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## Focus

### Congressional Investigation

# Foreseeing Oversight

By Mel Levine

Leaders and members of the new Democrat-controlled Congress are committed to aggressive oversight, which will involve much-greater scrutiny of private- and public-sector behavior than Congress recently has undertaken.

If your company or client becomes the subject of a congressional oversight investigation, it is critical that you or your outside counsel be familiar with the basics of how to respond and prepare.

All congressional committees have oversight jurisdiction in the areas they legislate; it is deemed an inherent part of the legislative process. But certain committees, because of their jurisdiction and membership, are more likely than others to be engaged heavily in oversight and investigations.

In the House of Representatives, the panel charged with oversight jurisdiction over the federal government is the Oversight and Government Reform Committee. It is not a coincidence that the word "Oversight" was added after Democrats assumed control of Congress in January.

For years, the committee's jurisdiction has included vast oversight power, but expect that power to be exercised during this Congress. That exercise will be a reflection not only of the priorities of committee chairman Henry Waxman, D-Calif., but also of the Democratic Caucus.

That oversight began in earnest immediately after the new Congress convened, and it will continue. The committee will focus aggressively on Iraq contracting, health care, homeland security, abuses in government contracting, private-sector profiteering, and fraud, waste and abuse across a range of federal-government sectors.

The closest Senate analogue is the Permanent Subcommittee on Investigations,

chaired by Democrat Carl Levin of Michigan. Its range of oversight hearings will focus on the roles of "enablers" of complex financial transactions that seek tax avoidance, looking at law firms, accounting firms and financial institutions that facilitate such transactions for their clients.

Numerous other congressional committees will engage in aggressive oversight, in an effort to reverse a relative lack of oversight by Congress from 2001 to 2006.

When I served in Congress, some of the most aggressive oversight was conducted by the House Energy and Commerce Committee, chaired by John D. Dingell, D-Mich. Watch for him to resume that role.

Also, among others, expect the House and Senate Armed Services, Judiciary and Banking committees to weigh in on government procurement, Department of Justice oversight and executive compensation, respectively.

This article offers a framework for responding to congressional oversight investigations, grounded in the "four Ps": preparation, principles, process and procedures.

### Preparation

Some assume that, because a congressional hearing is looser in structure than a judicial proceeding, one can prepare less than one would for an appearance in court. Such an approach courts disaster.

Testimony during a congressional hearing will be taken seriously by committee members, the media and the public. Further, it can be used to assist prosecutors in establishing criminal liability or to assist adversaries in establishing civil liability.

Various aspects of the preparation are different from courtroom preparation, as I shall describe, but thorough preparation is every bit as important.

### Principles

There are two important principles of

congressional investigations to remember. The first is that Congress can inquire about any subject it can legislate; for all intents and purposes, that is everything. Challenging that authority almost certainly will fail and will create an adversarial atmosphere, making it more difficult to obtain congressional staff cooperation — which often is available and desirable.

The second principle is that you are not only in the hearing room but also in the court of public opinion. That will influence the entire process, including pre-hearing communications with committee members and staff, questions asked during the hearing and the interest of third parties such as interest groups and the media. Accordingly, it must be a factor in developing one's strategy.

### Process

In contrast to a courtroom, where counsel asks witnesses relevant questions, a congressional hearing features multiple interlocutors. Their questions often range far afield from what would be considered relevant during a judicial proceeding.

The legislative branch has rules and procedures that are separate from those of the judicial branch. Thus, members of a congressional committee (and, at times, members of the committee's staff) can ask any question the chair of that committee deems relevant. Generally, a committee chair offers his or her members nearly complete discretion.

During my years in Congress, it was standard practice, following an extraneous question from a committee member, for the chair to instruct a confused witness to answer the question. Standard tests of relevance simply do not apply during a congressional proceeding; neither do other traditional rules of evidence that are axiomatic in a courtroom, including attorney-client privilege, the work-product

doctrine and hearsay.

At the same time, though, congressional committees generally have no interest in allowing hearings to stray too far. One often can negotiate with committee staff regarding the scope of an inquiry, in terms of documentary disclosures and oral testimony. Further, members of Congress and their staffs often are sensitive to the constraints potential or actual judicial or administrative proceedings might impose on what a witness can disclose comfortably.

### **Procedures**

Working in collaboration with congressional staff is critical to understanding and

narrowing the scope of an inquiry. Because a committee comprises numerous members with a wide range of constituencies, interests and priorities, thorough preparation for a congressional hearing includes traditional diligence as well as gaining an understanding of the concerns of each committee member. It is vital to anticipate the substantive and political agenda of each member.

As in a judicial proceeding, thorough command of the facts and anticipation of the arguments advanced by one's adversary will enhance the likelihood of a favorable result. In a legislative proceeding, though, that must be combined with a thorough understanding of the interests and concerns of

each committee member.

### **Conclusion**

If you or your client are in an arena that appears headed toward a congressional investigation, it is in your interest to stay as far ahead of the curve as possible. If you learn that you or your client are likely to be called to testify, early action, consulting with counsel and familiarity with the "four Ps" cannot begin too soon.

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