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## Preparing for an Uptick in Congressional Investigations of Corporations

Beginning next month, Democrats will control the House of Representatives for the first time since 2010. Given the pent-up demand for House Democrats to make robust use of their oversight and investigative authorities, the current relative lull in congressional investigations of corporations is expected to end. Corporations across sectors should anticipate an uptick in investigative activity.

In addition to holding the majority for the first time in nearly a decade, this will be the first time that Democrats control the House since a 2015 rule change that empowered a number of committee chairs to subpoena witnesses or documents unilaterally. The chairs of the following committees, among others, have this authority: Energy and Commerce; Financial Services; Intelligence; Judiciary; Natural Resources; and Oversight and Government Reform.<sup>1</sup>

Corporations and their senior officers may become objects of congressional demands for documents, interviews, depositions, and public testimony in a variety of ways. Some investigations may target President Trump, members of his administration, and key Trump initiatives. Corporations may be caught up in these inquiries—and face significant reputational, business, and legal risks—if they have ties to the administration, have benefitted significantly from its initiatives (including tax reform, deregulation, contract awards, and merger approvals), or otherwise are a relevant source of information.

The House also may launch investigations to take industries, corporations, and their senior officers to task for perceived misconduct, and to influence future behavior—essentially, regulation by oversight. Potential targets include corporations in particular sectors of interest (including technology, financial services, pharmaceuticals, and energy), and those that have recently experienced government or media scrutiny. Of course, organizations that received inquiries from Democrats in the recent past—whether in the House or Senate—may anticipate receiving follow-ups, this time backed by the threat of a subpoena.

Although a congressional investigation has the potential to interfere substantially with normal operations, with adequate preparation, a corporation can respond strategically and mitigate risk. This memorandum outlines key considerations for preparing for and addressing congressional inquiries, and identifies sectors and topics that may be likely subjects of House interest.

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**Preparing for Congressional Inquiries:**

- **Enhance monitoring of congressional activity.** Corporations should consider continually monitoring the statements of House committee chairs and other influential House Members who have an interest in the relevant industry, or in other topics of concern. This includes monitoring Members' press statements, speeches, tweets, oversight letters, and media appearances. In addition, it is important to track congressional investigations into competitors, business partners, and customers, all of which could result in document productions or testimony that could spark interest in the corporation. Attention should of course continue to be paid to the Senate—Senate Democrats may persuade their House colleagues to pursue specific oversight issues, and Senate Republicans may respond to any of this activity with inquiries of their own. Finally, corporations should consider building or expanding relationships with congressional committees (Members and staff) to better understand their concerns and to build a measure of trust and good will. Investing in these relationships early may help avoid or mitigate future oversight confrontations.
  
- **Have in place a crisis management team and key external advisors.** It is important to have a crisis management plan and team in place to address emergent problems of various kinds, from significant negative news and social media controversies to governmental investigations, including congressional investigations. The plan can identify responsible team members (and backups) and ensure that policies are in place across the organization to channel and control corporate communications. The crisis management team and key advisors can work with the corporation's leadership to ensure that all parties have full and correct information and that they engage productively with Members, their staff, and other stakeholders.
  - A key component of a crisis management plan is identifying in advance key advisors—principally, legal counsel, communications advisors, and government relations advisors—who can be activated quickly. Corporations' usual legal and other advisors, whether external or in-house, may not have the experience and skill set to deal with a fast-paced congressional inquiry governed by a different set of rules than other government investigations. Even some sophisticated international corporations will not have strong relationships with communications and government relations firms, and searching out such advisors in a moment of crisis can burn valuable time and increase risk. Optimally, an organization will have ongoing relationships with these advisors so that they can understand the corporation's business, have bonds of trust with its management, and be sensitive to the corporation's values and approach.
  
  - It is important to be attentive to attorney-client privilege throughout the cycle of a crisis. In addition to supervising fact-finding or an internal investigation, having outside counsel retain and supervise communications and government relations firms maximizes the ability to claim privilege.

- **Continually strengthen governance, risk management, and compliance measures.** There is no time like the present to evaluate and strengthen a corporation's governance, risk management, and compliance systems. Strengthening these systems not only will decrease the chance of incidents that could spark congressional inquiries, but in the event of congressional scrutiny, it will help to demonstrate the corporation's ongoing efforts to be on the leading edge of governance and compliance. As we have discussed in a previous memorandum, these efforts could include creating an ethics/compliance committee of the board (or other governing body), taking concrete measures to promote "tone from the top" and a culture of compliance, instituting hiring and promotion practices that value compliance and ethical conduct, strengthening sexual harassment and employee treatment policies, providing meaningful avenues for whistleblower complaints, and ensuring sufficient resources for strong, centralized control functions.<sup>2</sup>
- **Watch for inquiries promoted by the House.** In addition to issuing subpoenas and holding hearings, House Democrats will have other tools at their disposal. For example, House Democrats will have a greater ability to request the Government Accountability Office (GAO) to carry out investigations or audits, essentially serving as a force multiplier to Members' investigative efforts. Likewise, House Democrats can request the Inspectors General at various departments and agencies to initiate investigations or audits that could sweep in corporations that do business with or are regulated by the respective governmental body.

#### **Addressing Congressional Inquiries:**

- **Be aware of the differences between congressional inquiries and other types of investigations and legal actions.** If a corporation becomes the object of a congressional investigation, it is crucial to recognize how such inquiries differ from other governmental investigations or litigation matters. Strategies that could be effective in other settings have the potential to jeopardize the company in the course of a congressional investigation.
  - Congressional inquiries can be politically motivated and there may be relatively few limitations on jurisdiction and the extent of information that may be obtained. Moreover, documents or information produced to Congress can be publicly disclosed in staff reports, press releases, hearings, or online disseminations of private emails and other records.
  - Although some forms of constitutional privilege are recognized by Congress,<sup>3</sup> Congress does not categorically recognize the attorney-client privilege or work-product protection, which may be respected or not at the discretion of the committee in question.<sup>4</sup> This creates particularly vexing issues, because a corporation's disclosure of privileged information to Congress may risk waiver of privilege.

- **Engage in immediate fact finding.** Congressional inquiries should prompt corporations to consider immediate fact-finding efforts supervised by counsel, in coordination with the crisis management team. The fact gathering required may be narrow in scope, or it may require a full-scale internal investigation. It is also important to act promptly to ensure that documents and potentially pertinent information are preserved.
- **Respond to requests productively.** Usually, Members or staff begin the inquiry process by issuing voluntary document requests or seeking informal interviews and briefings, with subpoenas used in the event of non-cooperation. However, depending on Members' needs, the political climate, and the role of the corporation in the broader investigation, conceivably a subpoena may arrive without prior notice. If authorized, committee staff may also depose corporate officers. Many requests for information from Members or their staff will be incredibly broad, with unmanageable deadlines. Counsel can help a corporation work with the Member or staff to refine the scope of the request and to provide Congress with appropriate responses while simultaneously minimizing unnecessary exposure of sensitive information. It may also be possible to negotiate the manner in which information will be provided, and what protections in theory will exist for the information disclosed. Once armed with the facts, it is crucial to educate Members and staff about their issues of concern and how the corporation is addressing them—potentially persuading them that investigative resources and hearing time are better used elsewhere. If an inquiry evolves to the point of interviews, depositions, and even hearings, it is crucial to ensure that officers have sufficient time for mock sessions with the crisis management team and key advisors.
- **Be attentive to possible parallel or follow-on proceedings.** Congressional proceedings can produce a treasure trove of discovery for future plaintiffs, as well as spark investigations by federal and state law enforcement and regulatory agencies. And if a congressional inquiry causes reputational or other harm that results in decreased stock value, the corporation could face a securities suit.
- **Special considerations for non-U.S. corporations.** Non-U.S. corporations with U.S. operations may face special challenges. For one, they may be at increased risk of scrutiny based on their international status. Second, they may be less versed in the unusual nature of congressional inquiries. It is particularly important to educate headquarters executives about the nature and risks of congressional inquiries so that they can be active participants in decision-making. Strategies and messaging used during an investigation also must be evaluated for how they will resonate with home-country regulators.

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**Potential Areas for Congressional Scrutiny**

We anticipate the following areas to be of potential House committee interest:

- Technology, including cybersecurity, social media, big data, net neutrality, and privacy protections for consumer data;
- Financial services and consumer protection (including mortgages, small-dollar lending, credit reporting, student loans, and debt collection),<sup>5</sup> fintech, quant trading, high-frequency trading, and private funds and alternative asset management;
- Antitrust concerns, including the importance of big-tech platforms, pay-for-delay practices, “no-poach” agreements between competitors, and industry concentration and market consolidation;<sup>6</sup>
- Energy and environmental regulation, including mining, fracking, and climate change;
- The pharmaceutical industry, including sales practices, drug pricing, and the opioid epidemic;
- Health care, including insurance pricing and patient privacy; and
- National security, including dealings with Russia and China, foreign investment in sensitive U.S. industries, and economic sanctions, money laundering, and export controls.

In light of this new environment, corporations would be well served to evaluate and refine their crisis management strategies. Additionally, corporations considering new product lines, mergers or acquisitions, or other significant initiatives should consider including congressional oversight risk as part of their risk assessment process.

Our lawyers are well-positioned to advise corporations and their senior officers on congressional investigations and other crisis situations, drawing on years of government and private practice experience engaging with Congress. We look forward to providing additional updates on this topic.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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<sup>1</sup> Of the 21 House standing committees, 14 committee chairs can issue subpoenas without the consent of the ranking minority member. In addition to the committees listed above, the following committees have this authority: Agriculture; Education and the Workforce; Foreign Affairs; Homeland Security; Rules; Science, Space, and Technology; Transportation and Infrastructure; and Ways and Means. Michael L. Koempel, Cong. Research Serv., R44247, A Survey of House and Senate Committee Rules on Subpoenas 6–10 (2018), available [here](#).

<sup>2</sup> See Paul, Weiss Client Memorandum, “Increasing Regulatory Focus on Reforming Financial Institution Culture and Addressing Employee Misconduct Risk” (Feb. 21, 2018), available [here](#).

<sup>3</sup> See Alissa M. Dolan et al., Cong. Research Serv., RL30240, Congressional Oversight Manual 31, 32, 37-43 (2014) (hereinafter “COM”), available [here](#).

<sup>4</sup> COM at 46 (“In practice, the exercise of committee discretion in accepting a claim of attorney-client privilege has turned on a weighing of the legislative need for disclosure against any possible resulting injury to the witness.” (internal marks and footnotes omitted)); *id.* at 48–49 (work-product and common-law testimonial privileges treated similarly to attorney-client privilege).

<sup>5</sup> Rep. Maxine Waters (D-CA), for example, who is expected to become the Chairwoman of the House Financial Services Committee, recently discussed the mortgage crisis, asking financial institutions: “What am I going to do to you? What I’m going to do to you is fair. I’m going to do to you what you did to us.” See Neil Haggerty, “Should industry fear Waters-led banking panel?,” *American Banker* (Nov. 6, 2018, 11:04 PM), available [here](#).

<sup>6</sup> These issues are also of interest at other governmental bodies such as the Federal Trade Commission. See Paul, Weiss Client Memorandum, “Federal Trade Commission Begins Hearings on Competition and Consumer Protection in the 21st Century” (Sept. 24, 2018), available [here](#); see also Paul, Weiss Client Memorandum, “News from Senate Antitrust Enforcement Oversight Hearing” (Oct. 10, 2018), available [here](#).