Transforming NAPABA In-House and Private Practice Counsel into an International ‘Go-To’ Bodyguard and Consigliore: Anti-Corruption in China

NAPABA members excel because they (i) bring unique multi-cultural attributes to the legal practice, and (ii) deliver practical, actionable and integrated business and legal solutions. It is critically important that all NAPABA members combine interdisciplinary skills that cut across the regulatory, compliance, corporate, litigation, and enforcement spectrums, especially in complex international settings. This two-part training session uses international “bet the company” scenarios to apply the integrated spectrum of regulatory, compliance, corporate, litigation, and enforcement skills in selected case studies that focus on the four highest risk factors to an international operation. The scenarios are based on real life cases arising from China, a rapidly changing business ecosystem known for corruption, challenging in-house and outside counsel teams to protect the business. Each attendee will be a participant, contributor and beneficiary. Audience members may be assigned CEO, COO, HR, in-house and external counsel roles. The panel will close with a focus on anti-corruption tools, SOPs, checklists, and perspectives to enhance NAPABA’s in-house and external counsel’s problem-solving effectiveness. These “take-away” lessons will be ongoing reference points for NAPABA members when dealing with multi-dimensional problems that require integrated solutions.

Moderator:
Nicholas V. Chen, Managing Partner, Pamir Law Group
NAPABA International Committee

International Symposium

CLE Program Brief

Master Class Training Workshop

“Transforming NAPABA In-House and Private Practice Counsel into an International ‘Go-To’ Bodyguard and Consigliere: Anti-Corruption in China”

Nicholas V. Chen

Pamir Law Group

November 6, 2014
Program Brief

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Timed Agenda

Part 1: (25 Minutes)

The initial part of the workshop is a “crash course” to provide a last mile “boots on the ground” view of the major challenges legal professionals face when practicing in an increasingly corrupt business/legal ecosystem.

This initial part will include:

- A perspective on China’s risk/reward proposition from a 40+ year market-veteran
- Snapshot of the current anti-corruption campaign and its implications to every business
- A deep-dive nutshell on the real role of the China CXO/GC/Counselor and how it differs completely from the United States and elsewhere
- The growing societal Trust Deficit in China
- Ugly realities and challenges facing foreign parties seeking law enforcement protection on the ground
- Brief summary of applicable local criminal and civil enforcement laws since international compliance regulations are silent on addressing the actual on the ground threats to business operations
- What practical responsive tools and best practices are available to CXO’s/GC’s
- Whether foreign laws such as FCPA are directly applicable or practically useful to the CXO/GC when faced with widespread gaming of the system targeting key executives, procurement processes, sales/distribution channels and government permitting and approval systems
- How CXOs professionally trained to operate and implement a business in a basically lawful business environment can cope when the business ecosystem is increasingly criminal and toxic.

The above crash course will set the stage for the following interactive exercise.
Part 2: (25 Minutes)

Case studies will be presented to collectively analyze and design both reactive and proactive/preventive tactics and strategies, best practices and solutions. We expect the workshop to produce practical lessons to help in-house and external counsel expand their multi-disciplinary perspective and provide a foundation for finding and creating effective solutions when confronted with common China scenarios.

The case study scenarios include:

- **Due Diligence:**

  In any given year, there may be approximately 50+ China-based businesses, listed on an international stock exchange, that are delisted for various types of securities fraud. In each case, a major international law firm and/or accounting firm has completed a thorough 360 degree western-style due diligence process. Why have these cases resulted in so many civil and criminal and class action litigations, including suits against the legal, accounting and financial professionals?

  New-to-China mid-size North American chemical company is in discussions to establish a joint venture with a local partner who offers to take care of everything in China because they know everybody and how everything works. The company is preparing to conduct formal due diligence and a preliminary documentary review suggests that everything is in order. What is the best practices approach? The potential local partner assures the company that all its environmental (and other) approvals are in order, and shows company representatives’ multiple plaques and certificates from myriad organizations awarded for their extraordinary commitment to environmental protection, government compliance and community citizenship.
**Compromised Key Person:**

Electronics manufacturing MNC establishes a second inland cost-down facility in a high technology park operated by the local provincial government. The MNC empowers a senior local manager to oversee the project with little direct involvement from China or global headquarters, other than the periodic reports to the CEO. The senior local manager resigns suddenly to spend more time with his family just before the company starts to repay a special loan offered by the provincial government as an investment incentive. The manager’s replacement notices that loan re-payments are considerably higher than originally reported, which triggers an investigation.

Head of research at a life-sciences MNC retires after three decades of service with a generous compensation and non-compete package. The MNC uses a sophisticated knowledge compartmentalization system to prevent IP leakage. The head of research is one of only a handful of people with access to and an understanding of all the company’s trade secrets. Three months after his retirement he takes a teaching position at a higher education institution that takes 95% of its funding and sends 90% of its graduates to MNC’s major competitor. Top management at headquarters is concerned about the situation.

**Supply Chain: Sales and Distribution:**

After tasking a successful local senior manager with building and growing a sales and distribution network, an MNC China subsidiary faces an unexplainable plateau in sales, followed by a sudden steep decline. The company is the only authorized distributor of a particular commodity in China which is a key raw material for several industries.

**Vendor Selection:**

MNC establishes a new (manufacturing, distribution, service) operation in China and seeks to identify, select, and evaluate/verify local vendors, contractors and service providers.
Government Relations:

An MNC applies for approval of its wholly-foreign-owned subsidiary/Joint venture and in the application process the local authorities indefinitely delay approvals. Alternatively, senior manager at recently established China operation faces problems obtaining government approvals/permits and struggles to deal with corrupt uncooperative officials at several levels.

An international company CFO was told by the local logistics manager in China that if shipments were delivered to “Port A,” there was a 50% chance of paying customs duties, whereas if they were delivered to “Port B,” there was a 100% chance of paying customs duty. The CFO chose “Port A.” Little did he know that the possibility of duty free delivery was because the local logistics manager knew somebody at “Port A” who was bribing customs officials unbeknownst to the company. Later, when the company wanted to fire the local logistics manager, he threatened to disclose the bribes to the local authorities unless he was given a favorable severance package.

Supply Chain: Procurement

Mid-level manager at the procurement department of a foreign MNC in China is terminated due to poor performance and inability to cooperate with colleagues. When informed about his termination, he threatens to inform the authorities about multiple instances of kickbacks, self dealing and other forms of commercial bribery by employees at all levels of the procurement department unless he is provided an unusually high severance package. The head of procurement informs the board that this is how things work in China and the company should fulfill the manager’s request to avoid trouble with the authorities. The board must now decide its next step.

Part 3: (5 Minutes)

The session will close with a focus on anti-corruption tools, SOPs, checklists and perspectives to enhance NAPABA’s in-house and external counsel’s problem-solving effectiveness. These “take-away” lessons will be ongoing reference points for NAPABA members when dealing with multi-dimensional problems that require integrated solutions.
## Anti-Corruption Laws of China and Taiwan

<table>
<thead>
<tr>
<th>China</th>
<th>Taiwan</th>
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<tbody>
<tr>
<td><strong>Commercial Bribery</strong></td>
<td>Taiwan law covering corruption and bribery laws span numerous statutes, with the Criminal Code, Anti-Corruption Act, Trade Secrets Act and Money Laundering Control Act being the main pieces of legislation. Bribery is widely defined as basically using monetary interests to influence judgment of government personnel or persons entrusted with governmental or quasi-governmental authority. Terms such as “commissions,” “kickbacks,” “bid-fixing” and “influence-peddling” all fall under bribery in Taiwan law. The Anti-Corruption Act distinguish between three categories of punishment:</td>
</tr>
<tr>
<td>Definition</td>
<td>According to the PRC Criminal Code Section 163, commercial bribery refers to:</td>
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<tr>
<td>“Any staff of a company, an enterprise or of any entity takes advantage of his/her position to illegally seek or accept any property from any other person and make profits for that person as return; or any staff of a company, an enterprise or of any entity who, in the course of economic activities, takes advantage of his/her position to accept any rebate or commission for his/her own in violation of the state’s regulations.”</td>
<td>1. Category 1 (Most serious):</td>
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<tr>
<td></td>
<td>a. Accepting unjust enrichment in exchange for violating official duties (by either act or omission)</td>
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<tr>
<td></td>
<td>b. Theft or misappropriation of public property</td>
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<tr>
<td></td>
<td>c. Demanding or receiving anything of value through coercion, extortion, conversion or collection</td>
</tr>
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<td></td>
<td>d. Kickbacks or commissions from public procurement projects</td>
</tr>
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<td></td>
<td>e. Using government vehicles to transport contraband</td>
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<td></td>
<td>2. Category 2:</td>
</tr>
<tr>
<td></td>
<td>a. Receiving bribes or unjust enrichment in return for being influenced in performance of official acts</td>
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<tr>
<td></td>
<td>b. Misusing public funds</td>
</tr>
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<td></td>
<td>c. Abusing legal authority to fraudulently obtain money or property</td>
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<td>3. Category 3:</td>
</tr>
<tr>
<td></td>
<td>a. Frequently used in cases of attempted bribery</td>
</tr>
<tr>
<td></td>
<td>b. Used against suspects who make or seek bribes on behalf of others</td>
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<td></td>
<td>c. Giving bribes to officials in exchange for acts outside of their official authority</td>
</tr>
<tr>
<td>Penalties</td>
<td>The Anti-Corruption Act provides for the following Penalties:</td>
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<tr>
<td>The PRC Criminal Code Section 163 and other judicial explanations provide for the following Penalties:</td>
<td>For bribe-takers whose offenses fall under Category 1, Article 4 prescribes:</td>
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<tr>
<td>For bribe(s) valued between RMB 5,000-20,000 (USD 800-3,200):</td>
<td>• 10 years to life in prison</td>
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<tr>
<td>• Maximum 5 years in prison</td>
<td>• Maximum fine of NTD 100 million (USD 3 million)</td>
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<tr>
<td>• Confiscation of bribes and illegally gained benefits</td>
<td>For bribe-takers whose offenses fall under Category 2, Article 5 prescribes:</td>
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<tr>
<td>• Fines (no limit)</td>
<td>• Minimum 7 years in prison</td>
</tr>
<tr>
<td>For bribe(s) valued over RMB 100,000 (USD 16,130):</td>
<td>• Maximum fine of NTD 60 million (USD 1.9 million)</td>
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<tr>
<td>• 5 to 15 years in prison</td>
<td>For bribe-takers whose offenses fall under Category 3, Article 6 prescribes:</td>
</tr>
<tr>
<td>• Confiscation of bribes and illegally gained benefits</td>
<td>• Minimum 5 years in prison</td>
</tr>
<tr>
<td>• Fines (no limit)</td>
<td>• Maximum fine of NTD 30 million (USD 926,000)</td>
</tr>
<tr>
<td>For bribe-givers who target Taiwan Government Officials, Article 11 prescribes:</td>
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<tr>
<td>• Between 1-7 years in prison</td>
<td>• Between 1-7 years in prison</td>
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<tr>
<td>• Maximum fine of NTD 3 million (USD 92,000)</td>
<td>• Maximum fine of NTD 3 million (USD 92,000)</td>
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<tr>
<td><strong>Embezzlement</strong></td>
<td>Definition</td>
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<td>”Any staff of a company, an enterprise or of any entity takes advantage of his position to misappropriate the entity’s funds for himself/herself or to lend the unit’s funds to any other person, where the amount involved is relatively large and the staff fails to return the funds within three months or the funds are returned within three months but the amount involved is relatively large and is used for profit-seeking or illegal activities.”</td>
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<tr>
<td><strong>Penalties</strong></td>
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<td>The PRC Criminal Code Section 272 and other judicial explanation provide for the following Penalties:</td>
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<td>For embezzlement valued above RMB 5,000-10,000 (USD 800-1,613):</td>
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<td></td>
<td>• Maximum 5 years in prison</td>
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<td>• Confiscation of property and illegally gained benefits</td>
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<td></td>
<td>For embezzlement valued over RMB 100,000 (USD 16,130):</td>
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<table>
<thead>
<tr>
<th><strong>Trade Secret Violations</strong></th>
<th>Definition</th>
<th>According to the PRC Criminal Code Section 219, trade secret violation refers to:</th>
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<tbody>
<tr>
<td></td>
<td>”A person who commits any of the following acts infringing upon any trade secret and causes heavy losses to the owner of the trade secret by:</td>
<td>Article 10 of the Act defines that a trade secret violation is any of the following acts:</td>
</tr>
<tr>
<td></td>
<td>1. Acquiring any person’s trade secret by stealing, lure, force or any other improper means;</td>
<td>1. &quot;To acquire a trade secret by improper means;</td>
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<td></td>
<td>2. Disclosing, using or permitting others to use any trade secret acquired by means specified in Item 1;</td>
<td>2. To acquire, use, or disclose a trade secret as defined in the preceding item knowingly or unknowingly due to gross negligence;</td>
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<td>3. Disclosing, using or permitting any other person to use any trade secret held by him/her in violation of relevant agreement or the trade secret owner’s requirement of keeping the trade secret confidential.</td>
<td>3. To use or disclose an acquired trade secret knowing, or not knowing due to gross negligence, that it is a trade secret as defined in item 1;</td>
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<td>4. A person acquires uses or discloses any other person’s trade secrets where he/she is aware or should be aware of the above listed acts.”</td>
<td>4. To use or disclose by improper means a legally acquired trade secret; or</td>
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<td>5. To use or to disclose without due cause a trade secret to which the law imposes a duty to maintain secrecy.”</td>
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<td>According to Article 1 of the Trade Secrets Act [last amended 2013/01/30], a trade secret is:</td>
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<td>”any method, technique, process, formula, program, design, or other information that may be used in the course of production, sales, or operations, and also meet the following requirements:</td>
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<tr>
<td></td>
<td>1. It is not known to persons generally involved in the information of this type;</td>
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<td></td>
<td>2. It has economic value, actual or potential, due to its secretive nature; and</td>
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<td></td>
<td>3. Its owner has taken reasonable measures to maintain its secrecy.”</td>
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</tbody>
</table>
**Penalties**

The PRC Criminal Code Section 219 and other judicial explanation provide for the following Penalties:

For losses suffered by the trade secret owner valued above RMB 500,000-2,500,000 (USD 80,000-403,225):
- Maximum 3 years in prison
- Fines

For losses suffered by the trade secret owner valued above RMB 2,500,000 (USD 403,225):
- 3 to 7 years in prison
- Fines

**Article 13-1 of the Trade Secrets Act** provides for criminal Penalties when a person commits a trade secret violation for the "purpose of an illicit gain for himself/herself or for a third person, or inflicting a loss on the holder of a trade secret" under the below circumstances:

1. Acquiring a trade secret by an act of theft, embezzlement, fraud, threat, unauthorized reproduction, or other wrongful means, or using or disclosing a trade secret so acquired.
2. Committing an unauthorized reproduction, usage, or disclosure of a trade secret known or possessed.
3. Failing to delete or destroy a possessed trade secret as the trade secret holder orders, or disguising it.
4. Any person knowingly acquires, uses or discloses a trade secret known or possessed by others is under circumstances prescribed in the preceding 3 subparagraphs.

Violators are subject to the following Penalties, in addition to other civil remedies:
- Maximum 5 years in prison
- Fine between NTD 1 million and 10 million (USD 33,467 to 334,670)

Additionally, Article 13-2 provides that:

"Any person committing a crime prescribed in the first paragraph of the preceding article for the purpose of using the trade secret in foreign jurisdictions, mainland China, Hong Kong, or Macau" shall be subject to:
- Between 1 to 10 years in prison
- Between NTD 3 million and 50 million

Finally, Articles 13-1 and 13-2 also provide that if the gains by an offender exceed the maximum fine, the fine may be increased to be within 2 to 10 times of the gains.

**Tax Evasion**

Definition

According to the PRC Criminal Law Section 201, tax avoidance refers to:

"Any taxpayer files false tax returns by cheating or concealment or fails to file tax returns, and the amount of evaded taxes is relatively large and accounts for more than 10 percent of payable taxes, or the amount is huge and accounts for more than 30 percent of payable taxes; any withholding agent fails to pay or fails to pay in full the withheld or collected taxes by cheating or concealment, and the amount is relatively large; or where either of the acts described in the preceding two paragraphs is committed many times without punishment, the amount shall be calculated on an accumulated basis."

Various Taiwan laws refer to tax avoidance as along the lines of "omission or evasion of taxable income." Taiwan has a noticeable lack of a central law or act regarding tax evasion and relies on the nebulous phrase “various tax acts and regulations governing tax evasion” to encompass its tax laws.

Penalties

The PRC Criminal Code Section 201 and other judicial explanation provide for the following Penalties:

For those who avoided paying tax the amount of which is more than RMB50,000 (USD8,000) and more than 10% of the tax payable by such person:
- Maximum 3 years in prison
- Fines

For those who avoided paying tax the amount of which is huge (the measure in dollar amounts varies

There are 43 Taiwan laws explicitly dealing with tax, with others touching upon tax as well. Depending on the tax avoided, penalties and corresponding laws vary.
| **Contract Fraud** | Definition | According to the PRC Criminal Law Section 224, contract fraud refers to:

> "Whoever, for the purpose of illegal possession, uses one of the following means during signing or executing a contract to obtain property and goods of the opposite party by fraud:

1. Sign a contract in the name of a made-up unit or under somebody else's name;
2. Use forged, altered, or invalid negotiable instruments or other false certificates of property rights as guaranties;
3. Fulfill small-amount contracts or partially fulfill the contract, instead of actually fulfilling the contract, to inveigle the opposite party into continuing to sign and fulfill the contract;
4. Go into hiding after receiving goods, payment, advance payment, or property as guaranty from the opposite party;
5. Defraud the opposite party's property through other means. |
| | Penalties | The PRC Criminal Code Section 224 and other judicial explanation provide for the following Penalties:

For those who obtain property the amount of which is more than RMB5,000 (USD800):
- Maximum 3 years in prison
- Fines

For those who obtain property the amount of which is more than RMB50,000 (USD8,000):
- Minimum 3 years, Maximum 10 years in prison
- Fines

For those who obtain property the amount of which is more than RMB200,000 (USD31,700):
- Maximum life in prison
- Fines |
| **Official Bribery** | Definition | Section 389 of the PRC Criminal Code defines a bribe as:

> "An act of giving state functionaries articles of property in order to seek illegitimate gain" including kickbacks or "service charges of various types."

**Article 2 of the Interpretations of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues Concerning Application of Law for Handling Criminal Cases of Bribe Offering** (the “Interpretations”) a “serious circumstance” of bribery when:

1. The bribery amount is between CNY200,000 to CNY1,000,000;
2. The bribery amount is between CNY100,000 to CNY200,000 while any of the following circumstances occurs:
   - (1) bribing more than three persons;
   - (2) bribing for illegal gains;
   - (3) bribing state functionaries who are responsible for supervising the food industry, pharmaceutical industry, safety in production and environmental protection, etc. for the purpose of conducting illegal or criminal activities, which seriously harms the livelihood of the people and infringes upon people’s lives or property; or |
|  | Penalties | See Commercial Bribery above. |
(4) bribing any state functionary working at an administrative law enforcement agency or judicial authority, which impedes administrative enforcement or judicial justice;

3. Other serious circumstances.

**Article 4 of the Interpretations** defines an instance of bribery as a “particularly serious circumstance” when:

1. The bribery amount is over CNY1,000,000;
2. The bribery amount is over CNY500,000 to CNY1,000,000 while any of the following circumstances occurs:
   - (1) bribing more than three persons;
   - (2) bribing for illegal gains;
   - (3) bribing state functionaries who are responsible for supervising the food industry, pharmaceutical industry, safety in production and environmental protection, etc. for the purpose of conducting illegal or criminal activities, which seriously harms the livelihood of the people and infringes upon people’s lives or property; or
   - (4) bribing any state functionary working at the administrative law enforcement agency or judicial authority, which impedes fair enforcement or judicial fairness;
3. The bribery causes total direct economic losses over CNY5,000,000; or
4. Other particularly serious circumstances.

### Penalties

**Section 390 of the PRC Criminal Code** provides the following Penalties:

- **For non-“serious” circumstances:**
  - Maximum 5 years of prison
  - Fines

- **For “serious” circumstances or for those who cause “great damage” to state interests:**
  - 5 to 10 years of prison
  - Fines

- **For “extremely serious” circumstances:**
  - Minimum 10 years of prison or life imprisonment
  - Confiscation of property
  - Fines

See **Commercial Bribery** above.
Zhejiang kindergarten needed two years, 133 stamps to open

Staff Reporter  |  2013-10-05  |  13:50 (GMT+8)

A kindergarten in Nanjing, Jiangsu province. (Photo/CFP)
# Responsibilities of General Counsel

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<td>Supply Chain: Procurement</td>
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</table>
Related Government Agencies:

- 中华人民共和国商务部 (MOFCOM)
- 中华人民共和国国家发展和改革委员会 (NDRC)
- 中华人民共和国环境保护部 (MEP)
- 中华人民共和国国家工商行政管理总局 (SAIC)
- 国家税务总局 (SAT)
- 国家质量监督检验检疫总局 (AQSIQ)
- 外汇管理局 (SAFE)
- 中华人民共和国国家统计局 (NBS)
- 中华人民共和国财政部 (MOF)
- 中华人民共和国海关总署 (GACC)
- 中华人民共和国新闻出版总署 (GAPP)
- 中华人民共和国住房和城乡建设部 (MOHURD)
- 中华人民共和国交通运输部 (MOT)
- 中华人民共和国工业和信息化部 (MIIT)
- 国家能源局 (NEA)
- 国务院国有资产监督管理委员会 (SASAC)
- 中华人民共和国教育部 (MOE)
The Business Ecosystem in China Today
The Changed Business Ecosystem: Corruption

- Commercial Bribery
- Tax Avoidance
- Official Bribery
- Sexual Bribery
- Abuse of Power
- Nepotism
- Favoritism
- Illegal Contributions
- Fixed Bidding
- Money Laundering
- Insider Trading
- Embezzlement
- Local Protectionism
- Patronage
- Cronyism
- Price Fixing
- Conflict of Interest
- Unlawful Gratuities

- Trade Secret Theft
- Industrial Espionage
- Trademark Squatting
- Domain Name Squatting
- Passing Off
- Internet Crimes
- Counterfeiting

- Commercial Bribery
- Extortion
- Embezzlement
- Blackmail
- Forgery
- Fraud
- Breach of Trust
- Abuse of Dominant Market Position
- Conflict of Interest
- Fixed Bidding
- Price Fixing
- Tax Evasion
- Money Laundering
- Insider Trading
- Patronage
- Kickbacks
Protecting a Business: Main Sources of Threats and Risks

- Senior Management/Key Person
- Supply Chain: Procurement
- Supply Chain: Sales
- Government Relations
Responsibilities of General Counsel

Corporate
Finance and Banking
Regulatory Approvals
Government Relations
Strategic/Transactional
Dispute Settlement and Enforcement
Supply Chain: Sales
Supply Chain: Procurement
Human Resources/Labor
Intellectual Property Capital Management
Legal Team Management
Is the Anti-Corruption Campaign Real?

“Every Chinese leader in the past half-century has declared wars on corruption, toothless campaigns that often fizzled quickly.”


"After 30-plus years of reform, China has entered deep water. You could say that the easy reforms - the ones that would make everyone happy - have been completed. The tasty meat has been eaten up, what's left are the tough bones that are hard to chew… We should dare to wade into dangerous rapids."

- Xi Jinping in an interview with Rossiya, Russia’s state news channel.

**February 11, 2014**

“The war on corruption is a war of annihilation.”

- Wang Qishan, Head of the Central Discipline Inspection Committee on **March 2014**

As Congress begins its 2014 session, all signs point to an agenda dominated by aggressive congressional investigations. From the implementation of the Affordable Care Act to the conduct of the NSA surveillance program to perennial concerns over financial services regulation, Congress is likely to investigate a wide variety of matters that will impact public and private parties. In this primer, Mayer Brown lawyers discuss the general contours of Congress’s investigative authority and subpoena power. They also provide some practical advice regarding the protections available to the subjects of congressional investigations.
By Hon. David M. McIntosh
Hon. Mark Gitenstein
Sean P. McDonnell

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Understanding Your Rights in Response to a Congressional Subpoena

Most Americans understand that the United States Congress is constitutionally vested with the power to make laws. What is often less well understood—but may be just as important to those who are subject to its jurisdiction—is Congress’s power to investigate matters through the issuance of subpoenas and other compulsory processes. Put simply, Congress can compel the production of documents and sworn testimony from almost anyone at almost any time. And unlike the judicial process overseen by the courts, the congressional system offers relatively few procedural protections for those individuals or companies who find themselves subject to, what founder and early Supreme Court Justice James Wilson called, “the grand inquest of the state.”

As an independent and coequal branch of government, Congress’s investigative power is largely unchecked by the courts, as a matter of constitutional design. Thus, the true limitations upon Congress’s authority are pragmatic and based upon institutional and political power dynamics.

In this article, we discuss the contours of Congress’s investigative authority and subpoena power. We also provide some general advice regarding the protections available to parties that are subject to a congressional investigation. Although this article is intended to provide a basic primer, it is no substitute for a tailored response strategy. Each congressional investigation is different. The strategies and opportunities that are available to a party in a given investigation will be as varied as the matters that the Congress may seek to investigate. For that reason, it is essential that individuals or companies that learn they are subject to a congressional investigation seek out the advice of experienced legal counsel as soon as possible. In addition to the authors, Mayer Brown has a wide array of lawyers with litigation, regulatory, and government expertise and substantial experience representing individuals and corporations that find themselves the targets of congressional investigations.
The Scope of Congress’s Subpoena Power

Congress has long been held to possess plenary authority to investigate any matter that is or might be the subject of legislation or oversight. And as the Supreme Court observed over 35 years ago, this authority includes the power to use compulsory processes, such as the issuance of subpoenas. See Eastland v. U.S. Serviceman’s Fund, 421 U.S. 491, 504 (1975). The scope of Congress’s power “is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” Id. at 504 n.15 (quoting Barenblatt v. U.S., 360 U.S. 109, 111 (1959)). Put another way, although Congress ought not to delve needlessly into the “private affairs” of the citizenry, it has the power to inquire about and investigate any issue “on which legislation could be had.” Id. (quoting McGrain v. Daugherty, 273 U.S. 135, 177 (1927)). So long as Congress stays within this “necessarily broad” grant of constitutional authority, courts have little power to restrain its action. See Id. at 508 (“The wisdom of congressional approach or methodology is not open to judicial veto.”).

As a practical matter, this means that courts generally will not interfere with a congressional subpoena absent a truly opprobrious violation of an individual’s constitutional rights. Indeed, in the entire history of American jurisprudence, courts have sought to limit congressional investigations in only a handful of cases and, there, only in the face of blatant constitutional violations. See, e.g., McSurely v. McClellan, 521 F.2d 1024, 1043 (5th Cir. 1975) (holding that the Fourth Amendment applied to congressional inquiries, and explaining that congressional staff did not have immunity from a civil lawsuit alleging that they participated in an unlawful search and seizure by removing documents from a private residence); see also Exxon Corp. v. FTC, 589 F.2d 582, 590 (D.C. Cir. 1978) (declining to issue an injunction to protect purported trade secrets from congressional subpoena because, “[a]lthough the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members, where constitutional rights are not violated there is no warrant for the judiciary to interfere with the internal procedures of Congress.”)

In sum, the legal authority of Congress to seek and use investigatory information is extremely broad and is subject to only minimal oversight by the courts. Absent clear violations of substantive constitutional rights, there are few formal restraints on congressional action, and recourse to the judiciary for relief from such action is extremely limited.
Protections, Privileges and Procedural Rules

Each chamber of Congress has exclusive authority to determine and construe its own internal procedural rules. U.S. CONST., Art. I, § 5, cl. 2. This authority includes the discretion to apply, construe, and/or waive procedural requirements governing the conduct of congressional investigations. See AFL-CIO v. U.S., 330 F.3d 513, 522 (D.C. Cir. 2003) (explaining that Congress has “broad discretion” to conduct investigative proceedings and to decide what aspects of such proceedings are to be made public). Although it is not uncommon for individual members to make informal requests for information, the true constitutional authority of Congress to investigate using compulsory process is vested in each chamber’s various standing committees. Individual members acting on their own have no ability to issue subpoenas or compel compliance. Those powers are resident solely in the various committees and are governed primarily by committee rules. The procedural protections afforded to responding parties, therefore, will vary depending upon the rules of the committee pursuing the investigation and the goals of that committee’s chairman and other senior members.

Given the wide latitude afforded to committees, strategies for managing congressional investigations generally involve understanding the policy and political purposes of the investigation and engaging committee staff on those issues. Any protections afforded to the responding party will typically be the product of negotiations with committee staff and/or political constraints on the committee. In this section, we discuss the process by which committee investigations generally advance, and we identify some issues that are commonly negotiated between counsel and committee staff, including the availability of legal privileges, the confidentiality of information, and the need for witness testimony.

The Enforcement Process. Congressional investigations often begin informally, with the interested committee or subcommittee first seeking information on a voluntary basis (i.e., by sending a letter request or asking for an informal interview), rather than by issuing compulsory subpoenas. Although there is no legal obligation that a party comply with such a request, it is typically in the responding party’s best interest to do so, except where privileged or other sensitive information is involved, as discussed in more detail below. These informal requests present an important first opportunity for the responding party to shape the views and perceptions of the committee staff. Congressional staff members are required to work on a wide range of issues. They will rely heavily on
a responding party whom they view as trustworthy to educate them on the issues under investigation. In addition, cooperating with an initial request allows the responding party to demonstrate that it is compliant and respectful, favorably influencing the staff and potentially mitigating the risk that members will publicly attack the responding party for noncooperation.

As we noted above, there are few judicial limits placed upon the scope of a congressional investigation. As a practical matter, however, the mechanisms that Congress must use to enforce a subpoena or to sanction a party for contempt are time-consuming and cumbersome, with each escalating step in the process requiring a greater level of political commitment. For example, most committees’ rules authorize their subcommittees or chairpersons (occasionally in consultation with the ranking members) to issue subpoenas requesting documents or information. If a responding party fails to comply with the subpoena, committee rules then typically require a majority vote of the full committee before a resolution of noncompliance may be reported to the parent chamber. This additional requirement operates as a political brake on any committee or subcommittee hastily citing a party for contempt.

If there are insufficient votes in committee to report a resolution of noncompliance to the full chamber, the committee may simply reject the resolution and pursue no further action. If there are sufficient votes in favor, the report must typically then pass from the committee to the parent chamber (either the House or the Senate) to face a floor vote before a resolution of contempt may be issued. The level of support necessary to pass a resolution of contempt by chamber vote is obviously significantly greater than that needed to issue the subpoena in the first instance. In many cases, there will be insufficient interest in the chamber for a resolution of contempt to pass. One wild card in this equation, however, is press coverage. Issues garnering substantial media attention and public interest are much more likely to capture the interest of members and to move quickly through the enforcement process.

Assuming that a resolution of contempt is approved, Congress must then pursue one of three options for actually enforcing its contempt order. First, either chamber may invoke its inherent contempt power by instructing its sergeant-at-arms to arrest the noncompliant party and bring him or her before the chamber’s presiding officer. Theoretically, the chamber is empowered to hold the noncompliant party in the Capitol jail until the end of the legislative session. In practice, however, this practice has long been dormant and has not been
employed by either chamber for over 80 years. See Jurney v. MacCracken, 294 U.S. 125, 147-48 (1935) (addressing the last invocation of the inherent contempt power). Second, the presiding officer of either chamber may refer the matter to the U.S. Attorney for the District of Columbia to pursue criminal contempt proceedings, pursuant to 2 U.S.C. §§ 192, 194. Third, the Senate rules authorize the Senate to initiate a civil action in federal district court, seeking a court-ordered injunction to compel compliance with Senate process. Any person failing to comply with such an order would be subject to contempt of court under traditional judicial processes.

Scope of the Inquiry. Whatever formal enforcement mechanism Congress may ultimately decide to pursue, the process will inevitably require a significant commitment of time, resources, and political will. As a result, members and committee staff generally prefer to resort to formal processes only when they are absolutely necessary, giving the responding party some limited ability to negotiate the scope of an information request (i.e., by seeking to limit the time frame or subject area of the requests). The standard practice, therefore, is for the responding party’s counsel to engage with the committee staff in a negotiation regarding scope, while at the same time still attempting to be reasonable and compliant with the request. In practice, congressional staff members are aware of the reputational costs that the investigative process imposes upon private parties, yet they vigorously pursue documents that they believe may be important to the goals of their investigation.

Legal Privilege and Work Product Protections. One of the most important distinctions between congressional investigations and those conducted by law enforcement agencies is that Congress is not judicially obligated to acknowledge the attorney-client privilege or work product doctrines. Because these privileges are not generally recognized as constitutional guarantees, it is usually within the investigating committee’s discretion to decide on a case-by-case basis whether to recognize the attorney-client privilege or work product doctrine. See, e.g., M. Rosenberg, Report for Congress On Investigative Oversight, Congressional Research Service (1995) at 7. Again, this is often a point of negotiation between the committee and counsel for the responding party. In many cases, privilege concerns can be addressed by counsel persuading committee staff that certain privileged materials are not critical to the investigation, or by negotiating a compromise to provide the factual information to the committee without producing the privileged documents in which the facts may be embedded.
The ability to negotiate protections for privileged information will turn on the facts of the particular investigation, as well as the policy and political purposes motivating the investigation. Obviously, committee staff will be less willing to negotiate with a responding party that they regard as a bad actor or an attractive political target. To maximize the potential for success, therefore, the responding party must work diligently to cultivate credibility with the committee and to allay any concerns that the privilege will be used inappropriately.

It must be noted that there is a fundamental tension between a responding party’s obligation to cooperate with a congressional demand for privileged information and the need to demonstrate resistance to such a demand in order to prevent a voluntary waiver of the privilege for purposes of private litigation. “[I]f a party voluntarily discloses part of an attorney-client conversation, the party may have waived confidentiality—and thus the attorney-client privilege—for the rest of that conversation and for any conversations related to the same subject matter.” Williams & Connolly v. SEC, 662 F.3d 1240, 1243 (D.C. Cir. 2011) (emphasis in original). Thus, although Congress ultimately has the ability to insist upon the production of privileged information, responding parties are advised to strenuously “seek to quash or limit [a congressional] subpoena on all available, legitimate grounds” in order to protect the privilege. See Ethics Opinion No. 288, District of Columbia Bar (1999) (considering an attorney’s ethical obligation to protect client information in the face of a congressional subpoena). Initial strenuous resistance to a congressional demand may help to preserve the privilege in other contexts (including private litigation against third parties) by showing that the disclosure of the privileged information is compulsory, heading off arguments that the privilege has been voluntarily waived. At a minimum, navigating the dual imperative of cooperating with Congress and protecting the privilege will pose a series of difficult strategic decisions for the responding party throughout the Congressional investigation.

**Confidentiality.** Put simply, concerns about the confidentiality or privacy of information will not generally operate to limit the scope of a congressional subpoena. Courts have repeatedly held that subpoena respondents may not refuse to provide information to Congress based on purported concerns about sensitive information. See Exxon Corp., 589 F.2d at 590; see also FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 970 (D.C. Cir. 1980) (“Once documents are in congressional hands, courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.”) Likewise, documents that are usually protected from
disclosure by the Trade Secrets Act, 18 U.S.C. § 1905, the Privacy Act, 5 U.S.C. § 552, or under exceptions to the Freedom of Information Act, 5 U.S.C. § 552, are not exempt from production to Congress. Nor will courts act to “block disclosure of information in Congress’s possession, at least when the disclosure would serve a valid legislative purpose.” Owens-Corning, 626 F.2d at 970 (citing Doe v. McMillan, 412 U.S. 306 (1973)). And once documents are in Congress’s possession, there are no legal restraints on its ability to release them or otherwise disclose sensitive information. A responding party must expect, therefore, that any information provided to Congress—even information that is otherwise entitled to protection as confidential or privileged—may become public. As with the other areas we have noted, certain privacy concerns may be raised with committee staff and negotiated on a case-by-case basis.

Testimony at Public Hearings. In addition to their power to compel the production of documents, congressional committees also have the ability to issue testimonial subpoenas requiring individuals to appear at public hearings. For the same procedural reasons described above, committees nevertheless typically prefer to request voluntary testimony rather than issue formal testimonial subpoenas. This presents responding parties with an opportunity to attempt to negotiate who may testify (i.e. whether senior executives or PR representative will be permitted to testify on a company’s behalf) as well as the subjects of the testimony.

A public hearing is usually one of the last things to occur in a congressional investigation, and it typically signals the end of the committee’s fact-finding efforts. Often, the hearings themselves have no fact-finding purpose and are simply opportunities for the members to make their views known to the public or to embarrass witnesses or their employers. Indeed, in some cases, the committee may release a preliminary report of its findings prior to conducting any hearing. Hearings generally begin with an opening statement by the chairman, followed by tightly scripted member statements and questions for the witness (often these “questions” are themselves short speeches).

Witnesses testify under oath and may be represented by counsel, but counsel’s role is limited. For example, counsel is not generally permitted to interpose objections to questions. Witnesses may make brief opening statements covering the crucial points of their testimony, and they may request that a fuller written statement be made part of the record. In answering questions before a committee, witnesses are advised to choose their words carefully and to avoid
direct confrontation with the questioners. Federal criminal statutes akin to perjury and obstruction of justice apply in the context of congressional testimony, so it is important that witnesses are well-prepared to answer questions honestly while limiting responses to only those questions that are actually asked. The Fifth Amendment privilege against self-incrimination also applies in the context of congressional hearings.

**Political and Institutional Opportunities**

Ultimately, understanding the political dynamics at work in a congressional investigation is as important as understanding the procedural rules. More often than not, it is political calculation (including an evaluation of potential reputational harms and follow-on legal risks), rather than any procedural rule, that will drive the course of a congressional inquiry. Fundamentally, congressional committees and their members wish to be perceived by the public as effectively responding to highly important public issues. Media coverage and high-publicity events, therefore, have the potential to dramatically affect the pace and tone of an investigation. By the same token, investigations that may appear troubling at their outset often come to nothing as the lawmakers and the public shift their focus to other concerns. Parties that are sensitive to the relevant political issues can often avoid missteps that would make them attractive investigative targets.

To effectively navigate the congressional investigation process requires skill, creativity, and experience. It also requires strategic planning and thinking. At Mayer Brown, we have assembled a diverse and bipartisan team of experts designed to handle the disparate political, regulatory, and media challenges that arise in these situations. We encourage our clients or prospective clients facing a congressional inquiry to contact us as early in the process as possible, so that we can deploy an effective response strategy specifically tailored to their needs. 

**Endnotes**

1. THE WORKS OF JAMES WILSON 415 (1967 ed.).
2. It is important to understand the different capacities in which members may request information. For example, Representative Darrell Issa is an individual member with an interest in issues that impact his constituents in California’s 49th Congressional District. He is also, however, Chairman of the House Committee on Oversight and Government Reform. In this latter capacity, Issa has a significant
institutional ability to direct committee staff to subpoena documents, conduct hearings, and to shape any investigation conducted under the auspices of the Oversight Committee. For example, the Oversight Committee’s rules expressly give the Chairman unilateral subpoena authority. Other individual Members, acting without the support of their Committee leadership, do not have the same unilateral subpoena authority.
About Mayer Brown

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