

Coronavirus Q&A: Akin Gump Partners On Virus Relief Probes

By **Al Barbarino**

Law360 (August 13, 2020, 6:10 PM EDT) -- After spearheading trillions of dollars in COVID-19 relief, Congress is ramping up investigations into how the government distributed the funds, laying the critically important groundwork for a process that will likely stretch on for years, according to two Akin Gump Strauss Hauer & Feld LLP partners with years of experience as federal investigators.

Karen Christian and Rafi Prober told Law360 there is immense pressure for the specially created United States House Select Subcommittee on the Coronavirus Crisis — tasked with overseeing the \$2.2 trillion Coronavirus Aid, Relief and Economic Security, or CARES, Act — to jumpstart investigations into the government's handling of the funds before the current Congress wraps up in early January.

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Karen Christian

Rafi Prober

But as the investigations progress, companies that received relief may find themselves subjected to questioning, both from the subcommittee and a number of other congressional and government entities, and they will need to be prepared to ensure they complied with regulations while not missing a beat in responding to inquiries.

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Christian is former general counsel with the House Energy & Commerce Committee, and Prober is co-head of Akin Gump's congressional investigations practice and a former U.S. Department of Justice attorney. Together, they addressed the timing and scope of the investigations, what the public should expect from congressional oversight as the pandemic rages on, and what firms subject to investigations can do to prepare.

How quickly will these investigations play out?

Prober: There is a feeling of urgency on the investigative side that I have never felt before from congressional staff and congressional committees, and I think there's a very real recognition of that, at least with regard to the select subcommittee. It expires under the legislation at the end of this Congress.

So congressional investigators and committee counsel are now living in real time through the pandemic and they know they are on a limited clock to get these investigations done and get them done thoroughly. It's a very limited number of months — a period of six or eight months — to conduct investigations, find facts, interview witnesses, call hearings and reach conclusions. So things are certainly moving on an accelerated time frame.

Christian: The importance of anything that touches on public health is often amplified. And it has that hotness to it that other investigations don't because it's so personal to the public. In Congress, the members feel really motivated to try to get answers and be participating and speaking about it, which makes things move at a speed they might not otherwise move when it's a different topic.

This is unprecedented — it's a global pandemic. And it's gone beyond health to the economy and to schools and many other facets, so we're seeing a level of activity that's like nothing else we've seen. I think probably the response to the financial crisis in 2008 is the closest thing, with the added layer of public health.

Will investigations continue after the close of this Congress?

Prober: Absolutely. Traditional standing committees of the [House of Representatives] and the Senate have sweeping jurisdiction to investigate all aspects of the pandemic preparedness and response. Those investigations will likely go on for years and years. And I think it is probably likely that the select subcommittee will be reauthorized in the following Congress in any event.

But I think we can all be quite certain that COVID-related investigations will be with us for years to come during the crisis and in the aftermath, in the vein of examining allegations of waste, fraud and abuse.

Christian: With the Paycheck Protection Program's business loans and those types of things, I think it will take a little bit of time for Congress to figure out whether they actually made it to the people who needed it and whether it was spent appropriately. And then there's the larger programmatic question of whether that was a good idea. It will take a while for the data to be collected and available.

What's the focus of the investigations?

Christian: It falls into different buckets. In the early days, if you look back in March and April, some of it tracked very closely to what was top-of-mind in the news. It included things like the availability of therapies, vaccines, masks and those types of things, because that's what we were all worried about. Those are the types of things that Congress in the past has looked at with regard to pandemic response, and you saw it going to those topics first.

Some of Congress' interest right now is political. We're leading up to an election, and they're trying to examine whether the administration made the right moves in responding to the pandemic. And to the extent you're a company that was involved in some element of the response, they might be a proxy for what the administration did or didn't do. They will look at the immediate spending but also wait for things to pan out and see where the money is going and if it is actually spent consistently with Congress' intent.

What advice do you give to clients and other companies who have received CARES Act funding and could ultimately be summoned by Congress or other government authorities?

Christian: You have to respond to these congressional investigations. You can't just take the narrow look. You have to keep an eye on those compliance issues and other things because, should your documents become public or should an answer you give in a hearing that conflicts with what you've answered on a form or elsewhere, you know, then you've created an issue.

So some of it is about figuring out why Congress is conducting this investigation. What's their motivation? But you also need to be able to anticipate what other things might come down the road that you need to be prepared to address and make sure you're addressing it consistently in case an [inspector general] or someone else starts trying to look at the regulatory or compliance issues that are related to that investigation.

When you're responding to these things, you have to be careful because sometimes they can take on a life of their own that will continue to roll down for a number of years. The oversight of the financial crisis went on for years, some of it in Congress, but some of it is long-ranging IG and GAO investigations. But we're still in the middle of responding to the pandemic.

What's your role as attorneys if a client is questioned or asked to testify?

Christian: You have to figure out why the committee is talking to your client. Is the client really the target or a way of getting information about what the administration is up to? This administration's really pushed back on the congressional oversight requests for agency documents, so they come in to your client because they can't get it elsewhere. You're kind of a backdoor.

Your job is to kind of figure that out. And I think that really informs how you deal with the committee and respond to the committee and whether you can keep your client away from being a witness at a hearing. I think that helps inform the response in terms of what you want to provide or what the committee needs. Those requests can be extremely broad, but most committee staff need to get information quickly because their members want to move forward with it in negotiating those requests and figuring out how to assist the committee.

But protecting your clients' interests is huge, and sometimes you're getting the letter right as you're being retained. So you're trying to get up to speed really fast in terms of learning the subject matter but also figuring out what happened, and then at the same time figuring out how to respond to a committee that's given you a two-week deadline to give them information.

What, if any, will the interplay between committees look like?

Christian: There can be significant overlap between committees like the Health Oversight Committee, Health and Human Services, the Strategic National Stockpile, Energy and Commerce.

You've also seen the House Financial Services Committee ramping up as COVID has affected lending and banking and housing that are not really "public health" but have been addressed in one format or another through the different types of relief packages that Congress has been passing since March.

They've all kind of picked up, sometimes investigating the same thing, sometimes different things. But

then [Speaker Pelosi] established the select subcommittee that is charged with doing oversight. So it's kind of like turning a little bit of gas on the fire in terms of the oversight power that the Oversight Committee has.

What lessons were learned from the 2008 financial crisis, and what does it tell us about things to come?

Prober: I think the lesson is that these investigations are very important and consequential and happening in real time, in many cases, which is very different from the traditional longer-form government investigation. So it really is a game; it feels a lot like a game of three-dimensional speed chess. I think the most important lesson from the financial crisis is to treat the process with the seriousness it deserves because they really can be phenomenally impactful to companies and to shareholders.

Christian: I think the tentacles of these investigations will stretch for a number of years, and that is the lesson of the financial crisis. Congress set some investigations, but then the [inspectors general] picked up or the [U.S. Government Accountability Office] picked up. There's also always the possibility of shareholder litigation based on what happens with a congressional investigation. I think that's the part of it that companies, organizations or individuals need to keep an eye on because responding to the congressional investigation is just one piece of it.

What are the challenges of virtual vs. in-person hearings?

Christian: Some of the work is the same. It's about trying to anticipate the questions the committee is going to ask and then preparing your clients, make sure they're knowledgeable and can answer those questions or how to deal with curveballs that the members may ask.

Congressional hearings in and of themselves are an unusual forum. You have an audience behind you. The press is sitting on the floor right in front of you, taking pictures, and then members are usually seated above looking down on you. They control the time, and unlike a courtroom where your lawyer might have some period to examine you and rehabilitate you, that doesn't necessarily happen in a congressional hearing. So it's usually not the best setting to get out your story.

I think one of the things that's a little bit challenging is the technology. But also you're not in the room, so you can't take in the situational awareness and read the room and see which members look engaged. Depending on how the screen is set up for you, you don't always see the member unless they're talking to you and it's their questioning time. So the virtual hearing makes it a little bit of an out-of-body experience and can be off-putting for a witness. But Congress has continued to press on with those hearings and continued to exercise their authority, which I think is good.

Prober: Having had a client testifying remotely before Congress, we sat near nearby but at a socially distanced space with a mask on. It was certainly a different experience than marching through a House or Senate office building with a client on the way to a hearing room, typically with press following in tow and all the fanfare that can come with some of these more high-profile hearings. So it certainly had a much different feel.

Normally a witness likely feels the gravity of testifying before Congress in the run-up to the experience, but [if not then ... when they] are sworn in and raise their right hand.

All of that is much, much different when it's done virtually and a witness is sitting in their office or in a conference room. It's always good to have a plan and a backup plan — and a backup plan to the backup plan — for anything technology-related.

But it's of critical importance to always remember the exercise is exactly the same. The legal, reputational and business ramifications are exactly the same. And you need to make sure that you're approaching it with the same sense of purpose and seriousness, even though it feels different.

--Editing by Philip Shea.