

The State of Congressional Investigations in 2021

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Democrats retained control of the House in November 2020, though the party enjoys a notably smaller majority after losing several seats to Republicans. Additionally, after Democrats prevailed in both runoff elections in Georgia on January 5, 2021, Vice President Kamala Harris can provide the tie-breaking vote to give Democrats the majority in the Senate.

Leadership of the House committees in the 117th Congress, which convened on January 3, 2021, remains largely the same. At least nine Senate committees are slated to have new Republican minority leadership, mostly due to term limits. The majority of Democratic committee chairs for the Senate committees are yet to be announced, though we expect some Democratic members who formerly held Senate minority leadership roles in the 116th Congress to serve as chairs. The three committees that have announced chair changes thus far include the Banking Committee, which Sen. Sherrod Brown will lead. Conventional wisdom suggests congressional oversight of the private sector will increase with Democratic control of both Congress and the executive branch. Both chambers can be expected to pursue similar investigative agendas, as discussed further below.

Absent a crystal ball, it is difficult to anticipate the full scope of issues Congress will choose to examine in 2021. Nevertheless, various predictive sources can assist companies with anticipating topics of congressional interest. For example, the Department of Justice's (DOJ) priorities may shed light on the 2021 congressional agenda, as there is often a great deal of overlap between investigations conducted by the executive and legislative branches, especially where both are controlled by the same party. By way of example, both the DOJ and Congress recently have focused on Big Tech companies' alleged accumulation of market power. (See "[Transition From Trump to Biden May Bring Less Change to Antitrust Enforcement Than](#)

[Expected.](#)") Additionally, recent House hearings have examined the conduct of several generic drug manufacturers charged in an ongoing DOJ criminal antitrust investigation.

Under the Biden administration, corporations can expect the DOJ and congressional investigations to place greater focus on the private sector. Indeed, as noted in greater detail below, Biden's campaign took critical positions on a number of issues directly tied to private commercial activity, including climate change (such as requiring public companies to disclose climate risks), regulation of Big Tech, scrutiny of business relations with China and regulation of financial services (especially with respect to consumer protection issues). Such topics will continue to be important to both the Biden administration and congressional Democrats, and when the interests of the DOJ and Congress align, parallel investigations ensue, creating complex challenges for the private actors caught up in them. Companies find themselves weighing the competing risks and occasionally conflicting demands that such investigations pose.

While we expect many of the DOJ's priorities to continue — Big Tech likely will remain a key focus of both Congress and the DOJ with respect to antitrust, cybersecurity, data privacy and workforce protection — we anticipate additional industries will draw scrutiny. The focus of antitrust enforcement may extend beyond Big Tech to the pharmaceutical and financial services industries. The DOJ currently is in the midst of an ongoing criminal antitrust investigation of generic drugmakers,

having charged a seventh company this past summer, and in October 2020, it announced a new “muscular role” for antitrust in financial services, fintech and banking. These priorities align with the incoming Biden administration’s stated intention to prioritize protecting consumers from unfair business practices.



COVID-19

Implications of the COVID-19 pandemic will remain a focus of both the DOJ and Congress, including investigations of companies that allegedly took advantage of consumers by price gauging, selling unsafe and/or counterfeit products, and committing fraud.

In addition, President Biden plans to direct the DOJ and the Environmental Protection Agency to place greater emphasis on climate-related issues, such as enforcement of environmental laws — a priority they will likely share with congressional committees. Lastly, the incoming administration likely will continue to concentrate on China (it does not plan immediately to rescind the Trump administration’s tariffs on Chinese-made goods) and Russia (especially in the wake of the hack of U.S. government networks in late 2020 attributed to Russian state actors). (See “[US-China Trade and Enforcement Issues: What’s Next?](#)”)

President Biden’s legislative platform and anticipated policy priorities also provide insight into the oversight agenda. Congressional Democrats likely will follow the president’s lead regarding the following issues and industries:

– **Government Response to the COVID-19 Pandemic:** A great deal of the House’s oversight since March 2020 has focused on the Trump administration’s management of the COVID-19 pandemic. These investigations likely will continue and be aimed more broadly at such issues as how relief funds were distributed and used, and plans and strategies for responding to future natural disasters and pandemics.

– **Environmental Concerns:** President Biden has made climate change and environmental issues a key priority. As a result, issues such as fracking have received renewed attention. President Biden’s recent environmental appointments, including John Kerry as special presidential envoy on climate change and Gina McCarthy as head of the new White House Office of Domestic Climate Policy, also suggest a significantly increased emphasis on environmental issues. (See “[Climate Change Should Drive Energy and Environmental Policy](#).”) Key members of the House have signaled their alignment with this presidential priority: The Democrats who were vying to chair the House Appropriations Committee all expressed their plans to work closely with the Biden administration to prioritize federal dollars for fighting climate change. (Rep. Rosa L. DeLauro of Connecticut has been elected chairwoman.) The House can be expected to undertake broad investigations in this space and to conduct oversight of executive branch enforcement of environmental laws, both of which may draw in private actors.

– **Drug Pricing and Health Insurance:** The affordability of health care received significant attention during the 2020 presidential campaign. Furthermore, House and Senate committees have conducted bipartisan investigations of drug pricing over the past few years. Such investigations are expected to continue. (See “[Biden Administration’s Expected Impact on Health Care and Life Sciences Enforcement](#).”)

– **Tech:** Big Tech has been the recent focus of congressional investigations, and interest in this area is likely to expand as the influence of technology over nearly every aspect of American life continues to grow. In addition to antitrust issues, which have been at the center of many of these investigations, future inquiries may focus on cybersecurity, use of consumer data, website monitoring and social media, reflecting broad societal concerns over privacy issues.

– **Consumer Protection Issues:** Congressional oversight with respect to consumer protection issues featured prominently in 2020, including on e-cigarettes, products containing talc and consumer products created in response to the COVID-19 pandemic. During several hearings, Democrats questioned the drop in enforcement actions at consumer protection agencies under the Trump administration. (See “[Fair Lending Enforcement Poised To Increase Under Biden Administration](#).”) Given the bipartisan interest in consumer protection issues, all indications suggest that investigations in this area will feature prominently in Congress’ 2021 oversight agenda.

– **2017 Tax Reform Bill:** President Biden has challenged the Trump administration’s 2017 tax reform law, asserting that the Tax Cuts and Jobs Act was largely a windfall for large corporations and the wealthy. President Biden also has proposed his own tax plans. Congressional oversight committees may probe companies that benefited from the 2017 tax reform, specifically inquiring about how they spent any tax savings and whether the savings benefited any particular employees.

– **Trump Administration:** Investigations related to President Trump will be a continued priority for Congress. On November 10, 2020, a number of House committee chairs sent letters directing the Trump administration and more than 50 federal agencies to comply with federal record-keeping laws and preserve information responsive to past congressional subpoenas and investigations. Furthermore, following the events at the U.S. Capitol on January 6, 2021, [five House committees sent a letter to the FBI](#) seeking a briefing on the agency’s efforts to “investigate and pursue for prosecution the instigation, planning, and execution of the deadly terrorist attack on the United States Capitol.” Although President Biden has not publicly taken a position on impeachment or the broader agenda of launching investigations into the Trump administration, on

January 13, 2021, the House voted 232-197 to impeach President Trump, accusing him of inciting the insurrection at the Capitol. As of this writing, the Senate impeachment trial is scheduled to begin on February 9, 2021. Numerous Democratic elected officials have argued that impeachment is not enough and have also called for congressional committees and the DOJ to launch investigations into President Trump, his family and his top aides for a host of actions during his time in office, including his challenges to the presidential election.

Statements by chairs and members of key investigative committees have also provided clear previews of oversight priorities:

- Chairwoman Carolyn B. Maloney of the House Committee on Oversight and Reform recently stated that COVID-19, rebuilding the economy, drug prices, the U.S. Postal Service and the census will be top priorities.

- House Committee on Financial Services' Chairwoman Maxine Waters has vowed to continue oversight of megabanks and will strive to reverse the easing of financial rules during the Trump administration, including anti-redlining rules under the Community Reinvestment Act, changes to the Volcker Rule and capital requirements for banks.
- Jerrold Nadler, chairman of the House Judiciary Committee, has stated that the committee will continue its robust oversight of the digital marketplace and its examination of antitrust issues.

Conclusion

In 2020, Congress engaged in significant oversight of the private sector. We can expect such oversight to increase with Democrats controlling both houses of Congress and the executive branch. Companies should monitor relevant press related to potential congressional

oversight activities. For example, as noted above, committee chairs and other members often issue press statements indicating priorities of their respective committees. Moreover, oversight letters frequently are released publicly. Reviewing such statements and letters can assist a company in understanding whether the issues outlined therein are unique to them or generally related to industrywide issues, making it possible that other private companies in the industry could be swept up in a congressional investigation. If oversight activity is a possibility, companies should evaluate their policies, procedures and related compliance efforts to determine whether modifications should be made.