

Congressional Investigations and the Rules of the 117th Congress

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Election and Political Law, Public Policy

Congressional investigations have continued to have a significant role in the 117th Congress. In February 2021, we [predicted](#) that the Democratic majorities in both the House and the Senate would target investigations at the private sector, and this prediction turned out to be correct. Already in 2021, committees in both chambers have launched investigations across a broad range of subjects, including ransomware payments by corporations, bank lending decisions, evictions during the COVID-19 pandemic, and misinformation on social media platforms, among others.

Congressional investigations are deeply infused with politics. Although investigations may seem to proceed by familiar legal process—including document productions and witness testimony—there is actually very little due process in congressional investigations. There are no motions to dismiss, protective orders, or limited discovery orders. There are, however, some rules, and the rules that exist are important. The rules, for example, delineate the process for issuing subpoenas. Although many congressional investigations proceed entirely without a subpoena, and while there is some [uncertainty](#) surrounding the strength of the House's subpoena power, the underlying threat of a subpoena can influence the response to congressional demands.

At the start of a new Congress, the House and Senate, and their committees, adopt internal rules that govern their operations, including rules that affect congressional investigations. These rules are often revised from Congress to Congress. To assist our clients responding to congressional investigations, this alert summarizes the rules for the 117th Congress of the House, Senate, and key investigative committees related to congressional investigations, with a particular focus on the rules related to subpoena authority, depositions, and, where applicable, confidentiality.

I. Overview of Committee Rules

A. House of Representatives

Committee	Subpoena Power			Depositions	Confidentiality
	Who holds subpoena power?	Notice required to Ranking Member?	Consent of Ranking Member required?	Follows Generally Applicable House Rules?	Open Meetings?
<u>Armed Services</u>	A majority of the members voting (with a majority present)	Yes	No	Yes	Yes, with exceptions
<u>Education and Labor</u>	Committee Chair	Yes	No	No	Yes, with exceptions
<u>Energy and Commerce</u>	Committee Chair	Yes	No	Yes	Yes, with exceptions
<u>Financial Services</u>	Committee Chair	Yes	No	Yes	Yes, with exceptions
<u>Permanent Select Committee on Intelligence</u>	Committee Chair, with consultation of the Ranking Member, or by majority vote of the full Committee	Yes	No	Yes	Yes, with exceptions
<u>Judiciary</u>	Committee Chair, or with a majority of members voting when a majority of members are present	Yes	No	Yes	Yes, with exceptions
<u>Oversight and Reform</u>	Committee Chair	No (Deposition subpoena requires consultation with Ranking Member)	No	No	Yes, with exceptions
<u>Ways and Means</u>	Committee Chair	No	No	Yes	Yes, with exceptions

B. United States Senate

Committee	Subpoena Power			Depositions	Confidentiality
	Who holds subpoena power?	Notice required to Ranking Member?	Consent of Ranking Member required?	Does the Committee have specific deposition rules?	Follows Standing Rule 26.5b of the Senate?
<u>Special Committee on Aging</u>	Committee Chair and the Ranking Member	Yes	Yes	Yes	Yes
<u>Armed Services</u>	Committee Chair, when authorized by a majority of Committee Members	Yes	No	No	Yes
<u>Banking, Housing, and Urban Affairs</u>	Committee Chair, with the agreement of the Ranking Member or majority vote of the Committee or Subcommittee	Yes	Yes, with exceptions	No	Yes
<u>Commerce, Science, and Transportation</u>	Committee Chair	Yes	Yes, with exceptions	Yes	Yes
<u>Finance</u>	Committee Chair, with the agreement of the Ranking Member or majority vote of the Committee or Subcommittee	Yes	Yes, with exceptions	No	Yes
<u>Health, Education, Labor, and Pensions (HELP)</u>	Majority vote of the Committee unless delegated to Committee Chair or other Committee Member	Yes	No	No	No

Committee	Subpoena Power			Depositions	Confidentiality
	Who holds subpoena power?	Notice required to Ranking Member?	Consent of Ranking Member required?	Does the Committee have specific deposition rules?	Follows Standing Rule 26.5b of the Senate?
<u>Homeland Security and Government Affairs (Permanent Subcommittee on Investigations)</u>	Committee Chair, with the approval of the Ranking Member	Yes	Yes, with exceptions	Yes	Yes
<u>Select Committee on Intelligence</u>	Majority vote of the Committee	Yes	No	No	Yes
<u>Judiciary</u>	Committee Chair, with the approval of the Ranking Member or by a vote of the Committee	Yes	Yes, with exceptions	Yes	Not addressed in Committee rules

II. House of Representatives

On January 4, 2021, the House adopted the rules package for this Congress, H. Res. 8. The resolution continued many of the relevant investigation rules in effect last Congress with a few notable changes.¹

A. House Rules—Committee Subpoena Authority

The Rules of the House of Representatives provide the general authority by which committees may issue subpoenas. Many of the rules of individual committees also specifically apply the House’s Rule, which appears in Rule XI, Clause 2(m)(3)(A)(i).²

The Rule first provides that “a subpoena may be authorized and issued . . . only when authorized by the committee or subcommittee, a majority being present.” Importantly, however, the Rule next provides that the subpoena authority “may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe.” As described below, many committees take advantage of the second part of this Rule to provide

¹ [H. RES. 8, 117TH CONG. \(2021\)](#).

² [CLERK OF THE HOUSE OF REPRESENTATIVES, 117TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES \(2021\)](#).

authority to the committee's chair to issue a subpoena, often unilaterally. In addition, the Rules can require "the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary."

New this year, the Rule specifies that committees may issue subpoenas to any current or former President or Vice President, in either their personal or official capacities, as well as to the White House, the Office of the President, the Executive Office of the President, and any individual currently or formerly employed by those entities. The House adopted this change in response to various subpoena disputes with the Trump White House. In adopting the Rule, the House stated its view that this new provision merely clarifies, without change, the scope of existing authority.

B. House Rules—Committee Deposition Authority

The resolution adopting the House Rules extends for the 117th Congress the authority of a committee chair to "order the taking of depositions, including pursuant to subpoena, by a member or counsel of such committee."³ The provision also provides that the Chair must consult with the Ranking Member of the committee. Notably, this authority permits depositions by committee counsel—staff members—in addition to depositions by Members of Congress.

The deposition authority is "subject to regulations issued by the chair of the Committee on Rules," which were released on January 4, 2021.⁴ The regulations include requirements concerning consultation with the Ranking Member and written notice to committee members before depositions are taken, and address permitted attendees, the designation of depositions as part of joint investigations between committees, the order and length of questioning, processes for raising and ruling on objections, and transcribing and recording the deposition. For instance, if a deposition is conducted by committee counsel, no more than two committee counsel are permitted to question a witness per round. Further, rounds may last no more than 60 minutes per side, with equal time designated to the majority and minority. Lastly, a witness may not be required to testify unless the witness has been provided with the relevant deposition rules and regulations.

House Rule X, clause 4(c)(1)(3)(A), grants the Committee on Oversight and Reform the authority to adopt a rule authorizing a committee member or counsel to take a deposition, including pursuant to subpoena under clause 2(m) of rule XI.⁵ This provision was added in the last Congress and maintained this year. As this authority is set out in the House Rules, whereas the general committee deposition authority is contained in the House Resolution adopting the rules, the specific deposition authority for the Oversight and Reform Committee presumably supersedes the general deposition authority provided to other committees and frees the Oversight and Reform Committee from the limitations included in the regulations adopted by the Rules Committee.

³ [H. Res. 8 §3\(b\)\(1\), 117th Cong. \(2021\)](#).

⁴ [167 CONG. REC. 41 \(daily ed. Jan. 4, 2021\)](#).

⁵ [CLERK OF THE HOUSE OF REPRESENTATIVES, 116TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES \(2019\)](#).

C. House Rules—Committee Confidentiality Authority

The House Rules include confidentiality provisions regarding committee hearings and business meetings, such as markups. Rule XI, Clause 2(g)(2)(A), provides that every “hearing conducted by a committee or subcommittee (other than the Committee on Ethics or its subcommittees) shall be open to the public. The same applies to committee business meetings. However, business meetings and hearings will be closed when the committee or subcommittee “in open session and with a majority present, determines by record vote” that “disclosure of matters to be considered would endanger national security, would compromise sensitive law enforcement information, would tend to defame, degrade, or incriminate any person, or otherwise would violate a law or rule of the House.”⁶ Under Rule XI, Clause 2(k)(7), “testimony taken in executive session, and proceedings conducted in executive session, may be released or used in public sessions only when authorized by the committee, a majority being present.”

D. Committee on Armed Services

1. Subpoenas

The House Committee on Armed Services rules provide that “[a] subpoena may be authorized and issued by the Committee, or any subcommittee with the concurrence of the Chair and after consultation with the Ranking Minority Member . . . only when authorized by a majority of the members voting, a majority of the Committee or subcommittee being present.”⁷ The rules further provide that for the purposes of authorizing a subpoena, a majority of the Committee or subcommittee shall constitute a quorum.

In addition, the rules note that “pursuant to clause 2(m) of rule XI of the Rules of the House of Representatives, compliance with any subpoena issued by the Committee or any subcommittee . . . may be enforced only as authorized or directed by the House of Representatives.”

2. Depositions

There are no special rules addressing depositions, and depositions are therefore controlled by the generally applicable House Rules.

3. Confidentiality

The rules provide that hearings and business meetings must be open to the public, except when the majority of those Members present votes to close the hearing or meeting because the disclosure of testimony, evidence, or other matters would endanger national security, compromise sensitive law enforcement information, or violate any law or House rule. If two or more Members are present, they may vote to close a hearing or meeting for the sole purpose of discussing whether testimony or evidence to be received would endanger the national security, compromise sensitive law enforcement information, or violate any law or House rule.

The rules also provide that the Chair, with the approval of a majority of the Committee, must establish procedures to prevent the unauthorized disclosure of any national security information

⁶ [CLERK OF THE HOUSE OF REPRESENTATIVES, 117TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES \(2021\)](#).

⁷ [H. COMM. ON ARMED SERVS., 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

classified as confidential or higher. These procedures allow access upon request to the information by any Committee Member or any other House Member, Committee staff, or designated staff who have the appropriate security clearances and the need to know. In addition, the Chair must, in consultation with the Ranking Member, establish procedures to prevent the unauthorized disclosure of any proprietary information that is received by the Committee.

E. Committee on Education and Labor

1. Subpoenas

The House Committee on Education and Labor rules delegate the power to authorize and issue subpoenas “to the Chair of the full Committee.”⁸ The Ranking Member’s consent is not required. Rather, the rules require only that “the Chair shall notify the Ranking Member prior to issuing any subpoena under such authority” and that “to the extent practicable, the Chair shall consult with the Ranking Member at least 24 hours in advance of a subpoena being issued under such authority, excluding Saturdays, Sundays, and federal holidays.” In addition, “as soon as practicable after issuing any subpoena under such authority, the Chair shall notify in writing all Members of the Committee of the issuance of the subpoena.”

2. Depositions

The rules grant deposition authority to the Chair, upon consultation with the Ranking Member, in accordance with section 3 of H. Res 8. The Chair, or the majority staff, must consult with the Ranking Member, or minority staff, at least three business days before any notice or subpoena for a deposition is issued. After such consultation, all Committee Members must receive written notice that a notice or subpoena for a deposition will be issued.

According to the rules, the deposition shall be conducted by one or more Members or Committee counsel, as designated by the Chair or Ranking Member. A deponent may be accompanied at a deposition by counsel; however, only Members and Committee counsel may examine the deponent. No one may be present at a deposition other than members, Committee staff designated by the Chair or Ranking Member, the deponent, the deponent’s counsel, and people needed to administer the oath or affirmation and transcribe or record the proceedings.

The rules further provide for the manner and length of questions and objections in a deposition. Unless the majority, minority, and deponent agree otherwise, questions in a deposition will proceed in rounds alternating between the majority and minority, not exceeding 60 minutes per side unless a different length of questioning is otherwise agreed upon. The deponent may object and refuse to answer a question only to preserve a privilege. If the Chair overrules any such objection and thereby orders a deponent to answer, such ruling must be filed with the clerk of the Committee and must be provided to Members and the deponent at least three days before the ruling is enforced at a reconvened deposition. A deponent who refuses to answer a question after being directed to answer by the Chair in writing may be subject to sanction, unless the ruling of the Chair is reversed on an appeal by a Member of the Committee.

⁸ [H. COMM. ON EDUC. & LABOR, 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

3. Confidentiality

The rules provide that Committee and subcommittee hearings and meetings must be open to the public, including radio, television, and still photography coverage, unless such meetings are closed pursuant to the requirements of the Rules of the House of Representatives.

F. Committee on Energy and Commerce

1. Subpoenas

The House Committee on Energy and Commerce rules allow the Chair of the full Committee to authorize and issue subpoenas without a vote.⁹ The Ranking Member's consent is not required. Rather, the rules only require that "the chair shall notify the ranking member prior to issuing any subpoena under such authority." The rules also provide that the Chair "shall consult with the ranking member at least 72 hours in advance of a subpoena being issued under such authority," but only "to the extent practicable." Finally, the rules require that "the chair shall report to the members of the Committee on the issuance of a subpoena as soon as practicable but in no event later than one week after issuance of such subpoena."

2. Depositions

There are no special rules addressing depositions, and depositions are therefore controlled by the generally applicable House Rules.

3. Confidentiality

The rules provide that Committee meetings and hearings "shall be open to the public, including to radio, television, and still photography coverage, consistent with the provisions of Rule XI of the Rules of the House."

G. Committee on Financial Services

1. Subpoenas

The House Committee on Financial Services rules delegate the power to authorize and issue subpoenas to the Chair. The rules require that, unless there are exigent circumstances, "the Chair will provide written notice to the Ranking Minority Member at least 48 hours in advance of the authorization and issuance of a subpoena, and such notice shall include a full copy of the proposed subpoena, including any proposed document schedule."¹⁰ The rules provide that a majority of the Members of the Committee constitutes a quorum for the purposes of authorizing a subpoena, other than a subpoena authorized and issued by the Chair.

2. Depositions

There are no special rules addressing depositions, and depositions are therefore controlled by the generally applicable House Rules.

⁹ [H. COMM. ON ENERGY & COMMERCE, 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

¹⁰ [H. COMM. ON FIN. SERVS., 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

3. Confidentiality

The rules provide that the “meetings and hearings of the committee shall be open to the public unless closed in accordance with clause 2(g) of rule XI of the Rules of the House.”

H. Permanent Select Committee on Intelligence

1. Subpoenas

The House Permanent Select Committee on Intelligence rules provide that “all subpoenas shall be authorized by the Chair of the full Committee, upon consultation with the Ranking Minority Member, or by vote of the full Committee.”¹¹

2. Depositions

There are no special rules addressing depositions, and depositions are therefore controlled by the generally applicable House Rules.

3. Confidentiality

The House Permanent Select Committee on Intelligence rules provide that hearings and business meetings are open to the public unless the Committee votes in open session, with a majority of the Committee present that disclosure of the matters to be discussed may endanger national security, compromise sensitive law enforcement information, tend to defame, degrade, or incriminate any person, and otherwise violate any law or House rule.

The rules also prohibit, with certain limited exceptions, Committee Members and staff from discussing or disclosing at any time, either during or after their tenure, the classified substance of the work of the Committee, any information received by the Committee in executive session, any classified information received by the Committee from any source, or the substance of any hearing that was closed to the public. The Chair of the Committee must supervise and direct Committee staff with respect to the security and nondisclosure of classified information. The rules also provide for the proper procedures by which to handle classified material.

I. Committee on the Judiciary

1. Subpoenas

The House Committee on the Judiciary rules allow subpoenas to be “authorized and issued by the Chair . . . in the conduct of any investigation or activity or series of investigations or activities within the jurisdiction of the Committee, following consultation with the Ranking Minority Member.”¹² The rules also allow subpoenas to be authorized and issued by the Committee or its subcommittees when authorized by a majority of the Members voting, with a majority of the Committee or subcommittee present.

¹¹ [H. PERMANENT SELECT COMM. ON INTELLIGENCE, 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

¹² [H. COMM. ON THE JUDICIARY, 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

Absent exigent circumstances, the Chair must consult with the Ranking Member at least two calendar days before issuing a subpoena and provide a full copy of the proposed subpoena, including any proposed document schedule.

2. Depositions

There are no special rules addressing depositions, and depositions are therefore controlled by the generally applicable House Rules.

3. Confidentiality

The rules provide that hearings and business meetings are open to the public except if the Committee or subcommittee determines by majority vote to close the meeting because disclosure would endanger national security, compromise sensitive law enforcement information, or tend to defame, degrade, or incriminate any person or otherwise would violate any law or House rule.

J. **Committee on Oversight and Reform**

1. Subpoenas

The House Committee on Oversight and Reform rules allow the Chair to issue subpoenas unilaterally, without consultation with or notice to the Ranking Member.¹³

2. Depositions

As noted above, the House Committee on Oversight and Reform has unique deposition authority under the House Rules. Committee rules provide that the “Chair of the Committee, upon consultation with the Ranking Minority Member of the Committee, may order the taking of depositions, under oath and pursuant to notice or subpoena.” The consultation with the Ranking Member must include three calendar days’ notice (excluding Saturdays, Sundays, and legal holidays, unless the House is in session on such days), and a copy of a proposed deposition subpoena, if applicable, before any deposition is taken.

In addition, except in exigent circumstances, all Members must receive three calendar days’ written notice (excluding Saturdays, Sundays, and legal holidays, unless the House is in session on such days) that a deposition has been scheduled. Witnesses may be accompanied at a deposition by counsel to advise them of their rights. No one may be present at depositions except Members, Committee staff designated by the Chair of the Committee or the Ranking Member of the Committee, an official reporter, the witness, and the witness’s counsel.

Questioning during depositions may be conducted by any Member or counsel designated by the Chair of the Committee or Ranking Member of the Committee. While other Committee staff members designated by the Chair of the Committee or Ranking Member of the Committee may attend, they may not pose questions to the witness. When depositions are conducted by Committee counsel, no more than two Committee counsel may question a witness per round.

¹³ [H. COMM. ON OVERSIGHT & REFORM, 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

Depositions occur in rounds, alternating between the majority and minority. Unless the Members or counsel conducting the deposition agree to a different length of questioning, a single round may not exceed 60 minutes per side. In each round, the Members or counsel for the Committee majority ask questions first, and the Members or counsel for the Committee minority go second.

Members or counsel may raise objections “concisely” and in a “non-argumentative and non-suggestive manner.” The witness may refuse to answer a question only to preserve a privilege. If the witness chooses to do so, Members or staff may either proceed with the deposition or, either at that time or at a subsequent time, seek a ruling from the Chair. If the Chair overrules the objection during the deposition, the witness is ordered to answer. If, following the deposition’s recess, the Chair overrules an objection, that ruling must be filed with the clerk of the Committee and provided to the Members and the witness at least three days before the deposition reconvenes. If a Member of the Committee appeals in writing the ruling of the Chair, the appeal is preserved for Committee consideration. A deponent who refuses to answer a question after being directed by the Chair, in writing or orally, during the proceeding as reflected in the record, may be subject to sanction unless the ruling of the Chair is reversed by the Committee on appeal.

3. Confidentiality

Meetings and hearings are open to the public or closed in accordance with the House Rules.

K. Committee on Ways and Means

1. Subpoenas

The Committee on Ways and Means rules allow the Chair to issue subpoenas unilaterally, without consultation or notice to the Ranking Member.”¹⁴

2. Depositions

There are no special rules addressing depositions, and depositions are therefore controlled by the generally applicable House Rules.

3. Confidentiality

The rules refer to Rule XI of the generally applicable House Rules during their discussion of meeting transcription. They provide that an official stenographic transcript must be available for inspection by the public, Members of the House, and Members of the Committee, “except for meetings closed pursuant to clause 2(g)(1) of Rule XI of the Rules of the House.”

¹⁴ [H. COMM. ON WAYS & MEANS, 117TH CONG., RULES OF PROCEDURE \(2021\).](#)

III. United States Senate

A. Senate Rules—Committee Subpoena Authority

The Standing Rules of the Senate provide general authority by which committees may issue subpoenas.¹⁵ Senate Rule XXVI, paragraph 1, authorizes Senate committees and subcommittees to subpoena witnesses and documents. The Senate rule provides that “each standing committee, including any subcommittee of any such committee, is authorized . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents.” No additional details regarding the authorization or issuance of subpoenas appear in Rule XXVI.

The Senate is currently split 50-50 between Democratic and Republican Senators, with Vice President Harris holding the tiebreaking vote. Currently, the Senate is operating under a power-sharing agreement negotiated and adopted earlier this year. The agreement provides that Senate committees have an equal number of Democratic and Republican members. Given that most committees provide that subpoenas of witnesses and documents may be issued upon a majority vote of committee members, the mandated 50-50 split for committee membership could have major implications for the issuance of subpoenas—requiring committee Chairs to seek bipartisan support to compel witness testimony or the production of documents. The power-sharing agreement has provisions that can move committee business forward in the case of a tie vote, through a procedure to bring the matter to the floor, but the treatment of subpoenas is an open question under the agreement, and it is not clear whether the agreement’s tie vote procedures apply to committee votes to issue subpoenas.¹⁶

B. Senate Rules—Committee Deposition Authority

Senate committees do not possess independent deposition authority. Instead, deposition authority must be granted to each committee by the Senate. If a Senate committee has not been granted deposition authority, witnesses can be subpoenaed to testify only at a hearing with a quorum of Members present, one Member being the minimum.

C. Senate Rules—Committee Confidentiality Authority

Senate Rule 26.5b provides that committee meetings, including hearings, shall be open to the public.¹⁷ However, under certain circumstances, committee Members may move to close a meeting when the matters to be discussed or the testimony to be taken at such a meeting:

1. will disclose matters necessary to be kept secret in the interests of national defense or the confidential conduct of the foreign relations of the United States;

¹⁵ [STANDING RULES OF THE SENATE, S. DOC. 113-18 \(2014\)](#).

¹⁶ See Slayton, Darcy, [Senate Subpoena Power Under the 2021 Power-Sharing Agreement](#) (Feb. 19, 2021).

¹⁷ [STANDING RULES OF THE SENATE, S. DOC. 113-18 \(2014\)](#).

2. will relate solely to matters of committee staff personnel or internal staff management or procedure;
3. will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;
4. will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement;
5. will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if—(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or (B) the information has been obtained by the Government on a confidential basis, other than through an application by such person for a specific Government financial or other benefit, and is required to be kept secret in order to prevent undue injury to the competitive position of such person; or
6. may divulge matters required to be kept confidential under other provisions of law or Government regulations.

Many of the Senate committee rules mirror the confidentiality rules in Rule 26.5b.

D. Senate Special Committee on Aging

1. Subpoenas

Under the Senate Special Committee on Aging rules, investigations may be initiated “upon the approval of the Chairman and the Ranking Minority Member,” and the “Chairman and Ranking Minority Member, acting together, shall authorize a subpoena.”¹⁸ Before a subpoena may be issued, the Ranking Member and any other Member requesting notification must be notified regarding the identity of the person to whom the subpoena will be issued, the nature of the information sought, and its relationship to the investigation.

In addition, the rules explicitly provide that each subcommittee is authorized to conduct investigations, including by using subpoenas.

2. Depositions

The rules provide that a witness’s counsel may be present during a deposition to advise the witness of his or her rights. In the case of any witness who is an officer or employee of the government or of a corporation or association, the Chair may rule that witness must be

¹⁸ [S. SPECIAL COMM. ON AGING, 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

represented by personal counsel if representation by counsel from the government, corporation, or association creates a conflict of interest.

Notices for the taking of depositions in an investigation authorized by the Committee must be authorized and issued by the Chair or by a staff officer designated by him. Unless otherwise specified, the deposition are in private. If a witness fails to appear, the Committee may not initiate procedures leading to criminal or civil enforcement proceedings unless the deposition notice was accompanied by a Committee subpoena. The rules also address the recording of depositions.

3. Confidentiality

The Senate Special Committee on Aging rules provide that all meetings and hearings are open to the public unless closed. To close a meeting or hearing or portion thereof, a motion shall be made and seconded to go into closed discussion of whether the meeting or hearing will concern Committee investigations or matters enumerated in Senate Rule 26.5b. Immediately after the discussion, the meeting or hearing or portion thereof may be closed by a vote in open session of a majority of the Members of the Committee present.

No records of a closed session, material declared confidential by a majority of the Committee, or report of the proceedings of a closed session, may be made public, in whole or in part or by way of summary, unless specifically authorized by the Chair and Ranking Member.

E. Senate Committee on Armed Services

1. Subpoenas

The Senate Committee on Armed Services rules stipulate that subpoenas may be issued after consultation with the Ranking Member, by the Chair, or any other Member designated by the Chair, but only when authorized by a majority of the Members of the Committee.¹⁹

Regarding the contents of the subpoena, the rules provide that the subpoena must briefly state the matter to which the witness is expected to testify or the documents to be produced.

2. Depositions

The Senate Committee on Armed Services rules do not address depositions.

3. Confidentiality

The Senate Committee on Armed Services rules regarding confidentiality mirror Rule 26.5b of the Senate Rules. In addition, they provide that any confidential testimony or confidential material presented in a closed hearing of the Committee or subcommittee, or any report of the proceedings of such hearing, may not be made public in whole or in part or by way of summary unless authorized by a majority vote of the Committee or subcommittee.

¹⁹ [S. COMM. ON ARMED SERVS., 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

F. Senate Committee on Banking, Housing, and Urban Affairs

1. Subpoenas

The Senate Committee on Banking, Housing, and Urban Affairs rules provide that witnesses may be subpoenaed by the Chair of the Committee or a subcommittee with the agreement of the Ranking Member of the Committee or subcommittee or by a majority vote of the Committee or subcommittee.²⁰

Regarding counsel, the rules provide that any witness subpoenaed to a public or executive hearing may be accompanied by counsel of the witness's choosing who shall be permitted, while the witness is testifying, to advise the witness of their legal rights.

2. Depositions

The rules do not address depositions.

3. Confidentiality

The rules provide that confidential testimony or confidential material presented during closed session of the Committee or any subcommittees, or any report of the proceedings of a closed session, may not be made public either in whole or in part or by way of summary, unless specifically authorized by the Chair and the Ranking Member or by a majority vote of the Committee or subcommittee.

G. Senate Committee on Commerce, Science, and Transportation

1. Subpoenas

The Senate Committee on Commerce, Science, and Transportation rules state that the Chair may issue subpoenas "with the approval of the ranking minority member of the Committee."²¹ However, the approval of the Ranking Member is not required if the Chair or a member of the Committee staff designated by the Chair has not received notification from the Ranking Member or a member of the Committee staff designated by the Ranking Member of disapproval of the subpoena within 72 hours, excluding Saturdays and Sundays, of being notified of the subpoena.

If a subpoena is disapproved by the Ranking Member as provided in this paragraph, the subpoena may be authorized by vote of the Members of the Committee, according to the quorum rules. The quorum rules provide that, in general, a "majority of the members, which includes at least one minority member, shall constitute a quorum for official action of the Committee." Although the rules provide that "one-third of the entire membership of the Committee" is generally enough to constitute a quorum for the transaction of committee business, they except "authorizing a subpoena" from the one-third rule.

The rules provide that the failure of any witness to secure counsel shall not excuse the witness from complying with a subpoena.

²⁰ [S. COMM. ON BANKING, HOUS., & URBAN AFFAIRS, 117TH CONG., RULES OF PROCEDURE \(2021\).](#)

²¹ [S. COMM. ON COMMERCE, SCI., & TRANSP., 117TH CONG., RULES OF PROCEDURE \(2021\).](#)

2. Depositions

The rules allow for staff to take depositions from a witness “at the direction of the Chair, with notification to the ranking minority member of not less than 72 hours.” The Ranking Member, or a member of the Committee staff designated by the Ranking Member, must be given the opportunity to attend and participate in the taking of any deposition.

In addition, the rules allow for witnesses to be accompanied at a deposition by counsel to advise them of their rights. Counsel retained by any witness and accompanying such witness are permitted to be present during the testimony of the witness to advise the witness of their legal rights.

The rules also establish requirements regarding the recording and filing of depositions. They provide that an accurate electronic or stenographic record shall be kept of the testimony of all witnesses in executive and public hearings and depositions. If testimony given by deposition is transcribed, the individual administering the oath must certify on the transcript that the witness was duly sworn in his or her presence and the transcriber must certify that the transcript is a true record of the testimony. The transcript with these certifications must be filed with the Chief Clerk of the Committee.

The rules provide that the witness or the witness’s counsel may inspect the record of the witness’s testimony under Committee supervision. If a part of a deposition testimony is subsequently quoted or made part of the record in a public session, a copy of it must be provided to that witness at the witness’s expense if so requested.

After inspection, within a time limit set by the Clerk of the Committee, a witness may request changes in the transcript to correct errors of transcription and grammatical errors. The witness may also bring to the attention of the Committee errors of fact in the witness’s testimony by submitting a sworn statement about those facts with a request that it be attached to the transcript. The Chair or a Member of the Committee staff designated by the Chair rules on such requests.

3. Confidentiality

The Senate Committee on Commerce, Science, and Transportation rules regarding confidentiality mirror Rule 26.5b of the Senate Rules.

H. Senate Committee on Finance

1. Subpoenas

The Senate Committee on Finance rules provide that witnesses may be subpoenaed by the Chair of the Committee with the agreement of the Ranking Member or by a majority vote of the Committee.²² Subpoenas are issued by the Chair, or by any other Member of the Committee designated by him or her.

²² [S. COMM. ON FIN., 117TH CONG., RULES OF PROCEDURE \(2021\)](#).

2. Depositions

The rules do not address depositions.

3. Confidentiality

The Senate Committee on Finance rules regarding confidentiality mirror Rule 26.5b of the Senate Rules.

The rules add that the record of an executive session of the Committee that is closed to the public pursuant to Rule 26.5b may not be published or made public in any way except by majority vote of the Committee, and after all Members of the Committee have had a “reasonable opportunity to correct their remarks for grammatical errors or to accurately reflect statements.”

I. Senate Committee on Health, Education, Labor, and Pensions (HELP)

1. Subpoenas

The Senate HELP Committee rules provide that the Committee, or any subcommittee, may issue subpoenas or hold hearings to take sworn testimony or hear subpoenaed witnesses, only if such activity has been authorized by majority vote of the Committee.²³ The Committee may, by a majority vote, delegate the authority to issue subpoenas to the Chair of the Committee or a subcommittee, or to any Member designated by such Chair.

Prior to the issuance of each subpoena, the Ranking Member of the Committee or Subcommittee, and any other Member so requesting, must be notified regarding the identity of the person to whom the subpoena will be issued and the nature of the information sought and its relationship to the authorized investigative activity. However, this requirement is waived if the Chair of the Committee or subcommittee, in consultation with the Ranking Member, determines that such notice would unduly impede the investigation.

In addition, the rules require that, upon the request of any Member, the Chair call an executive session to discuss investigative activity or the issuance of any subpoena in connection with investigative activity.

2. Depositions

The Senate HELP Committee rules do not address depositions.

3. Confidentiality

The rules provide that confidential testimony taken or confidential material presented in an executive hearing, or any report of the proceedings of such an executive hearing, may not be made public, either in whole or in part or by way of summary, unless authorized by a majority of the Members of the Committee or subcommittee.

²³ [S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 117TH CONG., RULES OF PROCEDURE \(2021\).](#)

J. Senate Committee on Homeland Security and Governmental Affairs and the Permanent Subcommittee on Investigations (PSI)

1. Subpoenas

The Senate Committee on Homeland Security and Governmental Affairs rules authorize the Chair, with the approval of the Ranking Member, to subpoena the attendance of witnesses at a hearing or deposition or the production of memoranda, documents, records, or any other materials.²⁴

However, the Chair may subpoena attendance or production without the approval of the Ranking Member if, within 72 hours (excluding Saturdays, Sundays, and legal holidays in which the Senate is not in session) of the Ranking Member's receipt of a letter signed by the Chair providing notice of the Chair's intent to issue a subpoena (including identification of all individuals and items sought to be subpoenaed), the Chair has not received a letter of disapproval signed by the Ranking Member. If a subpoena is disapproved by the Ranking Member, the subpoena may still be authorized by vote of the Members of the Committee.

The rules provide that the failure of any witness to secure counsel shall not excuse such witness from complying with a subpoena or deposition notice. In addition, the Committee may not initiate procedures leading to criminal or civil enforcement proceedings for a witness's failure to appear or produce materials unless the deposition notice was accompanied by a Committee subpoena.

The rules also specify that subcommittees are allowed to adopt subpoena rules that need not be consistent with the rules of the Committee. The Permanent Subcommittee on Investigations rules provide that "subpoenas for witnesses, as well as documents and records, may be authorized and issued by the Chair, or any other Member of the Subcommittee designated by him or her, with notice to the Ranking Minority Member."²⁵ They further provide, in conjunction with the Committee rules, that, "a written notice of intent to issue the subpoena shall be provided to the Chair and Ranking Member of the Committee (or designated staff officers), by the Subcommittee Chair (or designated staff officers) immediately upon such authorization. In addition, no subpoena shall be issued for at least 48 hours, excluding Saturdays and Sundays, from delivery to the appropriate offices, unless the Chair and Ranking Member waive the 48-hour waiting period or unless the Subcommittee Chair certifies in writing to the Chair and Ranking Member that, in his or her opinion, it is necessary to issue a subpoena immediately."

2. Depositions

The Senate Homeland Security and Government Affairs Committee rules provide that "notices for the taking of depositions shall be authorized and issued by the Chair, with the approval of the Ranking Minority Member of the Committee."

However, the Chair may initiate depositions without the approval of the Ranking Member if, within 72 hours (excluding Saturdays, Sundays, and legal holidays in which the Senate is not in session) of the Ranking Member's receipt of a letter signed by the Chair providing notice of the Chair's intent to issue a deposition notice (including an identification of all individuals sought to

²⁴ [S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 117TH CONG., RULES OF PROCEDURE \(2021\).](#)

²⁵ [S. PERM. SUBCOMM. ON INVESTIGATIONS, 117TH CONG., RULES OF PROCEDURE \(2021\).](#)

be deposited), the Chair has not received a letter of disapproval of the deposition from the Ranking Member. Even if a deposition notice is disapproved by the Ranking Member, the deposition notice may be authorized by a vote of the Members of the Committee.

The rules allow for counsel retained by any witness to be present during the testimony of such witness at any public or executive hearing or deposition to advise such witness of his or her legal rights while testifying. The failure of any witness to secure counsel does not excuse such witness from complying with a subpoena or deposition notice.

The rules provide that unless otherwise specified, depositions shall be in private. In addition, the Committee may not initiate procedures leading to criminal or civil enforcement proceedings for a witness's failure to appear or produce unless the deposition notice was accompanied by a Committee subpoena.

The rules further provide for the manner and length of questions and objections in a deposition. The rules also address the recording and filing of depositions.

The Permanent Subcommittee on Investigations rules provide that "notice for the taking of a deposition in an investigation authorized by the Subcommittee shall be authorized and issued by the Chair. The Chair of the Committee and the Ranking Minority Member of the Subcommittee shall be kept fully apprised of the authorization for the taking of depositions." Similar to the Committee rules, depositions are conducted in private and the Subcommittee may not initiate procedures leading to criminal or civil enforcement proceedings for a witness's failure to appear or produce unless the deposition notice was accompanied by a Subcommittee subpoena.

3. Confidentiality

The Senate Committee on Homeland Security & Governmental Affairs rules regarding meeting and hearing confidentiality mirror Rule 26.5b of the Standing Rules of the Senate.

All testimony taken in executive session of the Permanent Subcommittee on Investigations, must be kept secret and will not be released without the approval of a majority of the Members of the Committee.

K. Senate Select Committee on Intelligence

1. Subpoenas

The Senate Select Committee on Intelligence rules provide that subpoenas authorized by the Committee may then be issued by the Chair, Vice-Chair, or any Member of the Committee designated by the Chair, and may be served by any person designated by the Chair, Vice-Chair, or Member issuing the subpoenas.²⁶

²⁶ [S. SELECT COMM. ON INTELLIGENCE, 117TH CONG., RULES OF PROCEDURE \(2021\).](#)

The rules require that each subpoena must have attached to it a copy of S. Res. 400 of the 94th Congress, which established the Committee and provided it with investigatory and subpoena powers, and a copy of the Senate Select Committee on Intelligence rules.

The rules also address contempt procedures surrounding subpoenas: The rules provide that “no recommendation that a person be cited for contempt of Congress or that a subpoena be otherwise enforced” may be forwarded to the Senate until the Committee has, upon notice to all its Members, met and considered the recommendation, afforded the person an opportunity to address such contempt recommendation or subpoena enforcement proceeding either in writing or in person, and agreed by a majority vote of the Committee to forward such recommendation to the Senate.

2. Depositions

The Senate Select Committee on Intelligence rules do not address depositions.

3. Confidentiality

The Senate Select Committee on Intelligence rules regarding confidentiality mirror Rule 26.5b of the Standing Rules of the Senate.

The Senate Select Committee on Intelligence rules also include specific provisions regarding the protection of information in the possession of the Committee relating to the lawful intelligence activities of any department or agency of the United States that has been classified under established security procedures.

L. **Senate Committee on the Judiciary**

1. Subpoenas

The Senate Judiciary Committee rules provide that the Chair may subpoena the attendance of a witness at a hearing or deposition or the production of materials, with the agreement of the Ranking Member or by a vote of the Committee.²⁷

2. Depositions

The rules provide that any subpoena issued for a deposition that is to be conducted by staff must be accompanied by a notice of deposition identifying the majority staff officers designated by the Chair and the minority staff officers designated by the Ranking Member to take the deposition. The majority and minority are given the opportunity to participate on equal terms.

In addition, unless waived by agreement of the Chair and Ranking Member, any deposition must have at least one Member present for the duration of the deposition. All Members must be notified of the date, time, and location of any deposition, and any Member of the Committee may attend and participate in the taking of any deposition. Unless otherwise specified, the deposition will be in private.

²⁷ [S. COMM. ON THE JUDICIARY, 117TH CONG., RULES OF PROCEDURE \(2021\).](#)

3. Confidentiality

No confidentiality provisions are provided in the Senate Judiciary Committee rules.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our Election and Political Law practice group or Public Policy practice group:

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