

How Your Member Can Use Oversight to Tackle Corporate Power

On April 11, 2018, headlines read, “[Zuckerberg outwits Congress](#),” “[Zuckerberg explains the internet to elderly senators](#),” “[Why are politicians so bad at asking questions?](#)” Following the House Antitrust Subcommittee hearing on July 29, 2020, journalists wrote “[Facebook’s Zuckerberg skewered with internal emails](#),” “[tech titans hammered by Congress](#),” and warned “[digital gatekeepers face a moment of reckoning](#).” What was the difference between these two hearings? Preparation.

This memo will show how to avoid experiencing a “Zuck-explains-the-internet” style hearing, and instead organize an impactful process like the antitrust investigation. It will explore the full range of tools that members of congress and committees can use to create accountability. The steps outlined below are not necessarily sequential. The appendix includes sample document requests that you can alter and use.

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Guidelines for Investigating Private Power

Step 1: Identify and define a manageable problem

- Identifying the right problem for investigation is basic but critical. Investigative journalists, advocacy organizations, constituents, and others regularly identify problems that full committees, subcommittees, and personal offices can all investigate effectively.
- Define the problem as clearly as possible so the investigation is manageable and focused, and so that members know what to expect. For instance, the hearings on the Cambridge Analytica scandal allowed members to rail about a scandal but with no clearly defined problem. By contrast, the big tech investigation focused on the problem of market power.

- Match the scale of the problem to investigative resources. For industry-wide investigations, like the 2020 antitrust investigation, committees make more sense because they have more resources. Individual members are well equipped to investigate the practices of single large companies or several companies' actions around a single event.

Step 2: Identify the major players

- Defining the main targets of investigation is critical. This decision will set boundaries on where to look. It will also determine potential allies.
- Business rivals may be more likely to cooperate with an investigation if they are not targets of the inquiry.

Step 3: Dedicate staff resources

- A good investigation should dedicate staff resources to developing deep expertise over an extended timeframe.
- In some cases, a member or committee can hire experts, academics, or detailees from relevant agencies for the duration of the investigation.
- Advocates, executive branch regulators, and academics often have a shared agenda, and can serve as useful allies in offering legal and research aid.

Step 4: Organize an introductory briefing if the topic is unfamiliar

- Members and committees alike can use initial meetings with experts in an industry to map out what questions to ask, and what information is necessary to close the knowledge gap between Congress and private industry players.
- Private briefings give the space for members and experts to speak freely and in deep detail without the pressure or performance of public hearings.

Step 5: Organize an introductory hearing to drive press attention

- An introductory hearing can be used to set the tone for the investigation and begin to build press attention around the narrative from initial testimony and questioning.
- Only hold a hearing when there is enough baseline familiarity that members generally know what answers they'll get from which witnesses.
- Initial hearings are better for demonstrating the direction of an investigation and building a public record than they are for gathering introductory information.

Step 6: Request information from the major players

- Requests for information (RFIs) are the main mechanism to gather documents from companies being investigated.
- RFIs can request internal communications, presentations, reports, and records. They can also ask for narrative explanations of practices or business decisions.
- RFIs will generally provide the bulk of the investigatory record and are the foundation for later interviews and hearings. Sample RFIs are included as an appendix to this memo.

Step 7: Request information from third parties

- Third parties like competitors or experts in the field should be encouraged to provide information. Generally, this is done by preparing a list of questions that third parties can answer with a voluntary submission.
- Follow up interviews with third parties can provide additional leads for fact gathering that staff would otherwise not know to request.

Step 8: Negotiate over information production

- Companies or third parties may resist responding to information requests because Congress is not subject to the same confidentiality requirements as the other branches.

- A subpoena is a useful negotiating tool to compel disclosure. It can also allow cover to friendly parties to provide more information than they otherwise would, and it can allow friendly witnesses to break non-disclosure agreements or other contractual prohibitions on sharing information.

Step 9: Organize interim briefings or hearings to help develop a record

- As an investigative record develops, public hearings or briefings can help gather and contextualize information as well as set the public narrative.
- Behind the scenes, interviews and roundtables with particularly helpful third parties can help build political will and create informed member allies.

Step 10: Review information production for “Hot Docs”

- As staff review production from the major parties, they should set aside documents that appear particularly incendiary or incriminating. These are crucial for public facing statements and serve as excellent sources for public questioning.
- Hot docs can drive political coverage, sentiment, and also provide the basis for additional investigation and enforcement actions.

Step 11: Organize capstone hearings

- Hearings with company executives should be capstone efforts in investigations. These hearings are not particularly effective general fact-finding mechanisms. They are best for pinning executives down to public positions on a very small number of topics.
- This requires preparation, hot docs, and carefully curated questions that staff can share and coordinate with members beforehand.

Step 12: Identify and produce a final product

- The investigation should always seek to produce a final documentable product to provide a public record of the work for others to build on or reference.

- A report is one version, especially for larger investigations. But for smaller investigations, letters or other public facing documents cataloguing the findings are equally valuable.
- Identifying the form of the final product earlier rather than later will help improve the quality of the product and also the quality of the investigation.

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Past Examples

Personal Offices

- **TransDigm** – Personal offices have successfully catalyzed wider investigations in the past. In March 2017, Representative Ro Khanna finished an internal investigation and [sent a letter](#) requesting the Defense Department Inspector General examine defense contractor TransDigm. In May 2019, the House Oversight and Reform Committee [held a hearing](#) on price gouging by TransDigm. The committee members successfully demanded [Transdigm pay back \\$16.1 million](#) of excess profits. The TransDigm investigations are an example of a personal office using its power to create accountability.
- **Big Pharma** – Representative Katie Porter’s office released a [16 page investigative report](#) on pharmaceutical mergers that shows the capacity of personal offices to take on multi-company issues. The report, [released on January 29, 2021](#), built on Porter’s questioning during an October 2020 hearing with the CEO of Amgen. Rather than singularly targeting a company, it outlines key findings and makes several specific recommendations for reforms in healthcare mergers and pharmaceutical regulation. This type of report can drive political narrative and legislation.

Senate Committees

- **Backpage.com** – In April 2015, the Senate Permanent Subcommittee on Investigations initiated an [18-month investigation](#) into human trafficking on Backpage.com. It revealed rampant illegality that local authorities had been [fruitlessly chasing for years](#). Backpage executives were held in [contempt for the first time in 21 years](#) before eventually appearing before congress for a [hearing](#). It [shut down its site](#) before the hearing because of the scrutiny.
- **Pharmaceutical Prices** – The Senate held a series of hearings in early 2019 on pharmaceutical prices including hearings with the CEOs of seven drugmakers [including](#) AbbVie, AstraZeneca, Pfizer, and Merck. The hearings on drug prices are a part of a [tradition dating back to Senator Kefauver's](#) investigatory hearings in the 1950s. The deep scrutiny, before any bill made it to the floor, pressured companies [to lower insulin prices](#) to \$25 for a 30-day supply. The response is an example of the benefits of sustained and regular investigations of problematic industries.

House Committees

- **Wells Fargo** – The majority staff of the House Committee on Financial Services [investigated Wells Fargo](#) over the course of a year, to examine a longstanding pattern on harming the bank's own customers. The [report](#) provided rare oversight on how the bank violated multiple consent orders over years. Following a [\\$3 billion settlement](#) with the DOJ and SEC, Wells Fargo's Chairperson and another board member [resigned](#) days before the committee hearings. It shows the benefits of inspecting individual companies, especially those under consent decrees.
- **Tobacco** – As a further historical example, the tobacco hearings showed the power that deep congressional attention can have. Led by Rep. Henry Waxman, the committee used [hearings strategically](#) to build a public record with public testimony rather than a compulsory process. The hearings included over six hours of voluntary testimony where CEOs of the major tobacco companies [agreed to publish](#) previously secret research on the harmful effects of smoking and the addictiveness of nicotine. The

social fallout from the hearing was historic and big tobacco companies eventually settled civil suits for [\\$246 billion](#).

- **Baby Food** — In February 2021, Rep. Raja Krishnamoorthi, Chairman of the Subcommittee on Economic and Consumer Policy, of the Oversight Committee, released a report on toxic heavy metals in baby food. The investigation and report detailed how manufacturers, including Walmart and Campbell Foods, routinely ignored internal standards, and others refused to respond to the Committee’s investigation. Chairman Krishnamoorthi called on the FDA to regulate these companies and impose strict compliance requirements and mandatory consumer labels.

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Future Suggestions

The above case studies provide helpful guidance for future oversight, and there are a host of new or under-investigated problems to address. Below is a list of some suggested topics, but Economic Liberties is happy to meet separately with your office to brainstorm further ideas.

Committees

- **Private Equity in Healthcare** – The private equity industry has been buying up healthcare operations—spending \$79 billion in 2019 alone—such that now the [majority of practices are no longer doctor owned](#). Reports suggest this [causes systemic harms](#) to the health of the industry and to the health of Americans.
- **Healthcare Abuses** – This encompasses a number of pressing issues. Surprise billing is one, where a patient is unwittingly treated by an out of network provider at an in-network hospital and [asked to foot the bill](#). Similarly, the consistently high price of drugs from [insulin](#) to [Daraprim](#), is an evergreen oversight priority until the healthcare system is fixed.
- **Transportation Consolidation and Abuses** – The wave of airline mergers since 2007 have allowed airlines to increase prices and [aggressively degrade the flying experience](#).

Similarly, consolidation in rails increases [costs for Americans in freight rail](#) and prevents innovation in high speed rail.

- Agricultural Supply Chains – Agricultural seed and chemical supply chains are now dominated by three companies created by recent mergers: [DowDuPont's Corteva in 2017](#), ChemChina-Syngenta in [2017](#), and Bayer-Monsanto in [2018](#). This causes significant hikes in [seed and chemical prices](#). The same is true in meat markets where poultry, hog, and beef [markets have consolidated, raising prices and destabilizing food supply chains](#).
- Defense Contractor Consolidation and Abuse – Committees may investigate systemic issues in procurement like rules preventing the military from [repairing its own equipment](#), which creates cost overruns. Or they may provide oversight on specific companies like investigating if Northrup Grumman violated a [2018 FTC consent decree](#) which required it to sell Orbital ATK products without discrimination.

Personal Offices

- Cheerleading – Varsity Brands, owned by Bain Capital, is the company in control of American cheerleading. The company has [iron-fisted control](#) of the sport and has prevented it from becoming an official sport to avoid regulation and continue to abuse its athletes. It has also been complicit in [the sexual abuse of its cheerleaders](#).
- UFC – Fighters have been battling UFC for fair treatment for years. Despite small [victories in the courts](#), oversight of wage and labor abuses in the sport would turn up the pressure.
- Textbooks and Research – The failed 2020 McGraw Hill merger is a red flag for [abusive pricing in education materials](#). The same extends to [research databases](#) like JSTOR.
- Individual Company Consent Order Oversight – Members are particularly well situated to oversee when agencies are not enforcing their own consent orders. For example, the FTC with [Google's scraping commitments](#) or Facebook's [WhatsApp privacy commitments](#).

Appendix – Sample Requests for Information (RFIs)

- House Antitrust Subcommittee Investigation RFIs:
 - [Facebook RFI](#)
 - [Amazon RFI](#)
 - [Google RFI](#)
 - [Apple RFI](#)
- House Financial Services Committee RFIs:
 - [CFBP RFI](#)
 - [Dept. Education RFI](#)
- Senate Finance Committee RFIs:
 - [Medicaid Managed Care RFIs](#)
 - [Novartis Data Manipulation RFI](#)
 - [Volkswagen Tax RFI](#)
- Senate Banking Committee RFIs:
 - [Fannie Mae Freddie Mac Private Equity RFIs](#)
 - [Wells Fargo Hearing RFI](#)

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