COVID-19: CONGRESSIONAL INVESTIGATIONS AND PANDEMIC RELIEF OVERSIGHT MECHANISMS

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U.S. Congressional Investigations Alert

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Congress passed some $2 trillion worth of pandemic relief at the end of March, with additional relief currently under consideration. The rules governing these programs have been constantly changing. As millions of businesses and individuals seek aid and relief funds are disbursed, federal and state government actors will be under intense pressure to prevent and punish corruption, self-dealing, and profiteering. During the Great Recession, law enforcement investigated over 200 defendants under the Troubled Asset Relief Program (TARP). But times have changed. Prosecutors are not the only ones investigating alleged misconduct. Congress is very much in the mix. Legislative accountability mechanisms extend beyond conduct that risks criminal prosecution. Those inquiries are bound to create investigative risk — and potential liability — for a variety of private sector actors.

CONGRESSIONAL INVESTIGATIONS OVERDRIVE: OVERSIGHT MECHANISMS IN THE CARES ACT

In response to the acute economic trauma caused by the novel coronavirus (COVID-19), Congress passed some $2 trillion worth of relief in three legislative packages by the end of March, with a fourth under discussion. Millions of businesses and individuals seek relief from these efforts. As more relief funds disburse, federal and state government actors will be under intense pressure to prevent and punish corruption, self-dealing, and profiteering. Both the House and Senate will have a keen focus on allegations of waste, fraud, and abuse in federal relief efforts, and they will seek to leverage newly created oversight mechanisms to boost their own standing committees' efforts.

The third legislative relief package — the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or “Act”) — will be of particular importance to companies seeking relief that may be subject to scrutiny by accountability watchdogs. During the legislative process, anticorruption and oversight became one of the chief negotiation sticking points. At the end of the negotiations, the Act established three principal oversight entities to bolster traditional oversight and accountability mechanisms.

While these mechanisms will each have power to act independently, they must also be considered together. There will likely be dynamic interplay between law enforcement, inspector general accountability, and congressional oversight. Investigations commenced by one investigative body may generate additional investigations, information sharing, and criminal referrals to the Department of Justice (DOJ) and U.S. Attorney Offices throughout the country.[1]

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There are steps companies and individuals can take now to minimize the investigative risks associated with relief funds, some of which are unique to congressional investigations. It is important to factor those risks into the flurry of activity during the application process.

CONGRESSIONAL OVERSIGHT COMMISSION

Section 4020 of the CARES Act establishes a five-member bipartisan Congressional Oversight Commission ("Commission") in the mold of the 9/11 Commission or the Congressional Oversight Panel that oversaw the TARP funds.[2] The Act charges with Commission with "oversight of the implementation" of Subtitle IV of the Act by the Department of the Treasury and the Federal Reserve, "including efforts to provide economic stability" related to COVID-19.[3] Subtitle IV includes a $500-billion loan and investment program, along with some provisions related to airline-related relief, as well as financial institution, housing, and consumer credit protections.[4] Oversight will be robust given the Commission's charge to report back to Congress no later than 30 days after the Department of the Treasury and Federal Reserve first exercise their lending authority under the Act and then issue reports every 30 days thereafter.[5]

For separation-of-powers purposes, the Commission sits within the legislative branch. As such, it has investigative and informing functions — holding hearings and issuing reports — but will not have enforcement or adjudication powers. Congress did not grant the Commission subpoena authority, so it will be dependent on either standing congressional committees or inspectors general to leverage compulsory process on recalcitrant witnesses or business organizations.

The Commission has a five-year charter and an unspecified budget to be funded by the reimbursements from the Federal Reserve.[6]

SPECIAL INSPECTOR GENERAL FOR PANDEMIC RECOVERY

Section 4018 of the Act establishes a presidentially appointed, Senate-confirmed special inspector general for pandemic recovery ("Special Inspector General") within the Treasury Department.[7] The Special Inspector General has a mandate to "conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under any program established by the Secretary under this Act, and the management by the Secretary of any program established under this Act."[8] That will largely focus on the $500 billion loan and investment program established under Section 4003 of the Act but will also extend to other Treasury programs. Like the Congressional Oversight Commission the Act creates, the Special Inspector General has regular reporting obligations pertaining to "all loans, loan guarantees, other transactions, obligations, and revenues" associated with the new relief programs.[9]

Instead of subpoena power, Congress established a congressional notice provision in Subsection (c)(4)(B) that requires the Special Inspector General to notify "appropriate committees of Congress without delay" if information is "unreasonably" withheld.[10] President Trump issued a signing statement signaling that the administration does not deem itself bound by the notice provision.

The Act authorizes the Special Inspector General to operate for a five-year term and grants the position a $25-million budget.[11]

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INSPECTORS GENERAL COMMITTEE

Section 15010 of the Act establishes the Pandemic Response Accountability Committee (IG Accountability Committee or Committee) with a five-year mandate to conduct and "support" oversight of the federal COVID-19 response and funding, including by coordinating oversight efforts by existing inspectors general.[12] Some in Congress will undoubtedly interpret "support" of oversight as an obligation for the Committee to share information and otherwise coordinate with congressional investigations.

The Act locates the IG Accountability Committee within the existing Council of Inspectors General on Integrity and Efficiency (CIGIE). Pursuant to the Act, CIGIE's chair, DOJ Inspector General Michael Horowitz, appointed Glenn Fine, acting inspector general of the Department of Defense, as chair of the IG Accountability Committee from a list of existing inspectors general. On April 6, President Trump removed Fine and appointed Environmental Protection Agency Inspector General Sean O'Donnell. The remainder of the IG Accountability Committee are the existing permanent or acting inspectors general of the Department of Health and Human Services, Department of Energy, Department of Homeland Security, Department of Justice, Department of Labor, Department of Treasury, Treasury Inspector General for Tax Administration, and Small Business Administration and any other inspectors general Horowitz selects. In addition, Horowitz may also select the IG Accountability Committee's executive director and deputy executive director. The IG Accountability Committee has subpoena authority to obtain testimony from nonfederal persons and may hold hearings.[13] The Act requires the Committee to operate a public website with extensive information.[14] It has an unspecified budget, with such appropriated sums "as may be necessary to carry out the duties and functions of the Committee."[15]

OTHER CARES ACT REPORTING FUNCTIONS

The Act also imposes various reporting requirements on agencies, recipients of federal benefits, and the Government Accountability Office. Those reporting requirements are designed to be an oversight forcing function or tripwire.

TRADITIONAL CONGRESSIONAL OVERSIGHT

Standing congressional committees can be expected to forge ahead with investigations within their subject matter jurisdiction related to COVID-19 after assessments of pandemic intelligence and policy responses and scrutiny of relief efforts. As such, the CARES Act oversight mechanisms will augment, rather than supplant, traditional congressional oversight. While much of Congress's oversight will focus on the executive branch, the private sector will also be under a microscope. Congressional committees have already started scrutiny of COVID-19-related topics directed at certain industries, including travel insurance coverage of pandemic-related cancellations, coronavirus disinformation on social media platforms, and unapproved COVID-19 health benefit and testing claims.

TRADITIONAL LAW ENFORCEMENT

Federal and state law enforcement will also maintain their mandate to deter and punish COVID-19-related frauds and other criminal conduct. As our K&L Gates colleagues explained in a previous alert, "federal and state authorities have prioritized enforcement related activities aimed at combatting fraud schemes arising out of the public uncertainty and desperation caused by the COVID-19 pandemic."

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K&L Gates' congressional investigations and investigations, enforcement, and white collar practice groups will continue to monitor and report on congressional investigations and government enforcement priorities in light of the COVID-19 pandemic.

FOOTNOTES

[1] There are historical antecedents for this circumstance. For example, over 200 defendants were investigated, and over 113 convicted of fraud in connection with TARP.

[2] TARP's Congressional Oversight Panel was likewise a five-member independent entity within the legislative branch that was appointed by congressional leadership. Between December 2008 and March 2011 the Panel issued 30 reports and held 26 hearings related to TARP oversight. It is reasonable to expect a similarly intense level of activity by the CARES Act Commission.

[3] CARES Act § 4020(b)(1)(A).

[4] CARES Act § 4003.

[5] CARES Act § 4020(b)(2)(A).

[6] CARES Act § 4020(f)–(g).

[7] President Trump nominated Senior Associate White House Counsel Brian Miller to be Special Inspector General on April 3, 2020.

[8] CARES Act § 4018(c)(1).

[9] CARES Act §4018(f)(1)(B).

[10] § 4018(c)(4)(B).

[11] CARES Act § 4018(g), (h).

[12] CARES Act § 15010(b).

[13] CARES Act § 15010(e)(3)(A).

[14] CARES Act § 15010(g).

[15] CARES Act § 15010(j).

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