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## **INVESTIGATIONS IN THE 116TH CONGRESS: A NEW LANDSCAPE AND HOW TO PREPARE**

To Our Clients and Friends:

With Democrats regaining the majority in the House of Representatives for the first time in nearly a decade, the investigative priorities of the lower chamber will shift—and corporations should expect (and prepare) to find themselves more frequently the subjects of investigations. Moreover, the investigative powers of several committees have expanded in significant ways since House Democrats last held committee gavels in 2010. And, while Republicans remain in charge of the Senate, new and returning chairs of a number of key investigative committees are likely to focus on issues that implicate several industries and private sector entities.

Unlike receiving a civil complaint or compulsory process in an Executive Branch investigation, when a congressional letter or subpoena arrives, targeted organizations may only have a matter of days to consider their response and devise a strategy, and often must do so amid significant media scrutiny and public attention. Congressional investigations often involve public attacks on a company's reputation, which can imperil the goodwill upon which the company has built its business and maintains its competitive advantages. It is therefore crucial that potential targets evaluate their exposure to likely investigations in the 116th Congress, familiarize themselves with how such inquiries unfold—including the rules and procedures that govern them—and consider potential responses.

To assist possible targets and interested parties in assessing their readiness for responding to a potential congressional investigation, Gibson Dunn presents this brief overview of how such investigations are often conducted, Congress' underlying legal authorities to investigate, various defenses that can be raised in response, and the changing political and investigative landscape of the 116th Congress. We also note missteps that subjects of investigations sometimes make when receiving an inquiry and best practices for how to respond.

### **I. What is a Congressional Investigation?**

Congressional investigations present a number of unique challenges not found in the familiar arenas of civil litigation and Executive Branch investigations. Unlike the relatively controlled environment of a courtroom, congressional investigations often unfold in a hearing room in front of television cameras and on the front pages of major newspapers and social media feeds.

The first thing to know about congressional investigations is that Congress' power to investigate is broad—as broad as its legislative authority. The “power of inquiry” is inherent in Congress' authority to “enact and appropriate under the Constitution.”<sup>[1]</sup> And while Congress' investigatory power is not a general power to probe any private affair or to conduct law enforcement investigations, but rather must

further a valid legislative purpose,[2] the term “legislative purpose” is understood broadly to include not only gathering information for the purpose of legislating, but also for overseeing governmental matters and informing the public about the workings of government.[3]

As a practical matter, numerous motivations (not always legitimate) often drive a congressional inquiry, including: advancing a chair’s political agenda or public profile, exposing criminal wrongdoing, pressuring a company to take certain actions, and responding to public outcry. Recognizing the presence of these underlying objectives and evaluating the political context surrounding an inquiry can therefore be a key component of developing an effective response strategy.

## II. Investigatory Tools of Congressional Committees

Congress has many investigatory tools at its disposal, including: (1) requests for information; (2) interviews; (3) depositions; (4) hearings; (5) referrals to the Executive Branch for prosecution; and (6) subpoenas. If these methods fail, Congress can use its contempt power in an effort to punish individuals or entities who refuse to comply with subpoenas. It is imperative that targets are familiar with the powers (and limits) of each of the following tools to best chart an effective response:

- **Requests for Information:** Any member of Congress may issue a request for information to an individual or entity, which may seek documents or other information.[4] Absent the issuance of a subpoena, responding to such requests is entirely voluntary. As such, recipients of such requests should carefully consider the pros and cons of different degrees of responding.
- **Interviews:** Interviews also are voluntary, led by committee staff, and occur in private (in person or over the phone). They tend to be less formal than depositions and are sometimes transcribed. Committee staff may take copious notes and rely on interview testimony in subsequent hearings or public reports.
- **Depositions:** Depositions can be compulsory, are transcribed, and are taken under oath. As such, depositions are more formal than interviews and are similar to those in traditional litigation. The number of committees with authority to conduct staff depositions has increased significantly over the last few years. In the last Congress, the House required (with limited exceptions) that one or more Members of Congress be present during a deposition. Importantly, the House rules for the 116th Congress have eliminated this requirement (*see infra*, Section IV), which will likely result in an increase in the use—or at least threatened use—of depositions as an investigative tool.[5] It is expected that the House Rules Committee soon will issue guidance on how staff depositions are to be conducted. In the Senate, only the Judiciary Committee requires a member present, unless waived by agreement of the Chair and Ranking Member.[6]

On January 25, 2019, the House Rules Committee issued new regulations governing depositions by committee counsel. Significantly, the regulations now allow for immediate overruling of objections raised by a witness’s counsel and immediate instructions to answer, on pain of contempt, and appear to eliminate the witness’s right to appeal rulings on objections to the full committee (although committee members may still appeal). This will likely speed up the deposition process, as previously the staff deposition regulations required a recess before the

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chair could rule on an objection. Additionally, the regulations now expressly allow for depositions to continue from day to day and permit, with notice from the chair, questioning by members and staff of more than one committee. Finally, the regulations have removed a prior requirement that allowed objections only by the witness or the witness's lawyer. This change appears to allow objections from staff or Members who object to a particular line of questioning.[7]

- **Hearings:** While both depositions and interviews allow committees to acquire information quickly and (at least in many circumstances) confidentially,[8] testimony at hearings, unless on a sensitive topic, is conducted in a public session led by the Members themselves (or, on occasion, committee counsel).[9] Hearings can either occur at the end of a lengthy staff investigation or more rapidly, often in response to an event that has garnered public and congressional concern. Most akin to a trial in litigation (though without many procedural or evidentiary rules), hearings are often high profile and require significant preparation to navigate successfully.
- **Executive Branch Referral:** Congress also has the power to refer its investigatory findings to the Executive Branch for criminal prosecution. After a referral from Congress, the Department of Justice may charge an individual or entity with making false statements to Congress, obstruction of justice, or destruction of evidence. Importantly, while Congress may make a referral, the Executive Branch retains the discretion to prosecute, or not.

## *Subpoena Power*

As noted above, Congress will usually seek voluntary compliance with its requests for information or testimony. However, it may compel disclosure of information or testimony through the issuance of a congressional subpoena.[10] Like Congress' power of inquiry, there is no explicit constitutional provision granting Congress the right to issue subpoenas.[11] But the Supreme Court has recognized that the issuance of subpoenas is "a legitimate use by Congress of its power to investigate" and its use is protected from judicial interference by the Speech or Debate Clause.[12] Congressional subpoenas are also subject to few legal challenges.[12] And "there is virtually no pre-enforcement review of a congressional subpoena." [13]

The authority to issue subpoenas is initially governed by the rules of the House and Senate, which delegate further rulemaking to each committee.[15] While nearly every standing committee in the House and Senate has the authority to issue subpoenas, the specific requirements for issuing a subpoena vary by committee. These rules are still being developed by the committees of the 116th Congress, and can take many forms.[16] For example, several House committees authorize the committee chair to issue a subpoena unilaterally and only require that notice be provided to the ranking member. Others, however, require approval of the chair and ranking member, or upon the ranking member's objection, require approval by a majority of the committee.

## *Contempt of Congress*

Failure to comply with a subpoena can result in contempt of Congress. Although Congress does not frequently resort to its contempt power to enforce its subpoenas, it has three potential avenues for seeking to implement its contempt authority.

- **Inherent Contempt Power:** The first, and least relied upon, is Congress' inherent contempt power. Much like the subpoena power itself, the inherent contempt power is not specifically authorized in the Constitution, but the Supreme Court has recognized its existence and legitimacy.<sup>[17]</sup> To exercise this power, the House or Senate must pass a resolution and then a full trial or evidentiary proceeding must occur, followed by debate and (if contempt is found to have been committed) imposition of punishment.<sup>[18]</sup> As is apparent in this description, the inherent contempt authority is cumbersome and inefficient, and potentially fraught with political peril for legislators. It is therefore unsurprising that Congress has not used it since 1934.<sup>[19]</sup>
- **Statutory Criminal Contempt Power:** Congress also possesses a statutory criminal contempt power. In 1857, Congress enacted this criminal contempt statute as a supplement to its inherent authority.<sup>[20]</sup> Under the statute, a person who refuses to comply with a subpoena is guilty of a misdemeanor and subject to a fine and imprisonment.<sup>[21]</sup> "Importantly, while Congress initiates an action under the criminal contempt statute, the Executive Branch prosecutes it."<sup>[22]</sup> This relieves Congress of the burdens associated with its inherent contempt authority. The statute simply requires the House or Senate to approve a contempt citation. Thereafter, the statute provides that it is the "duty" of the "appropriate United States attorney" to prosecute the matter, although the Department of Justice maintains that it always retains discretion not to prosecute.<sup>[23]</sup> Although utilized as recently as the 1980s, the criminal contempt power has largely fallen into disuse.<sup>[24]</sup>
- **Civil Contempt Power:** Finally, Congress may exercise its civil contempt power. The Senate's civil contempt power is expressly codified.<sup>[25]</sup> This statute expressly authorizes the Senate to seek enforcement of legislative subpoenas in a U.S. District Court. In contrast, the House does not have a civil contempt statute, but it may pursue a civil contempt action "by passing a resolution creating a special investigatory panel with the power to seek judicial orders or by granting the power to seek such orders to a standing committee."<sup>[26]</sup> In the past, the full House has "adopt[ed] a resolution finding the individual in contempt and authorizing a committee or the House General Counsel to file suit against a noncompliant witness in federal court."<sup>[27]</sup> It remains to be seen whether that process will be followed in the 116th Congress; the incoming Chairman of the House Rules Committee has taken the position that the current House rules empower the Bipartisan Legal Advisory Group (consisting of the Speaker, the Majority and Minority Leaders, and the Majority and Minority Whips) to authorize a civil enforcement action without the need for a House vote.<sup>[28]</sup>

### III. Defenses to Congressional Inquiries

While potential defenses to congressional investigations are limited, they are important to understand—likely more so now with Democrats taking control of the House. The principal defenses are as follows:

#### *Jurisdiction*

As discussed above, a congressional investigation is required generally to relate to a legislative purpose, and must also fall within the scope of legislative matters assigned to the particular committee at issue. In a challenge to a committee’s jurisdiction, the party subject to the investigation must argue that the inquiry does not have a proper legislative purpose, that the investigation has not been properly authorized, or that a specific line of inquiry is not pertinent to an otherwise proper purpose within the committee’s jurisdiction. Because courts generally interpret “legislative purpose” broadly, these challenges can be an uphill battle. Nevertheless, this defense should be considered when a committee is pushing the boundaries of its jurisdiction.

#### *Constitutional Defenses*

Constitutional defenses under the First and Fifth Amendments may be available in certain circumstances. While few of these challenges are ever litigated, these defenses should be carefully evaluated by the subject of a congressional investigation.

When a First Amendment challenge is invoked, a court must engage in a “balancing” of “competing private and public interests at stake in the particular circumstances shown.”<sup>[29]</sup> The “critical element” in the balancing test is the “existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness.”<sup>[30]</sup> Though the Supreme Court has never relied on the First Amendment to reverse a criminal conviction for contempt of Congress, it has recognized that the Amendment may restrict Congress in conducting investigations.<sup>[31]</sup> Courts have also recognized that the First Amendment constrains judicially compelled production of information in certain circumstances.<sup>[32]</sup> Accordingly, it would be reasonable to contend that the First Amendment limits congressional subpoenas at least to the same extent.

The Fifth Amendment’s privilege against self-incrimination is available to witnesses—but not entities—who appear before Congress.<sup>[33]</sup> The right generally applies only to *testimony*, and not to the production of documents,<sup>[34]</sup> unless those documents satisfy a limited exception for “testimonial communications.”<sup>[35]</sup> Congress can circumvent this defense by granting transactional immunity to an individual invoking the Fifth Amendment privilege.<sup>[36]</sup> This allows a witness to testify without the threat of a subsequent criminal prosecution based on the testimony provided.

#### *Attorney-Client Privilege & Work Product Defenses*

Although committees in the House and Senate have taken the position that they are not required to recognize the attorney-client privilege, in practice, the committees generally acknowledge the privilege as a valid protection. Moreover, no court has ruled that the attorney-client privilege does not apply to congressional investigations. Committees often require that claims of privilege be logged as they would

in a civil litigation setting. In assessing a claim of privilege, committees balance the harm to the witness of disclosure against legislative need, public policy, and congressional duty.

The work product doctrine protects documents prepared in anticipation of *litigation*. Accordingly, it is not clear whether or in what circumstances the doctrine applies to congressional investigations, as committees may argue that their investigations are not necessarily the type of “adversarial proceeding” required to satisfy the “anticipation of litigation” requirement.<sup>[37]</sup>

## **IV. Lay of the Land in the 116th Congress**

### ***House of Representatives***

With Democrats taking charge of the House for the first time since 2010, the chamber’s investigative priorities are likely to shift significantly to a number of issues Democrats have previously attempted to probe while they were in the minority. The investigative tools available to committee chairs also have significantly strengthened since Democrats were last in the majority.

For example, nearly all House committees now have authority that permits staff counsel to conduct depositions. And, as noted above, Democrats recently have removed the requirement that a Member must be present during the taking of a deposition<sup>[38]</sup> and have adopted new regulations that will permit staff investigators to adopt a more aggressive posture.<sup>[39]</sup> Such broad authority could make it more difficult for minority members to affect, influence, or otherwise hinder investigations to which they are opposed. The Democrats’ investigative arsenal is further bolstered by the fact that approximately a dozen committee chairs are empowered to issue subpoenas without consent of the ranking member. Democrats have thus gained command of a considerably more powerful investigative apparatus than existed in previous Congresses.

Many committees are likely to focus on oversight of the Trump administration; however, several members have signaled their intention to examine numerous topics affecting the private sector as well.

### **Industries and entities expected to face considerable scrutiny include:**

- The pharmaceutical industry;
- Drug manufacturers, distributors, and pharmacy benefit managers;
- Health insurers and health care providers;
- Consumer-facing financial institutions;
- Student loan lenders;
- Credit agencies;
- E-cigarette manufacturers;

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- Technology and social media companies;
- Entities responsible for safeguarding data privacy;
- Industries disproportionately serving elderly populations; and
- Private entities connected to the Trump Organization or high-level administration figures.

We have also catalogued the publicly stated priorities of certain incoming chairs and other key Democratic members.

- **House Oversight and Reform:** Chairman Elijah Cummings (D-MD) has said on several occasions that investigating prescription drug pricing and health insurance practices with respect to pre-existing conditions will be a primary focus of his committee. On January 14, 2019, Chairman Cummings launched his first major investigation of the 116th Congress—into prescription drug pricing.
- **House Energy and Commerce:** Chairman Frank Pallone (D-NJ) has already announced a hearing related to the Affordable Care Act, an indication that that the health care industry is likely to be a top issue. Pallone has also announced a hearing on issues related to climate change, a topic of inquiry that could envelop numerous industries. Meanwhile, in the prior Congress, Democratic members of the committee called for investigations related to prescription drug pricing, pharmaceutical tax breaks, and issues related to nursing home management, topics they are likely to press forward with now that they hold the gavel. In the prior Congress, Chairman Pallone also issued information requests to social media companies related to election interference, to online retailers related to counterfeit merchandise, and to media companies related to industry consolidation.
- **House Financial Services:** Chairwoman Maxine Waters (D-CA) has made clear that numerous financial institutions, particularly the country's largest banks, will face scrutiny on a variety of issues affecting consumers and small businesses, as well as financial institutions' ongoing compliance with safeguards designed to prevent another financial crisis. She has also indicated her intention to focus on minority hiring practices in senior corporate positions. In the prior Congress, Congresswoman Waters also sought to target payday lending practices. It also has been reported that she will hold a hearing in February focused on credit reporting companies.
- **House Ways and Means:** Chairman Richard Neal (D-MA) has stated he will take aim at issues related to the health care insurance industry and rising health care costs.
- **House Science, Space, and Technology:** Chairwoman Eddie Bernice Johnson (D-TX) has indicated an intention of focus on climate change. Additionally, in the prior Congress, Chairwoman Johnson sought to investigate certain private institutions and universities in relation to sexual harassment allegations. She also targeted the automotive and oil and gas industries in relation to relaxed EPA regulations.

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In their recently passed rules package, Democrats also re-established the House Select Committee on the Climate Crisis,[40] which is mandated with examining issues related to climate change and will be chaired by Congresswoman Kathy Castor (D-FL).[41] While the committee lacks subpoena power, a broad range of industry actors may find themselves on the receiving end of inquiries, particularly in light of the fact that several new House Democrats made climate change a top issue in their election campaigns. And the Select Committee can recommend that other committees issue subpoenas, which provides an added incentive to cooperate with its inquiries.

## *Senate*

On the Senate side, while Republicans remain in control of the chamber, committee chairs have signaled that they are likely to investigate business sectors such as technology, health care, and pharmaceuticals. And unlike their Democratic counterparts in the House, Republican chairs are unlikely to divert significant committee resources to oversight of the Trump administration.

Below, we have catalogued areas in which certain committees may focus in the 116th Congress:

- **Permanent Subcommittee on Investigations:** Majority and Minority staffs recently completed a two-year investigation regarding the price of drug treatments to combat Opioid overdosing and are expected to continue to pursue the subject of drug pricing generally.
- **Senate Finance:** Chairman Chuck Grassley (R-IA), who moved to Finance from Judiciary, has stated that he plans to use his new post to investigate rising health care costs. Chairman Grassley has also said he will investigate the effect of trade and tax policies.
- **Health, Education, Labor, and Pensions:** Chairman Lamar Alexander (R-TN), who plans to retire in 2020, has long made issues related to health care a primary focus and held hearings during the previous Congress related to drug pricing. We expect Chairman Alexander to continue to pursue these subject matters.
- **Commerce, Science, and Transportation:** Chairman John Thune (R-SD) has previously made drug pricing issues a committee priority and we expect that focus to continue. Issues related to technology and data privacy are also expected to be on Chairman Thune's agenda.
- **Special Committee on Aging:** We expect Chairwoman Susan Collins (R-ME) will continue her prior inquiries into rising health care costs for seniors, and particularly rising prices of prescription drugs that disproportionately serve senior populations.
- **Senate Judiciary:** Incoming Chairman Lindsay Graham (R-SC) previously spearheaded a Judiciary subcommittee inquiry into various social media companies on the issue of election interference. He is likely to pursue that topic, as well as larger issues of data privacy, on a broader scale now that he is chair of the full committee. The committee has also previously investigated social media companies for alleged bias against the dissemination of conservative opinions, work that may continue this Congress.

Additionally, Senate Democrats are expected to pursue numerous inquiries that they initiated in the previous Congress, some of which overlap with GOP priorities, including on issues related to data privacy concerns, social media company practices, e-cigarettes, banking regulations, and health care costs. And of course, Senate Democrats will remain focused on issues related to the Mueller investigation and, inevitably, private sector entities that may be tangentially related.

## V. Top Mistakes and How to Prepare

Successfully navigating a congressional investigation requires a multifaceted mastery of the facts at issue, careful consideration of collateral political events, and crisis communications.

Here are some of the more common mistakes we have observed:

- **Facts:** Failure to identify and verify the key facts at issue;
- **Message:** Failure to communicate a clear and compelling narrative;
- **Context:** Failure to understand and adapt to underlying dynamics driving the investigation;
- **Concern:** Failure to timely recognize the attention and resources required to respond;
- **Legal:** Failure to preserve privilege and assess collateral consequences;
- **Rules:** Failure to understand the rules of each committee, which can vary significantly; and
- **Big Picture:** Failure to consider how an adverse outcome can negatively impact numerous other legal and business objectives.

The consequences of inadequate preparation can be disastrous on numerous fronts. A keen understanding of how congressional investigations differ from traditional litigation and even Executive Branch or state agency investigations is therefore vital to effective preparation. The most successful subjects of investigations are those that both seek advice from experienced counsel and employ multidisciplinary teams with expertise in government affairs, media relations, e-discovery, and the key legal and procedural issues.

Gibson Dunn lawyers have extensive experience in both running congressional investigations and defending targets of and witnesses in such investigations. If you or your company become the subject of a congressional inquiry, or if you are concerned that such an inquiry may be imminent, please feel free to contact us for assistance.

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[1] *Barenblatt v. United States*, 360 U.S. 178, 187 (1957).

[2] *See Wilkinson v. United States*, 365 U.S. 399, 408-409 (1961); *Watkins v. United States*, 354 U.S. 178, 199-201 (1957).

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- [3] Michael D. Bopp, Gustav W. Eyler, & Scott M. Richardson, *Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations*, 25 *Corn. J. of Law & Pub. Policy* 453, 456 (2015).
- [4] *Id.* at 456.
- [5] *See* H.R. Res. 6, 116th Cong. § 103(a)(1) (2019).
- [6] Consistent with past practice, Gibson Dunn will release a client alert outlining the specific subpoena rules for each committee as soon as they become available. *See, e.g.*, Michael D. Bopp, F. Joseph Warin, Trent J. Benishek, & Alexander W. Mooney, *The Power to Investigate: Table of Authorities of House and Senate Committees for the 115th Congress*, <https://www.gibsondunn.com/the-power-to-investigate-table-of-authorities-of-house-and-senate-committees-for-the-115th-congress/>.
- [7] *See* 165 Cong. Rec. H1216 (Jan. 25, 2019) (statement of Rep. McGovern).
- [8] Bopp, *supra* note 3, at 457.
- [9] *Id.* at 456-57.
- [10] *Id.* at 457.
- [11] *Id.*
- [12] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504-05 (1975).
- [13] Bopp, *supra* note 3, at 458.
- [14] *Id.* at 459.
- [15] *Id.* at 458.
- [16] Gibson Dunn will detail these rules when they are finalized in an upcoming publication. *See supra* note 6.
- [17] Bopp, *supra* note 3, at 460 (citing *Anderson v. Dunn*, 19 U.S. 204, 228 (1821)).
- [18] *Id.*
- [18] *Id.* at 466.
- [20] *Id.* at 461.
- [21] *See* 2 U.S.C. §§ 192 and 194.
- [22] Bopp, *supra* note 3, at 462.

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- [23] *See* 2 U.S.C. § 194.
- [24] Bopp, *supra* note 3, at 467.
- [25] *See* 2 U.S.C. §§ 288b(b) and 288d.
- [26] Bopp, *supra* note 3, at 465.
- [27] *Id.*
- [28] *See* 165 Cong. Rec. H30 (Jan. 3, 2019) (“If a Committee determines that one or more of its duly issued subpoenas has not been complied with and that civil enforcement is necessary, the BLAG, pursuant to House Rule II(8)(b), may authorize the House Office of General Counsel to initiate civil litigation on behalf of this Committee to enforce the Committee’s subpoena(s) in federal district court.”) (statement of Rep. McGovern).
- [29] *Barenblatt*, 360 U.S. 109, 126 (1959).
- [30] *Watkins*, 354 U.S. at 198.
- [31] *See id.* at 197–98.
- [32] *See, e.g., Perry v. Schwarzenegger*, 91 F.3d 1147, 1163 (9th Cir. 2009).
- [33] *See Quinn v. United States*, 349 U.S. 155, 163 (1955).
- [34] *See Fisher v. United States*, 425 U.S. 391, 409 (1976).
- [35] *See United States v. Doe*, 465 U.S. 605, 611 (1984).
- [36] *See* 18 U.S.C. § 6002; *Kastigar v. United States*, 406 U.S. 441 (1972).
- [37] *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997).
- [38] *See* H.R. Res. 6, 116th Cong. § 103(a)(1) (2019).
- [39] Cong. Rec., *supra* note 7.
- [40] *See* H.R. Res. 6, 116th Cong. § 104(f)(1)(A) (2019).
- [41] This committee was previously named the House Select Committee on Energy Independence and Global Warming. Republicans disbanded the committee when they regained control of the House in 2011.

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*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 usually work or the following lawyers in the firm's Congressional Investigations group in Washington, D.C.:*

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