

The time is now to prepare for congressional inquiries from a Democrat-led House

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MARCH 4, 2019

At the start of a new year, we tend to make promises to ourselves. We often promise to address issues head-on — to be proactive¹ instead of reactive. While most New Year's resolutions are quickly forgotten, we urge those involved with highly regulated institutions to make and stick to at least one — to prepare for potential investigations by the House of Representatives.

To paraphrase a Navy SEAL's remarks² about the piracy of a U.S. ship: We weren't planning on that outcome, but we were prepared for it. Investigations are coming,³ and delaying preparation until the institution or its executives need to testify is a mistake.

As is true with respect to any major project, when preparing to testify before the House it is helpful to break the process down into its component parts. We suggest thinking about three core elements: pre-hearing groundwork, providing information and documents, and crafting the narrative.

PRE-HEARING GROUNDWORK

While prominent members of the House have clearly stated their intention to more actively engage in oversight, particularly of financial institutions and their regulators,⁴ the way their oversight will fall on each institution may vary significantly.

As a result, work needs to be done in the early stages to understand the politics at play, determine the focus of the relevant representatives' interests, and build a team capable of anticipating and addressing potential challenges and responses.

House committees are empowered⁵ to investigate almost any topic. Firms anticipating possible involvement in a congressional inquiry should be prepared for interviews and depositions on a broad number of topics. They should also be prepared to respond to equally broad letter requests and subpoenas for documents and information with short time frames for response.

The public statements of relevant committee and subcommittee members, including any campaign commitments, can reveal potential areas of interest concerning individual institutions. Any media coverage of the institution, particularly with respect to regulators or consumers, can be a source of congressional interest.

Once the areas of interest have been identified, an institution can assemble sources of information and response, including systems, individuals and documents. If it becomes clear that a committee

member is interested in a relevant topic, the institution must decide whether to engage committee staff. If the decision is made to move forward, the primary effort should be to educate and focus the staff.

One way to help narrow the scope is to understand and engage the staff of the relevant representatives. If the institution has an established government relations staff in Washington, the in-house staff can connect with the appropriate staff members. Alternatively, a law firm or other government relations firm can provide the connection.

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The key is to be prepared to understand the level of the staffer's knowledge and experience in the subject matter at hand. Often, a staffer has limited knowledge and will need education on the product or service under scrutiny. Staffers usually appreciate well-prepared, fact-based information.

Congressional investigations are inherently and obviously political. Committee members are elected by and responsive to their constituencies. Part of their analysis is how issues reach these constituencies, including how they are covered in the media.

The politics at play in any investigation will be unique and may change as the investigation progresses, but a company's success in responding will depend on an understanding of those political realities and the relevant committee's or members' objectives.

Closely following media coverage and public statements by relevant representatives will provide some insight into the political underpinnings. Engaging staff early in the process is another great way to get a better understanding of the motivations of the people involved.

Building the right team is critical to accomplishing these initial goals and preparing for the challenges to come. Executives may be called to testify in highly publicized hearings to answer questions about a firm's most sensitive matters.

Legal counsel can be essential in preparing for an initial interview, staff deposition or committee hearing. With their assistance, firms can anticipate areas of inquiry, prepare a critical response plan and engage strategically with Congress at the committee, member and staff levels.

Experienced legal counsel can also help a company present its side in a way that will stand the test of time in the likely event there is additional scrutiny by the media, state and federal regulators, private litigants and shareholders.

DOCUMENT PRODUCTION

Responding to document requests is often the most time-consuming and expensive work associated with a congressional inquiry. Requests are often wide ranging, and the timelines are often impossibly short.

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Because congressional investigations have a tendency to devolve into disputes about process, firms will want to make sure they both follow and document their use of best practices, including efforts to preserve and collect documentation.

There is no motion to quash a congressional subpoena.⁶ Likewise, in depositions, objections are typically considered by the same committee that calls the deposition.⁷ Before courts will intervene, a company must refuse to comply — and risk a finding of contempt.⁸

Because Congress generally does not recognize the attorney-client privilege or the attorney work product doctrine,⁹ there are no guarantees of confidentiality with respect to materials produced.¹⁰ While some committees and staffers may be sensitive to business and privacy concerns, firms should notify staff when serious economic harm could result from the disclosure of sensitive information. It may be possible to negotiate a deal so that sensitive documents are not be publicly released and are returned upon conclusion of the investigation.

CRAFTING YOUR NARRATIVE

Providing an opening statement is the best way to make sure a client's narrative is unambiguous. Your client can read from the opening statement and publish it before the hearing begins.

The statement should be as fact-based and as simple to understand as possible. There should be a central theme that a witness can return to throughout the testimony. Staff and the media will parse the statement for quotes and sound bites, and it must be scrutinized with that fact in mind.

A company may also assess whether to proactively implement changes to policies and procedures. These changes can prevent prior misconduct from recurring, and they can also help your client convey that it understands the seriousness of the issues and is working to address them.

Mock testimony sessions are critical. The person testifying needs to be comfortable conveying the company's message and responding to what, at times, can be intense questioning. The audience should consist of people across disciplines from within the institution in order to test the accuracy of the message and how it will be received by different constituencies.

Outside consultants can also provide invaluable insights based on their experiences with peer institutions and understanding of public and media reaction.

NOTES

¹ <https://bit.ly/2SMBbez>

² <https://nbcnews.to/2Eb09fx>

³ <https://nyti.ms/2MOIMbu>

⁴ <https://cnb.cx/2DhKLON>

⁵ <https://bit.ly/2N9VBjC>

⁶ <https://bit.ly/2N9VBjC>

⁷ <https://bit.ly/2S3e3E8>

⁸ <https://bit.ly/2N9VBjC>

⁹ <https://bit.ly/2tocGws>

¹⁰ <https://bit.ly/2EdUQMd>

This article first appeared in the March 4, 2019, edition of Westlaw Journal Bank & Lender Liability.

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