

PUBLICATION

Congress CARES (Act): Expect Oversight Investigations

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Congressional activity is already underway to begin oversight related to the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Based on historical trends and the current political environment, oversight and resulting investigations by Congress will likely increase. Those inquiries will come from multiple sources, often overlapping in focus and objective. This alert provides an overview of the CARES Act provision for oversight, a brief summary of Congressional investigative authority, and some general advice about what to do if a letter/subpoena arrives from Congress.

CARES Act Congressional Oversight Commission

Among other things, the CARES Act (Act) created the COVID-19 Congressional Oversight Commission (COC), a bicameral five-person committee comprised of four members selected by the majority and minority leaders of the House and Senate, and one chairperson (not yet named) jointly selected by Speaker of the House Pelosi and Senate Majority Leader McConnell, in consultation with the minority leaders. The COC is tasked with overseeing implementation of the Act and reporting to Congress on the impact and effectiveness of loans and investments made under the Act. In order to carry out these duties, the COC has the authority to hold hearings and take evidence, procure information and data from government bodies related to programs and spending in response to the COVID-19 pandemic, hire staff and hold meetings. Notably, the COC lacks subpoena authority.

House Select Subcommittee on the Coronavirus Crisis

Another new entity created in recent legislation is the House Select Subcommittee on the Coronavirus Crisis (Subcommittee), established to oversee the federal response to the COVID-19 crisis. The 12-member panel, a select subcommittee of the House Committee on Oversight and Government Reform (COGR), will be chaired by House Majority Whip Jim Clyburn. The Subcommittee is charged with investigating an expansive range of COVID-19 related matters, with particular attention on preventing waste, fraud, and abuse, and protecting against price gouging, profiteering and political favoritism.

During House floor debate, House Speaker Pelosi emphasized that one of the specific focuses of the Subcommittee will be on tracking how and to whom federal response funds are distributed, virtually guaranteeing that the Subcommittee will pay close attention to Paycheck Protection Program disbursements, Small Business Administration loan guarantees, as well as other relief appropriated under recent stimulus packages. This prospect is bolstered by Chairman Clyburn's recent statements that he very strongly believes in "equitable treatment" when it comes to disbursement of relief, giving a further glimpse into the potential direction and focus of the Subcommittee's efforts.

To root out any sort of profiteering and fraud, the Subcommittee has been given broad authority, including to issue subpoenas for testimony and documents, conduct depositions and compel information from other House committees. At the conclusion of its investigations, the Subcommittee will provide a final report to the House, with reports on its investigations in the interim.

Other Congressional Oversight and Investigations

The Subcommittee almost certainly is not the only Congressional body investigating COVID-19-related matters. Some inquiries already have been initiated, extending beyond administration and implementation of the stimulus packages and relief. For example, on the House side, the COGR already has initiated inquiries to respirator manufacturers, the pharmaceutical industry and travel insurance companies. In addition, certain Congressional leaders have asked about the role private equity firms have played in decisions made by physician practices that they own. Moreover, the House Committee on Energy and Commerce is expected to conduct wide-ranging investigations particularly related to the medical supply chain, drug pricing and nursing home deaths.

Although it is doubtful that the Republican-controlled Senate will conduct as much Act oversight as the Democratic-controlled House, we nevertheless should expect to see some oversight and investigative activity on the Senate side. Indeed, Senate Majority Leader Mitch McConnell has designated Mike Crapo, Chairman of the Senate Banking Committee, to lead and coordinate the Senate's oversight of the Act. In addition to overseeing economic stabilization efforts and Federal Reserve action – the largest parts of the legislation – Crapo will work closely with the chairs of other committees to supervise their own portions of the Act.

Congressional Investigative Authority

There is no provision of the Constitution that expressly authorizes Congress to conduct investigations or oversight; however, it has long been recognized that this power is implied since Congress possesses "all legislative powers."¹ The House used its investigatory privileges in the First Congress, at which time Representative James Madison said that the "House should possess itself of the fullest information in order to doing justice to the country and to public officers."² The Supreme Court has confirmed that one of those legislative powers is the implicit authority to gather information in "aid of its legislative function."³ The Court further has explained, "[t]he theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose" and, in those situations, "committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony."⁴ Individual members who have not been authorized to conduct oversight, however, are entitled to no more than "the voluntary cooperation of agency officials or private persons."⁵

Thus, all House and Senate committees have investigatory powers, across substantive areas of focus. The principal committees for oversight are (1) the House Committee on Operations and Reform and (2) the Senate Committee on Homeland Security and Governmental Affairs, in particular its Permanent Subcommittee on Investigations. These two Committees have a long, active history of launching in-depth investigations. However, all committees can subpoena documents, order testimony at committee hearings and sometimes compel depositions.

Practical Advice

It is not uncommon for the first communication from a Congressional member to be informal (for example, a letter on behalf of a constituent, a call from a staffer or some invitation to provide information voluntarily). However, despite their informal nature, these inquiries should not be taken lightly, as these requests may be precursors to more formal (and invasive) ones that follow. Ignoring these requests can also be interpreted negatively by the committee – and a recipient does so at its peril. A more proactive approach may include a number of actions, ranging from sending a formal reply to informally reaching out to the requesting body.

One important factor to consider is that any response can become a public record, subject to certain House and Senate rules, and also may be accessed by law enforcement, who may rely on the information provided to, for example, initiate a criminal investigation. Another important – and sometimes challenging – factor to consider is that Congress does *not* recognize common law privileges, other than an individual's Fifth Amendment privilege against self-incrimination.

This virtually unrestrained reach of Congress often comes through subpoena. In order to issue a subpoena, there must be a majority vote on a committee. If that procedural hurdle is met, the subpoena carries with it potential contempt of Congress enforcement and sanctions, including a criminal prosecution or, as seen recently, impeachment proceedings.

While each committee has its own procedural rules for obtaining information, some general procedures, particularly for depositions, apply in the House (including its Committee on Rules). In many committees, the Chair has authority issue a subpoena unilaterally.

How you implement a response is critical and involves important strategic considerations and questions. For example, is there a viable challenge to a committee's authority; does the investigation implicate or raise any constitutional claims or concerns; and what steps can you take to protect privileged information to the maximum extent possible. These are important considerations that must be assessed promptly, as they almost certainly will inform your response, strategy and long-term implications.

As a practical matter, many common questions and considerations include:

- Is there cooperation with the committee staff?
- Can witnesses be first interviewed by committee staff?
- Will majority and minority staff work jointly or separately to gain information?
- How are responsive documents identified?
- Is there an opportunity to narrow the request?
- What, if any, confidential information can be withheld?
- Can public testimony (and press coverage) be avoided?
- Can reports be reviewed before publication by the staff/committee?

These and other practical steps often will determine how adversarial the process becomes, lengthen or shorten the company/witness's ordeal, and affect the ultimate outcome.

Conclusion

Avoiding Congressional inquiries altogether may be impossible, depending on your industry, but there are some common-sense ways to minimize risk and prepare in the event one happens to you. First, understanding the current issues, election cycle and major newsworthy events is a logical place to start in minimizing exposure. If you work in an industry or on projects that are likely to face Congressional scrutiny, acting ahead of time to consult with strategic advisors and having lobbyists and other professionals be familiar with your business, can help prepare you for any contingencies. Regular review and audit of your business practices, online presence and reputation, and general regulatory compliance and record keeping are also logical steps to put your entity in a good position to appropriately respond if an inquiry comes. Lastly, ensuring you have good public relations and communications advice to avoid making public statements that could draw negative attention is also valuable. In the current real-time information age, preparing for the consequences of even innocent, but ill-perceived or unfortunate outcomes, will put you in the best position to respond to requests from Congress.

¹ U.S. Constitution, Article 1, section 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

² <https://history.house.gov/Institution/Origins-Development/Investigations-Oversight/>.

³ See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

⁴ *Watkins v. United States*, 354 U.S. 178, 200-01 (1957).

⁵ Congressional Oversight Manual, <https://fas.org/sgp/crs/misc/RL30240.pdf>.