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
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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

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

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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."[1] 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

[1] 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.[2] "[A]ny reference to 'this Act' contained in any division … shall be treated as referring

[2] *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."[3] *Only* "is a word that connotes exclusivity."[4] 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."[5] Thus "*the* alien" is a particular alien who has been released from custody;[6] "*the* person who has custody" is a particular person who is the proper respondent in a habeas proceeding;"[7] and "*the* remedies and procedures" of the Americans with Disabilities Act is a defined universe of rules that excludes others that would supplement them.[8] 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"

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

[4] *Farrell v. Commissioner*, 136 F.3d 889, 895 (2d Cir. 1998).

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

[6] *See id.*

[7] *See Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004).

[8] *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."[9]

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."[10] Congress required a clear textual signal before varying the meaning of "this Act" in the CARES Act, which necessarily excludes a context-driven analysis.[11]

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.[12] Indeed, even the Dictionary Act states that "[i]n

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[9] 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"].

[10] *Black's Law Dictionary* (11th ed. 2019) (definition of *express*).

[11] *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").

[12] *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.[13] The "context indicates" standard is different from the "expressly provides" standard,[14] and we can assume Congress chooses one or the other (or both, as in Dodd–Frank[15]) on purpose.[16]

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."[17] 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.[18] In each case, these cross-references apply only to provisions

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

[13] 1 U.S.C. § 1.

[14] *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").

[15] *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.").

[16] *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.").

[17] *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").

[18] 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.[19] In contrast, where Congress intended to specify a narrower unit, it used a narrower term.[20] The CARES Act also uses specific section numbers to reference specific sections.[21]

"These statutory features show that Congress knows how to" specify what it intends.[22] 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

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[19] 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.

[20] *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).

[21] *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").

[22] *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.[23] 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.[24] Congress has used the exact words of section 3 in at least two dozen annual appropriations statutes,[25] as well as other major emergency legislation, including the American Recovery and Reinvestment Act[26] and, most recently, the Consolidated Appropriations Act, 2021.[27]

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[23] 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.

[24] *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.

[25] *See* 1 U.S.C. § 1 note.

[26] *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).

[27] *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."[28] But there are at least two different "title VI"s in the CARES Act—one in division A and one in division B.[29] Fortunately, section 3 makes clear that this provision refers to "title VI" of division B.[30] 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."[31] A few months ago, Congress amended that definition to give the Committee jurisdiction over funds made

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[28] CARES Act, § 23004(c).

[29] *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).

[30] 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.

[31] CARES Act § 15010(a)(6)(A).

available under "the Coronavirus Aid, Relief, and Economic Security Act *(divisions A and B)*."[32] 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."[33] 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.[34] 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."[35] As we explained in our August report and letter to OLC,[36] 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.[37]

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[32] Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 801(b)(1).

[33] Treasury OIG Response, *supra* note 9, at 5.

[34] 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.

[35] CARES Act, § 4018(c).

[36] 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; 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).

[37] 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),[38] 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.[39]

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.

[38] Pub. L. No. 105-277, 5 U.S.C. § 3345 *et seq.*

[39] *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.[40] Lower courts have applied similar reasoning to statutory terms like "section,"[41] "subchapter,"[42] and "chapter,"[43]—and even to analogous terms in contracts.[44]

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.[45] In this case, not every program in division A relates to "investments made by the Secretary" or is "managed by the Secretary."[46] 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"

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[40] *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)).

[41] *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))).

[42] *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))).

[43] *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))).

[44] *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].").

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

[46] 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.[47] 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."[48] 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.[49]

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.[50] DOJ's funding that year came from the Commerce, Justice, Science, and Related Agencies Appropriations Act of 2016 (CJS Appropriations Act).[51] 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.[52] 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.[53]

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[47] *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).

[48] *See* Pub. L. No. 116-260, div. H, §§ 506–507.

[49] *See* Hyde Amendment, *supra* note 47, at 4.

[50] 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).

[51] *See* Pub. L. No. 114-113, div. B, 129 Stat. 2242, 2286 (2015).

[52] *See* Pub. L. No. 114-113, 129 Stat. 2242 (2015).

[53] *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.[54]

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.[55] The Congressional Research Service appears to share this

[54] IG Access, *supra* note 50, at 48.

[55] *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.[56] This understanding was also consistent with my testimony during my confirmation hearing before the Senate.[57]

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)."[58] Significantly, this program

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[56] *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 a*nd 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.

[57] 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. 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.*

[58] 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.[59]

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.

[59] *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; 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; 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.

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.[60] 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.[61] 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."[62]

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

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[60] *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.").

[61] *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)).

[62] *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.[63] Respectfully, this is not a recognized rule of interpretation supported by citation to caselaw or precedent.[64] Nor is this how other entities have understood the CARES Act; and Treasury OIG recognizes as much.[65] 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."[66]

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

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[63] *See* Treasury OIG Response, *supra* note 9.

[64] 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.

[65] *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").

[66] *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."[67] 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."[68] 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."[69] Treasury OIG interprets "this Act" in SIGPR's jurisdictional mandate to mean no

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[67] Treasury OIG Response, *supra* note 9, at 1.

[68] 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.

[69] CARES Act § 4018(c).

more than the subtitle's designation as "The Coronavirus Economic Stabilization Act of 2020."[70] 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.[71] 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."[72] In marked contrast, SIGPR's purview is tethered to the financial support provided by the Treasury Secretary "under this Act."[73] It is implausible that Congress repeatedly used different words—"subtitle" and "Act"—to mean the same thing: subtitle A.[74] 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."[75] 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.[76] The relevant "Act" in section 4018, then, is something overlying "this subtitle"—namely, division A.

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[70] CARES Act § 4001. *See* Treasury OIG Response, *supra* note 9, at 5.
[71] *See id.* §§ 4002, 4003(e), 4006, 4019, 4020, 4025, 4027, 4028, 4029.
[72] *Id.* § 4020(b), (g).
[73] *Id.* § 4020.
[74] *See* SIGPR, *Initial Report to Congress*, *supra* note 36, at 11.
[75] *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.").
[76] *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.'"[77] 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."[78] Other provisions distinguish between "this subtitle" and "this Act" in the same sentence.[79] 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.[80] 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.[81] 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.").

[77] CARES Act § 4001.

[78] *Id.* §§ 3501, 3502.

[79] *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) . . . .").

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

[81] 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."[82] 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."[83] 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.[84] 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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[82] *Id.* § 4018(c)(1).
[83] *Id.* § 4003(a).
[84] *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.