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Trends in Congressional Oversight to Watch After Midterm Results

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Partners Rafi Prober and Karen Christian, Co-Heads of Simpson Thacher's Congressional Investigations Practice, and Counsel John Geise authored an article, which was published by *Bloomberg Law*. The article examines six factors that could shape congressional investigative activity following the midterm elections, including potential changes in committee leadership, new sources of congressional scrutiny and the increasing use of video depositions. The authors also discuss the potential for companies to face competing pressures from Congress and the executive branch, as well as congressional efforts to revisit certain agency actions and decisions. The article highlights the importance of proactive planning as companies prepare to navigate an evolving congressional oversight environment.

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As the midterm elections get underway, companies are bracing for a potential increase in congressional oversight, particularly if the Democratic Party secures a majority in either the House, the Senate, or both.

Members such as US Reps. Robert Garcia (D-Calif.) and Jamie Raskin (D-Md.) have signaled through public letters their likely oversight priorities. Lawmakers have more oversight tools at their disposal, and congressional investigations may carry higher stakes, as companies navigate the risk of being caught between the executive and legislative branches.

In the run-up to the convening of the new Congress, executives should pay close attention to these six factors that are likely to influence congressional investigations.

If the Senate flips, expect a changing of the guard on key oversight committees.

A change of control in the Senate would bring new committee chairs to prominent oversight committees. These efforts will be aided by rule changes enacted when majority control last switched.

For example, Homeland Security Chairman Sen. Rand Paul (R-Ky.) changed the rules to give himself unilateral subpoena power, removing the ability of the ranking member to object to a subpoena's issuance and require a full committee vote. It's unlikely Democrats will reverse course.

The retirements of Sens. Dick Durbin (D-Ill.) and Gary Peters (D-Mich.) mean that the next in line for the chairmanships of the Judiciary and Homeland Security and Governmental Affairs Committees are Sens. Sheldon Whitehouse (D-R.I.) and Maggie Hassan (D-N.H.), respectively. Given the current environment and the signals both have publicly provided, companies should expect both will likely pursue far more aggressive oversight than their predecessors.

In addition to preparing for robust oversight from these committees, companies should keep a close eye on Sens. Elizabeth Warren (D-Mass.), Bernie Sanders (I-Vt.), and Ron Wyden (D-Ore.), who are expected to chair the Banking, Health, Education, Labor and Pensions, and Finance committees, respectively.

Warren has expressed interest in the illicit diversion and export of advanced artificial intelligence chips to China, Sanders is likely to use a possible chair position on the HELP Committee to investigate any efforts to stop employees from unionizing and to focus on AI-driven job loss, and Wyden is likely to continue to focus on privacy and tax issues.

More Senate oversight would come from more committees and lawmakers.

These new sources of oversight from a Democrat-controlled Senate could be either individual senators or committees that traditionally haven't engaged in extensive oversight.

Warren and Sen. Adam Schiff (D-Calif.) have increasingly built oversight capacities in their personal offices with success, even as part of the minority. For example, Warren recently pressed Trump-affiliated companies regarding President Donald Trump's deal with the Treasury Department and the IRS and received substantive responses, and Schiff has released multiple oversight reports through his personal office.

If the Senate flips, Republican senators—such as Sens. Josh Hawley (R-Mo.) and Ted Cruz (R-Texas)—may follow this example. Their profile and ability to generate press attention through oversight may alter the considerations companies will weigh when considering how to respond to such "minority" requests.

Lawmakers may use oversight as a platform for future political ambitions.

Lawmakers on both sides of the aisle looking to launch 2028 presidential campaigns may use oversight to increase their national profiles. Prime targets include consumer protection, privacy, AI, and affordability issues.

The focus on 2028 might lead lawmakers considering running for president to pursue bipartisan oversight (which is otherwise increasingly rare) to burnish their credentials on populist issues. A recent example of this is the bipartisan inquiry from Sens. Richard Blumenthal (D-Conn.) and Hawley concerning the use of AI in schools.

Expect more aggressive use of video depositions.

The Select January 6th Committee ushered in novel uses of video depositions that continue to resonate in House congressional investigations, with Republicans successfully adopting the tactic.

Companies should expect this tactic to continue and even increase in a Democratic House, with the Senate likely to follow suit as well. Video depositions change preparation strategies significantly, as members are more likely to attend these sessions and seek to use their questioning time to generate short, shareable clips.

Executives and other individuals preparing for video depositions need to view them more like mini-hearings than traditional witness interviews.

House, Senate, and Justice Department pressure will be felt simultaneously.

Companies responding to congressional subpoenas may face competing pressures from the legislature and the executive branch regarding compliance. On the congressional side, Democrats looking to obtain documents that support investigations of the Trump administration may see some corporations as attractive targets.

But the Justice Department Office of Legal Counsel's recent opinion that executive privilege may extend to a president's communications with external advisers suggests that the executive branch might seek to thwart such efforts. Companies may face the untenable position of either failing to respond to a congressional subpoena or turning over materials the executive branch claims are privileged.

Certain agency actions will come under review.

Congress may use its investigative authority to revisit certain merger approvals or other agency decisions that lawmakers believe were subject to inappropriate influence or political considerations.

Such inquiries — and the documents that could be produced — have the potential to spawn new avenues of scrutiny, whether that be DOJ referrals, state attorney general investigations, or other shareholder or investor challenges.

Here again, proactive planning can help companies navigate this oversight environment if or when it unfolds.

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