



## A Renewed Congressional Focus on Investigating the Energy Industry

05/15/2019 | Barry M. Hartman, William M. Keyser, and Andrew M. Wright

### COMMENTARY

On April 11, eight utility companies and a law firm received investigative letters from the House Energy and Commerce Committee (E&C). Each letter sought detailed documents and internal communications related to their membership in the “Utility Air Regulatory Group” and its interactions with Environmental Protection Agency officials, and in particular one official.

This legislative scrutiny of the energy industry is just one of many examples of ongoing Congressional inquiries.

On the 100th day of the new Congress, E&C Chairman Frank Pallone (D-N.J.) promised “robust oversight.” The accompanying press release indicated the committee has already sent “36 sets of letters to the Trump Administration and to companies during this Congress as part of its oversight responsibility.”

Other committees are also investigating the energy industry. The House Oversight and Reform Committee, chaired by Rep. Elijah Cummings (D-Md.), has granted its Subcommittee on Environment “oversight jurisdiction over ... energy policy.” In a signal to the private sector, that committee dropped the “government” from its name. Similarly, the House Committee on Natural Resources, the House Committee on Science, Space, and Technology, and the House Select Committee on Climate Change all could engage on issues within their jurisdictions.

It is unclear whether Congress’s focus on the private actors in the energy industry is motivated by policy disputes or concerns about Trump administration officials and their interactions with industry. Regardless, the private sector is being drawn in to the political fight. Importantly, these inquiries are not routine legislative hearings or even routine oversight hearings. They focus on whether there is “wrongdoing” of some sort.

So what are practical steps your company can take to prepare for congressional investigations?

### Have a Plan

**Plan How Congressional Requests Will Be Handled Internally.** A company can never be sure what point of contact will be the first to receive an investigative inquiry from a congressional committee. It could come to the CEO and executive suite or a business unit or department not located at headquarters, like the government or regulatory affairs group. Therefore, you need a plan to ensure wherever the inquiry lands, it gets to the right people quickly.

Congressional document requests usually have very short deadlines—often only two weeks. It is critical that those with responsibility for congressional investigation responses within the organization get the information within 24 hours.

**Retain Congressional Investigations Professionals.** Congressional investigations present unique challenges. They are political theater with concrete reputational, policy, and legal consequences. Stakeholders, markets, regulators, and law enforcement are watching. Congressional investigations that can generate parallel investigations and litigation, and sometimes parallel legal controversy, grabs congressional interest. And while there are concrete legal consequences, the forum is by no means a court of law. As a result, many of the traditional legal principles applicable to hearings before a judge or a regulatory body simply do not apply. You need a team that knows the substantive, legal, and political dimensions of these kinds of inquiries.

And responses to Congress's investigations present their own risks. There are 18 criminal statutes that can be implicated in these investigations, all just relating to how one responds to the investigation, regardless of the substance.

Managing responses to a congressional investigation is neither lobbying nor litigation, although there are elements of both.

**Map the Committee Dynamics.** Rely on your legal professionals to develop a comprehensive understanding of the requesting committee's dynamics. Who are the chair and ranking member? Is it a bipartisan investigation or is there political daylight inside the committee? Who are the targets of the investigation? What is the investigative culture of that committee? Does the staff do deep, long-term investigations, or quick, headline-producing hearings? These are all questions that will shape an effective and responsible strategy.

**Get Your Arms Around the Facts.** Every investigation is different. Some may seem spurious, but all are serious and may point to real problems that need to be addressed. It is critical that a company responding to a congressional request know the facts surrounding the issues raised. It is far better to tell an anxious committee staffer that the front office doesn't know the answer yet than to engage in unsupported speculation. It is not like "discovery" in a legal proceeding where one can supplement answers with few consequences. Speculation that turns out to be wrong could sound to Congress's ears like a felony misrepresentation.

**Be Responsive, but Protective.** Private companies have far fewer legal tools than the executive branch to resist congressional subpoenas. At the same time, companies have legitimate interests in confidentiality—such as privileged and proprietary information—that need to be safeguarded to the extent possible. Those concerns need to be identified early and presented to the investigating committee staff artfully.

For individuals and companies caught up in the glare of a congressional investigation, it can feel more like an inquisition. The energy sector faces a turn under the committees' bright lights and cameras. It is important to be prepared.

For more information about how to prepare for congressional investigations see our Congressional Investigations 101 [client alerts](#) and [podcasts](#).

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