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Congressional Oversight and Investigations in the 110th Congress

The new Democratic majorities in the Senate and the House of Representatives can be expected to undertake aggressive oversight and investigations of the Bush Administration and those perceived to have benefited from the initiatives of the Administration and recent Congresses.

Nearly every committee of Congress likely will participate in oversight on a broad array of issues, including those that are well anticipated, like Iraq redevelopment fraud, and those that are sometimes overlooked by the press, such as hedge fund oversight. Importantly, while the popular press will focus on high-profile actions like subpoenaing senior government officials or investigating Bush Administration failures, a broad range of private sector companies also will face scrutiny.

The Environment for Investigations in the 110th Congress

Immediately after the elections, Democratic leaders avoided public discussions of investigations and oversight, lest they seem too vindictive, and focused on scoring partisan points rather than moving forward. Nonetheless, exit polls have indicated that the issue of "corruption" was a leading issue motivating votes in this election. Moreover, many of the highest profile defeats were Members or in districts of Members linked to various investigations. These results will energize Democratic Members predisposed to support aggressive investigations.

In the House, the large majority – approximately the same number of seats the Republicans possessed after 1994 – and other factors will likely lead to a very active investigative agenda on a wide range of issues. In contrast, the narrow Democratic majority in the Senate will tend to limit investigations to areas of bipartisan support.

The 2008 presidential election also will influence the investigative agenda. Because national press attention will shift to the presidential primaries in early 2008, the most sensational and high profile congressional hearings will likely occur in the first year of the new Congress. In 2008, investigations will garner less public attention, but they will nonetheless continue to be a reality for corporate America.

Private Sector Impact of Congressional Investigations in the 110th Congress

The private sector can expect to be caught up in subpoenas, document requests, and demands for testimony. Three broad and overlapping categories of companies face investigative risks.

Perceived Beneficiaries of Bush Administration and Congressional Initiatives

Companies that are perceived or portrayed to have benefited from the legislative and regulatory initiatives of the Bush Administration and prior Republican Congresses will face the most immediate risks. Congressional investigators can be expected to look tirelessly for sweetheart contracts, administrative cost overruns, waste and fraud, and narrow appropriations earmarks. Even companies that benefited from policies adopted on a bipartisan basis may find investigators revisiting those decisions and forcing companies to rejustify the basis for the actions.

Specific industries and types of companies likely to come in for scrutiny include the following:

- Recipients of industry-specific tax relief or narrowly directed appropriations earmarks.
- Beneficiaries of regulatory relaxation, including those affecting environmental and labor standards, or other protections important to Democratic constituencies. We also expect oversight of corporate consolidation and an increased emphasis on antitrust limitations.
- Recipients of no-bid or similar contracts, and companies that profited from Iraq and Homeland Security contracting. Companies that experienced administrative or security cost overruns may face particularly strong scrutiny.

Companies Connected to Alleged Bush Administration Failures or Abuses, and Companies and Industries Perceived to Have Close Ties to the Administration

Companies that played a role in what are perceived as Bush Administration failures or abuses also likely will be targets for congressional investigators. Examples include companies involved in the Iraq redevelopment effort, telecommunication and Internet companies that responded to warrantless wiretap orders, and companies that provided services to Katrina victims. These lines of inquiry offer the “triple play” of embarrassing the Administration, uncovering potential corporate abuses, and highlighting the prior Congress’s abdication of its oversight responsibilities.

Corporate Accountability Redux

Although the immediate effects of the Enron and WorldCom scandals have passed, Congress will be quick to investigate areas indicative of corporate abuses. In particular, investigations can be expected on emerging issues like the backdating of stock options and allegedly excessive executive compensation. On the policy side, Congress may make additions to the criminal code in areas of white collar crime and increase sentences for corporate crimes.

Committee Chairmen and Likely Topics of Investigation

In the House, presumptive Speaker Nancy Pelosi has indicated a desire to channel oversight and investigations through the Committee on Government Reform, which will be chaired by Rep. Henry Waxman (D-Cal.), the current ranking Democratic Member of the Committee. The House Energy and Commerce Committee, historically the most aggressive congressional investigator of private companies, will be very active as well under its returning chairman Rep. John Dingell (D-Mich.). Congressman Dingell has a robust and well-earned reputation as a tenacious investigator, and there already are indications that he will use his clout and seniority (he is the longest serving Member in the House) to chart his own course regardless of the leadership’s wishes.

The Democratic Senate also will undertake investigations, although primarily limited to oversight in areas in which there is bipartisan support. The Senate Homeland Security and Government Reform Committee’s Permanent Subcommittee on Investigations, to be headed by returning chairman Sen. Carl Levin, will likely also be involved in select high-profile investigations in the new Congress.

Although the list of potential investigative topics is extensive and may well change as Congress uncovers information, the list below outlines likely avenues of inquiry relevant to the business community.

Defense/Homeland Security

- Iraq reconstruction contracts, administrative cost overruns, and waste and fraud.
- Warrantless wiretapping by telephone and Internet companies at the direction of the government.
- Waste, fraud and no-bid contracts, and Department of Homeland Security contract management.
- Waste and fraud in Katrina relief funds, and FEMA contract management.

Energy

- Oil company profits, and energy royalty relief.
- Energy independence, alternative fuels, and energy efficiency.

Pharmaceuticals

- Drug safety and products liability.
- FDA oversight of pharmaceutical companies.
- Drug company profits and the Medicare prescription drug program.

Financial Services

- Oversight of the hedge fund industry.
- Executive compensation.
- Stock options backdating.

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Our congressional investigations practice is led by Lanny A. Breuer, former Special Counsel to President Clinton who represented the President in the impeachment hearings and trial. Also very active in this practice is Covington partner Eric H. Holder, Jr., former Deputy Attorney General of the United States. They are joined in the practice by other senior lawyers with years of experience working with congressional committee Members and their staff from both parties and both Houses of Congress.

If you have any questions about the investigations landscape in the 110th Congress, please contact one of the lawyers listed below.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our congressional investigations practice:

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