CONGRESSIONAL INVESTIGATIONS 101

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The Democrats will control the House in the 116th Congress, which will convene on January 3, 2019. Although their majority is slim, Democrats now chair committees, determine which investigations to pursue and hearings to hold, and wield subpoena power. Two themes will govern their actions: (1) greed—whether companies treated the public fairly; and, (2) potential corruption stemming from dealings with the Trump administration. They have already targeted pharmaceutical, oil and gas, chemical, financial services, technology, mining, and transportation companies. For-profit educational institutions, banks, and other lenders are not far behind. Recent oversight investigations on opioids, oil spills, privacy protections of tech giants, and universities involved in the university gymnastics assault scandal all demonstrate how companies and their executives can be drawn into these controversies.

2020 will be a presidential election year. Expectations for legislative action on major issues are universally low. Partisanship, on the other hand, will be high. In such an atmosphere, those who receive a congressional "invitation" to meet with, or who may be called to testify before a congressional committee should be aware that a congressional investigation is a proceeding in which much is at stake - for the business whose officers must testify, for those individuals personally, and often for their industry as a whole.

The following points are key to understanding and preparing for a congressional investigation:

- **Congressional investigations are the big time.** Recognize the risks and opportunities—good and bad—they represent for your business and yourself. For instance, it is a crime to frustrate a congressional investigation, whether or not your testimony is under oath, and increasingly testimony is taken under oath. This also applies to activities that lead up to a hearing, such as interviews, depositions, document production, etc. Congressional investigations are run by political professionals who know how to direct criticism where it hurts the most. Congressional hearings make the news.
- **Congress makes its own rules.** Investigations can be conducted to be educational, to build a record for legislation, to generate publicity, to embarrass, or some combination of all those purposes. Whatever the purpose, you must be prepared for the worst. You may be asked to produce documents or to be interviewed, or required to be deposed or to testify at a public hearing. Any information you provide at each stage comes under the control of Congress, which, at least in theory, does not recognize confidentiality protections that any citizen can count on in other situations.
- **Understand the rules—or lack of rules.** Hearing rooms are not courtrooms, nor are witnesses given great flexibility. Nonetheless, some legal rules, such as preserving records that may be the subject of an official investigation, apply. Neglect them at your peril.

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- **Congressional investigations are political events.** It is often the soundbite, not the substance that matters. The stakes for companies—both private and public—and their executives can be high and sometimes quite personal. There is not always a winner and a loser, and even what “winning” means is not always clear. A well-prepared interviewee or witness will also identify potential allies behind the dais and seek to reinforce shared positions.
- **The real audience isn't the committee.** Any investigation can result in a public report, which you can neither review nor challenge before it is released. If there is a hearing, it will likely be televised. Recognize that, as often as not, both investigative reports and hearings are designed to produce sound bites on the 6 o'clock news.
- **Know your message.** Plan for the questions you can anticipate. Know your message, keep it simple, and repeat it often.
- **Prudence is your watchword.** Know the facts well. Don't guess. Don't lose your cool, and don't lecture.
- **Practice. Practice. Practice.** Prepare thoroughly. Prepare often. Prepare for the worst.
- **Get professional help.** Just as you would not consider setting foot in a courtroom without competent trial counsel, don't even consider appearing before a congressional committee without experienced, competent legislative counsel partnered with legal counsel since so many of these investigation are related to parallel criminal, civil, GAO, or inspector general investigations.

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