

Congressional Investigations

Introduction

Civil litigation and Executive Branch investigations are relatively commonplace burdens for sophisticated companies, and particularly for companies that conduct business in a complex and heavily-regulated industry. Many companies have a well-developed ability to manage and resolve these matters, and a robust network of outside counsel to assist them.

Congressional investigations and oversight, however, present a number of unique challenges not found in the more familiar arenas of civil litigation and Executive Branch investigations. As a result, many companies lack the developed skill set and intuitive sense of how to approach them effectively. Similarly, these investigations generally involve issues and agendas far outside the comfort zone and experience of most litigators.

Congressional investigations often involve public attacks on a company's reputation, which can imperil the goodwill upon which the company has built its business and maintains its competitive advantages. Rather than in the relatively controlled environment of a courtroom, congressional investigations often unfold in a hearing room in front of television cameras and on the front pages of major newspapers. Handled inartfully, the results of these investigations can be devastating—but they do not need to be.

Gibson Dunn has substantial expertise in handling congressional investigations, and it has regular and on-going interaction with Congress and its various investigative committees. Gibson Dunn has handled dozens of major congressional investigations for clients of all sizes. These investigations have included those initiated in both chambers of Congress, by all major investigative committees, and by special investigative entities. Moreover, our attorneys have deep experience defending Executive Branch investigations that result from congressional inquiries. From the outset, we work with the client to assess the issues from a strategic perspective, so that we can move forward to effectively handle every aspect of an investigation, including responding to a committee subpoena, negotiating the terms of a document production, preparing for interviews, depositions, or hearings, managing the public relations responses, and anticipating and neutralizing collateral consequences.

Gibson Dunn offers a combination of experience and talent that is unique among the small cadre of law firms that are regularly involved in the defense of congressional investigations. This experience adds to its overall efficiency, both in ramping up for a new investigation and managing it to completion.

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[Michael Bopp](#)
Washington, D.C.

TEAM MEMBERS

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The Gibson Dunn Advantage

Effective representation in the face of a congressional investigation requires a blend of experience and capabilities that, while often touted, is hard to find. This blend of experience and skill is what constitutes the Gibson Dunn advantage:

- *An Insider's Perspective on What Motivates and Influences Congressional Investigations.* Gibson Dunn lawyers have not only defended against numerous high-profile congressional investigations, but they also have conducted them. Our lawyers have held top positions on key congressional committees in both the House and Senate, and have held leadership roles on numerous high stakes special investigations. While serving in Congress, attorneys who are now part of the Gibson Dunn team have deposed and interviewed hundreds of witnesses, developed and executed dozens of investigative and media strategies, conducted numerous hearings, and written a variety of staff and committee reports. From this experience as well as our experience in representing clients in these investigations, Gibson Dunn offers a unique knowledge of and perspective on the inner workings of various investigative committees, including their motivations and how best to make inroads with them.
- *A Keen Understanding of How a Congressional Committee Is Likely to React to a Target's Responses.* You have received a letter from a congressional committee requesting a production of documents and information that will take hundreds of hours to complete. How do you decide whether to embark upon an expensive and time-consuming production? What is likely to happen if you do not comply? Can you negotiate with the committee and, if so, should you assume an adversarial or cooperative posture? Answering these questions in ways that protect your reputation and interests as well as your resources depends on an understanding of several key factors. You need to understand the nature of the committee involved. Is the request part of a full-scale investigation or is it part of an oversight matter that is likely to wither over time? You also need to understand the tools that the committee has available to enforce its request, and whether it is likely to employ those tools. The answer to these questions often depends as much on the practices and proclivities of the committee chairman and ranking member as it does on the committee's rules of procedure. You must have an appreciation of all of these elements to develop a strategy that will be effective in each particular circumstance. Gibson Dunn lawyers know the key members and know the rules and motivations of the committees that conduct serious investigations, and we can develop effective strategies drawing on that knowledge and experience. If failure to respond to a burdensome letter request is likely to result in a subpoena, a course of action may be warranted that would not have been if the request is unlikely to be backed up by coercive congressional action. These are questions that pose risks too great to leave to speculation or chance. We know how a committee or Member of

Congress is likely to react to a particular defense tactic, in part, because in the past, Gibson Dunn lawyers have been the ones reacting on behalf of Congress.

- *Experience Defending the Interests of Companies and Individuals Against the Unique Perils of a Congressional Investigation.* Experience in a litigation-based context is helpful in terms of understanding the effects that a congressional investigation might have on a client, but it is not enough. Gibson Dunn understands how the negative publicity that accompanies a congressional investigation can affect a client, sometimes dramatically, and we understand the best ways to try to prevent potentially catastrophic results. High profile hearings can pose great risks to a client, but so can a staff report or the selective leakage of damaging e-mails or other documents that, by themselves, can appear to show a client's actions in a negative light. Knowing what to avoid—and what may result from an investigation and how it could affect a client—is a critical part of a sound defense strategy. Gibson Dunn has devised effective defense strategies in numerous congressional investigations and stands ready to do so for you.
- *Appreciation of the Differences Between Litigation and Executive Branch Investigations and Congressional Inquiries.* You have received a burdensome document request from a congressional committee and have prepared a response. You withhold documents protected by the attorney-client privilege, and now the committee is demanding that you produce those documents. What do you do? Often, a strategy based upon tactics that are effective in a litigation or Executive Branch investigative context is ineffective—or can even backfire—in a congressional investigation. Knowing that Congress takes the position that the attorney-client and other privileges do not apply to its requests for documents or information is, of course, essential. But so is an appreciation for the practices of the particular committee, and an understanding of the consequences of refusing to comply with its demand for privileged documents. Similarly, an understanding of the reaction that hardball tactics is likely to elicit (for example, might the committee send a message by scheduling the deposition of your CEO?) is crucial to avoiding unexpected and unwelcome results. Gibson Dunn has extensive knowledge of committee procedures, authorities, and tactics, and experience with the reactions that defense tactics are likely to elicit.
- *Experience Preparing Top Executives.* Congressional committees often focus their attention on the CEO or other top executives of a company under investigation, whether or not the top executives know the most or even much about the issues at hand. Gibson Dunn is experienced at preparing top officials to testify at a congressional hearing or deposition, or to participate in an interview by committee staff. It is important for your CEO or other executive to have a full appreciation for how a hearing, deposition, or interview will be conducted, what is likely to be asked, who is likely to ask it, how the committee, the media, and

the public is likely to respond to certain answers, how it will differ from Executive Branch testimony, and what protections are available. Our methods, which include training and practice sessions and mock hearings, depositions, and interviews, have helped top executives weather high-stakes, contentious investigations.

- *Experience Neutralizing Collateral Consequences.* Congressional investigations often result not only in reputational damage, but to referrals that lead to or fuel Executive Branch investigations. When faced with a congressional investigation, clients need a law firm that knows not only how to defend against the direct consequences of the inquiry, but also against the collateral effects, such as a referral to another investigative body. Effective representation pairs skilled congressional investigations practitioners with skilled civil and white collar litigators. Both perspectives are needed, for example, when balancing the benefits of a joint defense agreement in a congressional investigation against the risk that it will not be recognized in subsequent litigation. Gibson Dunn practices a teaming approach that combines these skills and experiences at the highest levels, so that the successful defense of the direct effects of a congressional investigation works seamlessly with the defense of possible collateral consequences.

Our Experience Defending Clients Embroiled in Congressional Investigations

Members of our group have defended numerous clients in congressional investigations, including several in the past year. Some of these engagements include:

- Representation of a major health insurer before the House Energy and Commerce, House Oversight and Government Reform, and Senate Commerce Committees investigating practices within the health insurance industry. This multi-front defense of a series of high-profile investigations required careful coordination of the information and documents provided to different congressional committees.
- Ongoing representation of major financial services companies before the Financial Crisis Inquiry Commission investigating the causes of the financial markets crisis.
- Ongoing representation of a major financial services company before the Senate Permanent Subcommittee on Investigations regarding causes of the financial markets crisis.
- Ongoing representation of a company that provides senior living services before the Senate Special Committee on Aging.
- Ongoing representation of a major healthcare information technology firm before the Senate Finance Committee.

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- Ongoing House Science and Technology Committee's investigation of satellite procurement issues and follow-on investigation by the NASA Office of Inspector General.
 - Ongoing representation of an investigative services company before the Senate Finance Committee.
 - Investigation by nine different congressional committees and the Department of Justice of a leading global provider of broadband satellite networks and services.
 - Investigation of a leading defense contractor by two different congressional committees regarding export control practices.
 - Representation of a market leader in the entertainment industry subject to investigations by the Senate and House Judiciary Committees relating to antitrust issues.
 - Investigation by the Senate Foreign Relations Committee into the background of the CEO of a large cable company, who was under consideration to be the U.S. Ambassador to a major European country.
 - Commission on Wartime Contracting in Iraq and Afghanistan's investigation of services contracts, including the provision of protective services in Iraq.
 - Multiple investigations by the House Committee on Standards of Official Conduct and Office of Congressional Ethics involving Members of Congress and other individuals and entities.

Members of Gibson Dunn's Congressional Investigations group also have extensive knowledge of both legislative and regulatory processes, as well as of the powers and authorities of congressional committees. Our attorneys and advisors have very strong contacts on both the Republican and Democratic sides of the aisle, and they understand the ways in which different committees conduct investigations.

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