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THE POWER TO INVESTIGATE: TABLE OF AUTHORITIES OF HOUSE AND SENATE COMMITTEES FOR THE 116TH CONGRESS

To Our Clients and Friends:

For the fifth successive Congress, Gibson Dunn is pleased to release a table of authorities that summarizes the various, and, in many instances, expanding investigative authorities and powers of each House and Senate committee. We believe that understanding the full extent of a committee's investigative arsenal is crucial to successfully navigating a congressional investigation.

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. If a subpoena recipient refuses to comply, committees may resort to contempt proceedings. As a result, the failure to comply with a subpoena and adhere to committee rules during an investigation may have severe legal and reputational consequences. As we explained in a client alert issued earlier this year, however, there are defenses to congressional subpoenas, including challenging a committee's jurisdiction, asserting attorney-client privilege and work product claims, and raising constitutional challenges.[1]

Committees may adopt their own procedural rules for issuing subpoenas, taking testimony, and conducting depositions, though in the House, general deposition procedures applicable to all committees are provided for in the House Rules and subject to regulations issued by the chair of the Committee on Rules. Each committee may reissue and if it chooses alter its rules at the commencement of each Congress.

House and Senate committees adopted their rules for the 116th Congress earlier this year. We have highlighted noteworthy changes below. It is important to remember that, in addition to the rules detailed in our table of authorities, the committees are also subject to the rules of the full House or Senate.

Some items of note:

House:

- While all House Committee chairs (except Rules) have the authority to order the taking of a deposition,[2] the following thirteen committees fully empower their chairs to unilaterally issue a subpoena. Although the Ranking Member cannot block the subpoena, he or she usually must either be consulted or given notice prior to the subpoena being issued. Several of these committees require such notice to occur 24 to 72 hours before the subpoena is issued.[3]

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- Agriculture
 - Budget
 - Education and Labor
 - Energy and Commerce
 - Financial Services
 - Foreign Affairs
 - Homeland Security
 - House Administration
 - Judiciary
 - Oversight and Reform
 - Science, Space, and Technology
 - Select Intelligence
 - Ways and Means
- In the 115th Congress, the House required (with limited exceptions) that one or more Members of Congress be present during a deposition. The House rules for the 116th Congress have eliminated this requirement, which may result in an increase in the use—or at least threatened use—of depositions as an investigative tool.[4]
 - The House Rules Committee’s new regulations governing depositions by committee counsel now allow for immediate overruling of objections raised by a witness’s counsel and immediate instructions to answer, on pain of contempt.[5] These regulations appear to eliminate the witness’s right to appeal rulings on objections to the full committee without risking contempt (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 chair could rule on an objection.[6]
 - The Rules Committee’s deposition regulations also now expressly allow for depositions to continue from day to day[7] and permit, with notice from the chair, questioning by members and staff of more than one committee.[8]
 - Finally, the Rules Committee’s deposition 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.[9]

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Senate:

- The Permanent Subcommittee on Investigations remains the only Senate body to permit the Chair to issue a subpoena without the consent of the Ranking Member.
- The Committees on Agriculture, Nutrition, and Forestry; Commerce, Science, and Transportation; Homeland Security and Governmental Affairs; Small Business and Entrepreneurship; and Veterans' Affairs permit the chair to issue a subpoena so long as the Ranking Member does not object within a specified time period. Additionally, the Committee on Health, Education, Labor, and Pensions may, by a majority vote, delegate the power to issue subpoenas to the chair, subcommittee chair, or to the chair's designee.
- As in the last Congress, seven Senate bodies have received Senate authorization to take depositions: Judiciary, the Senate Committee on Homeland Security and Governmental Affairs and its Permanent Subcommittee on Investigations receive the authority to do so each Congress from the Senate's funding resolution.^[10] The Aging and Indian Affairs Committees were authorized by S. Res. 4 in 1977. 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. Of these, staff is expressly authorized to take depositions except in the Indian Affairs and Intelligence Committees. The Senate's view appears to be that Senate Rules do not authorize staff depositions pursuant to subpoena. Hence, Senate committees cannot delegate that authority to themselves through committee rules. It is thus understood that such authority can be conferred upon a committee only through a Senate resolution.^[11]
- The Judiciary Committee remains the only committee to require a member to be present for a deposition. This requirement may be waived by agreement of the Chair and Ranking Member.
- The Committees on Agriculture, Commerce, and Foreign Relations authorize depositions in their rules. However such deposition authority has not been expressly authorized by the Senate and, hence, it is not clear whether appearance at a deposition can be compelled.
- The Small Business and Entrepreneurship Committee rules no longer authorize depositions.

Our table of authorities is meant to provide a sense of how individual committees can compel a witness to cooperate with their investigations. But each committee conducts congressional investigations in its own particular way, and investigations vary materially even within a particular committee. While our table provides a general overview of what rules apply in given circumstances, it is essential to look carefully at a committee's rules to understand specifically how its authorities apply in a particular context.

Gibson Dunn lawyers have extensive experience defending targets of and witnesses in congressional investigations. They know how investigative committees operate and can anticipate strategies and moves in particular circumstances because they also ran or advised on congressional investigations when

they worked on the Hill. If you have any questions about how a committee’s rules apply in a given circumstance, please feel free to contact us for assistance. We are available to assist should a congressional committee seek testimony, information or documents from you.

Table of Authorities of House and Senate Committees:

<https://www.gibsondunn.com/wp-content/uploads/2019/07/Power-to-Investigate-Table-of-Authorities-House-and-Senate-Committees-116th-Congress-07.2019.pdf>

[1] *See Investigations in the 116th Congress A New Landscape and How to Prepare*, https://www.gibsondunn.com/investigations-in-the-116th-congress-a-new-landscape-and-how-to-prepare/#_edn6.

[2] *See* H.R. Res. 6, 116th Cong. § 103(a)(1) (2019).

[3] The House Transportation and Infrastructure Committee allows for unilateral issuance of a subpoena “[i]f a specific request for a subpoena has not been previously rejected by either the Committee or subcommittee.” Rule IV(d)(1).

[4] *See* H.R. Res. 6, 116th Cong. § 103(a)(1) (2019).

[5] *See* 165 Cong. Rec. H1216 (Jan. 25, 2019) (116th Congress Regulations for Use of Deposition Authority).

[6] *Id.*

[7] The regulations provide that deposition questions “shall be propounded in rounds” and that the length of each round “shall not exceed 60 minutes per side” with equal time to the majority and minority. *See supra* at note 4. The regulations, however, do not expressly limit the number of rounds of questioning. In this manner, they differ from the Federal Rules of Civil Procedure which expressly limit the length of depositions. *See* Fed. R. Civ. P. 30(d)(1) (“Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours.”).

[8] *See supra* at note 4.

[9] *Id.*

[10] *See* S. Res. 70, § 13(e) (2019) (Judiciary); *id.* § 12(e)(3)(E) (Homeland Security).

[11] *See* Jay R. Shampansky, Cong. Research Serv., 95-949 A, Staff Depositions in Congressional Investigations 8 & n.24 (1999); 6 Op. O.L.C. 503, 506 n.3 (1982). The OLC memo relies heavily on the argument that the Senate Rules never mentioned depositions at that time and those rules still do not mention depositions today.

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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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