

Congressional Investigations Highlight Risks for Companies Across Industries

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Contributing Partner

Margaret E. Krawiec
Washington, D.C.

Contributing Associates

Thomas A. Parnham
Washington, D.C.

Daniele M. Schiffman
Washington, D.C.

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Four Times Square
New York, NY 10036
212.735.3000

skadden.com

An examination of congressional investigations in 2014 reminds us that such investigations can strike an industry or company at any time. Irrespective of the subjects, the investigations typically share one or more of the following:

- Congress has the potential to employ an arsenal of investigative tools — including the creation of Select Committees — to ensure effective oversight;
- Congressional investigations are broad in scope, and there are implications for all involved, not just the targets of the investigation;
- Failing to disclose requested information, responding in an inaccurate or inconsistent manner, or failing to cooperate in an investigation can have serious ramifications, including being held in contempt of Congress;
- Congress uses investigations to achieve different ends — industry reform, legislation, shining a spotlight on bad actors, or encouraging involvement by regulators and law enforcement;
- Congressional investigations can span a significant period of time, especially when the issues are bipartisan;
- Congress initiates investigations into matters that often are subjects of parallel proceedings or eventually lead to subsequent government investigations or litigation; and
- Congress views its jurisdiction as limitless.

Government-Focused Investigations

Historically, second-term presidents and their administrations have faced high-profile congressional investigations — Richard Nixon and Watergate, Ronald Reagan and Iran-Contra, Bill Clinton and Monica Lewinsky, and George W. Bush and the outing of an undercover CIA agent. President Obama and his administration are no exception, encountering a large number of significant investigations focused on various federal agencies, policies and programs put into place by the administration. Nevertheless, these investigations provide useful lessons for the private sector. Examples of these investigations include the following:

Benghazi

The September 11, 2012, attack by militants who stormed the American diplomatic compound in Benghazi, Libya, and, hours later, a CIA compound nearby, which resulted in the death of the U.S. ambassador to Libya and three other Americans, prompted numerous congressional investigations into both the attack and the Obama administration's response. In 2014 alone, four separate House of Representatives committees continued investigations into Benghazi: the committees on Armed Services, Foreign Affairs, and Oversight and Government Reform, and the House Permanent Select Committee on Intelligence.

Despite these numerous ongoing investigations, on May 8, 2014, the House established the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, Libya, to

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investigate what happened and learn from potentially avoidable mistakes.¹ Congress has previously created select committees to investigate major events or disasters, such as, for example, the bombing of Pearl Harbor, the Watergate break-in, the Iran-Contra Affair and the preparation for and response to Hurricane Katrina. The Select Committee's investigation will continue its study of the events surrounding the Benghazi attack and ultimately issue a final report of its findings to the House.

Obamacare

The moment the Patient Protection and Affordable Care Act (Obamacare) became law on March 23, 2010, Republicans were ramped up to conduct congressional investigations. Perhaps most prominently, the House Committee on Government Oversight has held a number of hearings on Obamacare. Although these hearings generally focused on the Obama administration, private entities also became entangled in the investigation. For example, the committee subpoenaed records from MITRE Corporation, a federal contractor overseeing security for the HealthCare.gov website, and a company executive later testified at a January 2014 hearing regarding possible security vulnerabilities on the site. Similarly, in February 2014, the committee held a hearing on payments to private insurers under Obamacare's reinsurance and risk corridor programs. While the Republican Party undoubtedly would like to repeal Obamacare in 2015, they know President Obama will veto such efforts and, therefore, are likely to attack the legislation piece by piece. For example, House Republicans have already passed a bill that would change the definition of full-time work from 30 to 40 hours a week, reducing the number of employers that have to offer health insurance.

Investigation of the Internal Revenue Service (IRS)

Congressional committees also initiated investigations into the IRS's practice of targeting certain political groups applying for tax-exempt status for additional scrutiny based on perceived affiliations with conservative groups. Of those committees, the House Committee on Government Oversight was the most aggressive, hearing the testimony of former IRS Director of Exempt Organizations Lois Lerner, among several others. In May 2013, Lerner provided an opening statement and then invoked her Fifth Amendment right against self-incrimination. She again invoked her Fifth Amendment right on March 5, 2014, when summoned for additional questioning. On May 7, 2014, the House adopted H. Res. 574, finding Lerner in contempt of Congress for her refusal to comply with the committee's subpoena and answer its questions. On December 23, 2014, the House Committee on Government Oversight issued a staff report — its sixth on this subject — indicating that the committee is continuing to gather information and that its investigation of IRS targeting will continue in 2015.

The Veteran Affairs (VA) Scandal

In August 2014, the VA Office of the Inspector General issued its final report on the Phoenix VA health care system. The report deemed inappropriate scheduling practices that adversely affected the quality of care for veterans at the Phoenix VA medical center to be a nationwide systemic problem, prompting both the Senate Veterans Affairs Committee and the House Committee on Veteran Affairs to hold hearings addressing the report. In response to such public and congressional scrutiny, in November, the VA reported that over 100 investigations

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of VA facilities had been conducted by the VA Office of the Inspector General, the FBI, the U.S. Department of Justice (DOJ) and others. The VA noted that “disciplinary action,” including firings, had been taken against 5,600 employees in the past year with more anticipated firings in the future. It also said that reforms are under way, including the establishment of a VA-wide customer service office, new partnerships with private organizations, and reorganizations to improve and simplify the VA’s structure.

Private Sector-Focused Investigations

There also were a number of investigations in 2014 that focused exclusively on the private sector. Examples of these investigations include the following:

Data Breach

In 2014, the wave of high-profile data breaches continued, with several corporations announcing major cybersecurity attacks resulting in the release of massive amounts of consumer data, including credit, debit card and other sensitive personal information. Congressional committees including the Senate Judiciary Committee; the Senate Banking Subcommittee on National Security and International Trade and Finance; and the House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade have held hearings, which have focused on Target and Home Depot, among other companies. In addition, individual members of Congress have made data breach-related inquiries of numerous major financial institutions. Moreover, in December of 2014 Sen. Mark Kirk called on Congress to hold hearings on the destructive cyberattack that forced Sony Pictures to cancel the theatrical release of its controversial comedy “The Interview.” A number of legislative proposals also have been introduced to address the lack of standards in data protection. (See "[Insights Conversations: Cybersecurity](#).”)

Overseas Tax Issues

The Senate Permanent Subcommittee on Investigations (PSI) has been conducting an ongoing investigation dating back to the early 2000s of how U.S. multinational corporations have used U.S. tax statutes, regulations and accounting rules to shift profits and valuable assets offshore to avoid U.S. taxes. Previous PSI investigations examined offshore tax avoidance by Apple, Microsoft and Hewlett-Packard, among others. In 2014, PSI focused on Caterpillar, a major U.S. manufacturer of construction equipment, power generators and sophisticated engines, to illustrate the structure and methods employed by multinational corporations to allocate income outside the United States. Moving forward in 2015, although Democrats want to close the loopholes for corporations, Republicans will oppose such efforts and likely focus any hearings on tax reform and issues with the Tax Code.

Wireless Cramming

As a result of investigations by the Senate Commerce Committee into “cramming” on landline (2010-11) and wireless phone bills (2012) — unauthorized billing for products and services that consumers claim they did not authorize — in 2014, the Federal Trade Commission (FTC) and state attorneys general initiated derivative investigations and related litigation. For example, the FTC initiated a law enforcement action against T-Mobile, and the

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FTC and attorneys general of all 50 states reached a \$105 million settlement with AT&T. Further, on December 17, 2014, the Consumer Financial Protection Bureau (CFPB) filed a lawsuit against Sprint in the Southern District of New York related to alleged cramming on wireless phone bills. Sprint's answer to the CFPB's complaint is due February 20, 2015. This case will be followed closely as a test to CFPB's jurisdictional reach over telecom carriers.

General Motors (GM) Ignition Switch Recall

In 2014, GM was the subject of numerous inquiries, investigations, subpoenas and requests for information from the National Highway Traffic Safety Administration (NHTSA), U.S. Attorney's Office for the Southern District of New York, Securities and Exchange Commission (SEC) and DOJ in connection with GM's handling of the ignition switch issue that was linked to 31 frontal crashes and 13 deaths. Despite the concurrent investigations by numerous federal agencies, the House and Senate quickly launched their own parallel investigations and held hearings on the recall. GM has agreed to three years of monitoring by the NHTSA. Investigations by the DOJ, attorneys general and the SEC are ongoing, and there may be more congressional hearings in 2015 with a focus beyond GM.

Domestic Violence and Its Treatment by Professional Sports Leagues

In February 2014, Baltimore Ravens running back Ray Rice was arrested and charged with aggravated assault after an incident of domestic violence involving his fiancée (now wife) came to light. Concerned with the way the National Football League handled this issue and viewing its jurisdiction as limitless, 12 House of Representatives Judiciary Committee Democrats sent a letter to NFL Commissioner Roger Goodell demanding "the highest level of transparency" regarding how the league investigated the incident. In December 2014, the Senate Commerce Committee held a hearing to address domestic violence in professional sports. Then-Chairman Jay Rockefeller and new Chairman John Thune called on sports leagues to implement uniform policies to punish players who commit violent acts. Thune further stated that the committee might revisit this issue in 2015 "to assess the progress of the leagues and the players associations in dealing with domestic violence."

Conclusion

For businesses that find themselves involved in a congressional investigation, understanding the rules (or lack thereof) and minimizing reputational harm and the collateral impact of the investigation should be the highest priorities. As illustrated by the above examples, an entity has no control over when a congressional investigation may strike, and little to no ability to stop it. Employing transparency strategically, maintaining a high level of credibility and working cooperatively with committee staff during the course of a congressional investigation help mitigate the reputational harm caused and better position a company for collateral issues such as derivative investigations or litigation.

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