
Post-Election Congressional Investigations Update

November 7, 2018

I. Overview

The 2018 election—and, in particular, control of Congress—has been a subject of intense debate and speculation for months, as Democrats aimed to capitalize on an energized base and Republicans sought to mobilize Trump voters without alienating moderates. With the election now in the rearview mirror, the landscape for the next two years is beginning to take shape and the terrain promises to be incredibly complex for businesses and policy advocates.

Like most, we expect the new Democratic House majority to direct much of its attention to executive branch oversight and accountability. The members and staff leading Democratic oversight efforts have deep experience and expertise, and we do not expect them to overplay their hand. For that reason, reports of “payback” and rampant subpoenas are likely overblown. That said, Democrats will significantly increase congressional scrutiny of the private sector, both concerning its own activities and its interactions with the Trump Administration. Companies and their legal counsel should be prepared, and also need to factor in a dramatically changed collateral environment in terms of media and parallel inquiries. Investigations will cover a wide range of topics, but here are five areas that are certain to be of interest:

1. Fraud, Corruption, and Ethics. Expect oversight of Cabinet members and other government officials, as well as government contractors. This could extend to examining the role of lobbyists and interest groups in driving policy changes made during the first two years of the Trump Administration, as well as dealings with private businesses associated with Trump Administration officials.

2. Pricing. Look for price increases to be an issue, both in the pharmaceutical space with critically important drugs and in the tech and online retailing space given recent reporting about so-called “dynamic pricing.”

3. Consumer Protection. This will be a consistent theme in oversight of products offered in the banking and pharmaceutical sectors, as well as in the tech industry with regard to questions of data privacy, anti-competitive practices, and vertical integration.

4. Emerging Technologies. Safety in emerging technologies—such as drones, robotics, and autonomous vehicles—will prompt interest as well, particularly as companies inch closer to deploying these technologies for large-scale consumer-facing use. Efforts to supplement the regulatory framework for those technologies also will be reviewed.

5. Climate Change. Although their ability to directly effect change may be limited, Democrats also will examine climate issues, ranging from the Trump Administration's support of the fossil fuel industry to investigations of public statements by corporations regarding climate change and funding of so-called climate denial science.

Beyond those five key topics, there is the perennial reality of a wildcard:

6. Headline Events. Breaking news is still sure to generate congressional inquiries. Sexual misconduct, discrimination on the basis of sexual orientation or race, natural and manmade disasters, China, the opioid abuse crisis, and cyber threats will continue to drive the news cycle and generate oversight.

7. The Special Counsel Investigation and Impeachment. What will happen next in the Special Counsel investigation and whether Democrats will push to impeach President Trump are unknown factors that could drown out nearly everything else. An impeachment effort would certainly divert oversight resources; it also would make it harder for other investigations to attract media attention. The Special Counsel investigation also may prompt broader oversight into related topics, such as foreign influence operations in the United States and the Foreign Agents Registration Act.

Democrats will be aided in investigations by changes made by House Republicans in 2015 that gave more committee chairs the authority to issue subpoenas unilaterally; previously, most committees required a majority vote and consultation with the ranking member. Of the 21 standing committees in the House, 14 now allow their chairs to issue subpoenas unilaterally. Democrats also may be aided by new precedent supporting the enforcement of congressional subpoenas through civil suits.

It is also worth noting the speed and fluidity with which an inquiry from Congress today can cause ripple effects across forums, including the stock market, social media, the consumer market, and regulators and law enforcement agencies. Companies and advocates also need to keep a watchful eye on Senate Republicans and on Senate Democrats who may partner with House colleagues to launch inquiries.

II. What to Watch

Below are more details on likely oversight priorities by industry.

Technology

Democrats are likely to continue conducting oversight of the major tech companies by focusing on consumer protection issues such as data privacy, as well as broader antitrust and competition issues. Companies can expect lawmakers to continue to take issue with their size, reach, and control. Election security is a top priority of both parties, and any reports of interference in the midterm elections may prompt bipartisan inquiries. Hearings in this particular area have been plentiful, however, and we may see more quiet conversations than public spectacles.

In the area of consumer protection, legislative efforts to codify elements of the Internet Bill of Rights (IBR) drafted by Rep. Ro Khanna (D-CA) may lead to parallel investigations designed to highlight the abuses

that Democrats would aim to remedy through legislation. Investigations of dynamic pricing practices may touch on surveillance of Americans' consumption and retail habits more broadly. This is a common but little understood practice and the mystery around how it works may prompt scrutiny.

And while House Republicans may not get much traction for conservative bias or free speech investigations or for breaking up tech giants, tech companies may face competing narratives as Democrats launch their own bias investigations focused on gender discrimination or lack of opportunities for women and minorities.

Financial Services

Democratic-led oversight in the area of financial services is likely to include a greater focus on accountability of large banks and scrutiny of services in the automotive, student, and payday lending spaces. Republican-led efforts to reform the Community Reinvestment Act may lead to Democratic oversight of redlining and access by low-income borrowers to loans and financial services.

Some have speculated that Rep. Maxine Waters (D-CA), who is poised to chair the House Financial Services Committee, will prove to be amenable to working across the aisle to achieve results. But when it comes to oversight efforts, she made clear before the election that she intends to focus on large banks; in recent remarks, she stated: "I have not forgotten you foreclosed on our houses. I have not forgotten that you undermined our community . . . I'm going to do to you what you did to us."

But while this might be an attractive path for the Committee to take, we expect that Rep. Waters will weigh whether it is the most productive use of Committee resources. Large banks have already testified at multiple hearings and responded to hundreds of questions for the record; holding additional hearings in the face of that record may seem punitive. Additional hearings also are likely to generate limited media interest given the amount of coverage the topic already has received. Democrats may instead choose to look at how the financial services industry has expanded beyond banks to include non-traditional lending by private equity and hedge funds, and corporate lending by asset managers, as well as at new technologies and mechanisms for establishing creditworthiness. Such an effort likely would be designed to support new jurisdictional legislation, a possible permanent legacy for Rep. Waters after decades of public service. Rep. Waters will also certainly scrutinize Trump Administration efforts to rein in enforcement activity at the BCFP and other enforcement agencies. Democrats may, for instance, seek depositions or transcribed interviews of agency officials, as Republicans did during the last Congress.

Healthcare and Pharmaceuticals

In the healthcare sector, drug pricing and opioids are likely to be two top continuing targets of congressional oversight. There have been press reports that Minority Leader (and likely Speaker of the House) Nancy Pelosi met with PhRMA's board of directors earlier this year and stated that reducing prescription drug prices would be a top Democratic priority. Oversight efforts are likely to accompany legislative efforts.

Oversight also may focus on the role of third parties—such as hedge funds, business consultants, or private equity investors—in pricing or other pharmaceutical business decisions.

Energy / Natural Resources

Democrats are likely to dramatically increase oversight of the Environmental Protection Agency (EPA) and the Department of Interior, while also erecting bulwarks to Trump Administration regulatory rollback efforts. Rep. Raul Grijalva (D-AZ), the presumptive chair of the House Natural Resources Committee, has

been a staunch critic of Interior Secretary Zinke and is expected to hold hearings on "wasted resources" at the Interior Department.

House and Senate Democrats also will look for opportunities to investigate climate change issues, both in the private sector and in the executive branch.

Defense and Government Contractors

Under Democratic control, the House Armed Services Committee likely will examine President Trump's efforts to divert military resources to secure the border, as well as the use of Department of Defense facilities to house immigrant children and the Trump Administration's ban on transgender people serving in the military. Other areas of focus will include contractor support for "the wall" and for surveillance and monitoring of immigrants. We also expect to see some oversight focused on the use of emerging technologies in the defense space, including AI and facial recognition technology.

III. What to Do When You Are a Target

Companies implicated in congressional inquiries would do well to look for ways to cooperate while still advocating for their interests. Experienced counsel often can ensure that the staff has the information they need to conduct oversight while limiting the burden and risk to the company. For example, staff and member questions often can be answered more effectively (and with less burden on the company) by offering an informal in-person briefing rather than a voluminous document production. Counsel also may be able to propose creative solutions to limit the client's exposure from the process.

If a company is called to testify at a hearing, it should immediately begin a focused effort to prepare. Hearings are high-stakes events, and the preparation process should take the form of well-organized and methodical briefing sessions and mock hearings. Written and oral testimony offer a limited opportunity to frame the company's affirmative narrative and are memorialized as part of the hearing record. Following the hearing, witnesses may be asked to respond to questions for the record; high-profile hearings may generate hundreds of such questions. Committees also may issue reports detailing their findings, and companies will want to engage in a dialogue during this process.

Where congressional inquiries are taking place against a backdrop of civil litigation and regulatory or law enforcement investigations, corporate counsel will want to engage the assistance of advisors who can develop a global response plan and ensure coordination between all relevant players. When and how to engage consultants, from lobbyists to media strategists, is an important decision and one that should be guided by experienced counsel, as the right consultants will be able to integrate seamlessly into the company's broader strategic response plan. In some cases, it will be prudent for the board of directors to engage independent counsel, and a global response plan should incorporate a strategy for coordination between the various entities.

Most importantly, companies in high-profile industries should be aware that investigations often start long before the first letter or subpoena is sent. The first outreach may come in the form of an informal inquiry, and it is often possible to manage these inquiries in a way that prevents escalation. Companies and their counsel may wish to conduct a risk analysis or take other proactive steps, such as reaching out to key members and staffers to open a dialogue in advance of any inquiry. Others may prefer to monitor key committees and member statements. And others may find it useful to develop a comprehensive crisis management plan that will prepare the company for unexpected developments. Each company is differently situated and there is no one-size-fits-all solution, but experienced counsel will be able to

develop and advise on a suite of options that takes into account the industry, factors unique to the company or witness, and the political climate.

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