Prepared Remarks of Former Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") Neil M. Barofsky Before the U.S. Senate Committee on Homeland Security and Governmental Affairs, dated July 28, 2020

Chairman Johnson, Ranking Member Peters, and Members of the Committee, thank you for your invitation and for the privilege to testify before you today. As the former, and first, Special Inspector General of the Troubled Asset Relief Program ("SIGTARP")—nominated by President George W. Bush in November 2008 and confirmed by this body several weeks later—I was responsible for the oversight of one of the most significant components of our nation's financial response to the crisis we faced in 2008. That experience provided me with insights that I hope will be of use to the Committee as it considers the effectiveness of the financial programs enacted in response to our current crisis, as well as further controls that may be necessary to ensure that these programs serve their intended goals.

As the former SIGTARP, I established and supervised the audit division that monitored the financial assistance provided to companies and individuals as part of the historic TARP program. I also provided real-time advice and oversight as the U.S. Department of Treasury ("Treasury") developed and implemented the programs that are serving as the model for much of what it is using in response to the current crisis. I regularly reported to Congress on that work.

I believe that our agency played an important role in the last crisis, providing necessary transparency to Congress and the American people, and our recommendations helped preserve the integrity of the TARP program from fraud, waste, and abuse. I created and oversaw SIGTARP's law enforcement division, which conducted criminal and civil fraud investigations. The very existence of that division deterred would-be criminals who might otherwise have sought to rip off the TARP, but those who nonetheless did attempt to defraud the program were brought to justice.

SIGTARP's investigative division has secured 384 convictions and recovered more than $11 billion to date,[1] leading to historically low losses for a program of its size and scope.

After my tenure at SIGTARP, I served as a Senior Fellow at New York University School of Law's Center on the Administration of Criminal Law, and as an adjunct professor at the law school affiliated with the Mitchell Jacobson Leadership Program on Law and Business. Since 2013, I have been a partner at the law firm Jenner & Block LLP, where I currently serve as the head of the firm's Monitorship Practice, and more recently, as the head of the firm's COVID-19 Response Team. In that capacity, I have written and spoken extensively on the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").

I have been asked by the Committee today to testify about how "the money appropriated for COVID-19 relief has been obligated or spent to date;" to provide my views on "what we know and do not know about the effectiveness of" the programs enacted in response to the crisis; and to describe "any oversight or other controls" that "Congress should consider as it debates authorizing additional programs or appropriating additional funding." My testimony today reflects only my personal views, and does not reflect the views of Jenner & Block LLP, its partners, or its clients.

I have divided my prepared remarks into three sections. First, I summarize publicly available information on the relief allocated by the CARES Act and related legislation. Second, I state my views on the effectiveness of various government programs established by the CARES Act in response to the global pandemic and suggest some potential legislative improvements. Third, I provide my perspective on the current state of oversight and what additional measures this Committee may consider in improving its effectiveness.

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[1] *See* SIGTARP, Semiannual Report to Congress, Apr. 30, 2020, *available at* https://www.sigtarp.gov/Quarterly%20Reports/April_30_2020_Report_to_Congress.pdf

I. Summary of Funding

On March 27, 2020, Congress passed the CARES Act, a historic more than $2 trillion stimulus package to address the economic fallout from the COVID-19 pandemic. The CARES Act was intended to provide a lifeline to the nation's struggling workforce and provided relief mainly through direct payouts and loans to businesses and increased support for existing government programs. With an unprecedented outlay of funding to individuals and businesses of all sizes throughout the economy, the CARES Act has touched nearly everyone in this country.

As part of the CARES Act, Congress allocated funds for forgivable loans, grants, and other relief to small businesses whose ability to operate was jeopardized by the economic impact of COVID-19. The most active program for small businesses has been the Paycheck Protection Program ("PPP"), which, along with subsequent legislation, authorized $659 billion in forgivable loans to the nation's small business community. The Small Business Administration ("SBA") reports that over $519.6 billion of that had been distributed as of July 26, 2020.[2] Although there is nothing modest about the expenditure of more than a half trillion dollars, it is also important to note that lending through the program has dramatically slowed over the past two months, with just $9 billion being lent over the eight weeks since the SBA's report on May 30, 2020.[3]

In addition to the PPP, Congress also authorized Treasury to extend up to $500 billion to help businesses maintain personnel and continue operations. Of that amount, $25 billion was allocated for loans to passenger air carriers, $4 billion for loans to cargo air carriers, and $17 billion

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[2] *See* SBA, Paycheck Protection Program, Additional Program Information, *available at* https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program ("PPP Additional Program Information").

[3] *See* SBA, Paycheck Protection Program Report, Approvals through May 30, 2020, *available at* https://www.sba.gov/sites/default/files/2020-06/PPP_Report_200530-508.pdf (showing approvals of approximately $510 billion).

for loans to businesses critical to maintaining national security.[4] The remaining $454 billion was allocated for programs designed to take advantage of the Federal Reserve's emergency lending authority, which was used extensively during the last financial crisis. With the help of those funds, the Federal Reserve has created various special purpose vehicles ("SPVs") to support several lending programs to different segments of the economy. Under the design of those programs (which are based on similarly constructed TARP programs that I helped oversee), Treasury has used a portion of these CARES Act funds to provide equity capital investments in the SPVs in order to absorb possible losses on the Federal Reserve loans. The Federal Reserve has committed to leverage those funds to greatly increase the size of those lending facilities (by an average of 10 times Treasury's investment), with the understanding that, to the extent borrowers cannot repay the Federal Reserve's loans, Treasury's funds will bear the first losses, up to the $454 billion allocated by the CARES Act.

Unlike the PPP, the Federal Reserve programs seeded by CARES Act funds were late to launch and so far, have had very limited uptake. They break down as follows:

- A "Main Street" lending program, which is intended to provide loans to small- and medium-sized entities in order to ease the economic dislocation caused by the COVID-19 pandemic. Treasury has committed $75 billion of CARES Act funding to this program, which would enable up to $600 billion in Federal Reserve lending. This program was not fully operational until July 6, 2020, and as of July 22, 2020, only $14 million had been disbursed.[5]

- A Municipal Liquidity Facility, which is intended to provide short-term loans to all 50 states, and certain municipalities facing financial distress due to COVID-19. Treasury has committed $35 billion in CARES Act funding to this program, which would enable up to $500 billion in Federal Reserve

[4] The CARES Act also included $29 billion in direct grants to passenger carriers and cargo operators for payroll support.

[5] Federal Reserve, Factors Affecting Reserve Balances of Depository Institutions and Condition Statement of Federal Reserve Banks (July 23, 2020), *available at* https://www.federalreserve.gov/releases/h41/current/ ("Factors Affecting Reserve Balances").

lending. As of July 22, 2020, only $1.2 billion had been disbursed with just a single loan approval.[6]

- "Primary" and "Secondary" Corporate Credit Facilities, which is intended to purchase new and already issued corporate bonds to help large U.S. businesses access credit and otherwise increase liquidity in the corporate debt markets. Treasury has committed $75 billion to these programs, which would enable up to $750 billion in purchases by the Federal Reserve of new and existing corporate debt. As of July 22, 2020, the Federal Reserve had yet to made bond purchases as part of the "Primary" program, and had purchased a total of $12.1 billion in corporate bonds and in bond exchange-traded funds on the secondary market.[7]

- The Term Asset-Backed Securities Loan Facility ("TALF"), based on a similar program rolled out in 2008, which is intended to make loans to companies in exchange for a pledge of certain recently-issued, highly-rated asset-backed securities ("ABS"). As of July 22, 2020, the Federal Reserve had lent just $937 million of the $100 billion committed to lending (seeded by a $10 billion equity investment by Treasury).[8]

The "announcement effect" of these programs has been significant, stabilizing the capital and debt markets simply as a result of their announcement. To date, Treasury has committed just $195 billion of the total available funds (43%) to seed up to $1.95 trillion for these four programs, with just $14.25 billion spent (approximately 0.7%). Treasury has not yet announced whether it intends to use the remaining $259 billion at its disposal.

In addition, the Federal Reserve has stepped in with various other aid programs. In order to support the PPP, it initiated a program to supply liquidity to financial institutions participating in the program. As of July 22, 2020, $68.5 billion had been disbursed.[9] No Treasury funds are at risk for this program, because the underlying loans have already been guaranteed by the SBA. The

[6] *See id.*; Federal Reserve, Periodic Report; Updated on Outstanding Lending Facilities Authorized by the Board under Section 13(3) of the Federal Reserve Act at 6–7 (July 9, 2020), *available at* https://www.federalreserve.gov/publications/files/mlf-ppplf-pdcf-mmlf-cpff-pmccf-smccf-talf-7-10-20.pdf ("Periodic Report") (transaction-specific disclosures shows $1.2 billion was for a single loan).

[7] *See* Federal Reserve, Periodic Report, *supra* note 6.

[8] *See* Federal Reserve, Factors Affecting Reserve Balances, *supra* note 5.

[9] *Id.*

Federal Reserve also has expanded and initiated additional programs aimed at supporting the economy, many of which are reboots of the programs it initiated in response to the 2008 financial crisis. In addition to TALF, whose inception I helped oversee, the Federal Reserve has resurrected the Commercial Paper Funding Facility ("CPFF") (roughly \$1.5 billion lent with no announced cap[10]), and established a Money Market Mutual Fund Liquidity Facility ("MMLF") (roughly \$17.5 billion lent with no announced cap[11]). These programs have entailed commitments of potentially hundreds of billions of dollars, but thus far have also seen only modest uptake from market participants, undoubtedly due in part to the announcement effect noted above.

II. Comments on the Effectiveness of Certain Programs

My testimony concerning the effectiveness of the CARES Act will focus on the lending programs administered by the SBA, Treasury, and the Federal Reserve, with specific attention on the most active of these programs, the PPP. First, there is no question that the PPP has had a significant and positive impact on millions of small businesses, with a recent study by the Federal Reserve and others estimating that it helped preserve more than 2.3 million jobs.[12] But by no means should there be a declaration of mission accomplished. Chiefly, there has been a significant lack of transparency by Treasury and the SBA in the program that makes it difficult to fully assess its integrity, fairness (particularly to traditionally underbanked businesses), or overall effectiveness. In order to fully assess the program, additional measures will be needed to increase transparency and oversight. In addition, available information suggests that meaningful sums may

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[10] *Id.*

[11] *Id.*

[12] *See* Jonnelle Marte, *PPP Small Business Aid Saved 2.3 Million Jobs, Study Estimates*, REUTERS, July 22, 2020, *available at* https://www.reuters.com/article/us-usa-economy-ppp/ppp-small-business-aid-saved-2-3-million-jobs-study-estimates-idUSKCN24N2TK.

have been lost or misdirected because the program design elevated the risk of fraud and misuse by borrowers.

Second, although the Federal Reserve lending programs have been impactful as a result of the announcement effect noted above, they are significantly undersubscribed, despite apparent unmet need in the economy. That significant lack of uptake by eligible businesses and lenders appears to derive, in part, from the limited (and stated) purpose of those programs to serve principally as a backstop to private debt markets. If Congress intends to reach a broader (and riskier) range of entities, and to more immediately drive these funds from the sidelines and into the economy, it will need to take affirmative action to do so.

A. PPP Program

The PPP has provided critical emergency funding to more than four million small businesses. Although the rollout was chaotic—with significant changes to program terms just hours before the launch and a lack of clear guidance that left borrowers and lenders puzzled over key terms—the overwhelming demand for the program shows that it addressed a real need in the economy. As noted above, the PPP likely saved millions of American jobs in the short term, and gave millions of small businesses a lifeline, if only a temporary one.

At the same time, the design of the program has made it a potential playground for borrower fraud. The SBA's PPP lending applications directed banks to rely solely on borrower certifications of eligibility, with only scant requirements for supporting documentation to verify the attested-to information. Although it is certainly understandable that SBA and Treasury chose such a set-up in order to get the money out quickly and broadly—given the urgent needs many small businesses were facing because of the COVID-19 crisis—they nonetheless may have created ideal conditions for fraudsters. Just months into the program, the Department of Justice ("DOJ") has announced more than twenty criminal prosecutions for fraud,[13] and those cases are likely just the tip of the iceberg. Yet, the program design itself may preclude further uncovering of the iceberg. Despite the enormous volume of lending contemplated by the program (which has by now entailed more than 4.5 million PPP loans), the CARES Act left primary responsibility for oversight to the modestly sized SBA Office of the Inspector General ("SBA OIG"), with limited additional funding. With 4.5 million PPP loans, one estimate is that each SBA OIG employee would have to review approximately 55,000 loans.[14]

As a practical matter, it is unlikely that the SBA OIG alone (or even a good portion of the entire Inspector General ("IG") community) can provide the necessary oversight over such a vast program. In such circumstances, full and complete transparency by the government is essential in order to deter fraud (borrowers will be less likely to try and steal from a program if they know that their efforts will be publicly exposed), to better identify those who commit fraud, and to measure the effectiveness of the program. Such transparency, in effect, deputizes the public at large, including nonprofit oversight groups, journalists, and concerned citizens, in rooting out fraudulent participants and bringing program shortcomings to light.

After promising full transparency regarding PPP participants and loan amounts, we have witnessed just the opposite. Treasury at first resisted releasing borrower data at all, later relenting only under intense pressure by providing data for loans over $150,000 (and that data with ranges

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[13] *See* DOJ, Coronavirus-related Press Releases, *available at* https://www.justice.gov/news?f%5B0%5D=field_pr_topic%3A40971 (last visited Jul. 24, 2020) (listing announcements of over twenty criminal prosecutions related to PPP fraud).

[14] *See* Cezary Podkul & Orla McCaffrey, *Firms With Troubled Pasts Got Millions of Dollars in PPP Small-Business Aid*, WALL ST. J., July 18, 2020, *available at* https://www.wsj.com/articles/firms-with-troubled-pasts-got-millions-of-dollars-in-ppp-small-business-aid-11595064602.

instead of actual amounts for borrowers) and aggregate data for the rest.[15] With 86 percent of borrowers with loans under $150,000, data is being withheld for more than 4 million loans.[16]

Moreover, the SBA data that has been produced to date appears to contain significant errors and inaccuracies. Some listed companies have denied they participated at all, and a recent Bloomberg analysis[17] showed companies listed in the wrong district, employers with a negative number of employees, or other information that was clearly wrong or just did not make sense. For example, an architectural firm in Miami that received $19,700 was incorrectly listed as receiving over $1 million; and a one-man accounting firm that received $3,700 was listed as receiving $2 to $5 million.[18] This kind of inaccurate data undermines the oversight that public transparency provides, and saps public confidence in the program. And, in stark contrast to the last financial crisis, where SIGTARP pushed hard for the release of documents related to banks that accepted TARP funds—which Treasury eventually did—Treasury has taken a far different approach in this crisis by persistently withholding information about borrowers.

Although the administration has failed the transparency test so far, even the limited disclosures to date have exposed flaws in the PPP program design. It is now apparent that there were borrowers who took advantage of the program who never should have received funds, either because they misrepresented their eligibility or because they were not the types of businesses that Congress or the administration contemplated would participate—including highly profitable law firms or premier sports teams, to name only a few. The identification of seemingly ineligible recipients likely would not have occurred but for these limited disclosures and the actions taken

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[15] *See* SBA, PPP Additional Program Information, *supra* note 2.

[16] *See id.*

[17] Mark Niquette, et al., *PPP Data Errors Raise Questions About Relief Effectiveness*, BLOOMBERG, July 13, 2020, *available at* https://www.bloomberg.com/news/articles/2020-07-13/ppp-data-errors-raise-questions-about-effectiveness-of-stimulus?utm_campaign=pol&utm_medium=bd&utm_source=applenews.

[18] *Id.*

by news organizations and concerned citizens to review them (as also outlined in the testimony of my co-panelist, Danielle Brian of the Project On Government Oversight), and their work will allow law enforcement and IGs to focus their limited resources on such cases.

Transparency would also help identify whether the goals of the program are actually being met. As noted above, even the limited transparency provided has exposed that existing program rules appear to have paved the way for companies to participate that did not "need" the funds. But other key aspects remain unknown, including how often this may have occurred. For example, in providing additional funding to the program in April 2020, Congress included language that lawmakers said was intended to drive more loans to smaller and minority-owned businesses. Those provisions responded to widespread concern that funding was not getting to those constituencies.[19] But the SBA and Treasury failed to ask banks to collect demographic data on the businesses that received PPP loans—a failure of transparency highlighted in a recent SBA OIG report showing that such information was required to determine the volume of loans going to rural, women-owned, and minority-owned businesses.[20] As a result of these failures, we cannot measure whether Congress' attempt to drive more lending to minority-owned businesses was effective. In other words, a lack of government transparency about what loans are being made, in what amount, and to whom, has contributed to the difficulty in determining whether the program goals are actually being met, while simultaneously providing cover to those who may have defrauded the program.

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[19] *See* Emily Flitter, *Black Business Owners Had a Harder Time Getting Federal Aid, a Study Finds*, N.Y. TIMES, July 15, 2020, *available at* https://www.nytimes.com/2020/07/15/business/paycheck-protection-program-bias.html; National Community Reinvestment Coalition, Lending Discrimination Within the Paycheck Protection Program, *available at* https://ncrc.org/lending-discrimination-within-the-paycheck-protection-program/ (last visited July 27, 2020).

[20] *See* SBA OIG, Flash Report: Small Business Administration's Implementation of the Paycheck Protection Program Requirements 4 (May 8, 2020), *available at* https://www.sba.gov/sites/default/files/2020-05/SBA_OIG_Report_20-14_508.pdf.

Lack of transparency is also relevant to several current legislative proposals. For instance, some proposals include a process for extremely streamlined forgiveness for certain smaller loan amounts with no documentation requirements. There is an attractiveness to this proposal: Given the sheer volume of loans, there is no way that detailed and fully-documented forgiveness applications will ever be fully reviewed by the SBA, and preparing those applications would undeniably tax already struggling small businesses in paperwork and professional fees they can ill afford. It also risks bogging down lenders whose resources might be better spent on additional lending through the PPP or other governmental programs. However, this type of expedited forgiveness may materially increase the risk of fraud for a program already prone to it. Because this process will remove any audit trail for large swaths of borrowers—and remove the deterrent inherent in requiring borrowers to submit documentation—I believe that such a process could be adopted only if Treasury and the SBA provide full transparency and accurate data about the identities of participants and the precise amounts of their loans. Such disclosure will provide a deterrent to many businesses that might otherwise exaggerate their compliance in order to achieve full forgiveness, and will give the public the opportunity to identify bogus businesses that may have far fewer employees (or even no employees) than for which they are seeking forgiveness. In all, streamlined forgiveness may be necessary and desirable, but without the potential deterrent of exposure, it is an invitation to an even higher level of fraud.

More broadly, the lack of public transparency has made it harder for Congress to enact effective changes to the program. Controversy has surrounded the life of the PPP so far—from concerns about whether banks would participate at its launch, to questions about whether funds were going to the right businesses during the first round of funding, to worries over whether the program's use restrictions were stifling participation by small businesses. More recently, despite the availability of additional funding, the rate of PPP lending has significantly declined. Without adequate data from SBA and Treasury, policymakers cannot properly determine whether and how to adjust the program—whether there is a supply problem (for example, banks that are reluctant to participate, as at the launch of the program), a demand problem (for example, businesses that are either maxed out, unable to meet the payroll thresholds, or just scared away by politicization of the program), or another problem altogether. Transparency helps provide a basis for adjustments to the program to take into account changing economic realities.

Because of program design, its interplay with existing banking regulations, and the lack of incentives to drive lending to smaller businesses without established banking relationships, this portion of Main Street was less likely to be successful in getting PPP loans. This was an unforced error by Treasury and SBA, and echoes a mistake made in the last financial crisis. Back then, Treasury ignored warnings from SIGTARP that the banks who received TARP funds would not carry out the program's goals that the money be used to lend to Main Street businesses or help struggling homeowners because they lacked the necessary requirements or incentives to do so. It is not clear whether there was any internal warning by oversight entities about these issues this time around, but the failure to heed the lessons of such recent history has surely contributed to outcomes in the PPP. According to a recent report, just 1.7% of businesses participating in the PPP through June 30, 2020, received 35% of money lent through the program.[21]

To be clear, my criticisms about Treasury and SBA's lack of transparency in the PPP, its vulnerability to fraud, and the flaws in its program design should not be taken as an indictment of the program as a whole. The accomplishments noted in the beginning of my testimony are significant ones, and as businesses burn through their PPP funds (which were originally intended

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[21] *See* Yan Wu & Vivien Ngo, *Where Did the Biggest PPP Loans Go*, WALL ST. J., July 23, 2020, *available at* https://www.wsj.com/graphics/where-did-the-biggest-ppp-loans-go/.

to cover just 8 weeks of payroll), there is a desperate and obvious need for an additional round of funding for these businesses. I fully support such a response, but it must be done transparently and equitably to give the program the best chance to help the businesses that need it the most.

B. The Federal Reserve Programs

I will now turn to the various Federal Reserve programs I previously detailed. For the first two of the Federal Reserve's key CARES Act facilities mentioned above—the Main Street Program and the Municipal Liquidity Facility—lending is still largely non-existent several months after they were announced, even after the Federal Reserve made repeated attempts to expand eligibility for the programs. This is, in part, because these facilities were intended by Treasury and the Federal Reserve as a backstop for eligible entities, which by design are intended to become most attractive to borrowers should the debt markets for such entities seize up again. And it is undeniable that the mere announcement of the Federal Reserve's programs had the intended effect, helping to restore liquidity to these markets. But it is a question for Congress as to whether this is enough, and whether these funds should be distributed more immediately to a broader set of struggling entities, on more generous terms. This would certainly get more money into the economy more quickly, but would also significantly increase the risk of losses, as well as the possibility of depleting funds should the debt markets take a significant turn for the worse.

As to the Main Street facility, it appears that many smaller and mid-size businesses that do not meet the underwriting and eligibility standards required by the program are in significant financial distress and could benefit from government assistance. A recent report estimated that nearly 110,000 small businesses across the country shut down permanently between early March and early May.[22] Chapter 11 business bankruptcy filings increased 26% in the first half of 2020.[23] And the Labor Department reported last week that new state unemployment claims are on the rise again for the first time in nearly four months as businesses shed employees.[24]

The Main Street facility is not designed or intended to reach many of these types of struggling businesses. Its eligibility and underwriting requirements, which focus on an evaluation of a borrower at the time of application, mean that many such companies cannot get in the door. As to those who would qualify, many may be already able to get credit in the current market on terms more favorable that what is offered by Main Street. That lenders seem to have a low level of interest in participating in the program indicates that they too seem indifferent, apparently preferring to lend directly to such companies without availing themselves of the option of selling 95% of the loans to the Federal Reserve.

This is not to say that the program is broken; instead, it is being implemented as a backstop so that when and if the debt markets tighten, and banks are no longer willing to lend to such eligible businesses, there will be an alternative source of funding for such credit. But if Congress' goal is for these funds to be deployed now as a further form of stimulus, it will need to act. Lower interest rates, longer terms, and lower fees will attract more businesses currently eligible for the program,

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22 National Bureau of Economic Research, Alexander W. Bartik, et al., *How Are Small Businesses Adjusting To Covid-19? Early Evidence From A Survey* N.B.E.R. Working Paper No. 26989 (Apr. 2020), *available at* https://www.nber.org/papers/w26989.pdf; Emily Flitter, *'I Can't Keep Doing This:' Small-Business Owners Are Giving Up*, N.Y. TIMES, July 13, 2020, *available at* https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html.

23 Aisha Al-Muslim, *Chapter 11 Business Bankruptcies Rose 26% in First Half of 2020*, WALL ST. J., July 2, 2020, *available at* https://www.wsj.com/articles/chapter-11-business-bankruptcies-rose-26-in-first-half-of-2020-11593722250.

24 *See* Dep't of Labor, News Release, Covid-19 Impact (July 23, 2020), *available at* https://oui.doleta.gov/press/2020/072320.pdf (reporting more than 1.4 million new applications for state unemployment benefits in the week ending July 18,, 2020, up from about 1.3 million claims in the preceding two-week period).

and less stringent underwriting requirements and lower risk retention by the banks will result in the more immediate deployment of funding to businesses that may be on the brink of failure.

This more generous approach would significantly increase the risk that Treasury will suffer losses on its CARES Act investment, however, a result that Secretary Mnuchin has publicly stated that he is seeking to avoid. Early on, he stated that "[i]f Congress wanted me to lose all the money, that money would have been designed as subsidies and grants as opposed to credit support."[25] The Congressional Budget Office has thus far apparently concurred in this assessment, treating the $454 billion allocated to Treasury for these programs as likely to suffer no loss.[26] It also would risk involving the Federal Reserve as a competitor in the private markets, rather than as support for them, a result the Federal Reserve understandably seeks to avoid.

Given the overall tenor of the CARES Act to support the American economy, along with the economic crisis triggered by the pandemic lasting longer than what Congress may have contemplated back in March, Treasury's aversion to losses may not match the urgency for relief. And based on my previous experience with the Federal Reserve when it was designing the TALF program, it would be willing to design programs that model a loss for Treasury, but will not do so over Treasury's objection. But a clear directive in future legislation to Treasury would change that, for both the Main Street and Municipal Lending facilities.[27] Another option for Congress would be to reallocate the more than $250 billion of unallocated CARES Act funding to directly

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[25] Kate Davidson and Richard Rubin, *Steven Mnuchin Says U.S. Aims to Get Back Its Money from Fed Programs*, WALL ST. J., April 29, 2020, *available at* https://www.wsj.com/articles/mnuchin-says-u-s-not-aiming-to-lose-money-on-fed-lending-facilities-11588178749.

[26] *See* First Report of the Congressional Oversight Commission, May 18, 2020, at 12, *available at* https://hill.house.gov/uploadedfiles/coc_1st_report_05.18.2020.pdf.

[27] For the Municipal program, it appears that the relatively short terms, high borrowing costs (including a penalty rate), and eligibility requirements that have excluded smaller municipalities, may have inhibited participation, even though the announcement of the program has had a beneficial effect on the liquidity of the municipal bond market. *See* The Second Report of the Congressional Oversight Commission, June 18, 2020, at 28-29, *available at* https://www.toomey.senate.gov/files/documents/Congressional%20Oversight%20Commission%20Report%20(June%2018,%202020).pdf.

support struggling businesses and municipalities, and perhaps leave the existing programs in place to continue to serve as a backstop to these markets.

The Corporate and TALF facilities also triggered an announcement effect, and the markets that they were intended to support both demonstrated remarkable stabilization in the aftermath of the Federal Reserve's announcement of them. For the Corporate program, its announcement in late March quickly "improved performance and condition of financial markets," with corporate bond issuance in April and May 2020 (at $300 billion per month) far outpacing issuance in those months in 2019.[28] Similarly, the announcement of the TALF program also appears to have helped stabilize the market it was intended to assist. Since TALF was announced on March 23, 2020, "ABS spreads have contracted significantly," signaling that the ABS market has improved since the onset of the current crisis.[29]

Because the markets are functioning, there has been only modest spending. With so little activity, commentators have raised the question of why Treasury should continue to push a program for established companies with access to public debt markets, leaving money on the sidelines, when more can be done to sweeten the terms for programs like Main Street and the Municipal Liquidity Facility, where there is more of a need. In all—given the size of these programs, the availability of other funds, and the potential for a significant downturn in the future—it appears prudent to keep these programs in place in case conditions deteriorate.

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[28] The Second Report of the Congressional Oversight Commission, June 18, 2020, at 6-7, *available at* https://www.toomey.senate.gov/files/documents/Congressional%20Oversight%20Commission%20Report%20(June%2018,%202020).pdf.

[29] U.S. House Committee on Financial Services hearing on Coronavirus and the Cares Act, 116th Cong. (June 30, 2020) (statement of Jerome Powell, Chair, Board of Governors of the Federal Reserve), *available at* https://www.federalreserve.gov/newsevents/testimony/powell20200630a.htm. As a result, Chairman Powell noted the TALF "might be used relatively little and mainly serve as a backstop, assuring lenders that they will have access to funding and giving them the confidence to make loans to households and businesses." *Id.*

III. Comments on Oversight

With so much public money at stake, it is critical that Congress do what it can to ensure that government aid is not being stolen, wasted, or given to political cronies. It is just as critical, as already noted, that taxpayers are aware of how and to whom their money is being distributed. In the CARES Act, Congress demanded comprehensive oversight to guard government aid, and provided what was described as overlapping and redundant oversight entities to ensure full coverage. It also included some conflicts of interest provisions intended to prevent government officials and their families from benefitting from certain programs.

Congress' demands have not been met. We were promised three oversight bodies, but each one has been hamstrung, albeit in different ways. First, overseeing the actions of Treasury with respect to the $500 billion discussed above, the legislation promised a brand-new agency, modeled on the one that I used to lead, headed by a Special Inspector General for Pandemic Recovery ("SIGPR"). We were promised that this new agency would keep the programs on the right policy track, protect them from fraud, and provide the necessary transparency to make sure that when decision makers fall short, as they inevitably do in the haste of an emergency, SIGPR could make quick recommendations to correct course and share both the flaws and the proposed solutions with Congress and the American people. SIGPR—like SIGTARP—is supposed to shine a light on the decision-making processes, deterring policymakers from making decisions that are likely to determine which companies survive and which fail based on personal connections or cronyism, rather than on the merits. Unfortunately, there was a months-long delay in appointing and confirming Brian Miller as the SIGPR, meaning that many of the programs and processes I have discussed today were developed and implemented without key input by this position.

Although SIGPR was modeled after the agency I founded, the CARES Act failed to incorporate some of the key legislative amendments I was able to obtain for SIGTARP to put it in a position to succeed, including broad hiring authority to allow it to staff up in a hurry to be in a position to conduct the robust oversight required.[30] SIGPR is further hampered by a budget only half the size designated for SIGTARP, as well as by President Trump's signing statement to the CARES Act, in which he suggested he would limit the ability of the new IG to reveal to Congress efforts by his administration to obstruct or impede his inquiries. If undertaken, this directive would prevent SIGPR from using one of the most powerful tools that SIGTARP had to ensure agency compliance with our document and information requests. Even if not acted upon by the President, that signing statement, along with other actions taken by the administration detailed below, has the potential of signaling to Treasury and other federal agencies that cooperation with requests from SIGPR or other oversight agencies is purely optional. Although little has yet been made public about the priorities and actions of SIGPR during its startup period, and whether it is receiving full cooperation from the administration, its first 60-day report, which should be filed in the coming weeks, should be telling.

Second, the CARES Act created a new Pandemic Response Accountability Committee ("PRAC") to oversee the government's response to COVID-19, including the programs described above. The PRAC consists of IGs from various government agencies along with full-time staff devoted to overseeing, auditing, and investigating any fraud, waste, abuse, or mismanagement within the government's response. The PRAC is also under threat. In late March, after the widely

[30] At SIGTARP, we were able to navigate through our early days due to a series of exemptions that we received from the Office of Personnel Management that freed us temporarily from the hiring restrictions that are incompatible with starting up an agency during a crisis. But reliance on another executive agency is a potential impediment to independence, particularly if OPM denies necessary relief or threatens to pull it after a negative report, both circumstances which we had to deal with before the Special Inspector General for the Troubled Asset Relief Program Act of 2009 was enacted by Congress.

respected Acting IG for the Defense Department, Glenn Fine, was named as the PRAC chairman, President Trump replaced him as IG for Defense, with little substantive explanation. This disqualified Fine from serving as PRAC's Chairman, leaving the committee leaderless until Department of Justice IG Michael Horowitz took over in an acting capacity.

Fine, of course, is not the only IG to come under fire, with acting Health and Human Services IG Christi Grimm coming under withering criticism from the President (along with the intent to replace her) after she issued a report critical of the administration's handling of the crisis.[31] Similarly, State Department IG Steve Linnick was fired by President Trump simply because he "was asked by [the Secretary of State, who at time was under investigation by Linnick] to do so,"[32] and Michael Atkinson (Intelligence Community) was fired in apparent retaliation for providing certain information to Congress.[33] Although one may quibble with any one of these actions, taken together they can only send one message to the watchdogs that must to play a crucial role in overseeing the government's pandemic response: Criticize the programs at your peril.

Not only does this course of conduct chill robust oversight by those charged under law with that responsibility, but much like the President's signing statement, it risks signaling to agencies that they can disregard requests for information or recommendations that come from IGs, and that they can even have the more meddlesome ones removed. Indeed, following Fine's removal (and,

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[31] *See* Lisa Rein, *Trump Replaces HHS Watchdog Who Found 'Severe Shortages' at Hospitals Combating Coronavirus*, WASH. POST, May 2, 2020, *available at* https://www.washingtonpost.com/politics/trump-replaces-hhs-watchdog-who-found-severe-shortages-at-hospitals-combating-coronavirus/2020/05/02/6e274372-8c87-11ea-ac8a-fe9b8088e101_story.html.

[32] *See* White House, Press Release, Remarks by President Trump in a Roundtable with Restaurant Executives and Industry Leaders (May 18, 2020), *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-restaurant-executives-industry-leaders/.

[33] *See* Ellen Nakashima, *Inspector General Who Handled Ukraine Whistleblower Complaint Says 'It Is Hard Not to Think' Trump Fired Him for Doing His Job*, WASH. POST, Apr. 6, 2020, *available at* https://www.washingtonpost.com/politics/inspector-general-who-handled-ukraine-whistleblower-complaint-says-its-hard-not-to-think-he-was-fired-by-trump-for-doing-his-job/2020/04/06/083166de-77b4-11ea-b6ff-597f170df8f8_story.html.

of course, the signing statement), Treasury took the untenable position that it would block PRAC from overseeing funds disbursed under Division A of the CARES Act (which includes PPP and the Federal Reserve programs, among others), and denied PRAC access to relevant information. As with its position on withholding *all* PPP data described above, however, Treasury ultimately backed down on its position in the face of widespread criticism and agreed that PRAC's jurisdiction extended to those key programs. Yet, despite that change of position at Treasury, it appears that the Office of Management and Budget ("OMB") is separately refusing to direct agencies to collect information that PRAC needs to fulfill its reporting and disclosure mandate under the CARES Act,[34] thereby threatening its ability to function effectively.

In order to ensure robust oversight from the IG community, Congress must act. An important start is passing the Securing Inspector General Independence Act of 2020, a bipartisan bill co-sponsored by Ranking Member Peters, and Senators Carper, Hassan, Lankford, Peters, Portman, and Romney of this committee, among others. Its requirements, including a broad prohibition against the previously unimaginable practice of having existing agency executives also serve as acting IGs of their agency, include necessary reforms that should be implemented immediately. I would also strongly endorse similar legislation that mandates that IGs can only be fired for cause.

Overall, Congress needs to be more vocal and proactive in its support of the watchdogs. When I was at SIGTARP, it was not uncommon, particularly in our early days, for federal agencies to disregard my recommendations or to create some legal construct in order to block me from receiving information that I needed to fulfill the role that Congress had created. But, in each

[34] *See* Coalition Letter to Russell Vought, Acting Director of OMB (June 18, 2020), *available at* https://ourfinancialsecurity.org/wp-content/uploads/2020/06/Coalition-letter-to-OMB-on-COVID-disclosure-6-18-20.pdf. The details surrounding this issue are described in greater detail in my co-panelist Danielle Brian's testimony.

instance, we were able to overcome such resistance due to the fierce *bipartisan* support we received in Congress. Any complaint by an agency that we were motivated politically was briskly swatted away when the Committee Chairs and Ranking Members of *both* parties came to our defense. And when a series of our recommendations regarding a proposed Treasury/Federal Reserve program were ignored, Senators Boxer, Ensign, Pryor, and Snowe joined hands across the aisle to cosponsor a bill to adopt those recommendations that was passed without a single dissenting vote. The reality is that Congress can impose as many watchdogs and oversight entities as it wants, but for oversight to be effective, Congress has to back them up. Otherwise, they will be ignored and discarded. I applaud Chairman Johnson and Ranking Member Peters for calling this hearing as an important step in signaling the importance of robust, independent oversight, but much more still must be done.

Third, the CARES Act established a Congressional Oversight Commission ("COC") patterned on the Congressional Oversight Panel from the TARP legislation. And although four of the five commissioners have been appointed, it is now four months and counting without an appointed Chair. Although the commissioners deserve great credit for putting out reports and even scheduling an upcoming hearing without the benefit of a Chair, the COC cannot function as a robust oversight body without a fully installed Chair, and the staff and guiding vision that comes with it. Furthermore, the COC's ability to be effective could be greatly enhanced by giving it subpoena power—its predecessor's lack of such authority inhibited its effectiveness. And given the concerns regarding the limited resources attending to oversight of the PPP program discussed above, Congress should consider expanding the COC's jurisdiction to include that program as well.

Finally, Congress should consider expanding the conflict of interest provisions in the CARES Act. The TARP program certainly had its challenges and failures, but the strong conflict of interest provisions helped ensure program integrity. Although, as noted above, the CARES Act includes certain baseline provisions, there is simply no reason it should not include restrictions at least as robust as those in the TARP program.

IV. Conclusion

Chairman Johnson, Ranking Member Peters, and members of the Committee, thank you for the opportunity to address these issues of national importance. I welcome any questions.