

Are You Ready For Your Congressional Investigation?

By **Brian Smith**

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If the current polls and predictions are accurate, the Democratic party is poised to take control of the House of Representatives next year, for the first time since 2010. Notably, this would be the first time in a decade that a Democratic majority would control a house of Congress with a Republican president. Congressional investigations thrive in divided government, and Democratic leaders in Congress are already promising a new wave of investigations. An incoming Democratic majority would possess virtually unchecked power to issue subpoenas, demand documents, call hearings, and compel witnesses to testify.



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The political press has recently highlighted the implications of the upcoming congressional investigations for President Donald Trump and the White House, focusing on potential investigations targeting the administration's political vulnerabilities, such as the Trump Organization's business activities or the alleged misuse of official funds by administration officials. While these predictions are undoubtedly accurate, the new Democratic majority in Congress will also dramatically increase the congressional investigations risks for private sector companies.

When the country last had a Democratic House and a Republican president, Congress conducted large investigations of drug companies' sales and marketing practices, technology companies' sharing of private customer data, and the corporate practices of the country's largest financial institutions. A decade later, these three sectors — pharmaceutical, financial services and technology — remain prime targets for congressional scrutiny.

In addition, the rate and intensity of congressional investigations are likely to grow over the next two years as the Democratic Congress seeks to maximize its political advantages going into President Trump's re-election campaign. Moreover, congressional investigations tend to increase when Congress faces legislative gridlock. Without the ability to advance policy through legislation, Members will be more likely to turn to investigations as a means of influencing private sector practices. If the Senate remains in Republican control, the Democratic House will therefore have even more incentives to pursue investigations.

Preparing for the coming wave of congressional investigations requires predicting the issues that are likely to pique the interest of the incoming Democratic majority, assessing and understanding the

particular risks that apply to a given company, and understanding the unique characteristics, risks, opportunities and challenges that accompany a congressional investigation.

Predicting Your Congressional Investigation

Congressional investigations are a mix of politics and substance. Members of Congress tend to pursue investigations that advance preferred policy positions while also attracting political support and attention from constituents, campaign contributors, and the press. In assessing risks, companies should consider the factors that make a congressional investigation more likely.

First, predicating investigations often requires understanding the particular interests of individual members of Congress. Rep. Elijah Cummings, D-Md., for example, has consistently and determinedly pursued investigations related to drug prices. Access to affordable medicines is a deeply personal issue for Cummings, who represents many working-class neighborhoods in Baltimore. Drug pricing investigations are also political potent, with many Americans citing high health care costs as a primarily economic concern. Cummings is the likely incoming chairman of the House Committee on Oversight and Government Reform, and House's primary investigative committee. If Cummings becomes chairman, he is certain to use the committee's sweeping investigative powers to pursue drug pricing investigations next year.

Second, companies can expect incoming Democratic committee chairs to pursue investigations that were previously stymied by their Republican counterparts. For example, Democratic members of the House Financial Services Committee have unsuccessfully sought investigations and hearings related to consumer banking practices, banks associated with administration officials including Treasury Secretary Steven Mnuchin, and financial technology companies seeking national bank charters. The new Democratic leaders are very likely to pursue many of the same issues and investigations that they sought in the past, including investigations of drug prices, opioid abuse, data security, energy policy, and financial industry practices.

Third, there are certain political dynamics that spur congressional investigations. Controversies that combine alleged corporate abuses or greed, leniency or laxity by regulators, and harm to average Americans present a potent political trifecta that often leads to congressional scrutiny. The headline of a recent press release from Rep. Dan Lipinski D-Ill., perfectly encapsulated this argument: "Trump Rollback of Environmental Standards Prioritizes Corporate Greed Over Health of Americans."

Fourth, Democratic leaders can be expected to use congressional investigations of private sector companies in their efforts to undermine and investigate the president. For example, Rep. Maxine Waters, D-Calif., has requested that Rep. Jeb Hensarling, R-Texas, the current chairman of the House Financial Services Committee, subpoena bank records concerning alleged Russian money laundering. Hensarling has declined, and Waters may pursue the matter on her own if she becomes chair of the committee next year. In these types of investigations, the private sector company may not even be a target of the investigation. The risks can nonetheless be very high when a company is used as a tool or weapon to go after the administration. Many companies have seen their stock values significantly depressed when caught in the crossfire of a politically motivated investigation. Smaller companies have even been driven out of business by congressional investigations, as customers and investors flee the company because of the congressional spotlight.

Like a nascent hurricane moving into warm tropical waters, the most significant congressional investigations are likely to form where these dynamics converge. Democratic investigators will look for

opportunities to blame the Trump administration for regulatory leniencies that they believe permitted corporate abuses and harm to Americans. They will also seek to tie the Trump administration to corporate practices they find objectionable or inconsistent with their policy positions. The following types of companies should be ready for heightened congressional scrutiny:

- Companies that received notably large benefits from tax reform.
- Companies that benefited from Trump administration actions that loosened regulations or expanded permissible corporate activity.
- Companies that benefited significantly from contracts, licenses or other approvals from the Trump administration.
- Companies that were the subject of Trump administration actions that were criticized by Democratic members of Congress, such as approved mergers.
- Companies with executives that have connections to the Trump administration, such as executives that participated in the White House's formal and informal advisory groups or those that attended the president's various meetings with industry representatives.
- Companies with executives who were vocal supporters of President Trump during the campaign or since he assumed office.
- Companies with former employees who took positions in the executive branch, particularly positions with responsibility for regulating their former employers.
- Companies that have done business with the Trump Organization, such as companies that held events at a Trump property.

Preparing for Your Congressional Investigation

Too many corporate executives mistakenly believe that nothing can be done to prepare for a congressional investigation. Companies that handle congressional investigations successfully, however, often succeed because they have previously prepared by assessing their vulnerabilities, considering strategic options, and developing a plan of response. Although each situation is unique and requires an individualized assessment, companies with foresight are deploying techniques that have proven effective in preparing for a congressional investigation.

Companies are increasingly including an assessment of congressional investigations risks in due diligence performed for an acquisition, around a new product launch, or in connection with another major corporate initiative because a future congressional investigation can dramatically affect the value of a corporate acquisition or other action. In recent years, several companies have found themselves in large congressional investigations that involved issues associated with an acquired company or product. For example, the largest drug pricing investigation involved two products that a large pharmaceutical company acquired from a smaller company. During the financial crisis, one of the largest congressional investigations concerned a bank that acquired another financial institution under stress. New products have also attracted congressional attention. Drug companies and search engines have faced congressional scrutiny related to new products.

Recognizing these trends, leading companies are now including congressional investigation due diligence alongside assessments of other risks. Congressional investigation due diligence is much like other corporate diligence. After reviewing selected materials and speaking with key employees, counsel can assess the risks associated with a potential congressional investigation, permitting executives to balance those risks with other corporate risks and opportunities.

Companies in sectors that have high congressional investigations risks are also developing and testing congressional investigation response plans. Like any other major investigation, such as a U.S. Department of Justice subpoena, congressional investigations require a coordinated response across the entire company, including legal, corporate communications and investor relations. By their nature, they also involve senior leadership, often including members of the board. Guided by counsel experienced in congressional investigations, companies can develop response plans, identify responsible teams and lines of communication, and line up outside advisers, including public relations advisers with experience in congressional investigations. Companies that have assessed their key areas of vulnerability can also prepare standby statements, responses to anticipated questions, and proactive messages designed to rebut expected accusations.

The most discerning companies are conducting mock investigations to test their capabilities, identify gaps and familiarize staff with the intricacies of a congressional investigation. Mock investigations can range from a tabletop discussion over a few hours to a series of events over the course of several days that simulate the typical development of a congressional investigation.

Understanding Your Congressional Investigation

Congressional investigations are unique undertakings, unlike any other legal proceeding. They are deeply infused with politics and lack many of the safeguards to which lawyers are accustomed from civil litigation and other legal processes. There are essentially no rules governing congressional investigations. Companies facing congressional investigations may be surprised by several unique aspects of these inquiries.

First, committees are empowered to investigate any topic, even if only minimally connected to a legislative purpose. The U.S. Supreme Court has held that Congress can investigate anything within the “legitimate legislative sphere,” regardless of whether legislation is actually contemplated.[1] The rules of both the House and the Senate authorize committees to conduct investigations within the committee’s area of legislative jurisdiction.[2] Additionally, the House Committee on Oversight and Government Reform is empowered to “conduct investigations of any matter.”[3]

Second, unlike other legal process, there is no neutral third party to adjudicate disputes, and often not even a process by which to challenge congressional demands. Congressional investigators operate both as prosecutors demanding information and judges who determine whether the requests must be met. Even in formal depositions, which are themselves rare, objections to questions are considered by the same committee chairman calling the deposition. There is no motion to quash a congressional subpoena. Instead, the subpoena recipient must first refuse to comply and then endure congressional contempt (or other enforcement resolution) before the courts will entertain litigation. All the while, members of Congress will roundly criticize the company’s intransigence. Few companies — and even fewer executives — can withstand the reputational damage associated with congressional opprobrium.

Third, most discovery in a congressional investigation occurs through informal letter requests for documents rather than subpoenas, informal interviews instead of depositions, and informal briefings rather than written interrogatories. Document request letters are almost always exceedingly broad and imprecise. The broad document requests are always coupled with an impossibly short deadline — often a deadline that would be truly impossible to meet if the company elected to conduct the sweeping search and production that the committee requested. Experienced practitioners treat document requests as an opening salvo that represents the staff's initial view of relevant information, and they open discussions with the staff about providing information and materials that will answer Congress' questions. Nonetheless, the company should treat the request seriously, issuing an internal document hold and assessing all potentially responsive materials. Congressional investigations often devolve into disputes about process, so companies should take every effort to ensure there are no procedural hiccups along the way. Although the informality of congressional investigations can seem unsettling to general counsels accustomed to litigation, formal legal procedures — such as subpoenas and depositions — are even more challenging before Congress because there is no neutral magistrate or a ready opportunity raise legal challenges.

Fourth, Congress has vastly different views on confidentiality and privileges than the rest of the bar. Congress does not recognize the attorney-client privilege or the attorney work product doctrine. Although Congress will adhere to constitutional privileges, it has long considered common law privileges to be inapplicable in the legislative setting. Moreover, there are absolutely no guarantees of confidentiality for materials produced to Congress. Committee staff will often cite internal rules that prohibit disclosures, but these do not apply to official actions by members in hearings or public reports. Indeed, the constitution's speech and debate clause protects members from any repercussion for most of their official duties.

Finally, congressional investigations carry risks that simply do not exist in other investigations, such as the CEO being called to testify under oath, on live television, to answer questions about the company's most sensitive and complicated matters. Many companies have endured sharp stock drops when a CEO falters before Congress. In the most extreme situations, congressional investigations have forced CEOs and other executives to step down. Additionally, congressional investigations often spawn a series of follow on investigations, including investigations by the Department of Justice, state attorneys general, and regulators, and they prompt the plaintiffs bar to file class action litigation on behalf of harmed consumers. If the congressional attention and criticism caused the stock to drop, securities class action lawsuits often follow.

Getting Ready Now

The Democratic leaders in Congress have made clear that they will pursue an aggressive investigative agenda if they secure a majority in Congress in this fall's elections. Companies in the industries most targeted for congressional investigation can prepare now for the investigations they will likely face in the coming years. With the assistance of counsel experienced in the unique environment of congressional investigations, companies can anticipate areas of inquiry, assess vulnerabilities and prepare response plans now.

Brian D. Smith is a partner at Covington & Burling LLP and formerly served in the White House Counsel's Office under President Bill Clinton.

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[1] *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

[2] Standing Rules of the Senate, Rule XXVI; Rules of the House of Representatives, Rule XI.

[3] Rules of the House of Representatives, Rule X.