

Anticipating The New Congress' Private Sector Investigations

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With Republicans claiming a new majority in the House of Representatives in the upcoming Congress, corporates and individuals should expect a sea change in Congress' investigative priorities and areas of focus.

Recent innovations in how Congress conducts investigations and presents its findings may also prompt changes in how the new Republican House engages with private sector entities in investigations, particularly related to issues that overlap with oversight of the administration.

Because congressional investigations are a unique mix of legal, political and communications-related issues, they differ substantially from regulatory or enforcement investigations. It is important for private sector entities to understand the likely subjects the new Republican House will be interested in, and plan accordingly.

In this article, we outline: the likely areas of investigative focus for the Republican House that will affect the private sector; potential changes in how the Republican House will conduct investigations and hearings; and prudential steps private sector entities can take in the near term to best prepare for and mitigate risk.

5 Likely Subjects of Private Sector Oversight by the Republican House

The incoming Republican House will likely focus on the following five areas that will affect the private sector, either because congressional investigations will directly target private sector entities or because the Republican House will demand information from the private sector.

Use of Government Funds

The Republican House will likely continue the longstanding focus of congressional oversight on the private sector's use of government funds, which recent legislation has made available in historic amounts partly as a result of the COVID-19 pandemic. These government funds include:



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- The American Rescue Plan, which provides over \$1 trillion in programs and tax credits that states, counties and cities are using to spur economic recovery, the proceeds of which in turn are being spent on a wide range of projects across the country.
- The Infrastructure Investment and Jobs Act, which involves \$1.2 trillion in government spending for, among other things, the manufacturing, transportation, rail and electric vehicle industries.
- The CHIPS and Science Act, which includes a provision for \$39 billion in financial assistance for the development and manufacture of semiconductors.
- The Inflation Reduction Act, which provides several billion dollars in government loans for clean energy programs.

Private sector entities that have received such funds directly from the government, or that have done business with state and local governments funded by such legislation, may be the subject of congressional attention on this issue, particularly if there are allegations of wasteful spending of taxpayer dollars.

Such spending will likely be of particular focus for the Republican House because much of the spending in the aforementioned legislation was directed toward issues at the center of political debate, such as climate change and clean energy.

Indeed, Rep. Cathy McMorris Rodgers, R-Wash., the Republican leader of the House and Energy Commerce Committee, has specifically highlighted the loan program within the Inflation Reduction Act, committing to account for "every cent spent to ensure taxpayer dollars are not wasted and the American people are protected."

Companies that have received funds pursuant to these and similar programs could be the focus of congressional attention, even in the absence of allegations of wasteful spending.

ESG Implementation in the Private Sector

House Republicans have signaled their intent to focus on how the private sector implements environmental, social and governance activities and policy statements, and how those efforts are presented to consumers and investors.

Initial oversight efforts regarding ESG have focused on investment firms and financial institutions. Rep. Andy Barr, R-Ky., a Republican member of the House Financial Services Committee, underscored this focus recently, declaring that "ESG investing is a cancer within our capital markets."

Certain private sector entities outside the financial services industry have also received outreach from Republicans expressing concerns about their ESG policies. Given that Congress and other governmental bodies have shown intense interest in ESG matters, investigations and related pressures will very likely reach private sector organizations more broadly.

At the state level, some state attorneys general are already pursuing investigations regarding ESG matters.

The Technology Industry

House Republicans have been vocal about their intent to focus on the technology industry, based primarily on allegations that conservative viewpoints were censored by some in the industry.

Some Republican members of Congress have alleged that certain technology companies inappropriately worked with the administration to censor certain viewpoints related to COVID-19.

As part of this focus, several House Republicans have also signaled their intent to focus on antitrust concerns related to technology companies.

The Health Care Industry

House Republicans have signaled their intent to focus on the role of pharmacy benefit managers in affecting prescription drug pricing.

In late 2021, Rep. James Comer R-Ky., the senior Republican on the House Oversight and Reform Committee, stated that pharmacy benefit managers "must be held accountable for their role in rising prescription drug prices, and Congress must take on pharmacy benefit managers to implement transparency and restore competition." This issue will likely continue to be a focus of the new Republican House.

Private Sector Investment in China

Private sector engagement with China will also likely be the subject of intense focus from House Republicans, particularly related to supply chains, technology theft and cybersecurity.

Potential Changes in How the Republican House Will Investigate and Conduct Hearings

Congressional investigations often involve significant negotiations between the parties regarding the provision of requested information and testimony.

The tactics members of Congress and investigative staff employ has continued to evolve over recent years, and those changes may affect how the upcoming Republican House conducts its investigations and holds hearings.

While a lengthy negotiation process will remain in many instances, in certain high-profile matters, particularly those that intersect with oversight of the administration, the incoming Republican House may elect to proceed quickly to issue formal demands for information, including subpoenas.

The potential for rapid escalation of the investigative process is due in significant part to the perceived success of the House Select Committee to Investigate the January 6th Attack on the United States Capitol in obtaining documents and testimony on an expedited basis, in large part by rapidly escalating the committee's demands, i.e., forgoing the usual step of seeking voluntary cooperation and instead issuing subpoenas in the first instance.

Indeed, there is evidence that House Republicans in the current Congress are already adopting similar tactics. Republicans on various House committees have issued many letters to certain private sector entities and government agencies directing the preservation of information and evidence in anticipation of further demands in the new Congress.

Regardless of whether such preservation requests have legal effect, the letters reflect the aggressive posture that the upcoming Republican House will likely take in certain investigations.

Similarly, the upcoming Republican House may take a new approach to how congressional hearings are conducted.

Traditionally, the culmination of congressional oversight has been public hearings, during which private sector executives or senior administration officials were subject to sometimes hostile questioning from members of Congress. Such hearings, which could last for hours and break down into partisan rancor, were in many instances difficult to follow and often failed to capture public attention.

The hearings presented by the January 6th Select Committee were novel in that in many instances the hearings incorporated substantial use of video deposition testimony, included extended lines of live questioning from a limited set of members, and were sometimes set during evening hours to capture a larger television audience.

The new Republican House may draw upon these precedents in an attempt to draw more public attention to their investigative findings.

How to Prepare for and Mitigate Risk

In light of these developments, private sector entities can take prudential steps now to prepare for potential engagement with Congress, and in so doing, mitigate risk and protect their organizations.

As Congress may publicize an investigation without notice and move quickly to investigate, thus creating an immediate communications issue, private sector entities can take the following steps that could prevent a communications crisis and mitigate risk.

1. Develop clear lines of responsibility between legal, government affairs and communications teams.

Because congressional investigations are often announced publicly without warning, private sector entities should establish clear lines of responsibility between internal legal, government affairs, and communications teams regarding congressional investigations matters well in advance.

A congressional investigation is not exclusively a legal, government affairs or communications issue — it is most frequently a combination of all three. Clearly developed lines of responsibility between these teams will facilitate the crafting of a prompt and orderly response strategy that considers the various and sometimes competing interests of these teams.

These efforts are critical to effectively manage any controversy that may arise out of an unexpected announcement of a congressional investigation.

2. For identified risk areas, counsel should develop key facts and identify subject matter experts.

If a private sector entity identifies likely areas of congressional inquiry, counsel should consider working to develop key facts and identify subject matter experts in those areas.

Having counsel direct the factual development process ensures that such fact-finding is covered by the attorney-client privilege, which is particularly important because congressional investigations, in many

instances, take place adjacent to government investigations, civil litigation or both.

Such fact-finding will also clarify whether and to what extent a private sector entity can publicly comment in response to the announcement of a congressional investigation.

3. Carefully monitor progress of congressional oversight.

Given that congressional Republicans have been vocal about their areas of oversight interest, private sector entities can assess the general likelihood of whether certain activities will be of interest to Congress, and if so, can monitor the course of congressional oversight on such subjects.

Conclusion

The new Republican House will bring with it new investigative priorities and areas of focus, as well as new tools to quickly conduct investigations and more effectively publicize their investigative processes. With prudent forethought and planning, private sector entities can anticipate the congressional investigations that may implicate their business, and manage the risks that come with them.

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