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A Client's Guide to Congressional Investigations

You have just received a letter from a congressional committee stating that it has begun an investigation and would like your company to provide them with relevant information. The committee specifically requests that you respond to a set of questions, produce documents, make certain employees available for interviews and, eventually, provide a witness to testify at a hearing. What do you do?

Here are answers to a number of frequently asked questions that people ask when Congress comes calling.

Q. Does Congress have the power to make this request?

A. It probably does. Courts have historically held that Congress has extraordinarily broad powers to probe. Article One of the Constitution gives Congress the authority "To make all Laws which shall be necessary and proper" and this has been consistently interpreted as encompassing the power to investigate.[1] The U.S. Supreme Court has ruled that "the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function."[2] Former Chief Justice Earl Warren observed that "[t]he power of Congress to conduct investigations is inherent in the legislative process." And, he continued:

"That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them."[3]

This power, however, is not without limit. Congress must conduct investigations only in pursuit of "the legislative function."[4] In discussing this important limitation, the Supreme Court later cautioned that "[t]here is not general authority to expose the private affairs of individuals without justifications 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."[5]

1 U.S. Const. art. I, § 8.
2 *McGrain v. Daugherty*, 273 U.S. 135, 181-182 (1927).
3 *Watkins v. United States*, 354 U.S. 178, 187 (1957).
4 *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).
5 *Watkins*, 354 U.S. at 187.

Therefore, as long as Congress can demonstrate relevance to some legitimate legislative function, it can conduct an investigation. In practice, it is extraordinarily rare to succeed in arguing that Congress lacks the authority to conduct a particular investigation. Generally, a company is safe to assume that any investigative request from Congress is valid; it should promptly consult with counsel and make plans to respond.

Q. What rules govern this process?

A. It depends on which committee sent the request. The House of Representatives and Senate operate under different rules, and each body delegates the power to investigate to its committees.[6] In turn, each committee adopts its own rules and often individual subcommittees will adopt their own special rules for conducting investigations.

Therefore, it is crucial to review and understand the rules that apply to the committee making the request of your company. Although the Senate and House rules are published and publicly available, many committees and subcommittees post their own rules on their respective Web sites. If not posted online, they can be requested directly from the committee or subcommittee offices.

As with the local rules and practices in a particular court, each committee develops and follows informal "rules" of their own. Counsel representing a company should be knowledgeable of these "local rules."

Q. Do congressional committees have subpoena power?

A. Yes. Committees in both bodies of Congress have the power to issue subpoenas to require the production of documents or the attendance of witnesses.[7] Subpoenas issued by committees operate with "the same authority as if they were issued by the entire House of Congress."[8]

Committee rules vary as to the specific requirements for issuing a subpoena. Some require a majority of the members of the committee to vote to issue a subpoena, while others delegate the authority solely to the chairman of the committee or require the chairman to obtain only the consent of the ranking member before issuing a subpoena. In addition, almost all committees allow a chairman, alone, to issue subpoenas during congressional recesses or in emergency situations.

Although committees have subpoena authority, most committees rarely begin their investigation with the issuance of a subpoena, preferring instead to request materials and witnesses by letter, e-mail or telephone call. For a number of legal and public relations reasons, targets of investigations should work with committee staff to avoid the issuance of a subpoena unless a "friendly" subpoena is deemed necessary for a client to discuss a particular matter or release certain confidential information.

Q. What if the company refuses to comply with a congressional subpoena?

A. The Supreme Court has long recognized Congress' power to hold a witness in contempt as inherent to its legislative authority.[9] There are three different kinds of contempt proceedings: inherent contempt, statutory criminal contempt and civil contempt. Under the inherent contempt power of Congress, an individual is physically brought before either body of Congress by its sergeant-at-arms, tried by that body and imprisoned for a period of time but not beyond the adjournment of that session of Congress. This power has not been exercised in over 70 years but was used over 85 times from 1794 to 1930 to compel the production of documents or testimony from a witness.

Statutory criminal contempt was enacted in 1857 as an alternative to the cumbersome practice of inherent contempt. An individual who refuses to testify or produce documents subject to a subpoena may be found guilty of a misdemeanor carrying fines up to $100,000 and imprisonment for up to one year.[10] This process begins when a contempt citation is approved both at the committee level and then on the House or Senate floor. After it has been certified by the speaker of the House or the president of the Senate, a U.S. Attorney is obligated to bring the matter to a grand jury.[11] Criminal contempt has become more popular since Watergate and remains the most effective and viable enforcement mechanism in the House.

The Senate has enacted a civil contempt procedure whereby the U.S. District Court for the District of Columbia has jurisdiction to order a person to comply with a Senate subpoena.[12] If the person still does not comply, they are tried through summary procedures before the court and face judicial sanctions. In 1981, for example, William Cammisano, alleged to possess information about organized criminal activity, spent two years in jail for refusing to testify before the Senate Permanent Subcommittee on Investigations.

Q. Do we have to produce documents or testify about information that is privileged?

A. It depends on the privilege asserted. Committees are bound by certain constitutional privileges. For example, the right to invoke the Fifth Amendment protection against self-incrimination in response to a question is recognized, although committees will usually require witnesses to invoke that right in person and in public.

While the law is not completely settled on the availability of common-law privileges (i.e., attorney-client, work-product and deliberative-process) in the context of congressional investigations, most committees will determine if a privilege applies on a case-by-case basis where the need for the information is weighed against the harm caused to the client by its produc-

6 See Rules of the House of Representatives, 114th Cong., Rule X, clause 2(b)(1) and Standing Rules of the Senate, Rule XXVI, clause 1.

7 See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505 (1975) (holding that congressional subpoena power is "an indispensable ingredient of lawmaking.").

8 *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979).

9 *Anderson v. Dunn*, 19 U.S. (1 Wheat.) 204, 227 (1821).

10 2 U.S.C. §§ 192 and 194 (2008).

11 See *U.S. Congressional Research Service: Congressional Oversight Manual* (RL30240; June 10, 2011), by Frederick M. Kaiser et. al., 33-34.

12 28 U.S.C. § 1365 (2008).

tion.[13] Generally, committees will respect valid and properly asserted claims of privilege but may require both an agreement as to the scope and nature of when the privilege attaches and a record or log to track what is being withheld.

Evidentiary privileges, like those that protect an individual from having to reveal trade secrets, will not automatically afford any protection because the Federal Rules of Evidence do not apply to congressional committees. The company is best served when these issues are negotiated with committee staff early in the process in an effort to prevent later problems.

Q. Is an interview with a congressional committee like a deposition? Is it on the record? How is an interview different than testifying at a hearing?

A. Most interviews are not as formal as a deposition and are always held in private. Attorneys serving as committee staff will conduct the interview and, depending on their goals, may have the interview recorded. The company witness should be accompanied by counsel. In either case, what is said can be made public.[14] Issues surrounding the interviews, including public disclosure, are often negotiable, and the company should be ready to propose and support its position as to the format of the interview early in the process.

It is important to remember that all interactions with a congressional committee are conducted pursuant to an official government investigation, and a number of federal criminal provisions apply. In particular, any statements made must, to the best of one's ability, be true and complete. Federal perjury, obstruction of justice and false statement provisions apply to statements and records produced during the course of a hearing or deposition, or even in an "informal" interview that is not recorded.

What you say or do can and will be used against your interest. The need for accuracy and attention to detail is essential in all matters before the committee.

Q. If called to testify at a hearing, what can we expect?

A. First, the scene inside the hearing room will depend on the nature of the investigation and the witnesses appearing. If the issue itself (e.g., the recent IRS scandal involving scrutiny of tax-exempt groups) or the witnesses testifying (e.g., George Clooney on Sudan) is high profile, the executive should expect a full hearing room. Most members of the committee will be present and sitting on a raised dais, staff will line the walls, public seats will be full and throngs of print, video and photo journalists will be jockeying to capture the moment. This is not typical of every hearing but represents one extreme of what to expect, especially if the congressional committee has leaked material beforehand to increase public interest. At the other extreme, some hearings may have only one or a handful of members present with little or no press coverage.

It is important to remember that a hearing room is not a courtroom. Among other important differences, a witness cannot object to a line of questioning. The Federal Rules of Evidence do not apply, and lawyers representing the witness are not typically allowed to interject on their client's behalf or otherwise testify. The witness is there to answer the questions of the members and, depending on the nature of the hearing, should plan to be answering questions for at least a few hours.

The hearing will begin with an opening statement from the chairman, followed by an opening statement by the ranking member and other committee members. Depending upon the number of members, opening statements can last up to an hour or more.

At the conclusion of the opening statements, each witness will deliver a short opening statement, usually limited to three to five minutes. A longer statement can be submitted for the record at the discretion of the committee. In most investigatory hearings, witnesses testify under oath and are publicly asked to stand and swear that the testimony they will give is true. Again, a witness who willfully gives false testimony under oath is subject to prosecution for perjury under 18 U.S.C. 1621, carrying penalties of fines and/or imprisonment.

At the conclusion of the witness' statement, questioning will then begin with the chairman. After those questions, majority and minority committee members will take turns questioning the witness at least until each member has had a turn. Members of the committee are usually only given a few minutes to question the witness, often only three to five minutes per round of questioning. Therefore, witnesses who testify before a committee hearing should prepare for many different questioning styles and will likely find themselves repeating answers.

It is wise for a witness to be respectful to the committee members even if they are not respectful of the witness. A witness may not like the question or the tone of the member, but visibly frustrated and difficult witnesses create further problems for themselves and their companies.

Thorough preparation is essential for the success of any appearance before a committee. Considerable time should be spent not only in selecting the appropriate witness (when selection is an option) but also in preparing the written and oral testimony. A successful appearance before a committee is rarely an accident but, rather, the result of experience and hours of hard work including mock sessions or "murder boards," where the witness responds to potential lines of questioning.

Q. Should we schedule meetings with committee members and their staff?

A. Meeting with committee members and staff can be helpful in certain circumstances. Such meetings are particularly useful if the company believes there are facts that are not adequately being reported, not readily available to or otherwise not known to members or staff.

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13 See Kaiser et. al., supra, at 42-44.

14 Witnesses and counsel should be particularly aware that transcripts of witness interviews, when made public, can be used against the company in possible private litigation. Counsel should take care to ensure the record of the interview is as clear and balanced as possible.

However, all contact with the committee and its staff should be conducted by counsel or with counsel present to ensure a proper legal buffer between the client and the committee. It cannot be overemphasized that an investigative committee is unique and not comparable to the operations of a legislative committee.

Q. Should the company be concerned about this congressional inquiry?

A. If not handled properly, a congressional investigation can be extremely costly to a company not only in financial terms but in terms of harm either to the company's image or to the careers of company executives. Often, the greatest impact will be seen in parallel litigation or investigations. Congressional investigations can also have an effect on a company's standing with regulators in the marketplace. Therefore, requests for information from Congress should be handled promptly and professionally.

Investigations can vary in length and complexity, ranging from a single hearing to an ongoing investigation lasting years. The latter can result in multiple requests for information and witness testimony. Navigating this process can be made easier by engaging an attorney, familiar with congressional investigations, who can skillfully negotiate with the committee on a variety of different legal, political and procedural issues that are certain to arise.

On a final note, it is important for a company to get a head start in preparation for a possible congressional investigation. Requests for information from Congress rarely provide a company ample time to respond, so time and effort spent in advance of an inquiry will not only reduce the stress and burden on the company but will likely have significant cost savings as well.

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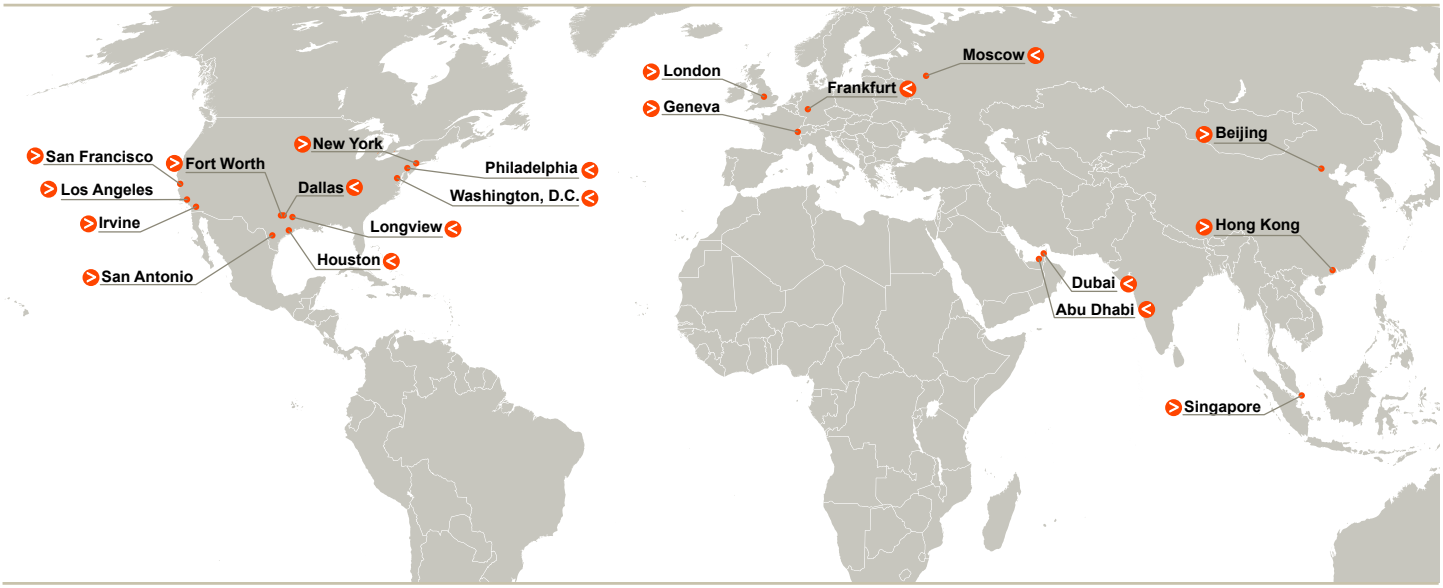

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