

Under the Gavel: What Every Company Needs to Know About Oversight in the New Congress
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Client Alert

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Many in Washington anticipate a congressional agenda packed with investigations come January. But how exactly will those take shape? Tune into our latest podcast episode as Drew Littman moderates a conversation between Greg Brower and Will Moschella, both former government attorneys with experience in congressional investigations, on Congress' oversight tools, the limits of its authority and the ripest subjects for oversight in the 116th Congress. Listen here.

With a new Congress comes new oversight priorities. Private companies could find themselves under the legislative microscope after Democrats seized control of the House for the first time since the 2006 midterm elections.

That much anticipated “blue wave” was largely fueled by electoral dissatisfaction with President Trump, but the Democratic agenda is certain to extend beyond the administration itself. Private sector companies, especially in certain industries, are also likely to be on the collective radar of these newly powerful Democratic committee and subcommittee chairs. Here, we introduce the committees and new chairs likely to play a leading role in this round of oversight activity, identify the most likely private sector targets and explain the basics of how to handle a congressional inquiry.

Elections Have Consequences

After the recent congressional elections flipped the House, Democrats will outnumber Republicans in the upcoming 116th Congress with at least a double-digit margin (four races have yet to be called at the time of this writing). This means Democratic control of everything in the House, including all the standing committees and subcommittees. With committee leadership comes the holy grail of congressional oversight: subpoena power.

Control of House committees will allow Democrats to unilaterally decide what, who, when and how to investigate. While most of this oversight authority will be aimed at targets such as the White House, the Department of Justice and the Environmental Protection Agency, House investigations will also touch, if not focus on, private sector targets. Given this reality, many companies should think seriously about which committees may look at them and how to prepare.

The New House Majority

Come Jan. 3, the new House Democratic majority will restore current Minority Leader Nancy Pelosi (D-CA) to the speakership. This will, of course, not be her first time with the big gavel, but dozens of other Democratic members of the House will be wielding smaller gavels of their own, most for the first time. And while these gavels may be smaller, they are powerful when it comes to oversight authority over virtually every segment of corporate America.

Rep. Jerry Nadler (D-NY) will be the new chair of the powerful House Judiciary Committee. Nadler will lead a group of newly dominant Democrats who have spent the past two years frustrated with what they saw as the Republicans' misguided focus on the wrong issues. Rep. Maxine Waters (D-CA) is poised to chair the House Financial Services Committee, a committee with broad jurisdiction over large segments of the U.S. economy. Under Chairwoman Waters, the committee will likely focus on increased oversight and investigations of large financial institutions, diversity and financial inclusion, data security and privacy and the preservation of the Bureau of Consumer Financial Protection. Taking the helm of the House Oversight and Government Reform

Committee will be Rep. Elijah Cummings (D-MD), a frequent critic of prescription drug prices.

The Likely Targets

The new Democratic chairs are likely to focus on industries they feel are in need of renewed scrutiny. These include health care, energy, financial services, pharmaceuticals, social media and for-profit higher education. Companies in these industries are especially likely targets for subpoenas seeking documents and the appearance of witnesses at hearings and should be thinking now about how to prepare to respond to such oversight efforts.

What Every Target of Congressional Committee Interest Needs to Know

Congressional investigations can resemble litigation except most rules can be easily changed in the middle of the proceeding. And the person who might seem like the judge, the committee chair, is in fact both the judge and a likely adversary. It is this reality that makes congressional investigations so difficult to navigate. Here are five basic factors every potential target needs to understand.

1. Know the Rules. Committee investigations generally operate in accordance with a written set of rules. But beyond the written rules, much of any committee's business, especially in the context of oversight investigations, is governed by an unwritten series of negotiated understandings between the majority and minority and with counsel for targets and witnesses. A thorough understanding of both the written rules and how to negotiate the unwritten rules is vital to successfully navigating a congressional investigation.
2. The Committee Chair Is All Powerful, But Don't Ignore the Staff. Much like the judge in a court proceeding, the committee chair is in complete control of virtually every aspect of the committee's agenda and schedule. However, unlike a judge, a committee chair is not merely a neutral arbiter but instead is a partisan actor, usually with a political goal in mind at the outset of an oversight investigation. The better the target of such an investigation understands the chair's goal, the more likely the target will successfully navigate the process. The key to understanding where the chair is coming from is constant and clear communications with committee staff.
3. On the Hill, Everything Is Political. Congressional investigations are political events. The real audience for any hearing is not the committee itself but the news media. For most committee members, the hearing is not so much a fact-finding endeavor. It is an opportunity for a good soundbite. And, unlike litigation, it is often difficult to "win" a hearing. It is, however, easy to lose one. Approaching an oversight like litigation is almost never a good idea. In a court case, the parties negotiating the timing or scope of a pre-trial hearing with the judge's law clerk would be unthinkable (and likely unethical). But almost anything goes in the context of dealing with a congressional committee. Understanding the politics of the topic being investigated, as well as the political dynamics between members of the committee and between staff, is critical.
4. Preparation. Preparation. Preparation. To maximize the chance of success (or to minimize the chance of disaster), it is critical to exhaustively prepare for a hearing in two ways. First, try to meet with committee members and staff before the hearing. There is no such thing as improper ex parte contacts in the congressional context. Indeed, committee members and staff generally welcome witness requests to meet before a hearing. Such meetings can create important allies on the committee and can elicit valuable intelligence about concerns and questions likely to come up. Second, testifying in a congressional hearing is very different from anything most corporate witnesses have ever done. Like most anything else, no one is very good at testifying before Congress without some practice. Witnesses must become familiar with

the venue, the process and the types of questions and questioning styles of the committee members. Since the hearing will likely be broadcast live (thank you, C-SPAN and Comedy Central), even those sitting with and behind the witness should be prepared to be “on the record.”

5. **Get the Right Advice.** There is no substitute for having experienced legislative counsel at your side when communicating with congressional staff, meeting with members, preparing documents for production, appearing at a hearing or dealing with any other aspect of a congressional committee’s oversight activities. Just like you wouldn’t have a tax lawyer pursue a patent application or a litigator prepare a trust, you don’t want a lawyer who doesn’t have significant experience on Capitol Hill to represent you before Congress. The best congressional oversight counsel is someone who understands the politics, knows the process and has relationships with key members and staff.

The stakes are high in congressional investigations. They involve many risks—political, reputational and legal. The goal for any target of an oversight investigation is to mitigate those risks to the greatest extent possible. This can be best accomplished by taking the process seriously and getting the right professional help to see you through it.

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