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House Select Subcommittee Announces First Public Investigations Involving CARES Act

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As anticipated, the hundreds of billions of dollars allocated under the CARES Act Paycheck Protection Program have become the focus of scrutiny from investigators. On May 8, the House Select Subcommittee on the Coronavirus Crisis launched its first public broadsides at five companies that received PPP loans.

What is the House Select Subcommittee?

The subcommittee is a recent addition to the oversight bodies created by the CARES Act that we described in March. The House of Representatives established the subcommittee on April 23 and authorized it "to conduct a full and complete investigation" of the "efficiency, effectiveness, equity and transparency of the use of taxpayer funds and relief programs to address the coronavirus crisis." Speaker Nancy Pelosi compared its mandate to the Truman Committee during World War II, which investigated waste and fraud in defense spending. While the Truman Committee had an initial budget of $15,000, the subcommittee's budget for 2020 is $2 million.

The subcommittee's seven Democratic members were named on April 29 and include Majority Whip James Clyburn and the chairs of the Financial Services, Small Business and Oversight and Reform Committees. The five Republican members include Minority Whip Steve Scalise and the ranking members of the Judiciary and Oversight and Reform Committees.

What did the subcommittee demand?

Barely two weeks after its creation, the subcommittee sent, and publicly released, letters to five public companies demanding that they return their PPP loans and threatening investigations if they refuse. The letters, which were signed by all seven Democratic members and none of the Republicans, stated that Congress "did not intend for these funds to be used by large corporations that have a substantial investor base and access to capital markets," and gave the companies three days to commit to returning their loans. The letters go on to state that if the company "choose not to return some or all of these funds," the subcommittee will request the production of documents about the company's loan application and communications with the Small Business Administration. The subcommittee's language about access to capital echoes guidance provided by the SBA in its April 23 FAQ, which stated, "It is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith."

Why these companies, and who is next?

According to the subcommittee, it targeted these companies because they are publicly traded, have more than 600 employees, have market capitalizations of greater than $25 million and received loans of at least $10 million. On May 11, the first of the five companies announced it was returning its full $10 million loan. The subcommittee promptly announced, "Our actions have already resulted in the return of $10 million in taxpayer funds – five times our entire budget for the year – which is exactly why we were created in the model of the Truman Committee during World War II."

This initial result is likely to spur further investigative activity, by both the subcommittee and other oversight bodies. Indeed, while the subcommittee's actions are public, investigative steps by the Inspectors General and the Department of Justice often occur over months or years before being disclosed, typically in connection with an enforcement action or agreed resolution. One would expect additional investigations moving down the list of companies that received CARES Act loans, particularly among public companies that have relatively higher market capitalization. The SBA has stated that it will review all loans – regardless of whether a company is public or private – in excess of $2 million following submission of the borrower's application for loan forgiveness under the PPP. And even companies whose loan amounts fall below that threshold face the risk of government scrutiny, as federal and state prosecutors and investigative agencies pore over data about companies that received federal money and look for ripe investigative targets.

What can your business do?

As this is the first time many of the businesses that received PPP loans have applied for and received federal funds, companies should take extra care to ensure that all applications and required certifications are accurate and consistent with other public and internal company statements and that they have documented their process and reasons for seeking, and keeping, PPP loans.

If a business believes that its certifications may not be accurate or that it otherwise may be ineligible for funds it received, the SBA has extended the safe harbor date to return PPP funds until May 18. The SBA also issued FAQ 46, which provides limited safe harbors related to the necessity certification.

Finally, businesses should take steps to ensure they continue to follow their internal compliance and fraud detection processes carefully. While the current focus is on PPP loan funds, companies that face scrutiny on this front cannot afford to have other misconduct come to light through this process.

Additional information about CARES Act enforcement issues:

Paycheck Protection Program Loans and Risk of Government Investigation: Advice From Former Federal Prosecutors

What You Need to Know About Potential Exposure if You've Gotten a CARES Act Loan

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