

Is There a Silver Lining of Congressional Investigations: Avoiding the Pitfalls and Finding the Competitive Opportunity

Contributed by: Tonya T. Robinson, WilmerHale

Let's be real: if your company is caught in the crosshairs of a congressional investigation, there is no obvious silver lining. The risks are great, the stakes are high, and the rules of the game are uncertain. The investigation may expose your company to intense public and media scrutiny and potentially irreversible reputational damage; could result in criminal referrals, civil enforcement proceedings, or stiff fines; and may invite costly third-party litigation. But, if anticipated and managed competently and creatively, the potential damage to your company can be effectively contained, and the exposure can be channeled to boost the business bottom-line. What follows are a few suggestions to help you and your counsel manage your company through the thicket, with reputation intact – and, if you're sufficiently savvy and a little lucky, find the occasional opportunity along the way to enhance your position vis-à-vis the competition.

Starting with the first congressional investigation in 1792 when a special committee of the U.S. House of Representatives demanded and received War Department records,¹ Congress's power to investigate has been firmly established. With time, these inquiries have increased in frequency and intensity. Yet, some figure themselves beyond Congress's reach or interest. Indeed, even in the current climate of aggressive oversight, many corporate leaders will bury their heads in the sand and believe that the clouds overhead will pass, along with Washington's appetite for heightened regulatory requirements. That approach will be a mistake. Hiding your head in the sand is not only counter-productive, it's unnecessary. Instead, you can employ tried-and-true strategies to keep Congress at bay and, if Congress does indeed call, avoid the pitfalls.

Congress's Arsenal Is Considerable

Congress has access to formidable tools to conduct investigations and, even more disconcerting, is not subject to the usual rules of conduct. Congress is not bound by evidentiary rules and legal privileges. Legislators' questions, technically, are limited by relevance and the respective jurisdictions of the committees, both of which, as an initial matter, are defined by the chair of the investigating committee. Moreover, under the Speech or Debate Clause of the Constitution, legislators, acting under the color of their office, may be insulated from liability for conduct that might otherwise be actionable, like slander.² Even the rule of double jeopardy does not apply, so a person or organization under investigation and cleared by one congressional committee may be investigated further on the same charges by another.

In addition, Congress has at its disposal any combination of especially powerful instruments, which can wreak havoc in the personal lives and organizations of those targeted. Here are a few to know.

- *Summons to Testify.* Key to its oversight function, Congress has the right to summon witnesses and force their attendance. If an individual fails to appear or refuses to answer material questions, that person may be indicted for a misdemeanor offense, punishable by a fine and imprisonment.³ Of course, witnesses can invoke their Fifth Amendment right not to incriminate themselves,⁴ but, since the committee may not consider requests for executive session or the exclusion of media, a witness may be required to "take the Fifth" repeatedly in public session. In the forum that matters most to many businesses – the court of public opinion – your shareholders, consumers and others may draw unfavorable and perhaps unwarranted conclusions from the decision to plead

the Fifth. Moreover, your refusal to cooperate may trigger a set of more aggressive responses from Members of Congress.

- *Issuance of Subpoenas.* Legislators and their committees often obtain what they need without resort to subpoenas. However, if pressed, they have the power to compel testimony and production of documents,⁵ and federal courts will accord these congressional subpoenas great deference.⁶ Even claims of attorney-client privilege or assertions that cooperation would jeopardize confidential trade secrets or other proprietary information may be ignored, if lawmakers consider the legislative needs more important. That's precisely what happened in the 1970s when the Federal Trade Commission (FTC) resisted production of data that included an oil company's estimates of natural gas reserves. The FTC argued that the data, which had been provided to the FTC by the company, constituted "trade secrets and commercial or financial information."⁷ On the oil company's motion to prevent dissemination of the information, a federal district court compelled production of the documents to Congress, stating that courts must assume that congressional committees "will exercise their powers responsibly and with due regard for the rights of affected parties."⁸ The natural extension of this assumption is that congressional committees have reliable procedures to ensure confidential treatment of information. As a result, arguments that you are unwilling to oblige a congressional request because it may lead to public disclosure of confidential or proprietary data mostly will fall on deaf ears. Moreover, if you're a third party trying to keep someone else from sharing your confidential information, that too may be challenging. If business necessity requires as much, you and your counsel certainly should take every reasonable and legitimate step to prevent disclosure – for example, suggesting redactions, *in camera* review of documents, private briefings for legislators and their staff, or some other accommodation that allows the investigators to satisfy themselves that the withheld information presents no concern. Indeed, more than a few witnesses successfully have negotiated such conditions, but know that the law and precedent may work against your position. Moreover, remember that requests for confidential treatment of information are just that – requests, which may or may not be honored.

- *Criminal and Civil Contempt Citations.* If a witness refuses to testify or produce papers in response to a committee subpoena, each house of Congress has the power to cite individuals for criminal contempt, which, on conviction, could lead to fines and/or imprisonment.⁹ The Senate additionally has statutory authority to seek civil enforcement of its subpoenas.¹⁰ Here too, witnesses may invoke their Fifth Amendment right against self-incrimination, with the possibility of the same undesirable consequences described above.

- *Grants of Immunity.* If a witness refuses to testify by invoking the Fifth Amendment, Congress may vote to compel testimony by granting the witness either partial or full immunity. Because immunized congressional testimony may destroy the possibility of subsequent prosecution for criminal acts, Congress likely will extend such an offer only where the need to inform itself and the public substantially overshadows other interests. For example, during the Iran-Contra investigation in the late 1980s, Congress offered partial immunity to several witnesses, including Vice Admiral John Poindexter and Lieutenant Colonel Oliver North. And, well, the rest is history: Poindexter and North later were convicted of multiple felonies, but those charges were subsequently dismissed because of their immunized testimony.

- *Sworn Depositions.* Committees normally rely on informal staff interviews to gather information, but, when specially authorized, congressional committees have utilized staff-conducted depositions to further an investigation. Staff depositions may assist committees in obtaining sworn testimony quickly and confidentially, without the need to devote time to lengthy and formal hearings. Also, staff depositions can be used to screen and verify witness statements that may incriminate or otherwise disparage other parties, before they are uttered in an open hearing.

- *Access to the Government Accountability Office (GAO).* Legislators and their staff rely on the GAO, also known as the "congressional watchdog," for its deep expertise, thorough research,

auditing skills, and relative independence – all of which can be immensely valuable when working to persuade political powerbrokers of the reasonableness of a particular position. While any Member of Congress can call on the resources of the GAO, as a practical matter, the office has limited resources and therefore prioritizes those requests that are mandated by law or requested by the House or Senate leadership or standing committees. For a recent example of Congress's effective use of the GAO, look no further than the 2006 request by the Ranking Minority Member of the Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs. Senator Carl Levin asked the GAO to study the pricing structure of credit cards, including interest rates and other fees.¹¹ Based in large part on the findings of that GAO report, the following year, the subcommittee investigated the interest rate practices of 5 major credit card issuers, held two hearings, and introduced legislation to curtail interest rate hikes.¹² Notably, the Credit Cardholders Bill of Rights Act that the President signed in May 2009 was justified in significant degree by the GAO's earlier findings, which lawmakers cited as evidence of the legislation's need.¹³

- *Referrals to Law Enforcement.* Most alarming, congressional investigations may lead to referrals to federal, state or local law enforcement agencies. These referrals may seek prosecution of substantive offenses based on evidence gathered by Congress, as well as criminal offenses related to the committee's proceedings, including false statements,¹⁴ perjury,¹⁵ and obstruction of justice.¹⁶ The possibility of a criminal referral is more than academic. After all, the lobbying scandal involving Jack Abramoff started with hearings before the Senate Indian Affairs Committee,¹⁷ and ended with criminal prosecution and a lengthy prison sentence for Abramoff and several others.

These tools notwithstanding, while Congress's power to investigate is substantial, it is not unlimited. Congress, at least in theory, cannot unleash its investigative power for the sole purpose of exposing and embarrassing.¹⁸ Instead, the power should be exercised to aid Congress's legislative function. In addition, Congress must respect certain constitutional prerogatives, including the Fifth Amendment right against self-incrimination and assurance of due process¹⁹ and the First Amendment guarantee of free speech.²⁰ Whether you want to exercise these rights and force a showdown with legislators is another story or, more accurately, another strategic decision for you and your counsel.

An Apple a Day Keeps Congress Away

That's just another way of saying that what's healthy and good for business also, as it turns out, is the best prescription for keeping Congress at bay. You should focus your company's attention on identifying weaknesses before and immediately after they occur; making timely and reasonable efforts to correct any problems; and communicating those efforts forthrightly to relevant stakeholders. There is no better elixir. Here is how to get started.

- *Assess the political landscape and be proactive in high-risk areas.* With relatively little effort, you can undertake the forward-looking exercise of assessing your likely areas of greatest risk, paying particular attention to issues that are high-profile or the subject of significant federal spending. With a bit of research and forethought, you can predict the aspects of your business platform that will be of greatest congressional interest and mitigate your potential risks now – and not when the congressional letter or subpoena issues, the disparaging news article is published, or your stock price dips.

- *Address significant audit findings.* Conduct regular audits to measure the effectiveness of your organization's compliance efforts. Importantly, the audit will ensure that your company is familiar with the current regulatory climate, as well as test your team's ability to detect and react to certain developments.

- *Identify and respond to whistleblower complaints.* Create systems to encourage employees to report suspected misconduct and be sure that you have the capacity and mechanisms to respond

to these complaints. If you already have such protocols in place, make certain they are robust. Senior management's attention in this regard signals, both to your workforce and to outside observers (like watchful regulators and legislators), that unacceptable behavior will not be tolerated. Better that any allegations of wrongdoing be reported and addressed by you, than leaked to the media, law enforcement, or any number of watchdog groups.

- *Conduct periodic and meaningful employee training and evaluation.* Whatever your compliance policies and procedures are, make sure that your employees have more than a passing awareness of them. Provide meaningful, recurring training and test your employees' knowledge and implementation.

- *Communicate openly and candidly with key stakeholders.* Maintain open communications and a cooperative relationship with the constituencies that matter most to your organization, including regulators, shareholders, and consumers. If your audit or complaint system reveals some problem, they should hear it first from you, not a news reporter.

None of these strategies is a guarantee that you will escape the attention of Congress, but they exponentially increase the likelihood that legislators, in search of true malefactors, will focus their examination elsewhere. More important, a business plan that incorporates these strategies will ensure that, if you do become ensnared in a congressional investigation, you'll have a compelling story to tell. As proof, ponder for a moment Nestle USA's recent kudos from lawmakers for refusing, when its competitors did not, to purchase peanuts from an unsanitary factory later accused of selling food contaminated with salmonella bacteria. Whether planned or not, for Nestle, it was a marketing professional's dream.

If Congress Calls, Ready Your Troops

If, despite your best efforts, you still become the target of a congressional investigation, know that it is not business as usual, and you should not treat it as such. First, resist the temptation to approach the investigation like ordinary litigation. While it undoubtedly will be adversarial in many respects, do not make the mistake of processing events and responding as you would in a traditional lawsuit. A congressional investigation is a very different forum (including, not least of all, the absence of a neutral arbiter to oversee the proceedings) requiring very different impulses.

Second, while I am loathe to dismiss outright any occasion for zealous advocacy, you're likely better off not wasting a dime nor a second of your time conjuring up challenges to the committee's jurisdiction or questioning the relevance of the congressional inquiry. These tactics might buy you time, but are almost certain to annoy Congress. In the end, you'll likely gain little and lose the initial opportunity to build a credible and trusting relationship with the investigating legislators and their staff. Instead, focus your attention and resources on understanding and responding accurately to the requests, keeping the following tips in mind.

- *Treat the inquiry seriously.* Whether it is a verbal inquiry, letter request or a subpoena, approach the investigation cautiously. Meticulously prepare for every encounter with Congress, and check, double-check and triple-check your facts before making any representations. Sure, you will be expected to move swiftly, and you must; but be careful not to sacrifice accuracy or precision.

- *Get professional advice and exploit your internal network of experts.* No matter the subject of the investigation, it will be a smart and necessary initial step to identify and coordinate your team – including your substantive or subject matter experts; communications and media personnel and, if distinct from your communications shop, customer relations professionals; technicians familiar with your organization's information technology and data systems; and advisors who know the investigative, legal or regulatory terrain. Importantly, while you may be inclined to handle the matter in-house or turn to your usual Washington or government relations attorney for advice, think twice. That's not to say that one or the other will not be the right choice, but be thoughtful and strategic when making the decision. Know that whoever you choose to represent

your interests before the investigating committee will bring his or her political baggage and/or capital to the table. Be sure that, whatever the representative's profile, it fits your particular needs. For example, if you anticipate that discussions with the committee may become contentious, you may not want to use your usual government relations representatives, in order to preserve their otherwise friendly working relationship with the relevant authorities. Take advantage of those Washington law firms with both the expertise and experience handling high-stakes congressional investigations.

- *Understand the investigating committee and its priorities.* Of course, you should read the committee's rules and otherwise familiarize yourself with the committee's particular practices, especially since procedures can vary significantly from committee to committee. For example, the rules governing issuance of subpoenas may vary considerably, with one committee granting decision-making authority to its chair alone, another requiring a vote of the full committee, and perhaps another following a tradition of Democrats and Republicans conferring before issuance. As important as the procedural requirements, you should work to discern the issues and priorities animating the committee's requests. Before engaging the committee, you'll want to know, for example, if the GAO has released a report regarding the issues under investigation, have key legislators introduced related legislation, or is there some parochial interest driving the investigative agenda (e.g., a decision by your company has impacted a legislator's district and constituency). Understanding the committee's motivations and individual legislators' priorities – whether they be expansion or contraction of the law, promotion of a legislative idea, public exposure of a troubling concern, staging for a hearing, or publication of an investigative report – will prove invaluable as you ready your response. Toward this end, be mindful of opportunities to cultivate a good relationship with the committee and its staff; and be sure to listen to, and not simply receive, their requests for information. Chances are, if you take the time to understand the committee's interests and what it hopes to glean from the investigation, you'll identify avenues to satisfy Congress's concerns while minimizing the interruption to your business.

- *Ascertain your own objectives and potential assets.* While it is critically important that you understand the motivating interests of the investigators, you also must think carefully about your own agenda. Your objectives matter most, whether they be correcting a misimpression about your compliance record, reversing negative publicity, staving off third-party litigation, flaunting some business success, or peddling a legislative solution. They will drive the terms, timing and content of your strategic response. Also, you'll want to identify any assets, including potential allies, that may help your cause. For example, one of the legislators on the committee may hail from your or your company's home state and may be more inclined to help you navigate the process and personalities. Or, perhaps your company is a large employer in the state, and that perspective may be instructive for the committee. In the end, the key is to identify your legitimate assets, whatever they are, and leverage them.

- *Identify any privileges or other limitations on testimony or production of information.* To be clear, your initial discussions with the committee should rarely, if ever, focus on privilege issues or what you think you cannot do. Rather, it typically makes more strategic sense to emphasize your willingness to cooperate and look for opportunities to build a cordial and productive relationship. That said, before responding formally to any request, you also should identify any common law privileges or other limitations that may apply, especially if the investigation is conducted against the backdrop of parallel proceedings elsewhere. Congressional committees may not be obligated to consider the boundaries that you suggest,²¹ but it is important that you are thoughtful about these limitations and clear about your position from the outset, before providing the requested information. It is common to negotiate the breadth and timing of responses to information requests, so, in that context, you may be able to reach some accord with committee staff regarding your proposed limitations. If, however, the committee does not accede to your suggested limitations, you will need to evaluate whether withholding the requested information is worth issuance of a subpoena and the possible commencement of contempt proceedings. Given

the damaging collateral effects of a contempt citation on business operations, you'll want to consider the action carefully before taking the gamble.

- *Avoid surprises.* Perhaps needless to say, you should not be caught unaware of some essential development, nor should the investigating committee. While the public bombshell may make for scintillating news feeds, it will undermine your ability to win the favor of committee staff. Instead, use every interaction with the investigating committee to gather intelligence, and be sure to engage both majority and minority (*i.e.*, Democratic and Republican) staff. If, for instance, you or a representative of your organization is planning a public statement related to the investigation or, at the committee's hearing, will assert the Fifth Amendment or other privileges, let the committee staff know in advance.

- *Consider optics, always.* Of course, a congressional investigation cannot sensibly be a component of your company's marketing strategy. You can't control what happens or the message legislators will send. However, you mindfully can direct your own actions, including the message you transmit to audiences both inside and outside of Congress. Consider, for example, the recent debacle when automobile executives, seeking a multi-billion dollar rescue for the failing auto industry, arrived in Washington on their corporate jets. Now, imagine the news stories had just one of them driven to Capitol Hill in one of the hybrid vehicles that his company manufactures. That one executive and his company would have been lauded as visionary and responsible, and the marketing bonanza would have been tremendous. Instead, the executives were derided as symbols of the corporate greed that produced the massive economic crisis that necessitated the very bail-out that they sought.

Maybe there is a silver lining after all: you have a choice. You can choose to pretend that congressional investigations are not increasingly common fixtures of American political and legislative life and are not apt to touch most any industry, trade, or business. Or, you can recognize that, especially in light of Washington's current mood, congressional oversight and accompanying investigations of private sector players will intensify – and, far from fearing the perilous consequences, you can steer your organization clear of the pitfalls and capture the competitive edge.

Tonya T. Robinson is a partner at WilmerHale, whose practice focuses on litigation and government (including congressional) investigations. She has worked for several individual Members of Congress and, most recently, as counsel to the U.S. Senate Judiciary Committee's Subcommittee on Crime. She can be reached at tonya.robinson@wilmerhale.com.

¹ See 2 Annals of Cong. 493 (March 27, 1792); 2 Annals of Cong. 1106-1113 and Appendix 1052-1059, 1310-1317.

² See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975).

³ 2 U.S.C. §§ 192-194.

⁴ See *Wilkinson v. United States*, 365 U.S. 399, 408-409 (1961).

⁵ Rules of the U.S. House of Representatives, XI(2)(m); Rules of the U.S. Senate, XXVI(1).

⁶ See *Eastland*, 421 U.S. at 503-507.

⁷ *Ashland Oil, Inc. v. F.T.C.*, 409 F. Supp. 297, 300 (D.D.C. 1976), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

⁸ *Id.* at 308.

⁹ 2 U.S.C. § 192.

¹⁰ 2 U.S.C. §§ 288b(b), 288d; 28 U.S.C. § 1365.

¹¹ See GAO Report, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, GAO-06-929 (Sept. 2006).

¹² See Press Release, Sen. Carl Levin, Senate Credit Card Hearing to Focus on Unfair Interest Rate Increases (Dec. 3, 2007).

¹³ See H.R. 627, 111th Cong., Pub.L. 111-124 (2009) (enacted); S. 414, 111th Cong. (1st Sess. 2009).

¹⁴ 18 U.S.C. § 1001.

¹⁵ 18 U.S.C. § 1621.

¹⁶ 18 U.S.C. § 1505.

¹⁷ Oversight Hearing Regarding Tribal Lobbying Matters, et al., Before the Committee on Indian Affairs, U.S. Senate, 108th Cong. (2004); Oversight Hearing Regarding Tribal Lobbying Matters, et al., Before the Committee on Indian Affairs, U.S. Senate, 109th Cong. (2005).

¹⁸ See *Watkins v. United States*, 354 U.S. 178, 187 (1957).

¹⁹ See *Quinn v. United States*, 349 U.S. 155, 162-163 (1955).

²⁰ See *Barenblatt v. United States*, 360 U.S. 109, 126-127 (1959).

²¹ See *Quinn*, 349 U.S. at 165-166; see also H.R. Rep. No. 105-792, at 11 (1998) (“[T]here is no constitutional, statutory or common law bar to the Subcommittee demanding even explicitly privileged materials. The historic position of the House of Representatives is that committees of Congress are not bound to recognize any non-Constitutional privilege, such as attorney-client privilege.”). Moreover, at least one bar association has advised that, once Congress has directed a lawyer to produce documents and rejected attempts to withhold information (including client confidences or otherwise privileged information), disclosure is legally compelled absent a judicial order to the contrary. See D.C. Bar Op. on Compliance with Subpoena from Congressional Subcomm. to Produce Lawyer’s Files Containing Client Confidences or Secrets, Op. 288 (1999).