



PROGRAM MATERIALS

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Congress Cares: Expect Oversight Investigations

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CONGRESS CARES: EXPECT OVERSIGHT INVESTIGATIONS

July 2, 2020



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- Substantial prior Department of Justice experience including:
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- Represents clients in business litigation, including False Claims Act matters; advises clients about regulatory compliance and corporate governance, and conducts internal investigations
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Introduction

- CARES Act created special provisions regarding congressional oversight and investigation in response to COVID-19.
- Congress already has substantial investigative authority.
- CARES Act-related oversight and investigative activity already underway.
- Government assistance always comes with conditions.
- Being vigilant and compliant from the beginning is critical.

Agenda

- Congressional Oversight Generally
- Fundamentals of Congressional Investigative Authority
- Key CARES Act Oversight Provisions
- Other Congressional Oversight and Investigations
- Lessons Learned from TARP and Other Historical Events
- Types of CARES Act-Related Issues Ripe for Congressional Inquiry
- Hypotheticals and Practical Guidance
- Questions and Conclusion

Congressional Oversight 101

- Framers intended Congress to “possess itself of the fullest information in order to doing justice to the country and to public officers”
 - James Madison
- One of those legislative powers is the implicit authority to gather information in “aid of its legislative function”
 - *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

Congressional Oversight 101

- Importance of the Committee Inquiry
 - Committee members serve as the representatives of the parent assembly.
 - Collecting information for a legislative purpose.
 - Committees and subcommittees, sometimes one congressperson, are endowed with the full power of the Congress to compel testimony.
 - 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.”
 - *Watkins v. United States*, 354 U.S. 178, 200-01 (1957).

Congressional Oversight 101

- All House and Senate committees have investigatory powers across substantive areas of focus.
- The principal committees for oversight are:
 - the House Committee on Operations and Reform
 - the Senate Committee on Homeland Security and Governmental Affairs (in particular its Permanent Subcommittee on Investigations).
- All committees can subpoena documents, order testimony at committee hearings, and sometimes compel depositions.

Fundamentals of Congressional Investigations

- Congressional “inquiry” can be triggered from a variety of sources, incidents, or experiences.
- Rules and practices vary by chamber and committee.
- Attorney-client privilege and other common law privileges – except an individual’s Fifth Amendment privilege against self-incrimination – may not be recognized in congressional investigations.
- Your response can become a public record and also can be relied on by law enforcement to initiate criminal proceedings.

Fundamentals of Congressional Investigations

- Congress can *investigate* conduct that may be criminal, but it cannot *bring* criminal charges or otherwise initiate a criminal prosecution.
- Congressional investigations often run parallel to a criminal investigation by the Department of Justice.
- Inquiry may also involve concurrent or related investigations and/or enforcement by other federal agencies, including the Office of the Inspector General and the Securities and Exchange Commission.
- Evidence presented or developed in a congressional investigation can be (and commonly is) used by DOJ in its investigation and, potentially, prosecution.

Fundamentals of Congressional Investigations

- Common Types of Congressional “Inquiries:”
 - May be **formal**:
 - Subpoena compelling the production of documents
 - Subpoena compelling oral testimony
 - Deposition
 - Request for documents or information
 - Invitation to be interviewed by staff
 - Invitation to provide testimony voluntarily
 - Or may be **informal**:
 - Request for documents or information
 - Invitation to be interviewed by staff
 - Invitation to provide testimony voluntarily

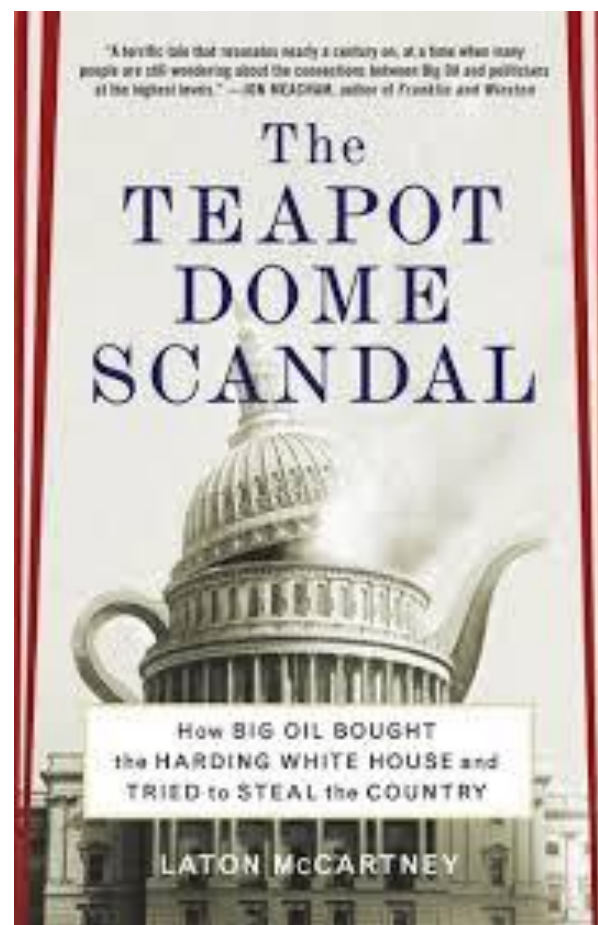
Fundamentals of Congressional Investigations

- A witness has limited remedies available to raise objections.
- The Supreme Court has ruled that courts may not enjoin the issuance of a congressional subpoena, holding that the Speech or Debate Clause of the Constitution provides “an absolute bar to judicial interference” with such compulsory process.
 - *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 503-07 (1975).
- Sole remedy generally is to refuse to comply; risk being cited for contempt; and then raise objections as a defense in a contempt prosecution.

Fundamentals of Congressional Investigations

- Test for Proper Congressional Investigating Power:
 - (1) the investigation of the broad subject matter area must be authorized by Congress;
 - (2) the investigation must be pursuant to “a valid legislative purpose;” and
 - (3) the specific inquiries must be pertinent to the broad subject matter areas which have been authorized by the Congress.
- *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961)

The Teapot Dome Scandal and Related Court Decisions



The Teapot Dome Scandal

- President Harding served from 1921-1923 (passed away in office).
- He was a long-shot winner of the election due to extensive backing by oil companies, which expected “favors” in return.
- In April 1922, the Wall Street Journal reported a secret arrangement in which the Secretary of the Interior (Albert Fall) leased the U.S. naval petroleum reserve at Wyoming's Teapot Dome to a private oil company.
- Fall received large amounts of cash (worth more than \$5 million in today's dollars).

The Teapot Dome Scandal

- On April 15, 1922, Wyoming Democratic senator John Kendrick introduced a resolution that set in motion one of the most significant investigations in Senate history.
- Fall would end up as the first former cabinet officer to go to prison.
- This and a subsequent Senate inquiry triggered several court cases testing the extent of the Senate's investigative powers.
- One of those cases resulted in the landmark 1927 Supreme Court decision *McGrain v. Daugherty*, which explicitly established Congress's right to compel witnesses to testify before its committees.

Key CARES Act Oversight Provisions

- The CARES Act created several key oversight provisions that provide the government with tools for compliance:
 - Section 4018: creates a “Special Inspector General for Pandemic Recovery” (“SIGPR”) to conduct focused oversight of the Act’s funds.
 - Section 4020: creates a “Congressional Oversight Commission” (terminating by Sept. 30, 2025) to oversee implementation by the Treasury Department and the Federal Reserve System’s Board of Governors.
 - Section 15010: creates the “Pandemic Response Accountability Committee” (“PRAC”) charged with promoting transparency and oversight of covered funds and the Coronavirus response.

COVID-19-Specific Task Forces

- On March 24, 2020, Attorney General William Barr outlined a task force approach in a memorandum, “Department of Justice COVID-19 Hoarding and Price Gouging Task Force”;
- The same day, Deputy Attorney General Jeff Rosen issued a memorandum, “Department of Justice Enforcement Actions Related to COVID-19,” that also anticipates close interagency and state coordination to address fraud and other misconduct related to the Coronavirus pandemic.

TARP and Other Historical Events

- 2008 Troubled Asset Relief Program (TARP) provided to the economy approximately \$700 billion in taxpayer funds.
- TARP established the “Congressional Oversight Panel” (COP), which is similar to the COC created under the CARES Act
 - Five members selected by Congress
 - Provided regular reports, including on issues of authority and impact of certain programs
 - Retained power to conduct hearings and issue subpoenas
 - Additional TARP oversight resided in the Comptroller General (General Accounting Office)
- SIGTARP was a single special inspector general versus CARES Act PRAC of nine current inspectors general
- Financial Stability Oversight Board (FSOB)

Lessons Learned from TARP

- TARP Enforcement Precedents
 - FSOB acted to report suspected fraud, misrepresentation, or malfeasance to the SIGTARP or U. S. Attorney General.
 - Investigations resulted in more than \$11 billion recovered through civil False Claims Act or criminal enforcement actions, including 438 charges and 381 convictions (with 300 persons sent to prison of which 76 were bankers).
 - To forecast the enforcement risks for those suspected of fraud and misconduct by grant or loan recipients under the CARES Act, there are several important contextual differences between the TARP and CARES environments.
 - The sheer magnitude of the monies being provided under the CARES Act dwarfs the hundreds of billions funded through TARP and will be disbursed to a much broader group, which heightens the risks.
 - There was bipartisan support and cooperation under TARP. Will it be repeated?
 - Proliferation of reports resulted under TARP (COP, GAO, Financial Crisis Inquiry). Were there too many? What will be process for the delivery and criteria for content of COC/Congressional Committee reports?

Areas Ripe for Congressional Oversight

- Can we expect CARES Act oversight to go beyond financial institutions (which was the focus under TARP)?
 - PPP Loans and Loan Forgiveness/Banking Practices
 - Hospitals and health care systems
 - Funding
 - Access to PPE
 - Oversight of patient care
 - Defense contracts
 - FEMA funds/distribution
 - Civil Rights implications – equal access issues
 - Executive compensation – fees/bonus incentives
- What criteria will be used to identify the subjects/targets of oversight investigations?
- Like TARP, the stimulus monies for PPP were directed through banks.
- How compatible were loans – without specific Treasury-directed incentives – with the Treasury’s initial goals?

Hypothetical 1

- Client is an owner of a large number of nursing homes who received an informal letter inquiry signed by several members of Congress.
- The requested data includes information that could be considered extremely sensitive.
- Some of the facilities have pending tort lawsuits as well state and federal surveys and an investigation.
- The focus appears to be the response and planning for COVID-19 issues.

Hypothetical 2

- Client is a large retail business that experienced significant financial challenges.
- In a recent article, a national newspaper reported that there were a number businesses receiving PPP loans as part of COVID-19. The article suggested that these businesses laid off employees but used the money to increase executive compensation.
- While your client is not named, the article discusses businesses in your industry.

Practical Guidance

- Weigh strategic options to deal with requests for information and/or testimony
 - Can a committee’s authority be effectively challenged?
 - What constitutional claims might be raised?
 - Can privileged information be protected?
- Importantly, assess these and other considerations promptly, as doing so will inform your response, strategy and long-term implications.

Practical Guidance

- Assess what tactical steps can be taken to ease the (inevitable) pain that comes with any form of a congressional investigation
 - Upon receiving a request, issue detailed document retention directive to preserve documents and information;
 - Assess any opportunity for early cooperation;
 - Maintain open communications with committee staff;
 - Offer witnesses for staff interviews before any public testimony and seek to narrow the scope of questioning;
 - Evaluate whether majority and minority staffs/committee members are working jointly or separately to gain information;
 - Collaborate with staff to identify and narrow documents to be produced, including agreed search terms for ESI;

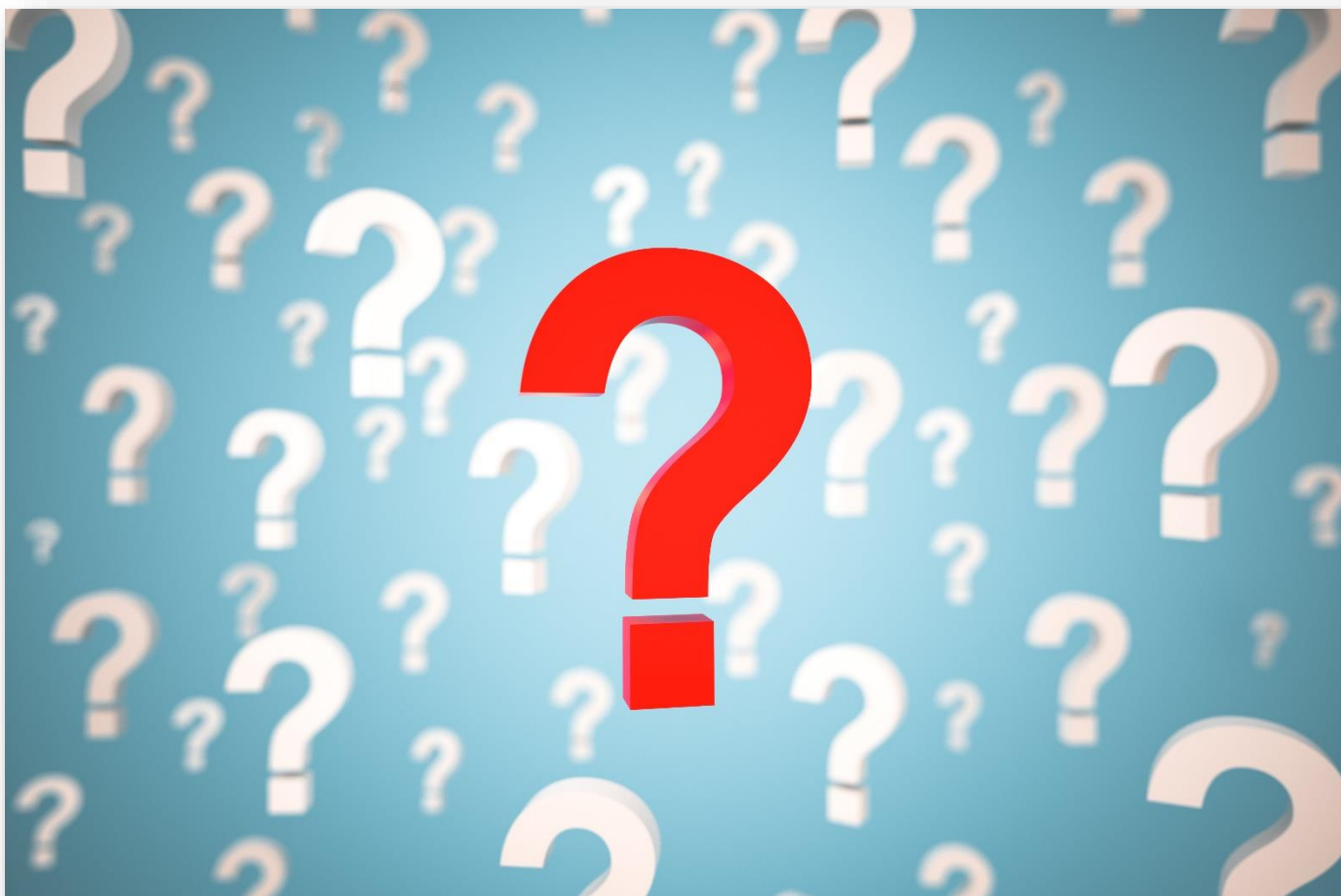
Practical Guidance (cont.)

- Seek to limit business confidential or privileged information and mark documents accordingly, including supplying a privilege log and password protected data base accessible to staff and counsel (secure FTP site/portal);
- Encourage use of interviews in lieu of public testimony (and resulting press coverage);
- Negotiate an opportunity for the entity/individual to review any committee report before release and request redactions where necessary;
- Centralize responses to any press inquiries to one spokesperson;
- Be prepared to deal with multiple forums – committees, COC – and be consistent in responses, hopefully avoiding investigation fatigue for management and employees;

Practical Guidance (cont.)

- Connect with members of Congress on the relevant committees who represent states/districts where entity is headquartered or has major offices/facilities;
- Be cautious in communications with other witnesses, including joint defense arrangements, as allegations of collusion may arise;
- In all dealings, be cooperative and address and explain any disagreements or questions that arise, seeking resolution rather than confrontation.

Question?



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