

Strategies for Responding to Congressional Investigations & Subpoenas

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THE UNIQUENESS OF CONGRESSIONAL INVESTIGATIONS:

Although on their face they look similar, Congressional investigations are unlike investigations run by the Department of Justice (DOJ), the Securities and Exchange Commission, or any other Executive branch agency. As such, the strategy for responding to a Congressional investigation must be bespoke to fit the unique circumstances and take into account these differences.

Different Players: Congressional investigations are often run by a House or Senate committee, and in particular, their staff. Each committee has separate majority and minority staff to support their respective party's members on that committee. Committee members play a key role in the public facing aspects of the investigation: conducting hearings, making public statements, issuing reports, and voting on responsive action. Each member on a committee may have different objectives and considerations in an investigation.

Different Rules: Congressional investigations adhere to different rules, which are subject to less direct judicial oversight. Generally, Congressional investigations must be for a legislative purpose, related to a matter within the House or Senate committee's jurisdiction and subject to that committee's rules. While courts can and do review Congressional actions, many of the traditional judicial restraints are absent in the Congressional context.

Different Goals: Congressional investigations can be conducted for different reasons, for example, an investigation may be a vehicle to gather facts to support future legislative action, to move an issue forward, to spur executive or private action, or to gather public or political support for an issue. Partisan politics may also drive investigations. The subjects and targets of a Congressional investigation are often largely decided by the majority party, and the goal of a Congressional investigation may be to make a political statement.

Different Tools: Although most committees have the power to issue subpoenas for documents or witnesses, those tools typically require a formal vote of the committee to be issued. However, under current rules, many committee chairs may issue subpoenas without a committee vote, often after notice to or consultation with the ranking minority member. Before that, most investigations will begin with informal requests for information or testimony, which carry different legal risks (but may also foreshadow the intent for future action). Testimony

before a committee is sworn, under penalty of perjury, but often takes place in a hearing room in front of television cameras and on the front pages of major newspapers.

Different Scope: Congress lacks authority to bring criminal charges or initiate criminal prosecution. However, if a congressional investigation uncovers evidence of a criminal activity, Congress ***may refer*** the matter to the DOJ for investigation and potentially, prosecution.

IMPORTANT TO KNOW *BEFORE* RESPONDING TO A CONGRESSIONAL INQUIRY:

While there is no one-size-fits-all approach to responding to Congressional investigations, there are common considerations and tactics to consider.

1. ASSEMBLE THE TEAM

- Given the public nature of Congressional investigations, any response needs input not only from legal, but often from a company's government relations and communications teams. It is imperative that legal lead the response effort, and be included on all communications, in an effort to preserve privileges and protections to the greatest extent practicable.

2. CONSIDER EXTERNAL LEGAL ADVISORS

- Outside counsel can help companies develop strategies to navigate and respond to congressional inquiries and/or congressional subpoenas timely, effectively, and efficiently.
- External legal advisors can also assist in negotiating directly with committee staffers to avoid problems and to deal with unique aspects of the congressional investigation, including coordination with public relations advisors. Committees can also make documents public, so confidentiality terms with staff should be negotiated, not assumed.

3. REVIEW THE RELEVANT RULES

- In addition to the rules of the House and Senate, each committee adopts its own rules every two years that address the scope of its jurisdiction, and procedure for carrying out investigations and issuing subpoenas.
- Companies should assess whether the inquiry conforms to the rules of that particular committee. But also, be aware that Congress has the authority to access almost anything that relates to its legislative function.

4. KNOW THE LIMITS

- Companies should assess the nature of the committee involved, the tools that the committee has available to enforce its request, how (and by whom) those tools can be used, and whether it is likely to do so.
- Traditional rules of discovery and subpoenas may not apply in the Congressional context, and non-constitutional objections, protections, and rights may be limited. For example, Congress has historically taken the position that it is not bound to recognize common law principles, including the attorney-client

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privilege and work product protection, and thus treats recognizing such claims as discretionary. Notwithstanding this, companies should promptly and properly assert the attorney-client privilege where applicable; recognizing, however, that refusal to comply with a valid subpoena can result in criminal and civil contempt charges.

5. GET A HANDLE ON THE FACTS

- When companies receive an inquiry from Congress, they need to get a handle on the facts. Companies should quickly figure out what happened that is driving the inquiry and ensure that information that is shared is accurate.
- Any mistakes describing the facts early on may become the focus of the investigation in the future.

6. PRESERVE DOCUMENTS

- Companies should consider whether there is a legal obligation to preserve documents, or whether other factors warrant preservation. A failure to preserve documents, even absent a legal duty to do so, may become the focus of the investigation.
- Companies should also prevent the dissemination of privileged, confidential, or proprietary information to the greatest extent possible.

7. DEVELOP RESPONSE STRATEGIES

- Companies should consider whether and how to contact committee staff to understand the scope and intent of the investigation. It may be possible to negotiate a different set of terms for response. Committees often work out compromises with companies or individuals to allow some non-public testimony or providing limited documents.
- A company's response strategy should take into account the political environment, including the history of the committee's interest in the subject matter, whether there are any related legislative proposals, the interests of other stakeholders, the interests of individual committee members, and the relationship between the chair and ranking minority member,
- Companies must not only anticipate the risks of the immediate response; but what is likely coming and how any given response will impact the investigation's trajectory.
- Companies must invest time and resources into preparing for interviews, hearings, and providing documents. The congressional investigation may last for months, even years; and at the end of an investigation, it may result in a public report that spurs litigation, or a referral for enforcement.

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8. ANTICIPATE AND NEUTRALIZE COLLATERAL CONSEQUENCES

- Companies should recognize that aside from the risk of the Congressional investigation itself, there may be collateral consequences. For example, public facing statements, in hearing testimony or in responding to Congressional inquiries, must be vetted for disclosure implications.
- Additionally, Congressional investigations can create reputational harm to the company, regardless of whether wrongdoing may have occurred, which can imperil the goodwill of the company's business and competitive advantages.

9. UNDERSTAND THE OPTIONS IN RESPONDING

- **Cooperate:** Companies can choose to cooperate.
- **Negotiate:** Companies may try to negotiate the terms of the request for information or testimony.
- **Not Respond:** In some instances, companies may choose not to cooperate or to respond to the request. This option carries varying risk depending on whether the request is for information or is a subpoena.
  - The risks of failing to respond to an information request can result in an escalation of the investigation, including the issuance of subpoenas.
  - The risk of failing to respond to a subpoena can result in being found in contempt of Congress, with an associated referral to the Executive branch for enforcement or civil suit asking a court to enforce a subpoena.
  - In addition to the legal risks, there are reputational risks to consider as well. A committee hearing may proceed without your appearance, and an empty chair may be detrimental to a company's reputation.
- **Judicial Challenge:** If the committee's request is outside of the committee's jurisdiction, a company may choose to seek judicial relief from a Congressional subpoena. However, Congress has broad authority to investigate in aid of its legislative function, and the availability of judicial relief will typically turn on whether the particular committee has the subject matter of the subpoena within its jurisdiction.

10. PREPARE TO TESTIFY

- The response team must prepare witnesses to testify under oath and draft related testimony and responses to questions.
- In preparing a witness, consider that Congressional hearings are proceedings often driven by political considerations, rather than judicial fact-finding proceedings.
- Companies should prepare for how a hearing, deposition, or interview will be conducted, what is likely to be asked, who is likely to ask it, how the committee, the media, and the public are likely to respond to certain

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answers, how it may differ from the testimony of other witnesses, how it would differ from Executive branch testimony that might also be given, and what protections are available.

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