

January 31, 2020

The State of Congressional Investigations and a Look Forward to 2020

By *Margaret Krawiec, David Leland, Dorielle Obanor and Ivan Schlager*
Skadden, Arps, Slate, Meagher & Flom LLP

Introduction

At the time that members of the House and Senate had been sworn into office in January 2019, the Democrats controlled the House with a margin of 235-200 seats, and the Republicans continued to maintain a majority in the Senate by a 53-45 margin (with two Independents).¹ It was the first time in eight years that the Democrats had controlled the House and its oversight agenda. Upon taking the House, the Democrats stated that they would pursue two investigative tracks – protecting and defending the Constitution and fighting for priority issues such as access to health care, high drug prices and various consumer protection issues.

In April 2019, the House Oversight and Reform Committee – the House’s principal oversight committee – issued a single 248-page report compiling the oversight plans of each standing committee. The report provided an overview of the House’s key oversight areas and a short summary of what each relevant committee intended to do in those areas. Not surprisingly, the noted key areas closely hewed to Democratic priorities. For example, ten of seventeen House standing committees planned to do some oversight activities with regard to healthcare; at least five House committees intended to conduct inquiries relating to wages, jobs, and economic prosperity; five committees planned to attack climate change-related issues; and numerous committees intended to focus on investigations into the Trump Administration. As discussed below, House committees have pursued a number of investigations that have had a significant impact on the private sector.

While Republicans typically are viewed as being less aggressive in investigating the private sector than Democrats, the Senate has nevertheless been active in carrying out its oversight responsibilities, a number of which have had significant consequences for companies. Moreover, the agendas of Senate committees have significantly overlapped with certain Democratic priorities, particularly consumer protection issues. Indeed, as discussed below, many of the House and Senate committees have focused on oversight relating to drug pricing, the e-cigarette industry, data privacy, and anti-trust enforcement.

¹ There have been three special elections for the House in 2019 and there will be at least four special elections for the House in 2020. There also will be two special elections for the Senate that will be held during the November 2020 election. However, none of these House or Senate special elections threatened to change party control in either body. In the November 2020 election, 435 seats in the House and at least 35 of the 100 seats in the Senate will be contested.

This article provides a high-level overview of congressional oversight and investigations in 2019, highlights certain litigation in 2019 related to the enforcement and compliance of congressional subpoenas, and summarizes certain predictive sources that serve as indicators for expected priorities in 2020.

2019 Committee Overview

While the House oversight committees have focused on President Trump and his administration, chairs of the key congressional oversight committees in both the House and Senate have pursued investigations into a wide range of industries within the private sector. In January 2019, as projected, 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 Oversight Committee also requested documents and convened hearings with respect to the e-cigarette industry, PFAS or “Forever” chemicals, and a number of consumer protection issues. The Oversight Committee, now chaired by Rep. Carolyn Maloney after Rep. Elijah Cummings’ passing in October, likely will continue to prioritize drug pricing and e-cigarettes given the Committee’s aggressive stance on both of these issues.

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 on her promise. The Committee has focused its oversight on private equity firms and their acquisition activity, emerging digital currency 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, Limit Duration insurance plans.

The House Intelligence Committee has focused on the Russia probe and the impeachment inquiry over the year. Now that the House Intelligence Committee has concluded its impeachment inquiry, the Committee is expected to shift some of its focus to private industry. In this regard, the Intelligence Committee recently held a hearing signaling its focus on deepfakes 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 healthcare industries. Given the mounting pressure the technology industry is facing from around the country, the Committee’s investigation into the technology industry likely will continue in 2020.

Senate committees also have been active in carrying out oversight responsibilities impacting the private sector. Among other issues, the Senate Permanent Subcommittee on Investigations has conducted oversight with respect to data breaches and cybersecurity issues.

Similarly, although it has not targeted particular companies yet, the Senate Commerce Committee also held several hearings on data breaches and data misuse. Data privacy and cybersecurity in the context of technology companies also has been an issue of interest to the Senate Judiciary Committee. Indeed, cybersecurity and data breach issues will be an ongoing concern of several oversight committees in 2020.

Like several House committees, the Senate Finance Committee has scrutinized prescription drug pricing. The Committee held three hearings on the issue with various witnesses from the pharmaceutical industry, which reflected the Committee's emphasis that issues of drug pricing implicate all parts of the supply chain.

While also focusing on drug pricing, the Senate Judiciary Committee has conducted oversight by addressing how drug patent reform can promote the Committee's interest in increasing competition in the drug industry without decreasing innovation.

The e-cigarette industry also has been subject to oversight from the Senate Health, Education, Labor & Pension Committee along with the cosmetic industry, particularly products sold to children and teenagers that may contain asbestos.

Enforcement of and Compliance with Congressional Subpoenas

A number of parties challenged the enforcement of congressional subpoenas in federal court in 2019, with such litigation largely stemming from efforts to obtain information related to investigations into President Trump and his administration.

Congressional committees have broad authority to compel witnesses to produce testimony and documents for matters under their jurisdiction. The Supreme Court long has emphasized the vast scope of Congress's power to investigate and issue subpoenas to obtain information. The Court has 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." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975). Recent decisions have reinforced this principle.

For example, in early December, 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. *Trump v. Deutsche Bank AG*, No. 19-1540-cv (2d Cir. Dec. 3, 2019). The court highlighted the breadth of Congress's 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, the U.S. Court of Appeals for the D.C. Circuit recently upheld a congressional subpoena issued to President Trump's accounting company. The subpoena sought records related to work performed for President Trump and several of his business entities before and after he took office. *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019). In that ruling, the D.C. Circuit reaffirmed and 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 committees additional momentum to move forward with aggressive oversight and investigatory activity in the future. On December 13, 2019, however, the Supreme Court granted certiorari in the two cases discussed above – the *Mazars* case and the *Deutsche Bank* cases. Oral argument is scheduled for March 2020, with a decision likely to come at the end of June 2020.

Predictive Sources

2020 will no doubt be a divisive election year. Companies can expect committees from the House and Senate to continue to launch investigations closely tethered to priorities and issues aligned with their respective parties and party presidential nominees. Indeed, we already have seen this with the House's focus on oversight relating to consumer protection, drug pricing, the e-cigarette industry, data privacy, and antitrust enforcement, some of the issues that have been highlighted by Democratic front-runners for the 2020 presidential election.

U.S. Government Accountability Office (“GAO”) reports, which are often requested in an effort to launch a more thorough investigation or hearing into an issue, also will be useful in assessing potential investigative priorities in the upcoming year. Over the past year, 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 these requests parallel the investigations that we have observed in 2019.

The investigations and enforcement actions of state attorneys general also may be a useful source in assessing 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 it to address issues involving PFAS or “Forever” chemicals. A coalition of state attorneys general also called on Congress to ban asbestos. Letter requests aimed at prompting legislative action have proven to also result in oversight and investigations. Other issues and industries that state attorneys general have pursued include data privacy, cybersecurity, robocalls, generic pharmaceutical industry, the e-cigarette industry, and the opioid crisis. Although this is not an exhaustive list, there is tremendous overlap in oversight between Congress and state attorneys general.

Conclusion

As 2019 has shown, even when there is a greater emphasis on political agendas – such as the Democratic-controlled House launching various investigations into President Trump and his administration (particularly in light of the 2020 election) – oversight agendas still have an impact on the private sector. Certain priorities already have been outlined for 2020. Companies need to be ready, particularly if their industry is likely to be under scrutiny. Careful thought should be given now as to whether any proactive measures should be taken to address certain business practices or policies that could come under congressional scrutiny. Getting ahead of an anticipated issue will pay dividends in the long run.