

Past as Prologue: The Wave of Investigations to Follow the Pandemic Recovery and Actions that Companies Can Take Now to Prepare

March 31, 2020

Election and Political Law, White Collar Defense and Investigations

On March 30, 2020, the inspectors general of several major agencies selected the Department of Defense Inspector General, Glenn Fine, to lead a newly created federal oversight entity that will investigate waste, fraud, and abuse in connection with the massive new coronavirus economic relief legislation. The inspectors general were exercising new authority contained in the legislation, but these actions also echo Congress's past approach to oversight of recovery efforts. This client alert examines the new investigative authorities in the legislation and provides advice for companies, based on past examples.

Throughout American history, when Congress has confronted a national emergency and authorized a major government response, the economic recovery has almost always been accompanied by significant congressional, civil, or criminal investigations. This paradigm dates back at least to the Civil War, with Congress's Joint Committee on the Conduct of the War. In modern times, the savings and loan crisis and bailout of the late 1980s led to criminal convictions and the Keating Five lobbying scandal.

Most recently, after the 2008 financial crisis, Congress sought to formalize and institutionalize the oversight and investigation of recovery efforts through the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") and other oversight bodies. A Congressional Oversight Panel held 26 hearings over more than two years on the causes, symptoms, and effects of the economic crisis and government response and reform efforts. Investigations by just one entity, the Recovery Accountability and Transparency Board, resulted in 1,665 convictions, pleas, or judgments, along with more than \$157 million in recoveries, forfeitures, seizures, and other savings.

In the newly enacted Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Congress again provided that oversight and investigations will accompany the \$2 trillion relief program:

- The bill establishes a **Special Inspector General for Pandemic Recovery** within the Department of the Treasury. The Special Inspector General will be presidentially appointed, as was the SIGTARP. The Special Inspector General will be responsible for conducting, supervising, and coordinating audits and investigations of the making,

purchase, management, and sale of loans, loan guarantees, and other investments by the Treasury under the CARES Act. Like the SIGTARP, the Special Inspector General for Pandemic Recovery will also be responsible for providing quarterly reports to Congress. Congress dedicated \$25 million of new Treasury funds for the Special Inspector General to carry out these duties.

- The bill establishes a **Pandemic Response Accountability Committee** within the Council of Inspectors General on Integrity and Efficiency to prevent and detect fraud, waste, abuse, and mismanagement of funds and to mitigate risks across programs and agencies. Congress appropriated \$80 million for the Committee. This new Committee appears to be modeled on the Recovery Accountability and Transparency Board established by the American Recovery and Reinvestment Act of 2009 (ARRA), which is generally viewed as having successfully protected against the misuse of recovery funds. Although the Recovery Board was required to coordinate its activities with various agency inspectors general, the new Pandemic Committee is created within the Inspectors General Council. This may mean that the Pandemic Committee will have a heightened degree of autonomy and a greater ability to act quickly and with better coordination than was the case for the Recovery Board. The Pandemic Committee is authorized to issue subpoenas to persons outside of the government.
- The bill authorizes the creation of a bipartisan **Congressional Oversight Commission** charged with oversight of the Treasury Department and Federal Reserve, as they work to provide economic stability in the wake of the coronavirus. Like the TARP Congressional Oversight Panel, the CARES Act's Congressional Oversight Commission will consist of five members appointed by the leaders of Congress. Also like its predecessor, the Congressional Oversight Commission will have significant authority to conduct oversight and investigations, including holding hearings and taking testimony.

In addition to these new entities, existing authorities are certain to continue to investigate. For example, the House Oversight and Reform Committee has already launched an investigation of travel insurance companies and their coverage decisions related to travel cancelled due to the coronavirus. It is likely that congressional committees will examine the administration's preparedness and response to the crisis, along with the activities of deeply affected companies and industries, especially those that receive federal aid. If history is a guide, these investigations will continue for many years into the future. For example, as late as last year, the House Financial Services Committee held a hearing that focused on bank accountability "10 years after the Financial Crisis." The CEOs of Citigroup, JP Morgan Chase, Morgan Stanley, Bank of America, Goldman Sachs, and others all testified.

Criminal authorities will also continue to investigate. Attorney General William Barr has directed federal prosecutors to prioritize investigations and prosecutions of coronavirus fraud schemes, and Deputy Attorney General Jeffrey Rosen directed each U.S. Attorney's Office to identify a prosecutor to serve as the lead coronavirus fraud coordinator. These developments mirror actions that were taken after the financial crisis. For example, SIGTARP investigations related to fraud involving TARP funds resulted in enforcement actions against nine financial institutions and in the successful criminal prosecutions of 51 bank officers and executives. The Department of Justice—including through a Financial Fraud Enforcement Task Force and a Residential Mortgage-Backed Securities Working Group—investigated fraud related to the financial crisis itself, ultimately resulting in several multi-billion dollar civil settlements with financial institutions.

Of course, the investigations that will follow the coronavirus recovery will not be exactly the same as the investigations of the financial crisis or the savings and loan bailout. Each new crisis has its own unique attributes and characteristics. Nonetheless, based on our experience defending companies and individuals involved in similar investigations, we can offer the following five tips for being prepared:

1. **Invest in compliance now to avoid problems in the future.** Companies need to understand the implications of taking federal money and establish systems that ensure compliance. For example, companies that benefit from increased federal investment in pandemic responses may have increased compliance obligations as a result of contracting with the government. Certain of the federal relief programs contain restrictions on executive compensation. Even the process of seeking federal assistance may implicate laws that regulate lobbying, depending on the agencies or officials contacted.
2. **Consider the public and political dynamics of corporate actions.** Congressional investigators often follow where the press leads, and investigative reporters will be looking for juicy stories to highlight. Some recipients of prior federal funds were criticized for paying bonuses, moving jobs overseas, or even for their executives' vacation arrangements. By seeking and accepting public funds, companies will often be held by the public and Congress to a higher standard.
3. **Understand your company's areas of vulnerability.** Companies in certain industries already face a high risk of investigation. Industries involved in the response to the crisis—including the biopharmaceutical, technology, consumer goods, and medical device industries—could have their actions scrutinized closely. Sometimes companies with the best intentions, such as rushing to respond to a pandemic, will take risks that would not be warranted upon reflection. Companies should have a clear understanding of these vulnerabilities and a clear and compelling answer to after-the-fact criticisms.
4. **Involve your legal department in business decisions.** With the vast majority of employees working from home, and business situations moving rapidly, there are significant risks that business decisions can be made in “silos” without proper examination by all relevant parts of the company, including the legal department. The coronavirus pandemic has placed pressure on government regulators, including the Food and Drug Administration and others, to relax tightly controlled regulatory regimes. This dynamic also creates opportunities for industry, including for companies that may seek to develop new product lines or otherwise re-tool their manufacturing processes to meet current demand for hand sanitizers, facial masks, and other products and supplies needed during the pandemic. It is critical to involve the legal and compliance functions in these business decisions in order to mitigate a host of risks, including missteps with the federal government that could lead to regulatory or criminal exposure.
5. **Carefully vet all applications for assistance and other submissions to the federal government.** In order to review applications and other submissions quickly and exercise judgment about the suitability of individual institutions to receive funds, the government will need to rely on representations, attestations, and certifications made by applicants. Companies and their counsel should carefully vet such statements with an eye toward the potential civil and criminal risks associated with submissions to the government. Civil and criminal authorities will focus on such submissions and other disclosures in any eventual investigations, and companies should seek to mitigate this risk with proper planning and legal review processes on the front-end.

Covington's cross-disciplinary team of congressional investigation and white collar defense and investigation lawyers are available to help companies navigate these issues now, and to defend them if necessary in the inevitable investigations to come.

* * *

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Election and Political Law and White Collar Defense and Investigations practices:

<u>Robert Kelner</u>	+1 202 662 5503	rkelner@cov.com
<u>Mythili Raman</u>	+1 202 662 5929	mraman@cov.com
<u>Brian Smith</u>	+1 202 662 5090	bdsmith@cov.com
<u>Steven Fagell</u>	+1 202 662 5293	sfagell@cov.com
<u>Daniel Suleiman</u>	+1 202 662 5811	dsuleiman@cov.com
<u>Angelle Baugh</u>	+1 202 662 5211	abaugh@cov.com
<u>Ashley Nyquist</u>	+1 202 662 5893	anyquist@cov.com
<u>Brendan Parets</u>	+1 202 662 5134	bparets@cov.com
<u>Morgan Schreurs</u>	+1 202 662 5362	mschreurs@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.