

CONGRESSIONAL INVESTIGATIONS PREVIEW FOR THE 117TH CONGRESS: UNIFIED DEMOCRATIC CONTROL MEANS MORE ROBUST OVERSIGHT AND INVESTIGATION OF THE PRIVATE SECTOR

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Investigations, Enforcement, and White Collar Alert

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The election of Joseph R. Biden Jr. as president of the United States and Democratic control of the U.S. House of Representatives and Senate mean that the private sector can expect to be the main focus of congressional oversight and investigations in the new 117th Congress. Democrats will set the floor agenda, chair the committees, and control the nominations process in the Senate. And the Biden administration—compared to its predecessor—poses an unappealing target for Democratic investigative committees. All of this adds up to intensified congressional scrutiny on industry and the private sector.

In this client alert, we assess the impact of unified Democratic government on the investigative agendas of the most consequential House and Senate investigative committees, highlight emerging investigative trends, and explore the sectors of the economy that are most likely to be targeted by congressional investigators.

U.S. HOUSE AND SENATE INVESTIGATIVE LANDSCAPE

A distinctive feature of the recently concluded 116th Congress (2019–2021) was the increased pace and volume of investigations of the private sector that accompanied aggressive oversight of the Trump administration.¹ In addition to the robust investigative activity of the House Oversight Committee and its active Select Subcommittee on the Coronavirus Crisis, we also witnessed major investigations launched against private companies by the Financial Services Committee, Judiciary Committee, and others—a total of 405 oversight hearings and more than 1,300 letters sent by House committees.²

In the coming months, Democrats will use oversight committees in both houses of Congress to investigate perceived wrongdoing and support legislative reform on a host of issues from pandemic relief to immigration. These activities will play an important role in the Democrats' overall governing strategy by tracking the Biden administration's policy priorities and building an investigative record to rebuff Republican efforts to take control of either the House or Senate in the 2022 midterms.

Health Care and COVID-19 Response

Much of the incoming Biden administration's immediate focus will be on containing the spread of the COVID-19 pandemic, improving testing, and executing a nationwide vaccination program. Companies involved in these efforts will see a flurry of congressional activity and inquiry, as the Democratic Congress seeks to restore public trust in the federal response and draw a sharp contrast to the widely criticized efforts of the Trump administration.

The House Oversight Committee, chaired by Rep. Carolyn Maloney (D-NY), has already kicked off investigations into allegedly faulty ventilators purchased by the federal government during the onset of the pandemic.³ The House Committee on Energy and Commerce (House E&C), chaired by Rep. Frank Pallone (D-NJ), has also ramped up with hearings on COVID-19 vaccinations, testing, and supply-chain issues set for February 2021.⁴ In addition to this early activity, expect the health sector and pandemic response to be a long-term focus for committees in both houses of Congress for 2021–2022.

The significant investigative and oversight activity on drug pricing issues that characterized the 116th Congress's investigative focus will likely continue in 2021 and expand into examination of COVID-19 vaccines. Investigations will be designed to complement a legislative package early in the new Congress, which could include requirements that lower drug prices negotiated by Medicare be available to patients with private insurance, structural changes to Part D, and limits on surprise medical billing. Companies caught in the crosshairs of a congressional investigation on drug pricing and health care costs may also see bipartisan activity on this issue.

Economic Assistance and Recovery

The economic response to the pandemic will continue to see significant congressional activity. The House Select Subcommittee on the Coronavirus Crisis, chaired by Rep. James Clyburn (D-SC), is poised to expand its long-term investigations into key aspects of the pandemic response, including Coronavirus Aid, Relief, and Economic Security (CARES) Act stimulus programs such as the Paycheck Protection Program (PPP), health care provider participants in the Provider Relief Fund (PRF), and support payments to the aviation industry under the Payroll Support Program (PSP). Some investigations will be instigated by concerns over the businesses that received stimulus funds; others may be triggered by questions about whether the program was properly implemented by the Trump administration. In either scenario, it is likely that a wide swath of the private sector will be touched by these investigations. Main targets for scrutiny will be entities perceived as too large to benefit from their respective stimulus programs and entities that engaged in activities like employee furloughs, which the investigative committees view as inconsistent with the purposes of the programs. In the Senate, investigations in this area will likely be undertaken by the Homeland Security and Governmental Affairs Committee, chaired by Senator Gary Peters (D-MI); the Permanent Subcommittee on Investigations (PSI), led by Senator Thomas Carper (D-DE); and the Banking Committee, chaired by Senator Sherrod Brown (D-OH).

Consumer Protection

In light of the havoc the pandemic has wrought on the U.S. economy, consumer protection will take center stage in many congressional investigations and hearings. Under the leadership of Chairwoman Maxine Waters (D-CA), the House Financial Services Committee can be expected to prioritize investigations into consumer protection issues involving regulatory compliance, eviction protections, small and minority business access to capital, and PPP oversight. On the Senate side, the Banking Committee is also expected to focus on pandemic-related consumer protection issues and oversight of CARES Act lending practices.

Big Tech

Big Tech was the subject of intense bipartisan scrutiny during the 116th Congress, and we expect this trend to continue in the new Congress. During the election, the Biden campaign argued that tech giants have “not only abused their power, but misled the American people, damaged our democracy and evaded any form of

responsibility,” signaling that the Biden administration will take a hard stance towards issues associated with Big Tech.⁵

Congressional leaders on both sides of the aisle have indicated that legislation to update antitrust laws, revamp Section 230, expand broadband, and boost data privacy are all priorities for the 117th Congress.⁶ As such, companies in this sector should expect significant congressional inquiries and bipartisan investigations in both chambers. After the 6 January 2021 Capitol riots, we also expect scrutiny by Republican members on perceived censorship and the de-platforming of former President Trump and associated groups.

The Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy, and Consumer Rights, led by Senator Amy Klobuchar (D-MN), is likely to focus on Big Tech and concerns over alleged anticompetitive conduct. On House E&C, new ranking member Rep. Cathy McMorris Rodgers (R-WA) has been a vocal critic of social media and Big Tech's content moderation policies while on the panel's Consumer Protection and Commerce Subcommittee. We expect her to continue scrutiny of Big Tech, along with increasing broadband access, an issue that has garnered bipartisan support.

Democratic Senator Maria Cantwell (D-WA) will become the new chairwoman of the powerful Senate Commerce Committee. A champion of online consumer privacy issues who introduced the Consumer Online Privacy Rights Act in the 116th Congress, Senator Cantwell will bring renewed vigor to data privacy issues as Democrats seek to build more support for long-awaited comprehensive data privacy legislation.

Energy

Clean energy and climate change issues will be a major priority for the incoming Biden administration. This is consistent with President Biden's campaign messaging and pledge to achieve net-zero carbon emissions for the power sector by 2035 and economy-wide by 2050.⁷ This focus on lower carbon emissions will draw in companies involved in the energy sector and has already prompted the Environment and Climate Change Subcommittee of House E&C to schedule a hearing in early February on carbon capture.⁸ Additionally, the electric vehicle tax break is an incentive that may also see increased scrutiny, with Democrats and some GOP lawmakers calling to increase the current per-manufacturer cap to encourage the electrification of the transportation sector, another expected priority of the Biden administration in this sector.

POTENTIAL AREAS OF BIPARTISAN SUPPORT

Many congressional investigations will garner at least some bipartisan support. In the health care sector, companies should expect scrutiny of prescription drug pricing. Foreign involvement in the technology sector has also garnered bipartisan attention. U.S.-China relations have noticeably soured in recent years, as both parties have grown increasingly concerned with China's ambitious plans for global economic dominance and the potential impact to U.S. national security. Last year, top Senate Democrat Chuck Schumer (D-NY) and Republican Senator Tom Cotton (R-AR) urged the Commerce Department to issue rules to make it harder to export sophisticated technologies that Beijing can use to boost its military.⁹ These Senators have also teamed up on potential national security threats posed by Chinese telecoms.¹⁰ We expect companies involved in the export of key goods to China to see increased scrutiny by Congress and the executive branch in the Biden administration.

Lastly, we expect there to be significant bipartisan support for congressional scrutiny of fraudulent activity related to CARES Act programs. These areas of bipartisan cooperation could open the door to parallel House and

Senate inquiries targeting the same or similar parties, presenting additional risk for private parties caught in the crosshairs.

WHAT YOU NEED TO KNOW WHEN CONGRESS COMES CALLING

President Biden campaigned on a message of unity. However, given the polarizing nature of the 2020 election and its continuing aftermath, we expect the trend of increased partisanship that we have witnessed over the last several administrations to continue. This translates into less legislating and more investigations. If you or your company receives a congressional letter, document demand, or subpoena, see our previous [client alert](#) with tips to help you understand and prepare for congressional investigations.

K&L Gates team has handled over 100 congressional investigations, including the impeachment investigation, CARES Act investigations, and investigations relating to Chinese companies doing business in the United States. We provide full spectrum, bipartisan congressional oversight and investigations services across our global platform. Our team includes policy professionals and lawyers who have deep substantive experience across numerous practice areas: government enforcement, white-collar crime, financial services, energy, environment, health care, technology, procurement, banking, educational institutions, nonbank lenders, and others. If you have questions related to congressional investigations, please contact the authors of this publication or any member of our investigations team.

FOOTNOTES

¹In late 2018, we [introduced](#) our Congressional Investigations 101 series and predicted that Democratic control of the House in 2019–2020 would result in expanded investigations of conduct by the Trump administration that would frequently implicate the private sector directly or indirectly. That happened, resulting in the “mother of all investigations”—the impeachment of President Trump. In early 2020, we also [noted](#) that the massive federal relief directed to the private sector to address the pandemic would become the focus of further investigations supported by [new oversight bodies](#) with extensive investigative powers.

²Molly E. Reynolds & Jackson Gode, *Tracking House Oversight in the Trump era*, BROOKINGS INST., <https://www.brookings.edu/interactives/tracking-house-oversight-in-the-trump-era/>. This figure excludes letters that were not made public by the issuing congressional committee or letters sent by members of the minority party. See BROOKINGS INST., TRACKING HOUSE OVERSIGHT IN THE TRUMP ERA – METHODOLOGY, http://www.brookings.edu/wp-content/uploads/2019/03/gs_20190321_tracking_oversight_trump_era_methodology.pdf.

³Press Release, House Comm. on Oversight & Gov't Reform, Oversight Committee Launches Probe into \$70 Million Contract for Ventilators Found Ineffective for Coronavirus Patients (Jan. 27, 2021), <https://oversight.house.gov/news/press-releases/oversight-committee-launches-probe-into-70-million-contract-for-ventilators>.

⁴*No Time to Lose: Solutions to Increase COVID-19 Vaccinations in the States*, 117th Cong. (2021) (H. Comm. on Energy & Com.), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-no-time-to-lose->

[solutions-to-increase-covid-19-vaccinations](#); *Road to Recovery: Ramping up COVID-19 Vaccines, Testing, and Medical Supply Chain*, 117th Cong. (2021) (H. Comm. on Energy & Com.), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-road-to-recovery-ramping-up-covid-19-vaccines-testing-and>.

⁵David McCabe & Kenneth P. Vogel, *Big Tech Makes Inroads With the Biden Campaign*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/technology/big-tech-biden-campaign.html>.

⁶Cristiano Lima, *Tech priorities for the 117th Congress*, POLITICO (Jan. 4, 2021), <https://www.politico.com/newsletters/morning-tech/2021/01/04/tech-priorities-for-the-117th-congress-792546>.

⁷See BIDEN-HARRIS CAMPAIGN, THE BIDEN PLAN TO BUILD A MODERN, SUSTAINABLE INFRASTRUCTURE AND AN EQUITABLE CLEAN ENERGY FUTURE, <https://joebiden.com/clean-energy/>.

⁸*Clearing the Air: Legislation to Promote Carbon Capture, Utilization and Storage*, 117th Cong. (2020) (H. Comm. on Energy & Com.), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-clearing-the-air-legislation-to-promote-carbon-capture>.

⁹See, e.g., Press Release, *Cotton, Schumer urge Commerce Department to implement export controls* (Nov. 18, 2019), <https://www.cotton.senate.gov/news/press-releases/cotton-schumer-urge-commerce-department-to-implement-export-controls>;

¹⁰See, e.g., Press Release, Senate Democrats, *Schumer, Cotton request FCC conduct review of prior FCC-granted licenses authorizing two Chinese telecom companies—owned and controlled by the Chinese government—to operate in the U.S.; Senators' letter follows FCC's recent rejection of China Mobile USA's application for same authorization on national security grounds* (Sept. 16, 2019), https://www.democrats.senate.gov/newsroom/press-releases/schumer-cotton-request-fcc-conduct-review-of-prior-fcc-granted-licenses-authorizing-two-chinese-telecomm-companies_owned-and-controlled-by-the-chinese-government-to-operate-in-the-us-senators-letter-follows-fccs-recent-rejection-of-china-mobile-usas-application-for-same-authorization-on-national-security-grounds.

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