



# A Fate Worse than Litigation

## The Congressional Investigation

By Paul M. Thompson

If you have ever been a defendant in a lawsuit, you understand that participation in the legal system is seldom pain-free. Litigation is costly, time-consuming, and emotionally draining. Yet, when hauled into court, you are at least in a place controlled by the rules of evidence, where decisions are guided by precedent and your fate rests in the hands of an impartial decision-maker.

As difficult as the courtroom can be, there is a place today that is far worse, a place where many of the rules so fundamental to our western legal system do not seem to apply.

- It is a place where you can be publicly accused of wrongdoing and ordered to testify against your will.
- The prosecutor, judge, and jury are one and the same.
- You have no right to confront witnesses.
- Any and all evidence, including hearsay, is admissible against you.
- The attorney-client privilege and work product protections do not generally apply.

- Neither do the protections for proprietary, confidential, or sensitive business information.
- Your private information can be taken, posted on the internet, or made the subject of a press conference.
- At the end of it all, you can be subject to criminal prosecution, significant civil liability, or the complete loss of your reputation or your business.

This proceeding happens in the United States, not in Iran or China. It's known as a Congressional investigation, and no matter how well you run your business, it can happen to you.

### MAJOR INVESTIGATIONS LOOMING

Congress has far reaching powers. Its power to investigate is as expansive as its power to legislate, meaning that Congress can, and frequently does, investigate private sector activities. Since January 2007, Congress has held hundreds of hearings on investigative matters, involving nearly every industry. In fact, during the 110th Congress, hardly a

week passed without a hearing on a matter that touched on the private-sector.

As we proceed into the 111th Congress, the number of investigations may increase, and with Democrats in control of both the Congress and the White House, Congressional leaders keen on making headlines will be reluctant to focus on a popular president of their own party. Their attention, therefore, will turn to the private sector. The time could not be better for such a focus. The current economic crisis clearly provides Congress with investigative fodder that will last for years.

But the economic crisis does not stand alone. Long-term energy policy and the rising costs of health care continue to be pressing matters. Indeed, the Democratic members of the House indicated just how aggressively they intend to pursue these issues during the 111th Congress when they toppled John Dingell as Chairman of the House Energy and Commerce Committee and replaced him with Henry Waxman, the former Chairman of the Committee on Oversight and Government Reform.

Mr. Waxman has aggressively investigated government contractors, financial institutions, energy companies, health care providers, and many others in the private sector. He is smart, capable, and extremely hard working. With even more power in the 111th Congress, Mr. Waxman's attacks on Wall Street financiers, big energy companies, and the pharmaceutical industry will be more than just the stuff of televised hearings. They could become the core of an investigative and legislative agenda for the new Congress.

Members of Congress themselves seem to agree with this prognosis. Speaking about the work done on the financial crisis in the fall of 2008, Chairman of the House Financial Services Committee, Barney Frank, provided those in the private sector with a

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word of warning. "This is not all that needs to be done," he said. "We will be back next year to do some serious surgery..."

If Congress is preparing for such serious surgery, then the likely patients include every major

industry in the U.S. economy. With scalpel in hand, the 111th Congress will inquire into the health of your company, carve up your proprietary information and dissect your balance sheet. To Congress, the surgery will no doubt be deemed

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a complete success. If you work for a company on the operating table, however, it is your job to ensure that the patient does not die in the process.

What will this surgery entail and how can you prepare for it?

#### KNOW THE PROCESS

Congressional committees are the entities charged with conducting investigations, and the rules of the investigation differ from committee to committee. Nonetheless, there are some common trends. If a civil lawsuit starts with a complaint and ends on appeal, then a Congressional inquiry has a fixed chronology as well: investigation, hearing, committee report and legislation.

- **Investigation:** Most Congressional investigations arise out of public events: newspaper articles about your industry; public calls for legislation; or civil lawsuits filed against your company. In conducting an investigation, each committee has standard tools at its disposal. Often, the committee will make a formal request for documents or testimony through a letter. If that a request does not do the trick, the committee can seek to compel the production of the documents or testimony through a subpoena. Throughout the process, there are opportunities for negotiation with staff to limit the requests and identify proper individuals for interviews or depositions.
- **Hearing:** A hearing provides members of Congress an opportunity to ask questions about the information uncovered to date and to probe for new information. Make no mistake, the hearing is a media spectacle, often designed for public consumption.
- **Report:** For the most important investigations, the committee will write a report, detailing the results of its investigation and often calling for legislative changes.

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- **Legislation:** Finally, the committee will often introduce and seek to pass legislation regarding the subject of the investigation. If the investigation is well done, it will provide Congress with a reason to pass the legislation in question.

## PROBLEMS AND PITFALLS

Within this basic framework, Congressional investigations pose some common risks. A Congressional investigation can, and often does, generate other inquiries. Sometimes, the information that Congress gathers is passed to the Department of Justice with a request to open a criminal investigation. Sometimes, it ends up in the hands of savvy plaintiffs' lawyers who use it to file civil suits.

Rather than jump-start a criminal investigation or lawsuit, the Congressional investigation may run parallel to them. In such circumstances, the corporation is often asked by Congress to disclose confidential information — information that neither prosecutors nor plaintiffs' lawyers have the power to acquire.

The question faced by the corporation is what to hand over and under what conditions. Disclosing the information no doubt runs the risk of revealing confidential information to competitors, handing it over to plaintiffs' lawyers, or placing it in the hands of criminal investigators. Refusing to comply, however, may sour your relations with Congress and result in a contempt citation.

Congressional investigations often result in adverse publicity. When engaged in a high-stakes Congressional investigation, a corporation needs to understand that a few days of bad publicity can do serious damage to its reputation and its bottom line.

Finally, Congressional investigations are costly and your insurance may not cover it. At times, Congress can make a request for documents that is as extensive as those made by parties in civil litigation. Preparation for a hearing is also time-consuming, often requiring top executives to spend days or weeks preparing. Without insurance coverage, the costs to

the corporation are substantial and come directly off the bottom line.

This does not mean that you are helpless. In fact, there are a number of things that you can do to head off a Congressional inquiry before it begins and minimize the effects of one once it has started.

## WHAT YOU CAN DO

**Attend to your compliance program.** Every company must have a compliance program. By catching problems before they become the fodder of lawsuits, front page news stories, or criminal investigations, you minimize the chance that Congress will become interested.

You should also implement a comprehensive legal, public relations and lobbying strategy that tracks the areas of most risk to your company and provides you with the guidance you need to head off a potential investigation or to manage one should it come your way.

**Implement policies on confidential and privileged information.** It is essential that you have consistent policies for the identification and protection of confidential, sensitive and privileged information, despite the fact that there is no mechanism to compel Congress to recognize such privileges. Having consistent policies will help you defend any decision that you make to withhold information from Congress.

**Develop and maintain relationships with Congress.** All major corporations must develop relationships with members of Congress, particularly with members from states where they do business or on committees relevant to their business. These long-term relationships can provide essential information and support in advance of and during a Congressional inquiry. Developing such relationships will also allow you to respond quickly when allegations surface.

**Be prepared to cooperate, but be ready to fight.** Congressional inquiries present an opportunity to

convey your message, set the record straight, and influence the public debate. Cooperation with Congress is often the best way to maximize that opportunity. It can limit the scope of an investigation, the breadth of a document request, or even eliminate the need for a hearing altogether. Nonetheless companies should know when to cooperate and when to fight.

During the 1987 Iran-Contra hearings, Lt. Colonel Oliver North described a Congressional investigation as “sort of like a baseball game” in which Congress “is both the player and the umpire.”

Addressing one Congressional panel, he said this is a game “in which you call the balls and strikes and you determine who is out and who is safe. And, in the end, you determine the score and declare yourself the winner.”

These words reflect the view of many caught in the midst of a Congressional inquiry, but they are not

completely accurate. Whatever may be said about a Congressional investigation, it is not a game. It can lead to costly and time-consuming civil suits or criminal investigations, destroy your reputation, and send your stock into a free-fall. While you can not prevent all harm that might arise from such an inquiry, you can and should be prepared. After all, your company’s health, financial stability, and reputation may depend on it.



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