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Congressional Oversight Investigations: What to Expect and How to Respond in the 112th Congress

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As the 112th Congress gets to work, the new Republican majority in the House of Representatives has announced that oversight is at the top of its agenda. New House committee chairs, armed with subpoena power, are solidifying plans to engage in rigorous oversight of the Obama administration, federal agencies and programs, and segments of the broader business community. Rep. Darrell Issa (R-Calif.), the new Chairman of the House Oversight and Government Reform Committee, already has identified the financial crisis, food and drug safety, business regulation, and alleged corruption in contracting, among other issues, as priorities for investigation. Senate committees, including Sen. Carl Levin's (D-Mich.) Permanent Subcommittee on Investigations, also are expected to lead vigorous oversight of business practices. For companies and individuals swept into a congressional investigation of an executive branch department or agency, or targeted for their own practices, congressional investigations pose significant legal risks.

The U.S. Supreme Court has confirmed that as an inherent part of its constitutional authority to legislate, Congress has far-reaching power to conduct oversight investigations. Congressional committees have the power to subpoena the testimony of witnesses and almost all documents that may be pertinent to the subject matter of their inquiry. This broad investigative power may be enforced through contempt proceedings, which ultimately can lead to criminal fines and imprisonment. Evidentiary privileges, such as the attorney-client privilege, rest within the discretion of the committees. In contrast to the rigid enforcement and fairness of evidentiary rules in court proceedings, during a congressional oversight hearing there is no right of cross-examination and none of the familiar rules of evidence apply. Even claims of constitutional rights, such as a witness's right under the Fifth Amendment not to give self-incriminating testimony, may be probed and tested by a committee. Courts almost never intervene, except to provide after-the-fact review that generally affirms Congress' broad authority.

A company or individual under the public spotlight of a congressional investigation often has myriad concerns, which may include threatened or actual litigation, civil enforcement action by federal or state agencies, criminal investigation and prosecution, and adverse publicity damaging to reputations and business. Actions in response to a congressional probe carry their own risks of criminal exposure: potential prosecution for perjury, false statements, or obstruction of Congress, as well as criminal contempt proceedings for refusal to testify or to provide documents pursuant to a committee subpoena. The penalties for these offenses may include fines and up to one year imprisonment for contempt to as many as five years imprisonment for each act of

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perjury, false statement, or obstruction.

Lawyers representing a target or witness in a congressional investigation must be able to work cooperatively with members and committee staff to meet their legitimate requests, yet also establish ground rules to assure fairness, protect a client's rights, and minimize risk to a client's litigation posture or reputation. They must take steps to assure that an individual's or organization's conduct during the investigation, and a witness's testimony before a congressional hearing, does not itself prompt a criminal inquiry.

Congress' Broad Oversight Powers

The Supreme Court has said that congressional oversight investigations must serve a ''legislative purpose'' and has cautioned, ''There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress . . . nor is the Congress a law enforcement or trial agency. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.'' Nevertheless, actual legislation need not be the end result of oversight hearings. Congress has broad powers to inquire into areas that could be the subject of future legislation and to examine the operations of existing governmental policies and programs.

There are few opportunities to challenge the basis of a committee's oversight inquiry. Each committee has authority to conduct oversight relating to the full range of jurisdiction delegated to it by the House or Senate. Since the jurisdictions of committees frequently overlap, a company or individual may be subject to multiple hearings on the same topic before different committees.

Committee Requests, Subpoenas

A company's or individual's first notice of an investigation may come as a letter from the committee chair requesting documents or an individual's appearance at a hearing or staff interview, which could be scheduled within a short time frame. In some circumstances, a subpoena may be sent in the first instance.

After a client receives a request or subpoena, counsel should direct that immediate steps be taken to preserve all potentially relevant documents and should promptly contact the committee staff. During early discussions with committee staff, counsel can establish important understandings and basic processes agreeable to both sides to manage the response to the committee's inquiry.

Documents that are privileged or protected from disclosure in other contexts are not necessarily shielded from congressional inquiries, and the pendency of litigation, enforcement actions, or criminal prosecutions generally will not provide an excuse to avoid or delay response to a congressional investigation. For example, during a 2009 investigation of Wall Street compensation practices, Rep. Edolphus Towns (D-N.Y.), then-Chairman of the House Oversight and Government Reform Committee, aggressively pursued privileged communications from a large financial institution, including its in-house and outside counsel's legal advice about the company's response to the committee's investigation. While the congressional investigation was ongoing, the company also was under investigation by the Securities and Exchange Commission and the New York Attorney General's Office and faced the risk that disclosure of privileged material to the committee would result in waivers of privilege in the other investigations. Nevertheless, Chairman Towns insisted on and obtained the production of those privileged materials that he deemed critical to the committee's investigation.

It is unclear whether the Towns privilege dispute is an unusual example of aggressiveness by congressional investigators or a sign of tougher legal times ahead. Often, however, committees will agree to reasonable steps that respect attorney-client privilege or provide other protections to sensitive information, even though they maintain that they are not obligated to do so. In such cases, the committee chair's letter or subpoena will request a privilege log and, in our experience, the staff may probe to ascertain the true nature of the documents or testimony for which privilege is claimed.

Committee staff should be willing to negotiate a reasonable narrowing of document requests or agree to limit access to documents in the case of commercially sensitive information, if disclosure of the information is not necessary for the committee's oversight purposes. But while assurances of confidentiality may be given, there is always the possibility that confidential documents may be leaked, included in the hearing record, attached to an investigative report, placed on the committee's website, or otherwise become public.

The Risk of Contempt Proceedings

Failure to comply with a committee subpoena, or a witness's refusal to answer a pertinent question during a deposition or hearing, may result in contempt proceedings. The most commonly used procedure is a statutory criminal contempt procedure, which begins with a vote by the committee involved, followed by a report by that committee to the House or Senate and a vote of the chamber. The President of the Senate or Speaker of the House then certifies the contempt to the U.S. Attorney for the District of Columbia, to bring the matter before a grand jury. Courts will not step in to enjoin a congressional subpoena. Therefore, if negotiations with the committee over documents or testimony break down and the committee insists on documents or testimony that the witness declines to provide, the witness's only (but distinctly unappealing) remedy is to refuse to comply and ultimately raise his or her objections in a contempt prosecution. For example, former White House Counsel Harriet Miers was held in contempt after refusing to testify in response to a subpoena as part of a House Judiciary Committee investigation of the removal of U.S. Attorneys during the Bush administration. In addition to certifying the contempt to the U.S. Attorney, the committee filed a civil lawsuit against Miers to enforce the subpoenas. The court rejected White House claims that its officials have absolute immunity under executive privilege to refuse to testify and ordered Miers to appear before the committee to provide testimony. Miers ultimately testified in a deposition conducted by the committee.

If the investigation is within the committee's jurisdiction and furthers a valid legislative purpose, and if the subject of the particular subpoena or question is reasonably related to the subject of the investigation, a congressional vote of contempt will be upheld, unless a court finds that constitutional rights—such as the Fourth Amendment's prohibition on unreasonable searches and seizures or the Fifth Amendment's privilege against self-incrimination—have been abridged. Most disputes are negotiated before reaching that stage, but the scope of the contempt power

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gives Congress tremendous leverage in this negotiation.

Develop a Response Strategy

Soon after an initial contact from the committee, the organization or individuals must assess their vulnerability in the matter under investigation, including business, reputational, and civil and criminal considerations. Certain circumstances may warrant acknowledgement of the problem and a pledge to take remedial steps. But an admission of fault may not be feasible for any number of reasons, such as pending or potential civil lawsuits or criminal exposure. A decision to ''fight'' the investigation must be taken with full awareness that members of Congress will dominate the hearing and likely dictate the press coverage.

Whatever the strategy, telling the truth and establishing credibility with congressional fact-finders must be paramount goals of the target or witness and their counsel. It is better to be candid about what one cannot say or do than to subject oneself to public criticism as uncooperative or mendacious. At the same time, the scope and timing of document production, witness interviews, and testimony should be negotiated with an eye toward the collateral consequences of releasing into the public realm information that may be proprietary, sensitive, embarrassing, or incriminating.

Staff Interviews and Depositions

Before testifying in a formal hearing, potential witnesses may be asked to appear for informal interviews or for on-the-record depositions under oath conducted by the staff. Counsel should schedule preparation sessions for any appearance before the staff, in much the same way a witness would be prepared for a deposition in civil litigation or proffer meeting with a prosecutor. The witness should understand that, despite the informal setting for such an interview—which may be conducted by young congressional staffers in a committee office—the consequence of failing to answer carefully and truthfully could be criminal prosecution for false statements. For example, famed pitcher Roger Clemens was indicted in August 2010 in part on charges that he made false statements during a 2008 deposition conducted by staff as part of a congressional investigation of steroids in Major League Baseball.

Written and Oral Statements

Committees generally ask witnesses to submit written statements two days before a hearing. But, although a committee can compel the production of documents, it cannot compel the submission of a written statement. In deciding whether to submit the statement, counsel and the witness must weigh the potential risk a written document may pose in the congressional investigation itself and in other proceedings.

Most committees invite witnesses to make a short opening statement and to submit the text in advance. Again, counsel and the witness must balance the risks versus benefits. If an oral statement is to be made, it usually should be a summary of the key points and themes of the written testimony.

Testifying at the Hearing

A congressional hearing is an unfamiliar and unsettling atmosphere for most witnesses. The inquiry is, in part, theater—but theater in which a failure to speak truthfully and carefully can lead to prosecution. For example, when Clemens testified before the full House Oversight and Government Reform Committee, he repeated many of the same allegedly false statements he had made during his deposition with staff, which led to additional false statement and perjury charges.

Members' opening statements and questions may be accusatory and inflammatory. They may mischaracterize the facts, be completely off-base, be leading (or misleading), or simply be speeches rather than questions. With members coming in and out of the hearing room, questions may be repetitive. Unlike a trial or deposition, there are constant distractions in a hearing room, including photographers and others moving around.

A lawyer must prepare the witness as he or she would for any trial: to listen carefully to the questions, to reject any incorrect foundation, and not to agree with or try to be helpful to the questioner simply to avoid conflict in this very public setting. This preparation is particularly important in the congressional hearing setting because, unlike in the courtroom, counsel has far less ability to speak and object on behalf of the witness. During the hearing, the committee chair will ask the witness to identify his or her counsel, and the witness has a right to consult with counsel throughout the hearing, but counsel's overall role is limited.

No individual can be compelled to give self-incriminating testimony, but, if subpoenaed, he or she must appear at the hearing. Committee chairs often resist excusing a witness from appearing based on counsel's representation that the witness will assert Fifth Amendment rights. The practice instead is to force the witness to appear, be sworn in, and to assert his or her rights under the glare of television lights.

While it may be tempting for witnesses to make brief exculpatory remarks while asserting the Fifth, they may be opening themselves to claims by committee members of ''selective'' assertion of the Fifth and waiver of that right, as well as threats of contempt for refusing to answer questions based on their remarks, however brief. Former WorldCom Chairman Bernard Ebbers found himself in this situation when he appeared before the House Financial Services Committee in 2002. In a prepared statement asserting the Fifth, Ebbers also claimed that a full airing of the facts ultimately would vindicate him. This prompted one committee questioner after another to pepper Ebbers with questions and threaten him with contempt as he continued to assert the Fifth, although contempt was never pursued. Witnesses should not try to have it both ways: a witness who asserts his or her Fifth Amendment rights should do so simply, then stop talking.

The House and Senate have varying rules that generally provide for committee executive sessions to protect a witness from a public spectacle that would ''defame, degrade or incriminate'' a person, ''expose an individual to public contempt'' or invasion of privacy, or disclose trade secrets. While these rules are rarely invoked, counsel should be aware of them and in appropriate cases should, at least for the record, make a request that a session be closed.

Other Tasks and Issues to Address

Before a hearing, intelligence gathering regarding the committee chair's specific concerns and those of other members is important. Counsel often can learn much from talking with the staff involved in the investigation.

Any company or high-profile individual should have a public relations strategy, but it should be driven by the legal strategy. How the press

views the facts, legitimacy, and fairness of the congressional inquiry can have an enormous impact on the potential fallout from a hearing that targets a business or industry. For that reason, consider briefing key journalists before the hearing, providing the press with materials on or before the day of the hearing, and making the witness or other spokespersons available after the hearing. All of this, however, must be decided with an eye toward avoiding prejudice to the company or witness in subsequent legal proceedings and avoiding antagonizing Congress.

Both staff depositions and formal hearings are recorded, and transcripts of the proceedings are prepared. Counsel should carefully review the transcript to ensure that all the statements are accurate and ask to supplement the record if there is any confusion or inaccuracy.

Conclusion

The subject of any congressional investigation must navigate an uncertain forum, where the rules are unlike any other—tempered only by the Constitution, Congress' own rules, and basic concepts of fair treatment to which most members of Congress adhere. In light of the broad powers of Congress, the unequal bargaining power of witnesses and committees, and the public and political nature of the proceedings, a witness must be carefully prepared, with advice and assistance from those experienced in dealing with Congress, with the particular committee, and with the civil and criminal litigation processes. This is essential to help minimize the legal, business, and reputational risks to any organization or individual who must respond to a congressional investigation.

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