

Congressional investigations and oversight of covid-19 relief likely to stretch beyond US borders

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The covid-19 pandemic and economic fallout has prompted Congress to pass a series of large aid packages, most notably the Coronavirus Aid, Relief and Economic Security (CARES) Act. Recipients of these aid packages can and should expect congressional scrutiny, as followed the

2008 financial crisis and subsequent recession. Given the increasingly global nature of business in 2020, the scope of these congressional investigations will likely stretch beyond US borders to include those who may believe they are outside the reach of US legislation.

Potential subjects of US congressional inquiries, particularly US-headquartered multinational corporations in global industries from airlines to finance, would be wise to prepare for such extraterritorial reach. Below, we outline instances when previous congressional investigations have gone global, and suggest ways that companies can prepare today to protect their global business interests in the scrutiny likely to come.

Global congressional investigations

Historically, congressional committees have leveraged pressure – both formal and informal – to obtain information and witnesses from abroad during their investigations. For example, the House Permanent Select Committee on Intelligence, investigating what they termed the “security threat posed by Chinese telecommunications companies doing business in the United States,” interviewed Huawei and ZTE company representatives inside China. Huawei and ZTE executives also testified in an open hearing.

In addition to asking politely, congressional committees have issued subpoenas to obtain information about overseas activity. The Senate Permanent Subcommittee on Investigations focused on LGT Bank, a Liechtenstein financial institution owned by the Liechtenstein royal family, as a case history in their investigation into tax haven banks. Not only did the committee obtain testimony from the bank’s head of compliance, but they also contacted the bank’s US clients directly to obtain documents and information about the bank’s business practices.

The subcommittee similarly probed illicit financial vulnerabilities created by foreign institutions with US subsidiaries through its case study of London-based HSBC, collecting documents and information including from abroad. HSBC executives based in London and Hong Kong also testified at a public hearing.

\$2 trillion plus in covid-19 relief to help US businesses at home and abroad

As the biggest COVID-19 aid package passed to date, the CARES Act authorises \$2 trillion in spending, including \$500 billion allocated for business assistance, of which \$25 billion is earmarked for passenger air carriers, \$4 billion for cargo air carriers, and \$17 billion for businesses critical to national security. In terms of aid awards, the total of \$29 billion for air carriers is second only to the amount dedicated to the healthcare and hospital industry, at \$150 billion. The New York Times reported that in a subsequent deal struck between airline companies and the US Treasury

Department, some of the terms to receive aid include resisting major staffing or pay cuts through September 2020, refraining from stock buybacks before 2021, and limiting executive pay until 2022. These terms extend the window of potential investigation far into the future.

In addition, the CARES Act allocates \$500 billion to the Economic Stabilization Fund, which is available to US-based businesses with fewer than 10,000 employees or less than \$2.5 billion in revenue, including businesses with operations and employees overseas as long as the majority of both are in the United States. The Act allocates hundreds of billions more dollars for small businesses, to be distributed by commercial banks already facing questions about their implementation of the programmes.

Prepare for the politicians to come knocking

Just as financial institutions, automakers, and other industries were put under the spotlight after the 2008 financial crisis, it is inevitable that Congress will scrutinise how taxpayer funds are deployed and used during the covid-19 pandemic. Unlike the 2008 financial crisis, which to a large degree impacted the key financial markets of New York and London, the economic fallout from the covid-19 pandemic will hit on a much more global scale, and congressional interest will be similarly broad.

There are several steps businesses should take now to prepare:

Undertake a risk analysis. Companies should identify their risk profile based on how they have used and are planning to use congressionally appropriated funds, and where those funds have physically gone and will go. For funds sent to non-US jurisdictions, the risk analysis should specifically consider the prevalence of fraud and corruption in the region – a potential red flag for investigators.

The analysis also should address any counterweights to these risks, ranging from specifically dedicated resources to the utilisation of open-reporting systems. Local company leaders having first-hand knowledge of ground conditions should be enlisted in support of these efforts. By undertaking a risk analysis, companies will understand whether they are

likely to attract questions from congressional investigators and, if so, what potential areas of exposure may need to be addressed or defended.

Augment controls and training with a view to what's to come. Controls and training likely will need to be enhanced, or at least modified, specifically to target the identified risks, again engaging local executives and business functions. Controls and training can be more difficult to enforce in remote locations for a variety of reasons, including cultural differences, resource limitations, and lack of proximity to the C-Suite from which policies and controls emanate. Companies, therefore, would be well-served to determine whether personnel and other resources should be redeployed during this time to overcome these challenges.

Now would be an especially good time for companies receiving congressional funds to enhance avenues and mechanisms for internal reporting of possible violations (including anonymously), which historically have not been as developed in many non-US jurisdictions. A robust internal whistleblowing programme is critical for signalling trends, understanding what controls might be lacking, and remediating before problems metastasise. Companies might also consider advancing audit schedules and deploying auditors to jurisdictions where the funds are directed.

Identify key information sources and anticipate future testimony. Once the parameters of the risk are well understood and a congressional investigation is judged to be imminent, the company will want to assess areas of potential vulnerability and prepare for investigators. This should include gathering and analysing relevant documents, identifying and interviewing relevant witnesses, including those overseas with granular knowledge of the subject matter, and analysing media coverage. Companies should also lay the groundwork for potential testimonial requests by identifying witnesses internally, considering which executives and other employees, including those abroad, can best advance the facts. Such efforts will enable the development of a consistent narrative for responses to congressional subpoenas and other information requests.

Employing independent, outside counsel who specialise in cross-border fraud investigations can enhance the credibility of the investigative findings for use in these inquiries, as well as ensure that the disclosure of any documents or information from overseas does not violate laws in those jurisdictions. Early engagement with outside company counsel and, where desired, independent counsel for personnel and executives, can help familiarise those overseas representatives and executives with US laws and customs, should they later appear before Congress.

Consider other jurisdictions' politicians or regulators who may come knocking. Just as overseas operations may be subject to US scrutiny if alleged misconduct surfaces, US companies with operations across the world could find themselves subject to investigation by legislators or regulators of other countries. Companies must be prepared to mount a response based not only on US laws and customs, but also those of other countries, especially in key jurisdictions such as the United Kingdom, Hong Kong and South Korea. For example, South Korea's Fair Trade Commission (KFTC), which has lately centred attention on foreign companies, may be interested in antitrust concerns, while the Hong Kong Police Force may zero in on money laundering and other financial misconduct, consistent with its recent focus. In such a scenario, a coordinated, multijurisdictional approach will ensure a consistent and comprehensive response.

Airlines, banks and other U.S.-based multinationals receiving aid must consider overseas operations and personnel as they anticipate congressional inquiries and other governmental investigations. From formal and informal requests for information and testimony, to possible coordination with other foreign regulators, extraterritorial exposure can take a variety of forms. Whether they are recipients of aid from the CARES Act or a future area of congressional interest, the best-prepared companies will be those that plan ahead by evaluating all critical angles and formulating strategic approaches today.