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What To Expect From A Congressional Investigation

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You are midway through another routine day as an assistant general counsel managing an array of civil litigations against your company. Several of those cases involve substantial claims valued in the hundreds of millions of dollars. By comparison, the email you receive around lunchtime from the company's Washington, D.C., office informing you that a junior member of Congress sent an email asking questions about some of the company's business practices registers as a mere nuisance. You devote only a tiny bit of mental bandwidth to it.

Weeks later, that pesky congressional email has metastasized into a full-blown congressional investigation that is splashing your company's name on the front page of every newspaper in the country, driving the company's stock price down so far that the loss exceeds the maximum value of every litigation matter you have ever handled for the company, and requiring virtually the full time and attention of the CEO, general counsel and board of directors. And that's not even the worst of it. Your job and your company may never be the same again.

For companies that haven't been through one, congressional investigations often seem like surreal bolts from the blue. They present surprises and challenges that companies are unaccustomed to handling, and for which the usual tool kit of legal, public relations and government relations strategies prove unavailing. Even major global companies that have sophisticated Washington offices are thrown off balance and sometimes discover themselves to be unprepared. Mainly, this is because the vast majority of companies will never have to deal with a congressional investigation. For most, they are “black swan” events: so rare and unpredictable that they can hardly be planned for. But for companies in high-profile, highly regulated or controversial industries, congressional investigations are more like “gray swan” events. They are rare, but sufficiently frequent and damaging that they merit thoughtful preparation.

What to Expect

Prepared or not, here are just a few of the curveballs that you should expect a congressional investigation to serve up:

The Almost Complete Absence of Due Process

In-house counsel who are used to dealing with no-holds-barred litigation often expect congressional investigations to be tame by comparison. After all, what can Congress do other than talk, issue press releases and put on a show? But in court, there is due process of law. Congress, by comparison, is a Magna Carta-free zone. In congressional investigations, few of the principles that have ensured fairness

in Anglo-Saxon legal proceedings for the last 800 years apply.

Objections to document requests and interrogatories, if they are heard at all, are heard and ruled upon by the committee chairman who issued them — that is, by the prosecutor rather than by a judge. Yet there usually is no opportunity even to argue your case before the chairman. There are no limitations on the number of interrogatories, the scope of document requests, or for the most part the length or manner of conducting depositions. There is no avenue to challenge an unreasonable or unlawful congressional subpoena in court unless you first defy the subpoena and risk being held in contempt of Congress. In the case of a criminal contempt proceeding, courts generally will not entertain a motion to quash a congressional subpoena until after an indictment already has been handed down by a grand jury against an executive of the company. Virtually no public companies (and very few privately owned companies) have the stomach to be indicted as a condition of having their objections heard by a judge.

There are no protective orders to maintain the confidentiality of sensitive trade secrets and proprietary information. There is no procedure for sealing records of highly confidential personnel matters. Leaks are common, and there is little you can do to stop them. Sensitive documents may be shared with plaintiffs lawyers, and discovery requests served by Congress may be drafted with trial lawyers' input.

Deadlines are often intentionally unreasonable and sometimes essentially impossible to comply with. Yet failure to comply fully may, and often does, prompt a widely distributed press release alleging that you are obstructing a congressional investigation, bringing cries of outrage from your major shareholders and business partners, and intense negative publicity. The routine glitches that occur in civil litigation, such as problems with an e-discovery vendor, or a brief delay in Bates stamping documents, may lead to a loudly publicized subpoena. Senior executives may be subpoenaed to appear with just days' notice for a deposition. In fact, one of the few rules that some committees do have is a rule requiring some amount of notice before a witness may be compelled to appear for sworn testimony at a public hearing. That is little comfort, however, considering that the notice requirement is sometimes as little as 48 hours.

Congress Does Not Recognize the Attorney-Client Privilege

Congress does not recognize the attorney-client privilege, the work product doctrine, or other nonconstitutional privileges. It has been the position of both the House and Senate, for well more than a century, that such privileges apply in judicial but not legislative proceedings. This view is based, in part, on the proposition that at common law, Parliament did not recognize the attorney-client privilege. For litigators used to relying on attorney-client privilege as a bedrock principle, the notion that Congress is the one venue in which attorney-client privilege does not apply is more than a little disorienting. Yet no federal court has rendered a final judgment adjudicating Congress' claimed exemption from the privilege. It is an untested question of law. That's because Congress has little desire to see the point tested, corporations often lack the will to test it, and courts do their best to dodge resolving the question because it raises awkward separation of powers issues.

In the ordinary course, Congress rarely goes so far as to compel the production of clearly privileged documents. But it occasionally does just that, as it did in 2009, when it forced Bank of America and its outside counsel to produce privileged documents. More typically, congressional investigators use the threat of compelled production of privileged documents as a source of leverage to extract other things from the corporation that is under investigation, such as an agreement to make witnesses available or pursue far-ranging e-discovery.

Congressional Investigations Pose Real Legal and Business Threats to the Company

Contrary to what many corporate executives, in-house lawyers and even government relations personnel tend to assume, congressional investigations are not mere political exercises. From a legal and business standpoint, they can become very real, very quickly.

First, Congress often can obtain documents in discovery faster and more easily than civil litigants could, and it is relatively free to share information obtained in discovery with plaintiffs lawyers or the media. Second, congressional committees refer matters to the U.S. Department of Justice and other regulators with some frequency, including particularly referrals for false statements to Congress or obstruction. (Federal law makes it a crime to obstruct a congressional investigation.) These referrals are made and pursued by the government more frequently than most corporations recognize. Third, the bright spotlight cast by a congressional investigation often extends far beyond the initial issue that drew congressional attention, bringing to light a company's dirty laundry and infractions that otherwise would never have come to light. Fishing expeditions have consequences. The longer a congressional investigation lasts, the more likely new issues will surface and take on a life of their own. Fourth, the impact of a congressional investigation on relationships with business partners and customers can be very acute, as the glare of negative publicity makes the company “radioactive.” In that environment, for senior executives in particular, a congressional investigation can be career ending.

Congressional Investigations Are Supremely Distracting

Few companies appreciate how much time and attention a congressional investigation requires. Not every such investigation grabs national headlines, but those that do become all-absorbing corporate crises. It is not unusual for the entire senior management of the company to have to spend weeks or months focused principally on the congressional investigation, making it difficult for them to manage the company’s business. Knowing this to be true, congressional committees often use this as a point of leverage, summoning key executives for congressional testimony on short notice. Multiple committees can conduct simultaneous investigations of the same company and topics, adding to the distraction.

Mistakes To Avoid

Given the disorientation that sets in as companies descend into the congressional investigation vortex, it is not surprising that they tend to make serious strategic mistakes. Here are some of the most common unforced errors, and some tips for avoiding them:

Failing to See the Investigation Coming

Corporations sometimes fail to recognize that they are under investigation until it is too late. Any inquiry from Congress, whether from a major investigations committee like the House Oversight and Government Reform Committee, or from a single freshman congressman, could be a telltale sign. Do not assume that your Washington lobbyists will always recognize it. Lobbyists vary widely in their level of experience with congressional investigations (as opposed to more routine legislative matters). Relatedly, it is important to keep track of social media chatter about the company, including chatter among activists, political operatives and investigative reporters who frequently incubate matters that evolve into congressional investigations.

Tip: Each congressional inquiry should be evaluated in context to determine whether it is the leading edge of something much bigger.

Failing to Take the Investigation Seriously

A remarkably common corporate response to a congressional investigation is to blow it off, treating it as a pesky intrusion from Washington bureaucrats. This happens more than you might think. It often draws a volcanic eruption from congressional investigators, who are never more dangerous than when they feel they are not being shown due respect.

Tip: The downside risk of trifling with a congressional investigation vastly outweighs the burden and expense of taking it seriously from the earliest possible moment.

Going Into Battle Mode

Once companies recognize that they are under attack, a very common reaction is to go into full battle mode. Not infrequently, senior executives feel the investigation is an unfair, unfounded witch hunt, and their first instinct is to return fire by sending forth lawyers and public relations flacks loaded for bear. For example, the company might respond to document requests with the kind of expansive boilerplate objections it would use in fending off a commercial lawsuit. Or it might decline to make witnesses available in a timely fashion, or to make them available at all. Even in the face of a congressional subpoena, the company might slow roll the production of documents or refuse to produce certain documents. Outside lawyers and lobbyists sometimes echo, or at least fail to resist, company executives' knee-jerk desire to tell Congress to go pound sand.

Congress has many weapons at its disposal to deal with uncooperative companies. And it has spent the last two centuries learning how to ratchet up pressure on those it investigates. A favorite tool is the press release issued to major national media outlets alleging that the company or a specific executive is obstructing a congressional investigation. It might also raise the specter of a referral to the Department of Justice or to regulators. Another tool is the subpoena to the CEO, board members, or even the general counsel — also accompanied by a press release. That might be followed by deposition subpoenas in quick succession for numerous key company executives, with just a few days' notice before their scheduled appearances.

If a company has the backbone to stick with its "battle mode" strategy, in rare circumstances that could turn out to be the right strategy, especially when outside events distract Congress or some other company makes itself a more attractive target. But when it comes to public companies, almost none have the backbone to stick with their scorched earth tactics when Congress fights back. Virtually every one caves in the end. And when they do so late in the game, having first pursued an unremitting battle mode strategy, they almost always end up in far worse shape than they would have been had they adopted a more calibrated strategy from the start.

Tip: Decide at the start how hard you are willing to fight, and then tailor your tactics to that strategy. Be realistic about how much backbone the company will have when Congress turns up the heat and the CEO comes under pressure from shareholders, the board, customers, and business partners.

Treating a Congressional Investigation as a Lobbying Exercise

There is a tendency to think that you can lobby your way out of a congressional investigation by calling in chits with members of Congress you already know or by hiring a lobbying firm to arrange meetings with members you do not know. There may be some things that a Washington "fixer" can still do.

Ending a full-blown congressional investigation usually isn't one of them. That's because congressional investigations have a political dynamic all their own, which may make piling on attractive, and stepping in to run interference for the targeted company very unattractive, for most members.

Tip: Lobbyists have an important role to play. But don't expect a silver bullet solution from a few meetings or calls.

Failing to Treat a Congressional Investigation the Way You Would Litigation

Congressional investigations often involve litigation skills and tactics and look more like litigation than they do lobbying — though a peculiar form of litigation to be sure. They involve subpoenas, document requests, depositions, interrogatories, privilege logs, document holds and e-discovery. Somewhere in the background, the Federal Rules of Civil Procedure notionally apply, in the sense that they may be invoked in the exceptionally rare case that procedural issues end up being resolved in court.

Moreover, it is very common for congressional investigations to morph from an investigation of a substantive issue into an investigation of your process for responding to Congress. Especially when its initial theory of the case against you fails to pan out, Congress tends to investigate the "cover-up." Any failure on your part adequately to preserve relevant documents or any potentially misleading statements made to Congress will end up breathing life into an investigation that otherwise would have died on the vine, and could lead to criminal enforcement actions.

Tip: On balance, you should approach congressional investigations the way you would a litigation, with the same level of formality, caution and attention to detail. The in-house legal department should be heavily involved, with assistance from outside counsel who have substantial experience in congressional investigations. Subpoenas and document requests from Congress should be treated as seriously as you would treat such requests in litigation.

Conclusion

Corporations today face a very long list of risks that they must manage, and for most, planning for congressional investigations does not rank high on the list. But this is one gray swan event that can, even without advance preparation, be managed far more effectively by knowing at the start what to expect and tailoring your response to avoid the most common mistakes. For companies in industries that are favorite targets for Congress, having a playbook prepared in advance, staff who are trained, and a crisis management team primed for action could pay ample dividends when Congress darkens their door.

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