

When Congress Hauls In Your CEO

Remember that your insurance policies may cover the costs of a defense.

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As the Democrats settle in to increased majorities in Congress, it is already clear the changed political landscape will result in intensified congressional oversight, particularly involving the current financial crisis and the business practices associated with it.

This presents heightened risks for individuals and companies that may become entangled in a congressional investigation. It is therefore imperative that companies at risk adopt prudent insurance strategies to recover attorney fees and absorb potential liabilities that may later flow from the investigation.

Evidence of Congress' aggressiveness is already manifest in key House and Senate committees. For example, Sen. Joseph Lieberman (I-Conn.), chairman of the Senate Homeland Security and Government Affairs Committee, announced a new ad hoc subcommittee on contracting oversight, presaging increased oversight of procurement fraud, especially in defense. The new "Oversight Plan" of the House Oversight and Government Reform Committee—traditionally the House's investigative spearhead—calls for investigation of the causes of the current credit and foreclosure crisis as well as the administration of the various government relief initiatives. The committee's investigative efforts, moreover, will not be limited to the financial sector; the committee has set forth a broad agenda that includes government contracting, food and drug safety, and consumer protection.

So while financial institutions—including mortgage brokers and servicers, hedge funds, securitizers, credit card providers, and insurers—will likely take center stage in the near future, congressional oversight likely will cut a wide swath through a range of companies during the 111th Congress.

For companies that could be targets, it is essential to understand the unique characteristics—and risks—of a congressio-

nal investigation. It is also essential to implement a comprehensive and proactive strategy that ensures that a company's management team, in-house legal department, risk management department, and outside defense and coverage counsel operate in concert.

A SUDDEN ONSLAUGHT

The sudden onslaught of a congressional investigation can be overwhelming. Within hours of a news story, a company may be faced with a committee's "requests" for documents and testimony, backed by the thinly veiled threat of a subpoena and accompanied by a press conference where members of Congress excoriate company officials.

Within days, company officials may confront the bright lights and withering pressure of a nationally televised hearing where they must endure public accusations of legal violations without the ability to present a meaningful defense.

As companies quickly learn, there are practically no limits to Congress' powers to investigate. Moreover, the procedural protections in executive branch investigations and lawsuits—such as rules of evidence and the attorney-client privilege—do not apply in congressional investigations. An errant response to a question can subject a witness to a criminal investigation for perjury, while the failure to produce all responsive documents risks charges of obstruction of justice.

Compounding those problems is the risk of a parallel government enforcement action exposing the company or its officials to civil or criminal liability. Although the first inquiry a company faces may be a letter from a congressional committee, additional claims, lawsuits, and investigations often follow. Statements by company officials during hearings almost certainly will be admissible in subsequent legal proceedings, and committees frequently post produced company documents on their Web sites. Thus, congressional investigations provide fodder for shareholder lawsuits or other efforts to impose civil liability. Criminal liability could also loom if a Justice Department investigation or

state enforcement proceeding is initiated. Federal or state regulatory agencies, or state attorneys general, may also pursue their own investigations.

The costs of defending against a congressional investigation can be substantial, particularly where the allegations can have a devastating impact on the company's reputation or share value and where the company must engage outside counsel to deal with a panoply of potential liability. It is therefore prudent for companies to insulate themselves from these costs before an investigation starts.

PROTECTING INSURANCE RIGHTS

An important but often overlooked component of a defense strategy in congressional investigations is protecting and securing rights under insurance policies. Policy-holders often fail to realize that their policies may provide coverage for the costs of responding to a government investigation or lawsuit.

The risk of government investigations should be considered during a company's insurance renewal process. For example, when purchasing insurance, companies can negotiate a broader definition of "claim" to include investigations. Doing so, however, will come with costs, potentially in higher premiums and giving notice to an insurer earlier in the investigation process.

When faced with an investigation or lawsuit, a company's defense counsel and coverage counsel should coordinate efforts. For example, any initial information-gathering process should include collecting and analyzing all potentially applicable insurance policies. For congressional investigations, the most likely insurance to provide coverage are directors-and-officers or errors-and-omissions policies. D&O insurance could be implicated by the very fact that your company's directors and officers are the individuals most likely to testify before Congress and could be personally liable as a result of doing so. For financial institutions and other companies providing professional services, E&O policies are another source because any congressional inquiry is almost certain to focus on the provision of and protections associated with those services. Although D&O or E&O are the most promising policies, companies should analyze their entire risk management portfolio, because coverage may be found in unusual places and 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 recovery. Particularly salient exclusions for a client under investigation are the fraud/improper personal profits exclusion in most D&O and E&O policies and the "expected and intended" exclusion in most commercial general liability policies. Note, however, that most courts require more than knowledge of potentially harmful conduct to lose coverage under the "expected and intended" exclusion. Instead, the policy-holder must have actual knowledge that the eventual injury would result.

Remember that policyholders often must satisfy policy conditions to secure coverage. For example, a company must determine as soon as possible when it is required to provide its insurer with notice of an actual or potential claim. The policy may also require a company to obtain prior consent for key decisions, such as choosing defense counsel and negotiating a settlement. Policy-holders are also typically required to afford their insurer an opportunity to "associate" or "cooperate" in the defense of the claim. To ensure insurance assets are used effectively, companies must consider these implications early and often.

Still, because a company's paramount objective is to minimize or avoid liability, there may be times when the best way to maximize an insurance recovery cannot be pursued. For example, in some policies, a formal written document, such as a subpoena, is necessary to satisfy the definition of "claim." Despite this prerequisite, a company may elect to jeopardize its coverage by cooperating with Congress and resolving the matter informally without the issuance of an investigative document.

Fortunately, defense and coverage counsel, working in tandem, usually can develop an approach that avoids such conflicts and does not compromise potential defenses or interfere with a company's other business objectives.

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