

UNDER PRESSURE: THE NEW CONGRESS AND WHAT YOU NEED TO KNOW TO PREPARE FOR A CONGRESSIONAL INVESTIGATION

By DeMaurice Smith, Nicholas Allard, and Robert Luskin

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Corporations and their counsels find themselves in an unprecedented atmosphere of corporate investigations, prosecutions, oversight, and individual criminal liability. In July 2007, the U.S. Department of Justice marked the fifth anniversary of the creation of the Corporate Fraud Task Force by highlighting over 1,200 corporate fraud convictions, including convictions of over 200 CEOs, 23 general counsels, 53 CFOs, and 129 vice presidents.

However, this is not the only source of corporate investigation and exposure.ⁱ At the beginning of its term, Congress put companies on notice, declaring that it intended to utilize its constitutional power to engage in an aggressive series of oversight hearings of corporate America. This prediction has now become a reality, resulting in a staggering list of current and past oversight hearings and calls for further investigation.ⁱⁱ Congress has armed itself with new rules to expand investigatory power, increased its strength with experienced and professional staff (including law enforcement officers) to conduct investigations, and given chairmanships to seasoned Members who have broad public support for ensuring accountability and compliance.

Any corporate attorney or senior executive who believes that a “call” from Capitol Hill is solely a public relations issue, or a simple litigation matter, risks much more than lost shareholder confidence and a negative market impact. In today’s climate, Congressional investigations can force a company to reveal proprietary information, vitiate attorney-client privilege, serve as the basis for perjury or obstruction investigations, expose a company to collateral shareholder litigation, increase scrutiny from financial markets and the Securities and Exchange Commission (SEC), and provide prosecutors and enforcement officials with information and grounds to initiate (or further) criminal investigations.

How do savvy senior executives manage this risk, protect their companies, provide them with the market edge, and take proactive steps to ensure that a negative result will not “happen on their watch”? Up front, a successful strategy involves recognizing that this is not another litigation or lobbying matter, knowing and appreciating the current political climate, learning the rules (or appreciating the lack of them), employing an “advance game strategy” to learn of potential investigations, and devising a complete “win-focused” approach.

The Current Political Environment

The leadership of the current Congress made oversight into intelligence, waste, fraud, abuse, pharmaceuticals, and defense contracts a staple of the mid-term elections. In a January 2006 *Washington Post* article by then-Democratic leader of the House Nancy Pelosi (now Speaker of the House) regarding intelligence oversight, Pelosi wrote, “The uproar concerning President Bush’s admission that he authorized the National Security Agency (NSA) to conduct certain electronic surveillance affecting people in the United States is a wake-up call for intensive Congressional oversight of intelligence activities.”ⁱⁱⁱ Similarly, in a letter to then-Senate Majority Leader Bill Frist from current-U.S. Senate Majority Leader Harry Reid, Reid urged Frist to ensure that the Senate Intelligence Committee begin to exercise oversight of Bush Administration intelligence activities, stating “effective Congressional oversight would help our intelligence agencies deliver the accurate and unbiased intelligence that is so essential to America’s success in the global war on terror.”^{iv}

Now, Congress has delivered on its oft-stated oversight promises. The Democratic majority has led more than 200 full committee hearings on oversight since the 110th Congress convened, on everything from safe and affordable generic biotech drugs to interference with climate science to FDA food safety

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efforts. After 14 years of one-party rule in the legislative branch, plus more than six years of one-party rule in the executive branch, issues which were long ignored are now being brought front and center. The current chairs of the committees, who set the both the agenda and protocols, are extremely experienced in oversight hearings and the unique parliamentary procedural rules. Congressmen Henry A. Waxman (CA), John D. Dingell, Jr. (MI), Charles B. Rangel (NY), John Conyers, Jr. (MI), Edward J. Markey (MA), Ralph Bradley “Brad” Miller (NC), Edward M. Kennedy (MA), Patrick J. Leahy (VT), Joseph R. Biden, Jr. (DE), and others are supported by seasoned staffs and in some cases federal prosecutors detailed to the committee staff who have proven track records in conducting criminal investigations.

During the spring and summer of 2007 alone, seven Fortune 500 companies have received “the call” to appear before Congress, along with many other companies. They have been forced to defend business practices, profits, and operations in a public paradigm with few rules protecting trade secrets, attorney client privilege, self-incrimination, discovery of internal documents, and inquiries into pending or collateral investigations or proceedings.

Committees are expected to further explore government contract fraud, consumer fraud, energy prices, food safety, pharmaceutical pricing, student loans, health care, and the financial services industry, among other areas. While companies involved in these practices are already in the cross-hairs, Congressional investigations will by no means be limited to these areas – as such, everyone is a potential target and needs to be prepared. Corporate counsel and senior executives should actively develop a game plan that will allow companies to strategically assess if they are targets of inquiry and what steps to immediately take to protect the interests of the company. Typically, it is too late to effectively manage all of the exposure if your first action of defense occurs after you have received a notice or request to appear.

What do Companies Need to Know, and What they Must Do:

“Hell, there are no rules here—we’re trying to accomplish something!”
- Thomas A. Edison

To the outsider, and even the experienced lawyer, watching a Congressional committee in action may remind someone of Edison’s quote. However, there are rules, customs, precedents, and procedures which are peculiar to this venue. While aspects of both litigation and lobbying play an important role, a Congressional investigation is neither lobbying nor litigation – it is a unique animal derived from the constitutional nature of the legislative branch.

The limits on a Congressional committee are few, and its powers are broad. The scope of subpoenas, eliciting witness testimony, and questioning under oath are difficult to manage, and unlike the judicial process, there is no final arbitration or judgment by a neutral fact-finder. Instead, the process of narrowing the scope of an investigation, limiting burdensome subpoenas, and managing issues of privilege and confidentiality is typically conducted through means of negotiation and incremental accommodation, which use certain skills carried over from litigation, but which are also aided by experience, relationships, and established credibility.

Congress has also granted itself new powers that enhance its overall investigatory ability. For example, new rules provide for staff depositions outside of the District of Columbia and re-establishing the applicability of federal false statement criminal liability to such testimony. This provision drastically expands the ability to gather information and subjects witnesses to the possibility of federal criminal prosecution or investigation if a law enforcement officer believes that the testimony was false, allowing

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for more pervasive questioning by staff, eliminating many of the time restraints that existed in a formal hearing, and providing a basis for false statement and perjury prosecutions by federal authorities.

So what does a general counsel say to the Board about a “defense strategy” when confronted with the daunting prospect of a Congressional investigation, or worse yet, a pending date to respond to Congressional subpoenas for documents or a hearing into sensitive and/or potentially criminal acts?

Negotiating, accommodating, and designing a comprehensive response to a Congressional investigation is essential. Committee staff may be open to negotiating or at least engaging in a discussion on the scope of requested material, the treatment of confidential material, and the problem of privileged or proprietary information, and be receptive to discussions that provide them with an efficient way of investigating the matter without being overwhelmed with collateral or irrelevant material.

In this new game, the experiences of the participants on both sides of the equation matter, and developing credibility can be the “best currency” for corporations or individuals. Any potential subject of a Congressional investigation should ask itself and its counsel critical preliminary questions that focus on this overall strategy – intelligence gathering, credibility with staff, experience with multi-faceted investigations, reputation, and knowledge of the Congressional process.

Below are some steps a company should take to devise a successful strategy and avoid some of the pitfalls associated with oversight investigations:

- First, companies should ensure that they have an “Early Warning System” that will inform them of what issues may be percolating in the Congressional arena, what committees may take up issues for oversight proceedings, the unique dynamics of the majority and minority Members and staffers, and the timing and scope of these oversight hearings.
- Second, companies should avoid the potentially fatal mistake of believing that a Congressional investigation is similar to criminal, civil, or regulatory litigation. There are several factors which completely differentiate these proceedings from traditional litigation – no formal recognition of attorney-client or attorney work product privilege, an inability to control witness questioning, expansive subpoena power, and the absence of a judicial officer to mediate and resolve disputes – which require the skillful navigation of both formal and informal rules.
- Third, companies must employ a comprehensive strategy in this unique environment to fully protect their interests, especially when positions taken in the hearing process could compromise strategies and positions in other forums. The public nature of oversight hearings requires careful consideration of the public relations impact of senior executives being questioned, while the scope of the hearings could have consequences on pending criminal or civil litigation or proceedings.

Managing and Eliminating Risk: Teamwork, Preparation and Execution

Companies often hesitate to hire defense counsel until they get a Congressional subpoena or request for appearance. While waiting for such an occurrence is understandable, it also precludes the opportunity to take significant proactive steps to favorably posture a company in an oversight hearing. Having an advance understanding of the potential issues and areas of inquiry of a particular committee **before** a

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formal request for appearance is the best corporate defense. Professionals who excel at maintaining contacts with Congressional staff and who have both access and credibility with Members and their staffs will be in a position to evaluate and counsel companies on the likelihood, timing, and scope of a prospective hearing.

Companies should also engage in a thorough self-assessment or audit of potential areas of inquiry, evaluating the likely impact, and coordinating with counsel on collateral proceedings or investigations. In addition, they must take a deliberate approach to these investigations in the same way as they do corporate compliance or internal investigations, and confront potentially important issues, including document retention, witness interviews, and document production.

In this all-important arena, experience and skill are the major factors in determining who will be the ultimate winner. An effective team is one composed of lawyers and lobbyists who specialize in protecting corporate interests in the context of Congressional investigations and oversight hearings, and that ensures access and advance warning, allows a company to evaluate and manage criminal, civil, and regulatory exposure, and manages and defends the company in the most public of formal tribunals.

It is also critical that the lobbyist team you assemble be bipartisan. Companies need to recognize that successful representation requires an understanding of the investigative process from the unique perspectives of both political parties in Congress in what is often an unpredictable and continually changing environment.

Coordination is Crucial

Congressional investigations and oversight hearings demand a monumental amount of management to ensure success. They entail incredible choreography and a comprehensive, in-house team that trusts each other and includes the aforementioned quality litigators, policy specialists, and regulatory specialists. Most of all, companies should have a great field general to run the campaign and a diverse group that can provide different perspectives.

The simple truth is that many government investigations do feed off of one another or run parallel to each other, and can then trigger a criminal or civil investigation. A company's legal team must be capable in all these areas – in lobbying, risk assessment, regulatory compliance, and criminal and civil litigation – and be able to work with other lawyers who may be representing the company's interests in other proceedings or investigations.

As many cases have proven in the past, company and witness statements and answers in a Congressional investigation often become statements and answers that are admitted in subsequent proceedings. Accordingly, Congressional oversight hearings present a factual and legal "minefield" where careful preparation is vital and even more careful steps are required. This makes it important to have careful coordination with SEC counsel with respect to public filings, counsel who may be involved in collateral civil or criminal litigation or investigations, employment counsel who may be addressing issues of disgruntled employees, or prospective whistleblowers or compliance counsel.

A Public Stage: The Importance of Formulating a Media Strategy

Unlike routine corporate litigation, much of the production and hearings take place in a charged political and public arena. The emergence of C-SPAN and enhancement of government-related websites mean that almost all Congressional hearings are covered by the press, televised, and accessible to interested groups or parties. Moreover, unlike in courtrooms or arbitration proceedings, there are no formalized

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mechanisms to handle confidential information production, protective orders, or remedies for violating confidentiality provisions. Also, the prospect of a negative hearing or a Member accusing the company or its executives of misconduct can cause substantial apprehension among investors or Board members.

Accordingly, one critical aspect of a corporate defense is the development of a media team and strategy. Companies should consult their defense team and consider the retention of public relations professionals. Of course, there are a few cautionary lessons. First, take careful steps to avoid waiving attorney-client privilege. Outside consultants should be retained by counsel on behalf of the corporate entity. Second, take careful steps to restrict the flow of confidential or privileged information to outside consultants who may be communicating directly to the press. An aggressive investigator or staffer may request to interview a member of the public relations team to learn “what they knew or when they learned of it” as a new avenue to uncovering critical information. Third, make sure that your media team, like your defense team, is aware and connected to any relevant collateral investigations or litigation issues.

Conclusion: Game time

In the current political environment, successful navigation of a congressional investigation requires executives and counsel to be **proactive** in anticipating potential inquiries and developing the right team and defense strategy. At the same time, this team must be savvy enough to take appropriate, comprehensive, measured, and reactive steps to respond to fluid and dangerous proceedings. By planning and composing the right team, a company is best prepared to effectively defend itself in a Congressional investigation.

About the Authors ...

DeMaurice Smith, Partner, Patton Boggs LLP

De Smith is a trial lawyer and head of Patton Boggs’ Government Litigation Practice Group. He concentrates in white-collar criminal defense and “bet the company” tort liability trials.

Nicholas Allard, Partner, Patton Boggs LLP

Nick Allard is co-chair of Patton Boggs’ Public Policy Department. He draws on his understanding of legislative, regulatory, and administrative matters to counsel clients in the fields of health, telecommunications, information technology, energy, and environmental law.

Robert Luskin, Partner, Patton Boggs LLP

Bob Luskin is co-chair of the Patton Boggs’ Litigation Department. He concentrates on complex criminal and civil litigation at both the trial and appellate level, advising clients in civil and criminal RICO actions, prosecutions under the federal money laundering statutes, civil and criminal forfeitures, and congressional investigations.

ⁱ Fact Sheet: President’s Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity: http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html

ⁱⁱ See e.g. Investigations: Committee on Government and Oversight Reform, Chairman Henry A. Waxman, 110th Congress, <http://oversight.house.gov/investigations.asp>

ⁱⁱⁱ See “The Gap in Intelligence Oversight,” by Nancy Pelosi; *The Washington Post*, January 15, 2006; Page B07

^{iv} See <http://democrats.senate.gov/newsroom/record.cfm?pid=252015&>