

Under Investigation: Who Will Fall in the New Congress' Crosshairs?

Against the nation's changing political landscape, corporate America should expect to be a chief target of congressional investigations.

BY RAFI PROBER AND KAREN CHRISTIAN

After a long two weeks, we now know that President-elect Joe Biden has won the White House, the Democrats have maintained control of the House, and the Republicans appear to have maintained control of the Senate. Against this political landscape, corporate America should expect to be a chief target of congressional investigations.

Since gaining control of the House, Democrats have spent the last two years launching inquiries primarily of President Donald Trump's administration, including those private sector entities with proximity to issues or individuals under investigation or key federal contracts at issue. Congressional oversight of the federal government's response to the COVID-19 pandemic is a prime example of this, as many companies involved in one way or another with the response found themselves the recipients of requests for briefings, documents and invitations to testify at committee hearings.

Without the foil of the Trump administration, and with the 117th Congress less than 60 days away, it is important for companies to consider now whether their business activities might draw the interest of congressional investigators over the next two years, and to prepare accordingly.

We can expect that Democrats will shift their oversight agenda toward the industries and issues that align with their legislative platform. The congressional oversight environment following the 2008 election serves as a roadmap: With Democrats controlling the House, Senate and White House in 2009, congressional



The U.S. Capitol building, June 6, 2020.

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committees conducted extensive oversight of private sector entities with the goal of building public support for President Barack Obama's legislative agenda and examining the financial crisis and how billions of dollars in federal funds were distributed.

These efforts included collecting documents and communications, receiving the testimony of CEOs and senior executives, including that of the leading Wall Street investment firms, and conducting interviews and depositions of company officials. These hearings examined such timeless investigative topics as executive compensation, corporate profits, board decision-making, questionable business practices, labor issues, and many others. These investigations helped to apply public pressure for reform, building a factual record to support the ultimate passage of Obamacare as well as

the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The focus of Democratic-led investigations in the House is unlikely to change, even if Republicans hold the Senate following the Georgia runoff elections. Such split control of Congress would greatly diminish Biden's ability to drive his legislative agenda, and investigations will be a useful tool for House Democrats to highlight political and policy differences with a Republican Senate. House committees will use their oversight tools to bolster Biden's policy proposals, to examine the \$4 trillion in economic relief provided in response to the COVID-19 pandemic, and also to focus on consumer protection, labor and other investigative topics.

Against this backdrop, the following topics appear to be likely targets for congressional investigations with Democratic committee chairs holding the gavels:

1. Oversight of the response to the COVID-19 pandemic: While much of the oversight conducted since March has been aimed at the Trump administration's management of the pandemic, these investigations will continue as Congress considers whether the contracts awarded to assist in the response were effective, how relief funds were allocated and spent, and what can be done to better prepare for pandemics and natural disasters in the future.

2. Climate change: Biden has made climate change a key priority and has criticized the executive branch regulatory actions of the

Trump administration on energy and environmental matters. Specifically, the debate about fracking has received increased attention in recent weeks. We can expect broad congressional investigations in this space as well as new investigations focusing on a decline in enforcement at such agencies as the Environmental Protection Agency.

3. Health care—insurance markets and affordability: Health care affordability continues to be a concern of many Americans and was a top point of contention during the presidential campaign. While committees in the House and Senate have conducted wide-ranging investigations of drug pricing in this Congress, investigations of affordability in health care are likely to continue.

4. Tech/social media/big data: While "Big Tech" has recently been in the congressional investigative crosshairs, we can expect congressional focus in this space to expand. In addition to antitrust issues, such investigations will likely focus on the use of consumer data, website monitoring, the role of social media (including with respect to content), among other angles.

5. Consumer protection and corporate enforcement: Democrats have questioned the drop in enforcement actions at consumer protection agencies under the Trump administration. Look for congressional committees to examine the enforcement agenda under Trump and to use congressional investigations to seek to demonstrate how it may have hurt consumers.

6. 2017 tax reform bill: Biden charged that Trump's tax reform law, the Tax Cuts and Jobs Act, was a giveaway to large corporations and the wealthy. Congressional oversight committees may probe which companies benefited from the 2017 law, how they spent any tax savings, and whether this benefited employees or not.

In turn, should Republicans hold the Senate, Republican Committee chairs are likely to use their oversight authority to focus on the Biden administration. This does not mean, however, that private companies will not receive oversight requests from the Senate, as committees or individual members will likely seek to gather information on administration activities from impacted private sector entities, among other inquiries.

While the full balance of power in Washington will not be determined until January, one outcome that is certain is that congressional investigations are likely to ramp up in the next Congress. Companies would be well-served to understand the president-elect's and the Congress' policy and oversight goals, and prepare for possible questions and document demands now, before subpoenas start flying.

Rafi Prober and Karen Christian are partners in the congressional investigations practice at Akin Gump Strauss Hauer & Feld. Prober is a former DOJ associate deputy attorney general and Christian is former general counsel of the House energy and commerce committee.