

CONGRESSIONAL INVESTIGATIONS

What Every Corporate Counsel Needs to Know

Akin Gump Strauss Hauer & Feld, LLP
March 26, 2019

Presenters:



Raphael A. Prober

- Partner – Litigation/Congressional Investigations
- rprober@akingump.com
- Washington, D.C.
- (202) 887-4319

Practice Areas

- Congressional Investigations
- White Collar Defense and Government Investigations
- Antibribery/Foreign Corrupt Practices Act (FCPA)
- State Attorneys General
- Crisis Management

- Raphael Prober serves as co-head of the firm's Congressional Investigations practice.
- Mr. Prober recently served as an Associate Deputy Attorney General at the U.S. Department of Justice, handling all facets of the Department's responses to congressional oversight and investigations. Mr. Prober also oversaw Inspector General and GAO matters for the Deputy Attorney General's Office.

Presenters:



Thomas C. Moyer

- Counsel– Litigation/Congressional Investigations
- tmoyer@akingump.com
- Washington, D.C.
- (202) 887-4538

Practice Areas

- Congressional Investigations
- White Collar Defense and Government Investigations
- Global Investigations and Compliance
- Global Financial Services Regulation
- Crisis Management

- Mr. Moyer focuses his practice on congressional investigations and white collar defense.
- Mr. Moyer currently serves as an adjunct professor at Fordham Law School, where he teaches a course on congressional oversight and investigations, and he has also served as an adjunct professor of congressional investigations at Georgetown University Law Center.

Presenters:



Martine Elizabeth Cicconi

- Counsel– Litigation/Congressional Investigations/Appellate
- mcicconi@akingump.com
- Washington, D.C.
- (202) 887-4478

Practice Areas

- Congressional Investigations
- Supreme Court and Appellate
- Litigation

- Ms. Cicconi focuses her practice on congressional investigations, and federal and state appellate litigation.
- Ms. Cicconi previously served as associate counsel in the Office of the White House Counsel, and as an attorney adviser in the Office of Legal Counsel at the Department of Justice. In both positions, Ms. Cicconi served on the oversight and investigations teams.
- Prior to those positions, Ms. Cicconi clerked for Justice Ruth Bader Ginsburg of the United States Supreme Court.

What We'll Cover Today

- **Outlook for Congressional Oversight in the 116th Congress**
 - Who should be paying attention?
- **Congressional Investigations 101: How Will It Happen?**
 - What can Congress actually do?
 - Who will Congress target and why?
 - Dynamics of a White House under the Congressional microscope
 - Dynamics of a divided House and Senate
 - Dynamics of a Presidential race and a crowded field of Democratic contenders
- **Risks for Corporations**
 - Increased oversight of the technology/big data, healthcare, financial services, and energy sectors, among others
 - Congressional oversight of companies doing business with the Administration or which intersect with the Administration
- **Practical Tips**
 - What can you do now to be prepared?

An Investigative Storm

Comey says Trump lied about him, FBI
Now That The Democrats Have
Won The House, Who Will They
Investigate And How?

Everyone the House Judiciary
Committee is questioning over
Trump

House Democrats Are Flooding
Trump With Demands.
Here's How to the Investigations.

Trump's anger
intensifies over
'crazy' Mueller and
FBI investigation

THERE WILL
BE HELL
FOR THOSE
WHO
TOUPEE

House Democrats demand documents from more
than 80 people and institutions affiliated with
Trump
Crossing the
Trump's Private Conduct With

The White House and
Congress Are Heading for
a Collision. Who Will Win?

Congress's Trump Investigation is
Trump, Not Congress

Congressional Oversight: Capitol Hill vs. Hollywood



Outlook for Congressional Oversight: 2019-2020

- **What should you expect in the next two years?**
 - With Democrats in the majority in the House, we expect heightened investigations focused on the Trump Administration as well as private sector actors, especially in areas intersecting with the Administration.
 - Oversight of the Trump Administration will lead to scrutiny of the private sector.
 - Communications/dealings with the Administration will be a key investigative focus.
 - Risk of getting caught between a Democratic House and a Republican White House and/or Senate.

Outlook for Congressional Oversight: 2019-2020

In the coming years, expect to see active Congressional oversight of:

- Private Equity-Owned Interests
- The Financial Services Sector
- Energy/Environmental Interests
- The Healthcare Industry
- Government Contracting
- Technology/Social Media/Big Data
- Certain Tax-Advantaged Industries

Some investigations that will be conducted, like inquiries related to Russian meddling in U.S. elections, are a foregone conclusion. Other investigations will be more event-driven and are harder to predict at this point.

Congressional Outlook: Key House Committees and Members

- **House Energy and Commerce Committee**
 - Chairman: Frank Pallone (D-NJ)
 - Ranking Member: Greg Walden (R-OR)
 - Oversight & Investigations Subcommittee Chair: Diana DeGette (D-CO)
- **House Committee on Oversight and Reform**
 - Chairman: Elijah Cummings (D-MD)
 - Ranking Member: Jim Jordan (R-OH)
- **House Judiciary Committee**
 - Chairman: Jerrold Nadler (D-NY)
 - Ranking Member: Doug Collins (R-GA)
- **House Financial Services Committee**
 - Chairwoman: Maxine Waters (D-CA)
 - Ranking Member: Patrick McHenry (R-NC)

Congressional Outlook: Key Senate Committees and Members

- **Senate Permanent Subcommittee on Investigations (PSI)**
 - Chairman: Rob Portman (R-OH)
 - Ranking Member: Tom Carper (D-DE)
- **Senate Finance Committee**
 - Chairman: Chuck Grassley (R-IA)
 - Ranking Member: Ron Wyden (D-OR)
- **Senate Health, Education, Labor, and Pensions (HELP) Committee**
 - Chairman: Lamar Alexander (R-TN)
 - Ranking Member: Patty Murray (D-WA)
- **Senate Judiciary Committee**
 - Chairman: Lindsey Graham (R-SC)
 - Ranking Member: Dianne Feinstein (D-CA)

You've Received a Letter from Congress: What Happens Now?

- Why is Congress conducting an investigation?
- What are the risks for the company?
- How does a Congressional inquiry begin?
- Does Congress have the power to make this request?
- What rules govern this process?
- What investigative tools may the Congressional committee use?
- What if the company refuses to comply with a Congressional subpoena?
- How does this differ from an ordinary government investigation?
- What should we expect at a Congressional hearing?
- What can we do now to minimize risk?

Why is Congress Conducting an Investigation?

- **Variety of potential motivations for a Congressional investigation:**
 - Intention to create new law or update an existing law.
 - Weigh-in on an issue under regulatory review or pressure Executive Branch agencies to take action.
 - Pressure private sector to take action.
 - A member may have a “pet” issue that is ripe for investigation.
 - Political, constituent, and/or public relations/media considerations.
- **Although an investigation may be politically driven, this can mean a variety of things.**
 - Seeking to capitalize on investigating an unpopular or compromised target.
 - Targeting an individual or company seen as politically aligned with an opposing party or view.
 - “Collateral damage”: Seeking information from a private party relevant to a broader investigation driven by political considerations.

Why is Congress Conducting an Investigation?

- **2020 Election**

- Both parties are focused here.
- The Democrats have many candidates vying for the spotlight.
- Investigations will likely play a major narrative role.

- **President Trump**

- Democrats remain focused on contractors and industries that intersect with the Administration.

- **A Favorite Pattern**

- **Last two “wave” midterm elections in 2006 and 2010 brought major changes in the composition and control of Congress.**
 - Heightened focus on investigations in key congressional committees
 - Oversight of private industry as a proxy issue to attack White House
- **Democrats in 2007 took control of both houses of Congress.**
 - Rep. Henry Waxman (D-CA) as chair of House Oversight Committee investigated U.S. defense contracting in Iraq and Afghanistan as a proxy against the war
- **Republicans in 2011 took back the House.**
 - Investigated insurance companies and other healthcare companies as a proxy against the Affordable Care Act

What Are the Risks for the Company?

- **The Committee will seek to drive the investigation's narrative, most often in a way that is helpful to the Committee.**
- **This can pose a variety of potential risks for the company:**
 - Direct legal risks if inaccurate information provided (e.g., false statements/perjury/obstruction).
 - Indirect legal risks—impact on parallel investigations and litigation (civil and/or criminal).
 - Reputational/public relations risk.
 - Impact on sales performance/consumer attitudes/investors.
 - Impact on market performance for publicly-traded company; may embolden activist shareholders.

What Are the Risks for the Company?

- Hearings are not often an “opportunity” to push your messaging.



How Does a Congressional Inquiry Begin?

- **A Congressional investigation may begin in a variety of ways.**
 - Investigations often rapidly unfold.
 - Typical investigations follow a general process including an initial letter/subpoena requesting documents, document productions, and a potential hearing and/or written committee report.
 - These investigations follow a process more akin to a typical government investigation, albeit with much different rules and on a very expedited schedule.
- **Different Congressional committees are known to take differing general approaches.**
 - For example, the Senate Permanent Subcommittee on Investigations is known to conduct lengthier, more in-depth investigations (often foregoing pursuit of media coverage until the culmination of a multi-month or multi-year inquiry), while other Committees will pursue the “rip and read” method.

Lifecycle of a typical investigation:

- Request → Discovery (Documents/Narratives/Interviews/Depositions) → Final Hearing and/or Report.

Does Congress Have the Power to Make this Request?

- **Congress has broad authority to investigate a wide range of subject matters.**
 - Congress may investigate any issue on which it may legislate, including virtually any matter relating to interstate commerce (*i.e.*, the private sector).
 - *See, e.g., McGrain v. Daugherty, 273 U.S. 135 (1927).*
 - Congress is uniquely tasked with overseeing the Executive Branch, including its agencies and, by extension, their contractors.
- **There are, however, limits on Congress's oversight authority.**
 - Inquiries must relate to the “legislative function.”
 - Inquiries designed to expose the private affairs of individuals, without further legislative justification, have been ruled invalid.
 - Congress is not a law enforcement agency.
- **Legislation need not follow a Congressional investigation.**
 - In the contemporary political climate, this means “made-for-TV” investigations may be politically-driven and not necessarily intended to change the law.

What Rules Govern this Process?

- **Inquiries are further limited by the rules of the Congress and its committees.**
 - The rules largely depend on which committee is conducting the investigation.
 - The House and Senate each adopt their own general rules.
- **Individual committees and subcommittees will then adopt rules governing their own affairs, including oversight activities such as the issuance of subpoenas and the conduct of hearings.**
 - Think of these like “local rules.”
 - There are many similarities across various House and Senate committees, but the nuances are key.
- **The House recently changed its rules to allow staff depositions to occur without any members present.**

What Investigative Tools May the Congressional Committee Use?

- **Subpoena Power:**
 - Various committees and subcommittees differ on the precise requirements for authorizing subpoenas.
 - For a growing number of committees, the Chairman, alone, may issue a subpoena. Some committees require consultation with the minority party, and some Democratic committee chairs—even on committees with unilateral subpoena authority—have pledged more active consultation.
- **Most inquiries do not start with subpoenas.**
 - Letter requests are far more common.
 - Production of sensitive or highly-regulated information may require seeking a “friendly subpoena.”

What Investigative Tools May the Congressional Committee Use?

- **Many committees are authorized to conduct witness interviews and depositions.**
 - Important to remember that even “informal” interviews may result in the public disclosure of information by the committee, and these are still “official” communications with the committee.
- **The media/bully pulpit can be an effective tool to force compliance with a Congressional request.**
- **All committees may conduct public hearings and require the testimony of private sector (and government) witnesses.**
- **This calls for a hybrid approach in responding: white collar defense with political sensitivity.**

What If the Company Refuses to Comply with a Congressional Subpoena?

- **If the subject of a Congressional subpoena—whether a company or an individual—refuses to comply, the committee or subcommittee may seek to hold that party in contempt.**
- **Three Types of Contempt of Congress:**
 - Inherent Contempt: No longer utilized.
 - Criminal Contempt: Punitive relief to punish a party failing to comply.
 - Statutory Civil Contempt: Designed to force a party to comply with a request.
- **There can be significant reputational/market risk for a company failing to comply with a Congressional subpoena.**

How Does This Differ from an Ordinary Government Investigation?

- **Many similarities between Congressional investigations and more traditional government inquiries.**
 - Follow similar document discovery processes, though often on an accelerated timeframe.
 - Constitutional privileges (*i.e.*, the First & Fifth Amendments) apply.
- **Important Difference: Attorney-Client / Work Product Privileges.**
 - House and Senate reserve the right to not recognize the privilege.
 - Typically recognized in practice.
- **Federal Rules of Evidence & Federal Rules of Procedure do not apply.**

What Should We Expect at a Congressional Hearing?

- **A Hearing Room is not a Court Room.**
 - There are few limitations on questioning, with Members often trying to force witnesses to provide “sound bite” responses.
 - Witnesses may have counsel present, but may not object to questioning.
- **Members will make opening statements to begin.**
 - Witnesses are generally given five minutes to make an oral opening statement.
 - A longer, written statement may generally be submitted for the hearing record.
- **It’s important to be truthful.**
 - False statements may give rise to liability even if not made under oath.
- **Lobbying rarely stops a Congressional inquiry.**
 - Meetings with members of the committee and committee staff may be helpful in certain circumstances, but do not expect these activities to mitigate the committee’s interest in the company or to make an investigation go away.
 - Lobbying can complicate issues or create unintended problems if not undertaken in an appropriate manner.

What Should We Expect at a Congressional Hearing?

- There are few limitations on questioning, with Members often trying to force witnesses to provide “sound byte” responses:



What Should We Expect at a Congressional Hearing?

- It is always important to be respectful. Remember Martin Shkreli...



What Should We Expect at a Congressional Hearing?

- Members may ask a seemingly simple question to ultimately lead you where they want to go...



What Should We Expect at a Congressional Hearing?

- Public statements made in court (or elsewhere) may be used as well, exemplifying the importance of consistent messaging and communications:



What Can You Do to Prepare?

- **Understand the relevant facts and potential exposure, including the potential impact of the Congressional inquiry on any parallel legal proceedings.**
 - It's always easier to prepare in advance – develop your strategy at 3pm, not 3am.
- **Consider any appropriate corrective measures or actions.**
 - But remain mindful that this may not mitigate an aggressive investigation and public narrative.
- **Develop an appropriate strategy and messaging going forward.**
 - Ensure consistency between public statements and representations.
 - Take steps to ensure good email hygiene.
- **It is critical to navigate the process with experienced Congressional Investigations counsel.**

Questions?



A reminder about the benefits of ACC membership...

- Free CLE, like the one you're attending right now
- Roundtables
- Networking meetings
- Special events (Spring Fling, Fall Gala, races, etc.)
- Access to ACC resources, including:
 - ACC Newsstand (customizable updates on more than 40 practice area)
 - ACC Docket Magazine
 - InfoPAKs
 - QuickCounsel Guides
- **For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Chris Stewart, at ChrisStewart@ACCglobal.com.**

