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NOVEMBER 9, 2026

# CONGRESSIONAL INVESTIGATIONS

*A Primer for Companies*

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When the 120th Congress convenes on January 3, 2027, the Democrats will have majorities in the House and the Senate and will appoint new committee chairs. As part of ordinary legislative oversight, congressional committees can send document requests and subpoenas, and the House can also issue them in impeachment proceedings. There are important differences between congressional investigations in the two contexts. Judicial decisions and practice regarding congressional oversight and impeachment during the first Trump administration supply insightful guidance as to what to expect in 2027.

Ordinary oversight must be grounded in a valid legislative purpose, a standard the Supreme Court has historically construed generously. In *Trump v. Mazars USA, LLP*, 591 U.S. 848 (2020), however, the Court required closer scrutiny of third-party subpoenas for a President's pre-office financial information, directing courts to weigh: (1) whether other sources could supply the information; (2) whether the subpoena is broader than reasonably necessary, (3) substantial and detailed evidence of a legislative purpose, and (4) the burden on the President.

When the House issues subpoenas or requests documents under its Article I "sole power of impeachment," it does not need a legislative purpose, and relevance is judged against the official's alleged misconduct. Such factfinding can reach personal and pre-office records an oversight subpoena could not. The Justice Department's Office of Legal Counsel concluded in January 2020 that committee subpoenas issued before the House authorized its impeachment inquiry in 2019 were invalid, but the House has rejected that view.

In terms of procedure, formal subpoenas will usually be preceded by informal letters that should be treated as subpoenas-in-waiting. A congressional subpoena compels documents and electronic records or testimony at a hearing or deposition. Congress has no formal interrogatory device, and so narrative answers are usually sought by letter. A company that receives a congressional committee letter of inquiry may request a subpoena (a so-called "friendly" subpoena) to compel production because of confidentiality duties to customers or counterparties.

A company may comply, negotiate, or refuse and risk a civil enforcement action, a criminal referral, or contempt of Congress. Given these consequences of refusal, most subpoenas end in negotiated scope, custodians, search terms, and rolling production.

Congressional committees treat the attorney-client privilege and work-product protection as discretionary, and no court has squarely held otherwise. Most committees, however, respect well-supported claims to attorney-client privilege and work-product protection. Individuals may assert the Fifth Amendment privilege against self-incrimination, but companies may not. Although companies cannot assert executive-branch privileges, the President may assert them, and executive-branch officials may raise them at the President's direction.

With new committee chairs taking control in January, companies that prepare now will be better positioned to negotiate the scope and timing of future requests and mitigate the burden of a congressional inquiry, as outlined below.

## COMPANIES CONCERNED ABOUT POTENTIAL CONGRESSIONAL INVESTIGATIONS SHOULD CONSIDER THE FOLLOWING STEPS NOW:

### Preserve documents and communications.

Issue a hold as soon as an inquiry is reasonably anticipated, and no later than receipt of a request, covering all sources of information, including mobile devices and messaging applications; suspend auto-delete, including ephemeral-messaging settings; and consider forensically imaging key custodians' devices.

### Retain experienced investigations counsel.

Choose counsel with deep investigations and e-discovery experience who can negotiate narrower requests, custodians, and search terms, structure rolling production, and manage privilege review.

## ONCE A CONGRESSIONAL INVESTIGATION HAS BEEN INITIATED, THE COMPANY SHOULD:

### Engage congressional staff through counsel.

Counsel should contact committee staff promptly regarding scope and timing. Statements to Congress, even in informal interviews, carry exposure under 18 U.S.C. §§ 1001 and 1505.

### Plan for disclosure.

A committee may release or enter into the record what a company produces, whatever informal assurances it gave, and private plaintiffs and other agencies may then use it. Productions and positions should be coordinated across related matters.

### Consider the executive branch.

If requests seek communications with the administration, consider notifying the agency before producing; the company cannot assert executive privilege, but the agency may raise it at the President's direction.

### Notify insurers and consider disclosure.

Give prompt notice under D&O and regulatory-defense policies; coverage may be uncertain, and late notice may result in forfeiture of coverage. Public companies should also consider their disclosure obligations.

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