

*The Calm Before The Storm:  
Preparing for The Next Wave of Congressional Investigations*

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As soon as Congress returns from recess, a new slate of investigations and hearings is all but inevitable. In the past few years, congressional investigations have increasingly focused on business activities in a wide-range of industries. For companies in the crosshairs, these investigations can have significant consequences. They can be devastating to a company's business, its public image, and the credibility of its top executives. In addition, they often trigger private lawsuits and further investigations by regulators, not to mention criminal and civil enforcement authorities.

Given the magnitude of these consequences and the heightened level of scrutiny companies face, it is important for any organization to be familiar with the practical realities of a congressional investigation. While the precise process may vary depending on the investigating committee, the scope of the inquiry and changing political pressures, there are basic elements of all congressional hearings that companies should anticipate.

*Congress' investigative authority is extremely broad*

While congressional authority is not without limits, the Supreme Court has long recognized that so long as the investigation is in "aid of the legislative function" – which can be as expansive as deciding whether or not legislation is appropriate or informing itself in matters of national importance – Congress has an inherent, constitutional prerogative to conduct investigations. As a result, a congressional committee has broad discretion regarding both the scope of its investigation and the relevance of the information it requests. Indeed, unlike in a judicial proceeding, a company that is the subject of a congressional investigation has limited recourse in challenging a committee's power to subpoena information, documents, or witness testimony. Courts are generally reluctant to block a congressional subpoena. Thus, in order to challenge its scope or legal sufficiency, the subpoena recipient must refuse to comply, risk being cited for contempt, and then raise the objection as a defense in a subsequent prosecution. Even then, such objections rarely succeed, because courts have held that relevance in the legislative context is far broader than under the rules of evidence used in court.

*Congress is not obligated to recognize certain privileges or confidentiality*

There are a variety of different "testimonial privileges" recognized by common law that enable companies and individuals to refuse to produce documents, or testify on certain subjects or about conversations with particular people. The attorney-client privilege, for example, protects conversations between a lawyer and his client. While many congressional committees will recognize claims of attorney-client and other common law privileges, they certainly are not

required to do so. The decision is up to the individual committee, and even then, recognition of the privilege could vary from one investigation to the next.

Likewise, Congress has no obligation to keep private documents or information that typically would be protected. Unlike a federal grand jury investigation conducted by the Justice Department, where secrecy rules apply and there are consequences for unauthorized disclosures, information and documents disclosed to a congressional committee can (and often do) appear in publicly available reports, on a committee's website, or even in the media. As a result, it should be assumed that any information given to Congress during the course of an investigation may very well become public.

*Congressional investigations play out in a public, politicized environment*

Not only is Congress not obligated to maintain confidentiality; its investigations often culminate in a publicly televised hearing. As demonstrated by the rules that typically govern these hearings, they often have little to do with fact-finding, are tightly scripted, and are primarily driven by political considerations. For example, the subject of a congressional investigation has no right to cross-examine adverse witnesses or to discovery of materials used by the committee as the basis for its questions, or even to object to those questions. This makes testifying at a congressional hearing a high-stakes performance, with potentially hostile and argumentative questioning, which requires careful and thorough preparation.

To successfully survive this process, companies must develop a strategy that considers all aspects of the investigation and its implications. To start, with the help of experienced counsel, the company must identify the motives and goals of the investigating committee, open a line of communication with committee staff to negotiate the rules of engagement, and coordinate its strategy with any potential or actual parallel investigations and proceedings. By understanding the process and having a plan in place, an organization can effectively manage the risks associated with a congressional investigation, thereby protecting its executives and its brand.

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