

The State of Congressional Investigations Heading Into 2020

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When members of the U.S. House of Representatives and Senate were sworn into office in January 2019, Democrats took control of the House and its oversight agenda for the first time in eight years, 235-200 seats, and Republicans maintained a majority in the Senate, 53-45 (with two Independents). In April 2019, the House Oversight and Reform Committee — the House's principal oversight body — issued a 248-page report detailing each of the House standing committees' plans to address those priorities, including health care; wages, jobs and economic prosperity; climate change; and investigations into the Trump administration. Over the course of 2019, House committees have initiated numerous investigations that have significantly affected the private sector.

While Republicans typically are viewed as being less aggressive toward the private sector, the Senate also has been active in carrying out its oversight responsibilities, and the work of many of its committees has overlapped significantly with Democratic priorities. This is particularly evident with consumer protection issues, drug pricing, the e-cigarette industry, data privacy and antitrust enforcement.

2019 Committee Investigations Overview

In January 2019, the House Oversight and Reform Committee launched a broad investigation into the drug industry, focusing on the prescription drugs that have increased the most in price over the last five years. The committee also requested documents and convened hearings with respect to the e-cigarette industry, PFAS (also known as "forever chemicals" because they don't easily break down and can exist in the environment for decades) and a number of consumer protection issues. The committee likely will continue to prioritize drug pricing and e-cigarettes regulation in 2020.

At the start of 2019, Rep. Maxine Waters, chair of the House Financial Services Committee, pledged that the committee would hold many hearings under her leadership, and she has followed through.

The committee has focused on private equity firms and their acquisitions of hospitals, nursing homes, emergency service companies, retail companies and residential real estate. The committee also has focused on emerging digital currencies and cryptocurrencies, diversity and inclusion efforts within the financial services industry, and data breaches and cybersecurity policies of industries under the committee's jurisdiction.

Rep. Frank Pallone, chair of the House Energy and Commerce Committee, has prioritized antitrust issues, robocalls, the e-cigarette industry, PFAS chemicals, "surprise billing," drug pricing and short-term, limited-duration insurance plans.

The House Intelligence Committee, which has focused on the impeachment inquiry and claims surrounding Russia's interference in the 2016 election, is now likely to shift its attention to the private sector. It recently held a hearing signaling its focus on deepfakes — fake videos or audio clips that appear to be real — and other forms of manipulated media.

The House Judiciary Committee chaired by Rep. Jerrold Nadler has held hearings on antitrust concerns in the telecommunications, technology and health care industries. Given the mounting scrutiny the technology industry is facing from

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state and federal officials, the committee's investigation into the sector likely will continue in 2020.

Data privacy and cybersecurity have been the focal points for numerous Senate committees, including the Senate Permanent Subcommittee on Investigations, the Senate Judiciary Committee and the Senate Commerce Committee, which has not yet targeted particular companies but has held several hearings on data breaches and data misuse.

Similar to several House committees, the Senate Finance Committee has scrutinized prescription drug pricing, holding three hearings on the issue with witnesses from the pharmaceutical industry; and the Senate Judiciary Committee has addressed how drug patent reform can promote the committee's interest in increasing competition in the drug industry without discouraging innovation.

The Senate Health, Education, Labor and Pensions Committee has conducted oversight of the e-cigarette industry and the cosmetic industry, the latter in particular for products sold to children and teenagers that may contain asbestos.

Congressional Subpoenas

A number of lawsuits have challenged the enforcement of congressional subpoenas in 2019, largely stemming from investigations into President Donald Trump and his administration.

The U.S. Supreme Court has long emphasized the vast scope of Congress' power to investigate and issue subpoenas to obtain information. In its 1975 ruling in *Eastland v. United States Servicemen's Fund*, the Court explained that "the scope of the power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Recent decisions have reinforced this principle.

For example, in early December 2019, in *Trump v. Deutsche Bank AG*, the U.S. Court of Appeals for the Second Circuit

upheld a congressional subpoena issued to two banks for documents related to President Trump's finances. The court highlighted the breadth of congressional investigative authority and explained that although "disclosure of the financial records sought by the Committees will subject Appellants' private business affairs to the Committees' scrutiny," "inquiry into private affairs is not always beyond the investigative power of Congress."

Additionally, in *Trump v. Mazars USA, LLP*, the U.S. Court of Appeals for the D.C. Circuit recently upheld a congressional subpoena issued to President Trump's accounting firm seeking records related to work performed for President Trump and several related business entities before and after he took office. In that ruling, the D.C. Circuit emphasized that "a legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress." These and other decisions in 2019 likely will give additional momentum to oversight and investigatory activity. On December 13, 2019, however, the Supreme Court granted *certiorari* in *Mazars* and *Deutsche Bank*. Oral arguments for both cases are scheduled for March 2020, with decisions likely to come at the end of June 2020. These decisions likely will further define the scope of Congress' authority to issue subpoenas.

2020 Predictions

Companies can expect House and Senate committees to launch investigations closely aligned with priorities and issues of their respective majority parties and presidential nominees. As stated above, we already have seen this with the House in terms of consumer protection, drug pricing, the e-cigarette industry, data privacy and antitrust enforcement, some of which have been highlighted by Democratic presidential election front-runners for 2020.

U.S. Government Accountability Office reports, which often are requested in an effort to launch a more thorough

investigation or hearing into an issue, will be useful in assessing potential investigative priorities in the upcoming year. In 2019, Democratic committee members have requested reports on data privacy, e-cigarettes, insurance companies, diversity and inclusion, hospital and nursing home facilities, climate change and drug pricing, many of which were subject to investigations last year.

The investigations and enforcement actions of state attorneys general also may be useful in predicting the potential investigative priorities of the House and Senate in 2020. State attorneys general often play a crucial role in bringing new issues to the forefront of committees and committee members. In July 2019, 22 state attorneys general sent a collective letter to Congress urging its members to address PFAS chemicals, which likely played a role in Congress' decision to investigate them. A coalition of state attorneys general also called on Congress to ban asbestos. Letter requests from state attorneys general aimed at prompting legislative action have resulted in oversight and investigations. Other issues and industries that state attorneys general have pursued include data privacy, cybersecurity, robocalls, generic pharmaceuticals, e-cigarettes and opioids. Although this is not an exhaustive list, there is tremendous overlap in oversight between Congress and state attorneys general.

Conclusion

As we saw in 2019, even when issues such as the various investigations into President Trump and his administration take center stage, congressional committees still expend significant attention and resources on oversight agendas that affect the private sector. Companies that are within industries that have been or are likely to be subject to congressional scrutiny in 2020, as described above, should assess whether to take proactive measures, such as modifying internal policies, halting certain practices or understanding certain risks posed by mergers and acquisitions.