

Are You Prepared for a Congressional Investigation?: Integrating Defense and Insurance Recovery Strategies

As pundits and prognosticators debate the impact of the Democrats' ascension to the White House and increased majorities in Congress, there is widespread consensus that the changed political landscape will result in increased Congressional oversight. Many analysts expect that Congress will focus its investigative authority on particular industries and subjects in order to advance the regulatory and legislative agenda of the new Congress.

Evidence of the new aggressiveness in oversight is already manifest in Congress's reaction to the current financial crisis. Recently, House Oversight and Government Reform Committee Chairman Henry Waxman wrote letters to nine banks seeking information and documents on the use of funds they received as part of the government's response to the financial crisis. Such inquiries highlight the risk that many companies will face in the coming months. While attention to financial institutions—including mortgage brokers and servicers, hedge funds, securitizers, credit card providers, and insurance companies—will likely take center stage in the near future, Congress is likely to also intensify its scrutiny of other industries such as health care service providers, government contractors, and food and drug manufacturers and importers.

If your company could be one of those targeted, it is essential to implement a comprehensive, integrated, and proactive strategy that ensures your management team, in-house legal department, risk management depart-

ment, and outside defense and coverage counsel respond in concert.

Defending Your Company on The Hill and Beyond

The sudden onslaught of a Congressional investigation can be overwhelming for companies and executives. Within hours of a news story, a company may be faced with requests for documents and testimony. Within days, company officials may confront the withering glare of a public hearing. It is therefore critical that your company consider how it would respond prior to receiving its first "request" from a Congressional committee. Your plan should be broad enough to consider the universe of potential risks. While the first inquiry may be a letter from a Congressional committee, the scrutiny your company may face is unlikely to end there. Congressional investigations can provide significant ammunition for shareholder lawsuits or other efforts to impose civil liability on a company. Criminal liability may also loom as a Department of Justice enforcement investigation or equivalent state proceeding often ensues. Federal, state, or local regulatory agencies may also see opportunities in pursuing their own investigative proceedings. Given these disparate sources of potential liability, companies must take a comprehensive approach to protect themselves, before, during, and after Congressional investigations. Otherwise, your company risks asserting a position in one forum that may create peril in another. Understanding and planning for potential liabilities and developing an integrated defense strategy will minimize such risks.

It is imperative that your company be proactive if you believe your industry could be targeted by Congress. A tension often arises between the need to be open with Congress and the public and the need to protect information in defense of the company. Early on you should coordinate your team of legal counsel and other advisors to begin balancing your message and your defense. It is important to begin asking questions internally, preparing facts, and collecting information to support your company's position. Keep in mind, however, that Congressional investigations are unique and do not follow the same rules with which many companies are familiar from litigation. For example, the scope of Congress's investigative powers is not constrained by the protections available in Executive Branch investigations and lawsuits, like rules of evidence and attorney-client privilege. Further, politics are always at play, and understanding political dynamics and the interests of the Members of Congress is vital.

Protecting and Securing Your Insurance Rights

An important but often overlooked component of a defense strategy is protecting and securing rights under your company's insurance policies. While most policyholders expect that their insurance policies will cover liabilities resulting from an adverse judgment, they often fail to realize that the same policies may provide coverage for the costs of responding to a government investigation or lawsuit. Therefore, whether your company is faced with a Congressional or Executive Branch investigation, or criminal or civil lawsuit, you should examine your insurance policies for potential coverage.

As a preliminary manner, your company should consider the risk of Congressional or other government investigations when purchasing new insurance or renewing policies. For example, when negotiating Directors & Officers ("D&O") insurance, companies can negotiate a broader definition of "claim" to include coverage for investigations. Doing so, however, will

come with costs, potentially in the form of higher premiums and the requirement to give notice to your insurer earlier in the investigation process. These and other consequences should be considered and weighed as part of your company's risk management strategy in the current political and economic environment.

When faced with an investigation or lawsuit, your defense counsel and coverage counsel should coordinate their efforts. For example, any initial information-gathering process should include collecting and analyzing all potentially applicable insurance policies. While D&O or Errors and Omissions ("E&O") policies may be most applicable, your company should consider and analyze its entire risk management portfolio, as it is essential to understand early on whether or where coverage might exist.

Determining whether coverage exists requires understanding key policy provisions, including the policy's definition of "claim," the insured entities and individuals, and exclusions that might foreclose or limit your company's potential recovery. Moreover, policyholders often must satisfy policy conditions in order to secure coverage. For example, your company must determine when it is required to provide the insurer with notice of an actual or potential claim. The policy may also obligate your company to obtain prior consent for key decisions, like choosing defense counsel and negotiating a settlement. You may also be required to afford your insurer an opportunity to "associate" or "cooperate" in the defense of the claim.

Decisions made at the initiation of a defense, including notification to the insurer, can affect not only the amount of an insurance recovery but also its availability. Therefore, to ensure that insurance assets are preserved and used effectively, companies must consider insurance implications early and often. Still, because your company's paramount objective is to minimize or avoid civil, regulatory, or criminal liability, there may be

times when the best way to maximize an insurance recovery cannot be pursued because of other considerations. Fortunately, defense and coverage counsel, working in tandem, usually can develop an approach that does not compromise your company's defenses or interfere with other business objectives.

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