>28</sup> But there are at least two different “title VI”s in the CARES Act—one in division A and one in division B.<sup>29</sup> Fortunately, section 3 makes clear that this provision refers to “title VI” of division B.<sup>30</sup> That is section 3’s job. It asks too much of it to demand that it contextually vary the meaning of the phrase “this Act.” The better interpretation is simply to accept section 3 at face value: references to “this Act” really refer to “this division,” all of it.

Congress too has understood section 3 of the CARES Act literally. Section 15010, in division B of the CARES Act, established the Pandemic Response Accountability Committee, another oversight entity with duties to monitor “covered funds,” defined in part as funds made available under “this Act.”<sup>31</sup> A few months ago, Congress amended that definition to give the Committee jurisdiction over funds made

<sup>28</sup> CARES Act, § 23004(c).

<sup>29</sup> See *id.* § 6001; *id.* at 262. There is arguably also a third “title VI” located in division A, title V, section 5001, which amends the Social Security Act to include new provisions to be styled “title VI” of the Social Security Act (codified at 42 U.S.C. § 601).

<sup>30</sup> Context confirms this interpretation. Title VI of division A concerns miscellaneous provisions and borrowing authority for the U.S. Postal Service. It has no relationship to section 23004’s limitation on the use of funds to respond to the pandemic. Interpreting section 23004 to apply to this section would therefore make no sense. Title VI of division B, on the other hand, concerns the regular operation and support for DHS, TSA, USCG, CISA, and FEMA. Section 16001 there makes clear that “Notwithstanding any other provision of law, funds made available under each heading in this title, except for ‘Federal Emergency Management Agency—Disaster Relief Fund’, shall only be used for the purposes specifically described under that heading.” In other words, this title concerns appropriation for ongoing operation of several government agencies separate and apart from the broader government response to the pandemic; it contains a caveat that the funds may be used for the purposes described in the title, “notwithstanding any other provision of law.” The “other provision of law” referenced is section 23004, which would otherwise prohibit the use of these funds for anything other than “to prevent, prepare for, and respond to coronavirus.” Thus, reading “this Act” in section 23004(c) to refer exclusively to provision contained within the same division permits reading sections 16001 and 23004 in harmony—where they fit hand in glove.

<sup>31</sup> CARES Act § 15010(a)(6)(A).

available under “the Coronavirus Aid, Relief, and Economic Security Act (*divisions A and B*).”<sup>32</sup> Treasury OIG characterizes this action as stemming from a “misapplication of Section 3,” and states that “this Act,” in context, “was a freestanding reference . . . referr[ing] to the whole CARES Act.”<sup>33</sup> But section 3 makes clear (as does your Office’s question) that “this Act” never goes so far as to encompass the entire CARES Act.<sup>34</sup> If anything, it was Congress’s *regard* for the plain language of section 3 that led it to amend the Pandemic Response Accountability Committee’s jurisdiction.

This interpretation does not grant SIGPR overly expansive authority. SIGPR has jurisdiction only over programs in division A—and even there, only those that relate to (1) “the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury” or (2) “the management by the Secretary of any program established under this Act.”<sup>35</sup> As we explained in our August report and letter to OLC,<sup>36</sup> we analyze each program in division A individually to determine whether it meets all the criteria set out in section 4018—and most do not.<sup>37</sup>

<sup>32</sup> Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 801(b)(1).

<sup>33</sup> Treasury OIG Response, *supra* note 9, at 5.

<sup>34</sup> The Department of the Treasury’s Office of General Counsel agrees. See Memorandum from Deborah L. Harker, Assistant Inspector General for Audit, to Daniel J. Kowalski, Counselor to the Secretary, attach. 1 at 4 (May 27, 2020) (“the reference to ‘this Act’ in the definition of covered funds in division B can only be construed to refer to funds made available under provisions within that division”), [oversight.gov/sites/default/files/oig-reports/OIG-20-036.pdf](https://www.oversight.gov/sites/default/files/oig-reports/OIG-20-036.pdf).

<sup>35</sup> CARES Act, § 4018(c).

<sup>36</sup> SIGPR, *Initial Report to Congress* at 9–25 (Aug. 3, 2020), [sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Initial-Report-to-Congress-August-3-2020\\_0.pdf](https://sigpr.gov/sites/sigpr/files/2020-09/SIGPR-Initial-Report-to-Congress-August-3-2020_0.pdf); Letter from Brian Miller, Special Inspector General for Pandemic Recovery to Steven Engel, Ass’t Att’y Gen., Office of Legal Counsel (Jan. 14, 2021).

<sup>37</sup> For example, we do not believe SIGPR has jurisdiction over Entrepreneurial Development (§ 1103), the State Trade Expansion Program (§ 1104), the Minority Business Development Agency (§ 1108), Emergency Economic Injury Disaster Loans (§ 1110), or the Small Business Debt Relief Program (§ 1112), which are all administered by the Small Business Administration—not the Secretary of the

**1.3. Reading section 3 to treat “this Act” as referring to the whole of the relevant division comports with precedent and practice.**

The natural reading of section 3 is consistent with the precedent and practice of all three branches of government and the views of contemporaneous observers.

*The judicial branch.* The Supreme Court has used a similar approach when interpreting the scope of statutory provisions. The Federal Vacancies Reform Act of 1998 (FVRA),<sup>38</sup> at section 3345(b)(1), provides that “a person may not serve as an acting officer for an office under this section” in certain circumstances. Writing for the Court, the Chief Justice explained that the phrase “under this section”

clarifies that subsection (b)(1) applies to all persons serving under § 3345. Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line. Congress used that structure in the FVRA and relied on it to make precise cross-references. When Congress wanted to refer only to a particular subsection or paragraph, it said so. See, e.g., § 3346(a)(2) (“subsection (b)”); § 3346(b)(2) (“paragraph (1)”). But in (b)(1) Congress referred to the entire section—§ 3345—which subsumes all of the ways a person may become an acting officer.<sup>39</sup>

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Treasury. Nor does SIGPR assert jurisdiction over the Pandemic Unemployment Assistance Program (§ 2102) or Temporary Financing of Short-Term Compensation Payments (§ 2108), which are administered by the Department of Labor. Neither does SIGPR assert jurisdiction over the telehealth network and telehealth resource centers grant programs (§ 3212), rural healthcare services outreach programs (§ 3213), the Healthy Start Program (§ 3225), the Importance of Blood Supply program (§ 3226), nursing workforce development (§ 3404), or Outreach and Assistance for Low-Income Programs (§ 3803), which are administered by the Department of Health and Human Resources. Even though these programs are all established in division A, they are not funded or managed by the Department of the Treasury.

<sup>38</sup> Pub. L. No. 105-277, 5 U.S.C. § 3345 *et seq.*

<sup>39</sup> *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 938–39 (2017) (citations omitted).

Applying this reasoning, the Court held that the FVRA's limitation on service applied to all three categories of acting officers in section 3345.<sup>40</sup> Lower courts have applied similar reasoning to statutory terms like "section,"<sup>41</sup> "subchapter,"<sup>42</sup> and "chapter,"<sup>43</sup>—and even to analogous terms in contracts.<sup>44</sup>

The same reasoning applies here. Whenever the CARES Act refers to a division, subtitle, or section, it refers to "the entire" unit identified. Thus, when section 4018(c) directs SIGPR to audit and investigate the activities of the Secretary of the Treasury "under any program established under this Act," that subsection refers the reader to consider division A in its entirety. The next task is to review each provision individually to determine which ones are applicable.<sup>45</sup> In this case, not every program in division A relates to "investments made by the Secretary" or is "managed by the Secretary."<sup>46</sup> Only a few do. SIGPR therefore only has jurisdiction over these programs.

*The executive branch.* Your Office has previously read the identical reference provision in appropriations bills to equate "this Act"

<sup>40</sup> *Id.* at 929; *cf. Sealed Appellee 1 v. Sealed Appellant 1*, 767 F.3d 418, 423 (5th Cir. 2013) ("The phrase 'as provided in this section' plainly refers to the entirety of § 549.45, which includes a subsection applicable to inmates committed under § 4245." (quoting 28 C.F.R. § 549)).

<sup>41</sup> *See, e.g., Actelion Pharm., Ltd. v. Matal*, 881 F.3d 1339, 1345 (Fed. Cir. 2018) ("The 'statute also unambiguously refers to the entirety of 'section 371.'" (quoting 35 U.S.C. § 154(b)(1)(A))).

<sup>42</sup> *United States v. Hoang*, 636 F.3d 677, 680 (5th Cir. 2011) ("This subchapter" refers to "the entirety of SORNA—not just the initial registration requirements." (quoting 42 U.S.C. § 16913(d) and *United States v. Hinckley*, 550 F.3d 926, 951–52 (10th Cir. 2008) (McConnell, J., dissenting))).

<sup>43</sup> *See, e.g., Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1548 (D.C. Cir. 1992) ("The words 'this chapter' refer to the entire Act." (quoting 30 U.S.C. § 1270(c)(1))).

<sup>44</sup> *See, e.g., Wright v. Excel Paralubes*, 807 F.3d 730, 733 (5th Cir. 2015) ("First, 'this Agreement,' as used in the contract, refers to the entirety of the M[aster Services Agreement].").

<sup>45</sup> *See, e.g., SIGPR, Initial Report to Congress*, *supra* note 36, at 9–25 (conducting such analysis of division A).

<sup>46</sup> CARES Act, § 4018(c).

with the entire applicable division. Just this year, your Office adopted the whole-division interpretation to conclude that the Hyde Amendment applied to federal student-aid programs.<sup>47</sup> Division H, title III of the 2021 annual appropriations legislation funded, among other things, the Department of Education’s student-aid programs. The final title in division H contains a Hyde Amendment, which applies to all funds “appropriated by this Act.”<sup>48</sup> Because the Hyde Amendment is located in division H, your Office concluded that the “relevant ‘Act’ in this case is division H” so “by its plain terms, the Hyde Amendment applied” to all funds appropriated for the federal student-aid programs.<sup>49</sup>

Your Office also read “this Act” to mean the whole relevant division when concluding that an appropriations rider obligated the Department of Justice (DOJ) to provide its Office of Inspector General with grand jury and wiretap information that would otherwise be shielded from disclosure.<sup>50</sup> DOJ’s funding that year came from the Commerce, Justice, Science, and Related Agencies Appropriations Act of 2016 (CJS Appropriations Act).<sup>51</sup> After it was stitched together with a half dozen other appropriations acts, the CJS Appropriations Act became division B of the Consolidated Appropriations Act, 2016.<sup>52</sup> Section 540 in the last title in division B commanded that “[n]o funds provided in this Act” to the Justice Department “be used to deny an Inspector General . . . timely access to any records” so requested.<sup>53</sup>

<sup>47</sup> See Application of the Hyde Amendment to Federal Student-Aid Programs, 45 Op. O.L.C. \_\_, slip op. at 4 (Jan. 16, 2021) (Hyde Amendment).

<sup>48</sup> See Pub. L. No. 116-260, div. H, §§ 506–507.

<sup>49</sup> See Hyde Amendment, *supra* note 47, at 4.

<sup>50</sup> Effect of Appropriations Rider on Access of DOJ Inspector General to Certain Protected Information, 40 Op. O.L.C. 39, 46–48 (2016) (IG Access).

<sup>51</sup> See Pub. L. No. 114-113, div. B, 129 Stat. 2242, 2286 (2015).

<sup>52</sup> See Pub. L. No. 114-113, 129 Stat. 2242 (2015).

<sup>53</sup> See Pub. L. No. 114-113, div. B, § 540, 129 Stat. 2242, 2232 (2015).

Your Office readily concluded that “The ‘Act’ referred to in section 540 is the CJS Appropriations Act” or division B.<sup>54</sup>

So too here. The CARES Act is consolidated appropriations legislation with two divisions. By default, the word “Act” means one of those two divisions. The CARES Act does not designate each constituent act as its own division, but that makes sense given that the consolidated enactment is focused on tackling one problem: the economic fallout caused by the government’s response to the coronavirus pandemic. There is therefore no reason to break with executive branch precedent that, absent express language otherwise, “this Act” means “this division.”

*The legislative branch.* As discussed earlier, Congress has a ready set of rules of construction. It knows how to calibrate references and definitions to the level of precision it desires, including the standard section 3 clause it used here. The natural interpretation of section 3 comports with that historical practice.

It should be no surprise that the CARES Act’s legislative history and the statements of contemporaneous observers support this view. Legislators regularly referred to SIGPR’s broad authority over CARES Act funds allocated to the Department of the Treasury.<sup>55</sup> The Congressional Research Service appears to share this

<sup>54</sup> IG Access, *supra* note 50, at 48.

<sup>55</sup> See, e.g., 116th Cong. Rec. S2026 (Mar. 25, 2020) (Statement of Sen. Schumer) (“We compelled the creation of Treasury Department Special Inspector General to provide oversight of Treasury loans and investments...”); 116th Cong. Rec. H1853 (Mar. 27, 2020) (Statement of Rep. Maloney) (“The bill establishes a Special Inspector General to conduct oversight over stimulus spending by the Department of the Treasury. The bill requires the Special Inspector General to track *all loans*, loan guarantees, and other obligations and expenditures *made by the Treasury Department under the bill.*”) (emphases added).

interpretation.<sup>56</sup> This understanding was also consistent with my testimony during my confirmation hearing before the Senate.<sup>57</sup>

If anything, legislators seem to presume that SIGPR has more authority than contained in the text of the CARES Act. For example, 29 Senators wrote to me asserting that, “[a]s the newly confirmed Special Inspector General for Pandemic Recovery (SIGPR), you have the authority to investigate and audit all loans made or managed by the Secretary of the Treasury, including those made under the Paycheck Protection Program (PPP).”<sup>58</sup> Significantly, this program

<sup>56</sup> See Ben Wilhelm, Cong'l Research Serv., *Special Inspector General for Pandemic Recovery: Responsibilities, Authority, and Appointment* at 1 (Apr. 13, 2020) (“The SIGPR . . . is directed to ‘conduct, supervise, and coordinate audits and investigations’ of the financial assistance programs for businesses included in Title IV of the CARES Act and any other Treasury programs established under the act (§4018(c)(1)).” (emphasis added)); Ben Wilhelm & William T. Egar, Cong'l Research Serv., *Congressional Oversight Provisions in the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136)* at 3–4 (Apr. 17, 2020) (“The SIGPR is tasked with conducting audits and investigations of the activities of the Treasury pursuant to the CARES Act, including the collection of detailed information regarding loans provided by Treasury.”). These characterizations of SIGPR’s jurisdiction contain no limitation to particular titles or subtitles of the CARES Act.

<sup>57</sup> During my confirmation hearing, I stated that “it is clear I have jurisdiction over the Secretary of the Treasury. And right now, I consider every dollar that goes from Treasury through the Federal Reserve to also give me jurisdiction over the Federal Reserve. Now, if I am fortunate enough to be confirmed, and I analyze that and come up with a different view, I may be knocking on your door to get more explicit authority.” *Confirmation Hearing for Special Inspector General and Treasury and Housing Departments Before the S. Comm. On Banking, Housing, and Urban Affairs*, 116th Cong. (May 5, 2020) (at 2:02:11), [c-span.org/video/?471759-1/confirmation-hearing-special-inspector-general-treasury-housing-departments](https://c-span.org/video/?471759-1/confirmation-hearing-special-inspector-general-treasury-housing-departments). In response, Senator Brown confirmed his understanding of SIGPR’s broad authority: “That is exactly what we wanted to hear. It is essential. I mean, it is trillions of dollars, as you know.” *Id.*

<sup>58</sup> Letter from Kelly Loeffler, U.S. Senator, et al., to Brian Miller, Special Inspector General for Pandemic Recovery, at 1 (Aug. 6, 2020); *cf.* Letter from Brian Miller, Special Inspector General for Pandemic Recovery, to Kelly Loeffler, U.S. Senator, at 1 (Aug. 12, 2020) (“[I]t is not clear SIGPR has jurisdiction over the PPP.”); Office of the Special Inspector General for Pandemic Recovery, *Quarterly Report to the United States Congress*, at 16-19 (Sept. 30, 2020) (analyzing whether SIGPR has jurisdiction over PPP and stating that PPP “is the primary example of a program over which SIGPR’s jurisdiction remains unclear . . . . The critical question is

was established by CARES Act § 102, which is in division A but outside title IV, subtitle A. Other legislators have similarly viewed SIGPR's jurisdiction broadly.<sup>59</sup>

For all these reasons, we believe that section 3 establishes the first rule.

## **2. Reading section 3 to treat “this Act” as a changeable term would be strained and unworkable.**

OLC has asked whether section 3 could “instead establish a *restrictive* rule that references to ‘this Act’ refer *at most* (‘only’) to the provisions in the division, but not necessarily to *all* of the provisions in the division?” The answer is no.

As explained above, section 3 when read in a plain, ordinary manner does not suggest that “only to the provisions of that division” contemplates anything less than the whole of those provisions. That is simply not how regular users of the language would convey the idea of “up to, but not beyond, the division’s provisions.”

An alternative interpretation should not be adopted. There is no canon of interpretation that a rule of construction should be

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whether, or to what extent, the Secretary [of the Treasury] manages the program.”). These letters are available on SIGPR’s website, [sigpr.gov/news](https://sigpr.gov/news).

<sup>59</sup> See Letter from Mike Crapo, U.S. Senator, to Janet Yellen, Secretary of the Treasury, appendix of questions (Mar. 16, 2021) (“Can you guarantee that SIGPR will have the full backing of the Treasury to carry out proper oversight over any program established and managed by the Secretary—even if that program is continued through new legislation?”), [finance.senate.gov/ranking-members-news/crapo-presses-treasury-for-details-on-use-of-state-local-funds](https://finance.senate.gov/record/ranking-members-news/crapo-presses-treasury-for-details-on-use-of-state-local-funds); Letter from Kathleen M. Rice, U.S. Representative, et al. to Justin Muzinich, Deputy Secretary of the Treasury, and Brian Miller, Special Inspector General for Pandemic Recovery, at 1 (Dec. 10, 2020) (urging an investigation into a town’s use of funds under the Coronavirus Relief Fund), [kathleenrice.house.gov/uploadedfiles/letter\\_to\\_treasury\\_re\\_toh\\_cares\\_act\\_fund\\_12.10.20\\_final.pdf](https://kathleenrice.house.gov/uploadedfiles/letter_to_treasury_re_toh_cares_act_fund_12.10.20_final.pdf); Letter from Elizabeth Warren, U.S. Senator, to Brian Miller, Special Inspector General for Pandemic Recovery, at 1 (July 15, 2020) (SIGPR has jurisdiction “to investigate *any* fraud, waste and abuse of *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) funds.” (emphasis added)), [sigpr.gov/sites/sigpr/files/2020-11/Sept-22-2020-Letter-Response-to-July-15-2020-Warren-Letter.pdf](https://sigpr.gov/sites/sigpr/files/2020-11/Sept-22-2020-Letter-Response-to-July-15-2020-Warren-Letter.pdf).

disregarded, depending on context. What is more, such a rule is at odds with the textual command of section 3's proviso clause: that "this Act" can bear a different meaning only when "expressly provided otherwise." This plain-language command is doubly enforceable as an essentially definitional one.<sup>60</sup> At the very least, an alternative interpretation would render the proviso superfluous, since a different meaning could attach to "this Act" even if *not* expressly provided otherwise.<sup>61</sup> An alternative interpretation would also invite variations in meaning of "this Act," but "we do not lightly assume that Congress silently"—or here, quite loudly to the contrary—"attaches different meanings to the same term in the same statute."<sup>62</sup>

This last feature of the alternative interpretation would be especially problematic. As discussed above, Congress knows how to vary the constriction of a rule of construction, and how to give terms special meaning in particular subunits of legislation. It did not open the spigot here to alternative, non-expressed meanings, nor did it provide a special meaning to "this Act" in CARES Act § 4018 or otherwise. Inferring such variegated meanings would introduce unwarranted uncertainty. It would require readers to guess at the scope of the

<sup>60</sup> See *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from a term's ordinary meaning." (quoted source omitted)); see, e.g., *Fed. Sav. & Loan Ins. Corp. v. Ticktin*, 490 U.S. 82, 87 (1989) ("Because the proviso does not apply to" a certain provision, it "is not an Act of Congress that has 'otherwise provided' a limitation on the jurisdictional grant"); cf. *SAS Inst., Inc. v. Inacu*, 138 S. Ct. 1348, 1358 ("The statutory provisions before us deliver unmistakable commands. . . . There is no room in this scheme for a wholly unmentioned 'partial institution' power that the lets the Director select only some challenged claims for decision.").

<sup>61</sup> See, e.g., *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) ("[O]ur reading . . . is consistent 'with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'" (brackets omitted) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

<sup>62</sup> *U.S. Forest Serv. v. Cowpasture River Preserv. Ass'n*, 140 S. Ct. 1837, 1845 (2020) (ellipsis and internal quotation marks omitted).

statute's most frequently used term, unmoored from a statutory definition or workable standard.

Perhaps recognizing as much, the Treasury OIG has proffered its own bright-line test: "this Act" means the nearest short title; but if the provision is not in a unit with a short title, then it refers to the entire division.<sup>63</sup> Respectfully, this is not a recognized rule of interpretation supported by citation to caselaw or precedent.<sup>64</sup> Nor is this how other entities have understood the CARES Act; and Treasury OIG recognizes as much.<sup>65</sup> Such a reading privileges titles over operative text, but a legal text's titles and headings "cannot undo or limit that which the text makes plain."<sup>66</sup>

Treasury OIG's interpretation also misreads another word in section 3—"division." OIG's test only fits section 3 if "referring only to the provisions of that division" means "referring only to the provisions of that title or subtitle bearing a short title." But the word "division" is not a generic term like "unit" or "portion." It is a term of art used to refer to a hierarchical unit larger than a "title," "subtitle," "part," "chapter," or "section." As noted, the CARES Act contains two such divisions—A and B. The first of these begins immediately following section 3. There should be no doubt, then, that "division" in section 3

<sup>63</sup> See Treasury OIG Response, *supra* note 9.

<sup>64</sup> The only provisions OIG cites are found in the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231. Division A, section 3606 provides a short title for that section; division B, title IV, section 401 provides a short title for that title. But neither Section 3606 nor title IV contain any use of the term "this Act" that sheds light on whether the use of that term is necessarily restricted to the larger unit bearing that short title. These citations are merely evidence that some large statutes use short titles.

<sup>65</sup> See Treasury OIG Response, *supra* note 9, at 2 ("While this does not appear to have been the interpretation previously placed upon that Section..."); see also *id.* at 1 (characterizing "evaluations of this section" as "in error").

<sup>66</sup> *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947); see also *Caminetti v. United States*, 242 U.S. 470 (1917) ("the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words").

uses the term in the technical sense and refers to “division A” and “division B.”

Further, contrary to Treasury OIG’s suggestion, “providing a specific designation for included legislative provisions, such as the ‘Coronavirus Economic Stabilization Act’” is not “superfluous.”<sup>67</sup> Such short titles are useful shorthand to refer to provisions in other statutes and commonly appear in draft legislation. Indeed, quite a number of draft bills refer to title IV, subtitle A by its short title, including H.R. 6778 “to amend the Coronavirus Economic Stabilization Act of 2020 to place certain requirements on corporations receiving Federal aid related to COVID-19.”<sup>68</sup> These short titles are helpful labels.

### **3. At the very least, the relevant “Act” referred to in section 4018 is division A.**

Even if “this Act” can sometimes refer to something less than the division in which it is found, contextual evidence demonstrates that section 4018 uses “this Act” to refer to division A. Therefore, the Payroll Support Program and the Coronavirus Relief Fund fall within SIGPR’s jurisdiction because they are funded and managed by the Secretary of the Treasury and located in “this Act”—division A.

The CARES Act, title IV, subtitle A, section 4018 grants SIGPR jurisdiction over (1) “the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under this Act” and (2) “the management by the Secretary of any program established under this Act.”<sup>69</sup> Treasury OIG interprets “this Act” in SIGPR’s jurisdictional mandate to mean no

<sup>67</sup> Treasury OIG Response, *supra* note 9, at 1.

<sup>68</sup> Or consider H.R. 8007, 116th Cong.: “To eliminate the authority of the Board of Governors of the Federal Reserve System to hold closed meetings in planning economic stabilization under the Coronavirus Economic Stabilization Act of 2020.” *See also* H.R. 6379, 116th Cong., § 105; H.R. 6965, 116th Cong., § 2(b)(2); S. 3598, 116th Cong., § 3(c)(2); S. 3727, 116th Cong., § 2(b)(2); S. 4236, 116th Cong., § 2(e); S. 4818, 116th Cong., § 805.

<sup>69</sup> CARES Act § 4018(c).

more than the subtitle's designation as "The Coronavirus Economic Stabilization Act of 2020."<sup>70</sup> Contextual clues undermine that reading of section 4018.

*First*, throughout title IV, subtitle A, Congress consistently used the phrase "this subtitle" instead of "this Act" to refer to the provisions of subtitle A.<sup>71</sup> For example, the Congressional Oversight Commission is tasked with oversight "of the implementation of this subtitle," by reporting on "the use" of "authority under this subtitle," "investments made under this subtitle," and "transactions under this subtitle" with funds "made available by this subtitle."<sup>72</sup> In marked contrast, SIGPR's purview is tethered to the financial support provided by the Treasury Secretary "under this Act."<sup>73</sup> It is implausible that Congress repeatedly used different words—"subtitle" and "Act"—to mean the same thing: subtitle A.<sup>74</sup> As the Supreme Court has explained, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."<sup>75</sup> There is a presumption against such elegant variation—particularly when the variation is between "closely related" provisions like those establishing SIGPR and the Oversight Commission.<sup>76</sup> The relevant "Act" in section 4018, then, is something overlying "this subtitle"—namely, division A.

<sup>70</sup> CARES Act § 4001. See Treasury OIG Response, *supra* note 9, at 5.

<sup>71</sup> See *id.* §§ 4002, 4003(e), 4006, 4019, 4020, 4025, 4027, 4028, 4029.

<sup>72</sup> *Id.* § 4020(b), (g).

<sup>73</sup> *Id.* § 4020.

<sup>74</sup> See SIGPR, *Initial Report to Congress*, *supra* note 36, at 11.

<sup>75</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th rev. ed. 2000)); see also, e.g., *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("In the end, we cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute.").

<sup>76</sup> See *E.E.O.C. v. Gilbarco, Inc.*, 615 F.2d 985, 999 & n.23 (4th Cir. 1980) ("Congress determined in closely related circumstances to use two different terms. It is, therefore, more likely than not that the use of different language indicated a legislative intention to mean different things."); see also *Med. Coll. of Wis. Affiliated Hosps., Inc. v. United States*, 854 F.3d 930, 933 (7th Cir. 2017) ("A presumption that a single

Moreover, Congress used the phrase “this subtitle,” not “this Act,” to refer to portions of the CARES Act with their own short title designation. Section 4001 of the CARES Act provides, “This subtitle may be cited as the ‘Coronavirus Economic Stabilization Act of 2020.’”<sup>77</sup> Section 3501 designates “[t]his subtitle” as “The COVID-19 Pandemic Education Relief Act of 2020,” and the following section defines terms for “this subtitle.”<sup>78</sup> Other provisions distinguish between “this subtitle” and “this Act” in the same sentence.<sup>79</sup> This pattern shows careful delineation, not inartful drafting.

It is worth noting that Congress went out of its way to refer to title IV, subtitle A of the CARES Act as a “subtitle,” rather than an “Act.” Take, for example, the legislation facsimile highlighted in Treasury OIG’s response letter.<sup>80</sup> Section 1 designates the entire public law as the Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief, 2017. Like the CARES Act, this law is arranged into divisions, and it contains the same “references” section at issue here. In contrast, section 1 of division A provides that “This Act may be cited as” a particular short title, whereas section 4001 of the CARES Act provides this “*subtitle* may be cited as” a particular short title.<sup>81</sup> Even when using stock language to create a short title for the subtitle, Congress altered the formula to use “subtitle” to refer to these provisions, demonstrating that when Congress meant to refer only to title IV, subtitle A, it used the phrase “subtitle”—not “this Act.”

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word means the same thing throughout a statute goes together with a presumption that different words mean different things.”); *cf.* Antonin Scalia & Bryan Garner, *Reading Law* 172 (2012) (“The presumption of consistent usage applies also when different sections of an act or code are at issue.”).

<sup>77</sup> CARES Act § 4001.

<sup>78</sup> *Id.* §§ 3501, 3502.

<sup>79</sup> *See id.* § 3853 (“Nothing in this Act (or the amendments made by this Act) shall apply to any nonprescription drug (as defined in section 505G(q) of the Federal Food, Drug, and Cosmetic Act, as added by section 3851 of this subtitle) . . .”).

<sup>80</sup> Treasury OIG Response, *supra* note 9, at 2 (reproducing Pub. L. 116-56, 131 Stat. 1129 (2017)) (emphasis added).

<sup>81</sup> CARES Act § 4001 (emphasis added).

*Second*, section 4018 contemplates that SIGPR will have oversight jurisdiction over programs outside title IV, subtitle A. SIGPR has jurisdiction over two categories of activity: (1) “the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary,” and (2) “the management of any program established under this Act.”<sup>82</sup> The first category fits well with subtitle A, the heart of which is § 4003, authorizing the Secretary to make “[l]oans, loan guarantees, and other investments.”<sup>83</sup> But the second category appears to be much broader. It acts as a residual clause, capturing all other critical activities provided by Treasury under division A of the CARES Act. But that clause would have no operative effect under Treasury OIG’s reading since the programs of title IV, subtitle A clearly fall within the first category of SIGPR jurisdiction. Limiting SIGPR’s jurisdiction to programs in subtitle A effectively crosses out SIGPR’s second duty to oversee the Treasury’s management of “any program” under the CARES Act.

*Third*, reading “this Act” in section 4018 to mean division A better effectuates Congress’s goal of protecting the CARES Act’s unprecedented economic investment with unprecedented oversight. To create a matrix of oversight entities to monitor the use of these funds, Congress extended the jurisdiction of existing institutions, such as Treasury OIG and the Government Accountability Office, and also created new entities such as the Pandemic Response Accountability Committee, Congressional Oversight Commission, and SIGPR.<sup>84</sup> These entities are not siloed into realms of exclusive oversight jurisdiction; they have overlapping responsibilities to monitor many of the same programs. Confining SIGPR to a single subtitle would decrease the level of oversight afforded to the use of government funds in the hundreds of billions of dollars. Surely Congress did not intend that outcome.

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<sup>82</sup> *Id.* § 4018(c)(1).

<sup>83</sup> *Id.* § 4003(a).

<sup>84</sup> See SIGPR, *Initial Report to Congress*, *supra* note 36, at 56–60.

In sum, the “Act” in section 4018 is division A. That is the only meaning that accounts for Congress’s choice to distinguish “Act” and “subtitle” throughout title IV, subtitle A. And this interpretation is necessary to give harmonious effect to the rest of the CARES Act.

### CONCLUSION

Section 3 establishes a rule that “this Act,” absent an express exception, means all the provisions in the division. The alternative interpretation would subvert basic principles of statutory interpretation, inject uncertainty, and run counter to the history of all three branches of government in this area. We appreciate your Office’s attention to this matter and look forward to its response, so that all entities involved can proceed confidently with their critical oversight work.

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SIGPR’S RESPONSE TO OLC’S INQUIRY



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