To Our Clients and Friends:

Congress has inherent power to investigate and that power has been delegated to House and Senate Committees. Both House and Senate rules, for example, give standing committees the ability to issue subpoenas, hold hearings, and conduct investigations.[1] It can be a harrowing experience to receive a request for information or documents or for an interview or deposition from a congressional committee. But does it matter which committee the request comes from? Do committees all have the same investigative authorities or are there differences and, if so, do the differences matter?

In fact, it often does matter which committee is conducting the investigation as authorities can and do differ, and often the differences do matter.

Congressional committees have the power to issue subpoenas to compel witnesses to produce documents, testify at committee hearings, and, in some cases, appear for depositions. Although the Fifth Amendment likely applies in the context of a congressional investigation,[2] standing committees nevertheless may appeal to the full House or Senate to hold in contempt any witness who refuses to appear, answer questions, or produce documents. Congressional contempt authority may take one of three forms: inherent, civil, or criminal. Failure to adhere to committee rules during an investigation may thus have severe legal consequences.

Committees, however, generally have adopted their own procedural rules for issuing subpoenas, taking testimony, and conducting depositions. Moreover, each committee may alter these rules at the commencement of each Congress. To efficiently navigate the complexity of congressional investigations and most effectively represent our clients, Gibson, Dunn & Crutcher LLP carefully reviewed each committee's rules and, where applicable, the source of its compulsory subpoena and deposition authority. We have organized relevant information in the attached table, creating a new, comprehensive resource that can be referenced easily and will be updated each Congress.

The attached table reflects each standing committee's rules for issuing subpoenas, taking testimony, and, where applicable, conducting depositions. It also provides a link to each committee's rules of procedure for the 112th Congress. Our table also references how each investigative procedure can be exercised, any unusual procedural requirements, and sources of committee authority. Variations across committees are not necessarily intuitive or obvious, and understanding the differences in each area can be critical.

While each chamber of Congress has just one set of rules governing their committees, each chamber requires its committees to adopt their own rules, "not inconsistent with" the chamber's rules, governing procedure.[3] As a result, procedural rules differ from committee to committee, often in ways that matter. Some areas of differences are as follows:
• Whether a committee chairman can issue a subpoena without the consent of the ranking member – or even with such consent;

• Voting requirements for issuing a subpoena and when they apply;

• What options the rules provide for questioning witnesses;

• Quorum requirements for taking testimony; and

• A witness' right to have counsel present.

As this list suggests, some committee staff may interrogate witnesses, either in depositions or in extended questioning periods following committee hearings. Some committee chairmen may unilaterally issue subpoenas,[4] while others must consult with and receive consent or no objection from ranking members or obtain a majority vote from the full committee. Finally, while some congressional committees claim authority to conduct depositions, a close examination of the rules reveals that only a few committees have compulsory deposition powers without authorization from the full House or Senate—meaning that how and when a witness must respond to a request or order to appear at a deposition can depend on which committee issues the request or order.

In the House, only the Committee on Oversight and Government Reform has authority to compel depositions by subpoena. The Committee on Education and the Workforce has roughly identical rules but specifically notes that it requires authorization from the full House to compel a witness to appear for a deposition.

Five Senate committees have received Senate authorization to take depositions. The Senate Committee on Homeland Security and Governmental Affairs and its Permanent Subcommittee on Investigations receives authority each congress from the Senate's funding resolution. The Aging and Indian Affairs committees were authorized by S. Res. 4 in 1977, which the committees incorporate into their rules each congress. The Ethics committee's deposition power was authorized by S. Res. 338 in 1964, which created the committee and is incorporated into its rules each Congress. And the Intelligence Committee was authorized to take depositions by S. Res. 400 in 1976, which it too incorporates into its rules each congress.

Other Senate committees, namely the Agriculture, Commerce, and Foreign Relations Committees, authorize depositions in their rules. However, it is not clear that such deposition authority is authorized by the Senate and, hence, it is similarly not clear whether appearance at a deposition can be compelled.

The House Committee on Ethics has unique rules that reflect its role of investigating and adjudicating allegations of ethical violations, and its authority varies depending on the stage at which the investigation is being conducted.[5] Hence, it is important to understand the rules that apply to a given circumstance.
Our table provides a general sense of what rules apply in given circumstances. But it is essential to look carefully at a committee's rules to understand specifically how its authorities apply in a particular context.

If you have any questions about how a committee's rules apply in a given circumstance, please feel free to contact us for assistance.

Congressional investigations are unique exercises, and our table of committee authorities is meant to provide a sense of how individual committees can compel a witness to cooperate with its investigation. Gibson Dunn lawyers have extensive experience in both running congressional investigations and defending targets of and witnesses in such investigations. We are available to assist should a congressional committee seek information or documents from you.

---

[1] See, e.g., Rules of the House of Representatives, Rule XI ("For the purpose of carrying out any of its functions and duties . . . a committee or subcommittee is authorized . . . to sit and act at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, and to hold such hearings as it considers necessary; and (B) to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary."); Standing Rules of the Senate, Rule XXVI ("Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures out of the contingent fund of the Senate as may be authorized by resolutions of the Senate. Each such committee may make investigations into any matter within its jurisdiction . . . .").


[4] In the House, the chairmen of the Committees on Oversight and Government Reform, Education and the Workforce, Foreign Affairs, Ways and Means, and Intelligence have this power. Additionally, several committees in the House authorize chairmen to issue subpoenas unilaterally during recess periods. In the Senate, the chairmen of the Permanent Subcommittee on Investigations and the Committee on Aging have this power.

[5] For example, there are different rules for investigatory hearings (Rule 19) as opposed to adjudicatory hearings (Rule 23). For example, Rule 19 authorizes depositions, while Rule 23 provides for acceptance of depositions taken by an investigative subcommittee into the record of an adjudicatory hearing.
Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you work or the following:

Michael Bopp - Chair, Congressional Investigations Group, Washington, D.C. (202-955-8256, mbopp@gibsondunn.com)
Mel Levine - Co-Chair, Public Policy Group, Los Angeles (310-557-8098, mlevine@gibsondunn.com)

Table of Authorities of House and Senate Committees:

© 2011 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice