

Preparing for Democratic Oversight Investigations

Contributing Partners

Margaret E. Krawiec / Washington, D.C.

David B. Leland / Washington, D.C.

Ivan A. Schlager / Washington, D.C.

Following eight years of Republican majorities in Congress, Democrats took control of the House of Representatives in January 2019, thereby regaining the ability to control committee and subcommittee agendas, hold hearings and issue investigative subpoenas. Companies can expect the new Democratic majority to employ these tools to vigorously pursue vastly different legislative and investigative priorities than Republicans, including issues affecting the health care industry (access to health care and high drug prices); the financial services industry (deceptive consumer practices); for-profit colleges (student debt issues); oil and gas companies (relaxation or deregulation of environmental protection rules); and technology companies (election interference and data privacy issues). Companies in these industries should anticipate that House Democrats will launch a number of investigations that reach beyond the activities of the Trump administration, and they should prepare a game plan for responding to a subpoena or other inquiry in the event they are affected by one of these investigations.

Chairs of key oversight committees have expressed an interest in pursuing a range of investigations. Rep. Elijah Cummings, chair of the House Oversight and Government Reform Committee, has indicated that one of his highest priorities will be drug pricing. Rep. Adam Schiff, chair of the House Intelligence Committee, has stated that he plans to reopen the Russia probe and likely pursue angles that Democrats claim were not fully explored by Republicans, including gathering further information from social media companies and banking records from financial institutions. Rep. Jerrold Nadler, chair of the House Judiciary Committee, has expressed an interest in Russian election interference issues as well as drug pricing. Nadler also would lead impeachment efforts if Democrats pursue that path. Rep. Maxine Waters, chair of the House Financial Services Committee, has stated that her priorities will include banking relationships

with President Donald Trump and such consumer protection issues as deceptive sales practices. Waters also will focus on restoring the intensity of enforcement and regulatory activities of the Consumer Financial Protection Bureau. (See [“Despite Leadership Changes, No Pivot in Priorities Expected for Consumer Financial Services Enforcement.”](#))

Democratic Priorities

Congress can broadly investigate any matter for which it can propose and enact legislation. As a result, few companies or industries are beyond the reach of a congressional subpoena. Democrats’ investigative priorities the past two years have been evident in the letter requests they have issued to companies; reports they have solicited from the Government Accountability Office (GAO) — an independent, nonpartisan legislative agency that investigates federal spending and federal programs, and assists Congress

This article is from Skadden’s 2019 *Insights*.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

in making effective policy and oversight decisions; investigations by Democratic state attorneys general; and oversight letters issued by Democrats to the Trump administration. Further, Democrats likely will use their oversight efforts to scrutinize those initiatives that Trump has touted to date.

Letter Requests. As the minority party, Democrats lacked subpoena power to compel witness testimony and document production. Accordingly, they often resorted to the issuance of letter requests in an effort to increase the visibility of issues and potentially convince the chairman or majority members that a thorough committee investigation was warranted. With a House majority, Democrats in committee chairs likely will issue legally enforceable subpoenas demanding similar information, particularly where companies have not responded to or are perceived to have otherwise mishandled earlier informal requests.

Many of these letter requests — the recipients of which included pharmaceutical companies, financial institutions and social media companies, among others — have been sent to multiple companies within an industry, particularly when the issue being raised was an industrywide one. Congressional Democrats also have called on the Department of Justice, the Securities and Exchange Commission (SEC) and other federal regulators to either investigate or provide information regarding a number of companies.

GAO Reports. Like letter requests, GAO reports often become talking points aimed at spurring a more thorough investigation or hearing. A review of GAO reports issued over the 13 months starting with November 2017 (see our [November 7, 2018, client alert](#) for a list of GAO reports that Democrats in Congress requested during that time) shows that a substantial number of these reports were issued solely at the request of Democratic members of Congress and focused on the health

care industry (e.g., the opioid crisis; open enrollment outcomes in the Affordable Care Act health insurance exchanges; profits and research-and-development spending; and merger and acquisition activity in the pharmaceutical industry).

Other topics that appear to be the focus of Democrat-requested GAO reports include:

- Trump administration programs and priorities (e.g., family separations at the border, deregulation of environmental protection standards, implementation of recent tax cuts);
- education and student lending (e.g., federal student aid, public service loan forgiveness, school accreditation);
- the mining and oil and gas industries (e.g., oil and gas lease management, coal mine reclamation, natural gas storage);
- the financial services industry (e.g., lending to low- and moderate-income communities, large bank supervision, workplace retirement accounts); and
- climate change (e.g., SEC requirements for disclosures of climate-related risks, Department of Defense climate change adaptation planning).

Democratic State Attorneys General Investigations. More than 20 Democratic state attorneys general have pursued investigations and enforcement actions that also may be useful in assessing the potential investigative interests of the new House majority.

New York has been particularly active, using the state's expansive anti-fraud law and other regulatory tools to pursue investigations into and lawsuits against a number of public companies. Among other active matters during the past year are:

- a New York state lawsuit against an oil and gas company for its disclosures relating to climate change;

- subpoenas issued to trade groups, lobbying firms and advocacy organizations over allegedly fraudulent net neutrality comments; and
- the pursuit of consumer protection issues across various industries, including the financial services sector.

Other examples include North Carolina's and Massachusetts' investigations into e-cigarettes and New Jersey's settlements with oil and gas companies for alleged environmental damage caused by a gasoline additive.

Oversight Letters to the Trump Administration. Senate Democrats have sent a number of oversight letters to various federal agencies that appear to remain outstanding and could have implications on the private sector if pursued. Such letters include requests for information regarding or relating to:

- loopholes in the Buy American laws;
- alleged malfeasance of federal agency heads (e.g., stock market trading activities; conflicts of interest with private sectors, such as oil and gas companies, Russian investors and higher education companies);
- the approval and construction of oil pipelines;
- alleged Russian interference in the 2016 election;
- drug pricing issues;
- Americans' access to health insurance coverage information; and
- health care enrollment issues.

While the Democrats will no doubt focus on Trump himself — his tax returns, family businesses and alleged dealings with Russia, among other issues — they are expected to also follow up on outstanding requests that may have a wide reach beyond the Trump administration.

Trump Administration

Accomplishments and Priorities.

Democrats are expected to use their control of oversight committees and subcommittees to scrutinize the policy initiatives of the Trump administration. For example, Trump has repeatedly touted the passage of the tax bill, which, among other changes, lowered the corporate tax rate from 35 percent to 21 percent. He also has stated his desire to further reduce the corporate tax rate. (See “[US Tax Reform and Cross-Border M&A: Considering the Impact, One Year In.](#)”) Democrats will do their best to oppose such efforts by shining a spotlight on provisions of the tax code that they perceive as disproportionately benefiting large corporations. As part of their efforts, Democrats may turn to corporations for information and set public hearings where CEOs are called to testify and disclose the amounts saved as a result of the tax cuts as well as how these savings were used.

Trump also has taken steps to cut regulations that he argues diminish the growth of the U.S. economy. For example, he has moved toward expanding drilling in the Gulf of Mexico and the Arctic. Democrats have strongly denounced the Trump administration’s environmental record and contend that changes at the Environmental Protection Agency have not only harmed the environment but also damaged how the U.S. is viewed around the world. Deregulation will likely remain a priority of the Trump administration, and Democrats are expected to devote substantial oversight efforts to identifying and publicizing any regulatory changes with which they disagree.

Responding to Congressional Inquiries

Congress frequently has used investigations to force industrywide changes. For that reason, companies that have received letter requests from Democrats in

Congress, or whose industry has been the subject of a GAO report or state attorney general investigation, should take steps to prepare for potential congressional investigations. For example, companies should assess whether to make changes to policies, procedures or business practices that may be scrutinized. Companies also might consider identifying and reviewing documents that may need to be produced in the event of a congressional subpoena. Additionally, companies involved in transactions should consider assessing the risk of congressional oversight — which could impact the value of the acquisition — as part of their due diligence.

[Click here for a full list](#) of government enforcement and white collar crime-related articles authored by Skadden attorneys in the last year.