



# IN THE CROSSHAIRS OF CONGRESS: TIPS FOR TARGETS OF INVESTIGATIONS

by  
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The swearing in of the 110th Congress ushered in a new era of increased Congressional oversight. Investigations by key Congressional committees are likely to cover a wide range of topics, from government contracting to pharmaceutical pricing to energy policy – to name just a few of the most widely-publicized areas of potential scrutiny. For the companies and executives caught in the crosshairs of Congressional investigations – and those representing them in open hearings and before Congressional staff – there are some important principles to guide the strategy. Decisions made in the initial stages of a Congressional investigation may shape how parallel and/or subsequent litigation unfolds. The challenge is to respond to the investigation with an eye toward preventing or containing potential criminal and civil exposure.

***Responding to a Congressional Inquiry: Manage Issues on the Horizon.*** A Congressional investigation is neither fish nor fowl – it's both. There is an inherent tension for those caught up in the investigation. On the one hand, there is the instinct to put the story out, to play ball with the Congressional committee, to shift the public relations engine into damage control mode to counter unfavorable press exposure, and to take immediate steps to protect the company's or individual's reputation. However, reputational risk cannot be the sole controlling factor when managing a Congressional investigation. The response must be more nuanced and measured, looking beyond the horizon to gauge collateral threats that may impact important long term issues. The potential for a parallel or follow-on criminal investigation raises the stakes exponentially. But even without such concerns, many possible traps – avenues to create civil and criminal liability when none were obvious before – arise along the way. Even where substantial criminal liability seems remote, a false step may provide political embarrassment, or worse. Each action in the face of the inquiry must be taken with a view toward avoiding potential civil and criminal liability in other forums. Here are some basic tips for managing a Congressional investigation:

**Tip 1: Act Proactively Rather Than Reactively.** There is simply no substitute for adequate preparation. Congressional inquiries can be initiated by nothing more than a media report, and the announcement of such an inquiry alone can quickly lead not only to a public relations nightmare but to a flurry of hastily-filed lawsuits by an over-zealous plaintiffs' bar. In order to avoid being caught off-guard, companies who view themselves as likely grist for the Congressional investigations mill should seize the initiative and prepare themselves in areas of potential inquiry. Determine whether you have sufficient facts at your disposal to respond to anticipated questions when Congressional investigators start asking questions. It is not what you know but what you do not know that may pose your most significant challenge.

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**Tip 2: Remember that a Hearing Room is not a Courtroom.** “Rules in a knife fight?” – One recalls the famous question from the puzzled giant just before Butch Cassidy delivered a punishing kick in the fracas. Of course, Congressional hearings are not knife fights, and yes, there are rules. But they are not the same rules that can be relied upon to safeguard the presumptions and protections ingrained in our criminal and civil justice systems. The members asking the questions are at once prosecutor, judge, and (together with the media and the public) jury, whereas the witnesses appearing before them retain essentially only the most elemental Constitutional protections. In the hearing room, an appreciation of the political dynamic at work can be just as essential as an understanding of the applicable rules – but most important is knowing when to rely upon which.

**Tip 3: Stay Disciplined.** Although Congressional hearings can serve multiple purposes – from raising awareness of issues of public concern, to introducing new legislation, to conducting oversight over executive department agencies, to showcasing the activities of representatives to specific constituencies – they often function as a type of stylized, and largely scripted, public ritual. Members develop their statements and questions in advance of the hearing, which often reflect weeks or months of behind-the-scenes staff investigation. True spontaneity holds little upside, but carries significant risk for those seated at the witness table. It is essential to prepare anticipated answers and hew closely to the themes of prepared testimony in order to avoid having off-the-cuff remarks pulled out of context and used in misleading sound-bites. Worse, extemporaneous remarks at odds with what members hear through other testimony or see in documents may serve as the bases for considerable grief at a later date.

**Tip 4: Think Ahead and Look Beyond the Halls of Congress.** Although the intensity of an ongoing Congressional investigation may seem all-consuming, it is absolutely critical to be cognizant of potential pitfalls beyond the halls of Congress. First, although by now a cliché, it may well be allegations of a “cover-up” rather than any underlying conduct that create the most enduring trouble. A criminal referral to the Department of Justice stemming from a Congressional inquiry in and of itself can be enough to solidify public perception about a company or an individual – regardless of what the members conclude about the ostensible topic of the investigation. Moreover, although the members of the committee are your most immediate audience, you should assume that documents and testimony you provide will eventually end up in the hands of federal and state prosecutors or regulators, not to mention potential civil plaintiffs. Finally, leaks should not only to be expected, but must be anticipated as part of an overarching media strategy.

**Tip 5: Cautious Cooperation with Staff Goes a Long Way.** Although it may be tempting to resist feeding what seems to be an unfounded or media-driven Congressional inquiry, nothing stirs greater interest than a perceived lack of cooperation. Accordingly, early and consistent cooperation with selected Congressional staff can go a long way toward cooling rather than stoking the investigative heat of an ongoing inquiry. Of course, cooperation must always be provided with the caveat that a client is prepared to aggressively assert its rights if Congress starts to abuse its investigative authority. Constructive, open, and ongoing dialogue with the staff on both sides of the aisle at every stage of an investigation can in the end even help frame the inquiry in a way that results in a more favorable outcome for the client.

**Tip 6: Team Leadership is Essential.** Every high profile Congressional investigation will naturally attract a bevy of business, legal, and public relations advisors. In order to effectively manage a coordinated and flexible strategy in response to Congressional inquiry, there needs to be a captain of the ship. Untimely or inconsistent messages – whether in the media, in a hearing, or in private discussions with the representatives or staff – will at best create confusion and possibly raise an unwarranted and avoidable level of suspicion. In either case, resolution of the inquiry may be prolonged, compounding the financial, reputational, and personal impact on the client.

**Conclusion.** Prosecutors, regulatory enforcement staff, plaintiffs’ lawyers and active shareholders pay close attention to Congressional investigations. Once the cameras are gone and committee staff are on to the next issue, companies and individuals are left with the consequences of judgments made during the investigation. Managing the response to Congressional investigations requires a reasoned, strategic approach to the overall picture – not just the imperatives of the moment.