



SPECIAL REPORT

# US House of Representatives Rules Change Will See Corporate Clients Being Deposed Under Oath

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## INTRODUCTION

The US House of Representatives adopted H. Res. 6 on January 9, 2019, setting forth the rules for the conduct of House business in the 116th Congress.

H. Res. 6 dramatically expands committees' investigative power by—in a stark departure from prior House rules—allowing committee staff to depose any business or individual, subject to the near plenary power of the federal government, *without* a member present. Anyone facing a congressional investigation (or even the prospect of one) would be wise to consider the tactical implications this rule change will have on managing and responding to congressional investigations.

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## A. BACKGROUND

Prior to the 114th Congress, only the Committee on Oversight and Government Reform (now the Committee on Oversight and Reform) was authorized

to conduct staff depositions. Under the applicable rules from 2011 onward, a member of the House was required to be present for all depositions (unless the deponent waived that right).

In the 114th Congress, the House rules expanded staff deposition authority to a limited set of Committees, but maintained the requirement that at least one member be present for depositions. The rules expressly provided: “At least one member of the committee shall be present at each deposition taken by the committee, unless the witness to be deposed agrees in writing to waive this requirement.”<sup>5</sup>

This limited expansion in staff deposition authority occurred in response to what was perceived by the then-Republican majority House as a refusal by the Obama administration to submit to lawful congressional oversight.<sup>6</sup> Notably, the rules change was designed to allow selected committees to not only compel the substantive testimony of individuals who had refused to appear before the committee, but also to compel testimony from agency oversight attorneys on custodial matters—namely inquiring as to the root cause of delayed document production.<sup>7</sup>

The House rules enacted during the 115th Congress again expanded staff deposition authority, but once again the rules contained the core limitation that a

<sup>1</sup> See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 US 491, 504 (1975) (analyzing the broad scope of congressional power); *Barenblatt v. United States*, 360 US 109, 111 (1959) (same).

<sup>2</sup> H.Res. 6, at 21–22, 116th Cong. (Jan. 3, 2019) (“H.Res. 6); see also *id.* at 6 (conforming amendment to house rules governing Staff Deposition Authority of the Committee on Oversight and Reform); House Democratic Staff, *Section-By-Section Analysis of H.R. 6 Adopting the Rules for the 116th Congress*, at 7 (Jan. 2, 2019) (“Members, Delegates, and the Resident Commissioner may participate in all such depositions, but their presence is not required.”).

<sup>3</sup> See, e.g., US Senate Special Committee on Aging Rules, Rule VII, 115th Cong.

<sup>4</sup> For example, newly appointed House Financial Services Chairwoman Maxine Waters publicly called for the depositions of

senior executives at a major financial institution when serving as the Committee's Ranking Member. See, e.g., Minority Staff Report, House Financial Services Committee, *The Case for Holding Megabanks Accountable: An Examination of Wells Fargo's Egregious Consumer Abuses*, 115th Cong. (Sept. 29, 2017) (“The Committee has numerous oversight authorities at its disposal that it has thus far failed to utilize. These include conducting bipartisan depositions of senior Wells Fargo executives . . .”).

<sup>5</sup> See H. Res. 5, at 10–11, 114th Cong. (Jan 6, 2015); *114th Congress Staff Deposition Authority Procedures*, 161 Cong. Rec. E21 (daily ed. Jan. 7, 2015) (statement of Rep. Sessions).

<sup>6</sup> Personal knowledge of authors.

<sup>7</sup> *Id.*

member must effectively be present. Specifically, the rules provided:

- (3) At least one member of the committee shall be present at each deposition taken under the authority prescribed in this subsection, unless—
  - (A) The witness to be deposed agrees in writing to waive the requirement; or
  - (B) The committee authorizes the taking of a specified deposition without the presence of a member during a specified period, provided that the House is not in session on the day of the deposition.<sup>8</sup>

As a practical matter, the theoretical possibility under paragraph 3(B) that staff could take a deposition without a member present was, in practice, unworkable. To our knowledge it was never used.<sup>9</sup>

Section 103 of H. Res. 6 changes this:

- (a) DEPOSITION AUTHORITY.—
  - (1) During the One Hundred Sixteenth Congress, the chair of a standing committee (other than the Committee on Rules), and the chair of the Permanent Select Committee on Intelligence, upon consultation with the ranking minority member of such committee, may order the taking of depositions, including pursuant to subpoena, by a member or counsel of such committee.
  - (2) Depositions taken under the authority prescribed in this subsection shall be subject to regulations

issued by the chair of the Committee on Rules and printed in the Congressional Record.<sup>10</sup>

## B. PRACTICAL IMPLICATIONS

The removal of the member presence requirement super charges the ability of House committee staff to conduct hard-hitting investigations. As a consequence, the strategic landscape has changed. Anyone facing a congressional inquiry must carefully consider this new tactical playing field in crafting a strategy.

1. Practically speaking, the member presence requirement imposed a substantial political and administrative cost on committees when compelling a deposition. In today's political environment, members have neither the time nor the inclination to spend hours sitting in a deposition. Member time is a very valuable and very scarce commodity. As a result, scheduling a deposition under the old rules required the chairman to devote substantial political capital to instructing members to sit in a deposition and required expending substantial member and staff time coordinating schedules. (This limitation was partially intended to limit the use of depositions).<sup>11</sup> Now that the member presence limitation is gone, the chairman can much more readily sign a deposition subpoena. This will likely lead to a dramatic increase in the number and frequency of depositions.
2. The requirement that members be present also limited the scheduling of depositions to those full days during which members were present in Washington, DC (usually Tuesday through

<sup>8</sup> H. Res. 5, at 17–18, 115th Cong. (Jan. 3, 2017).

<sup>9</sup> Personal knowledge of authors.

<sup>10</sup> H. Res. 6, at 21–22. Additional steps to expand House committees' investigative power may be taken in the regulations issued by the Chairman of the Rules Committee.

<sup>11</sup> Personal knowledge of authors.

Thursday, but not Monday or Friday).<sup>12</sup> This limitation had the practical effect of delaying the scheduling of depositions and created substantial periods of time (such as the summer recess) during which committees were practically incapable of conducting depositions. The scheduling limitations were affirmatively exploited (and, offended committee staff would say, abused) by both administration officials and private counsel during both the 114th and 115th Congresses to delay depositions and impair committees' abilities to react to breaking events in a timely fashion. Removing this limitation allows committees to be much more productive and dramatically increases their ability to react to events. It also allows committees to more easily conduct depositions outside of Washington, DC.<sup>13</sup>

3. These changes will lead to a number of practical effects flowing from the dramatic increase in the frequency of depositions (or the threat thereof).
  - a. *Investigative Targets Must Manage the Increased Risks Presented By More Depositions Under Oath*

Staff depositions present an extraordinary risk because: (1) they can probe any topic pertinent to the committee's investigation;

(2) they are not subject to the "key man" rule (to the contrary senior government officials and corporate executives are the preferred congressional deponents); (3) they are not subject to time limits; (4) they are not subject to provisions limiting the release of confidential information; and (5) all objections made by the deposed will be ruled on by the very chairman issuing the deposition subpoena.<sup>14</sup> Senior officials may be made to answer embarrassing questions, sensitive information may be publically disclosed, and extensive transcripts may present serious issues in collateral litigation or executive branch proceedings down the road.<sup>15</sup> Moreover, many depositions occur in parallel with existing executive branch proceedings presenting heightened risk in both forums that must be addressed in a coordinated fashion. In coordinating a response, investigative targets must consider that an appropriate solution in one forum could increase risk in another.<sup>16</sup> Simply put, H. Res. 6 means that more entities will be exposed to these risks. Any entity facing even the prospect of a congressional investigation would be wise to take affirmative steps to mitigate these risks.<sup>17</sup>

<sup>12</sup> In the experience of the authors, there is little utility in beginning a deposition for the few hours members are in town (and not voting) during fly-in or fly-out days.

<sup>13</sup> This has particular significance for individuals and entities operating outside of the United States as it allows committees to easily issue deposition subpoenas returnable to the closest US Embassy.

<sup>14</sup> See, e.g., Majority Staff, House Financial Services Committee, *Majority Staff Report on Director Cordray's Failure to Comply with His Legal Obligations Under the Committee's Subpoena Duces Tecum Dated April 4, 2017, Issued in Part to Further the Committee's On-Going Investigation into the CFPB's Arbitration Rulemaking*, 115th Cong. (Aug. 4, 2017) (discussing bounds of congressional oversight power); 115th Congress Staff Deposition

Authority Procedures, 163 Cong. Rec. H536–H537 (daily ed. Jan. 13, 2017) (statement of Rep. Sessions); US Senate Special Committee on Aging Rules, 115th Cong., Rule VII.

<sup>15</sup> See, e.g., Michael D. Bopp, Gustav W. Eyster, & Scott M. Richardson, *Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations*, 25 Cornell J.L. & Pub. Pol'y 453, 475–81 (2015) (discussing direct and collateral risks from congressional investigations).

<sup>16</sup> For example, political risk may be mitigated by giving a congressional committee all the documents it has requested. But this approach can create substantial downstream legal risk by affecting a subject matter waiver of privilege.

<sup>17</sup> See *id.* at 493–98 (discussing steps to mitigate direct and indirect risks stemming from congressional investigations).

b. *Committees Will Use Custodial Depositions and the Threat Thereof to Dramatically Increase the Pace and Intensity of Their Priority Investigations.*

Staff depositions are also one of the most effective tools in the congressional investigators' arsenal for compelling compliance with *other* requests. Few agency general counsels will be anything but compliant when faced with the prospect of being compelled to retain private counsel and being deposed for days regarding their agency's response to oversight. And woe the outside counsel whose strategy of slow-walking document production leads to the deposition of his/her client's CEO. Often the mere threat of a custodial deposition induces compliance. For example, the common order of operations for a committee to increase pressure on an investigative target in order to induce compliance is to first request records, then if escalation is necessary, subpoena those records, and then, if further escalation is still necessary, threaten or even conduct a custodial deposition of the lawyers responsible for production.<sup>18</sup> By removing the real political and logistical costs of resorting to a deposition (and making the ability to resort to a deposition available year round), H. Res. 6 vastly increases the ability of congressional investigators to quickly increase pressure to compel compliance across the board—not just in

obtaining testimony. Each step in an investigative targets' responses to any form of committee request must reflect this new reality. There is less margin for error and even more risk posed by an investigation moving on a more aggressive time frame.

c. *Committees Will Be Less Flexible in Scheduling Depositions*

Because of the unique time frame in which Congress operates in the modern media environment, and due to Congress' authority as a coordinate branch of government, congressional committees will often refuse to accommodate the schedules of witnesses and their counsel. Under the prior rules, counsel for a deponent could frequently extract scheduling concessions from a committee by conditioning a waiver of the member presence requirement on scheduling the deposition for a mutually agreeable date. No longer.

d. *Deponents Face Increased Risk of Abuse by Unskilled Committee Counsel*

A key argument for maintaining the member presence requirement was that the presence of members would restrain the behavior of committee counsel who are not experienced litigators. This principle had some merit because its underlying premise is correct—not all House committees have experienced litigators on staff.<sup>19</sup> Deponents

<sup>18</sup> To take another example, committees in both the House and the Senate lack authority to compel a response to written interrogatories. Accordingly, committees seeking data best presented in written form (such as financial data) will often put a target to the choice of complying with written interrogatories or

seeing a senior official or officer deposed on oral examination as to the relevant data.

<sup>19</sup> Indeed, in the past, experienced counsel for deponents at times considered the identity of the committee counsel conducting the deposition when considering whether or not to advise waiving the member presence requirement.

and their counsel must now be prepared for the unenviable and exceedingly delicate task of arguing to a chairman that committee staff acted in an objectively inappropriate manner in the chairman's absence.

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