

## 117th Congress to Target Private Entities with Increased Congressional Investigations

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March 23, 2021

*This is the fourth in our First 100 Days series examining important trends in white collar law and investigations in the early days of the Biden administration. Our previous entry discussed [anti-corruption enforcement](#). Up next, [SEC on ESG Risk Disclosure – Moving From “If” to “How”](#).*

With President Biden in the White House and Democrats controlling both chambers of Congress, the private sector should expect increased scrutiny through congressional investigations used to probe perceived wrongdoing and support an ambitious legislative agenda.

Congress has always possessed broad investigatory powers as part of its general legislative authority. After all, for Congress to exercise its lawmaking functions effectively, it must remain informed regarding the subjects of current and future legislation. The House of Representatives and the Senate carry out investigations through committees, to which they designate particular areas of inquiry and provide specific investigatory tools. These tools may include the power to subpoena documents and deposition testimony, to conduct hearings, and to refer findings to the executive branch for criminal prosecution or civil enforcement. Often, however, Congress will first seek voluntary compliance with requests for information or interviews before resorting to compulsory processes.

Congressional investigations may target other members of the government, legislative or executive (for example, the investigations of former President Trump’s administration), as well as private persons and entities. These powers are far-reaching—wherever Congress can legislate, it can investigate and, subject to certain, narrow constitutional limitations, compel cooperation. Whatever their target may be, congressional inquiries generally draw a high level of media scrutiny and may, at a minimum, inflict significant reputational harm.

The 117th Congress is poised to be very active in its investigations for several reasons. First, we can expect to see new investigations coming from the Senate, which the Democrats now control for the first time in a decade. The Senate has been slower than the House in organizing committees and publishing rules, but we can expect to see significant oversight of the private sector by the Senate Finance Committee, the Senate Committee on Banking, Housing, and Urban Affairs, and the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights.

Second, as the focus begins to shift away from the government’s pandemic response, Congress will likely shift its focus toward the actions of private entities, including those that benefitted from legislative pandemic relief, as well as climate change, economic inequality, and other issues on the Democratic congressional agenda. The [rules package](#) that the House of Representatives approved back in January underscores these investigative priorities by re-authorizing the Select Subcommittee on the Coronavirus Crisis and the Select Committee on the Climate Crisis, and authorizing the new Select Committee on Economic Disparity and Fairness in Growth, all of which have oversight authority.

Finally, the 117th Congress has further increased the House’s investigatory power. The rules package enabled the Committee on Oversight and Reform and the Select Subcommittee on the Coronavirus Crisis, prior to the formal reorganization of these committees, to reissue subpoenas from the 116th Congress related to the 2020 census and political interference with federal public health agencies. The rules package also maintains the deposition policy adopted during the 116th Congress, which permits staff counsel to take depositions without a member present.

While it is still early in the congressional term, Congress has already launched inquiries into private entities related to alleged abuses of

pandemic relief legislation, a botched response to the extreme climate event in the Southwest, and the potential need for antitrust reforms.

## Opioid Settlements and CARES Act Tax Deductions

On March 4, 2021, Chairwoman Carolyn Maloney (D-NY) of the House Committee on Oversight and Reform, along with committee members Vice Chair Jimmy Gomez (D-CA) and Mark DeSaulnier (D-CA), sent letters to four companies – Cardinal Health, McKesson, AmerisourceBergen, and Johnson & Johnson – seeking information about their plans to use a CARES Act provision to deduct the cost of settling lawsuits related to their roles in the opioid crisis.

The CARES Act permits businesses to carry back for up to five years any net operating losses incurred in 2018, 2019, and 2020. Republican and Democratic lawmakers have described the tax provision as a measure primarily meant to provide relief for struggling businesses and industries, although the provision (contained in 26 U.S.C. § 172(b)(1)(D)) is broadly applicable to taxpayers.

In its quarterly SEC filing, Cardinal Health disclosed that it planned to use the CARES Act carryback provision to file for a \$974 million income tax refund – a refund nearly \$500 million larger than it would have otherwise received. Chairwoman Maloney is seeking information on whether McKesson, AmerisourceBergen, and Johnson & Johnson would also use the CARES Act carryback provision to seek increased refunds, and described Cardinal Health’s plans to do so as “insulting to every community suffering from the opioid crisis and the pandemic.” Since the issuance of the letter, AmerisourceBergen and Johnson & Johnson have confirmed to the media that they do not plan to use the CARES Act carryback provision. Cardinal Health has [stated](#) that its use of the provision complies with “current federal law” and allows it to “recover previously paid taxes.”

Presently, it is unclear what, if any, subsequent action the Committee will take. The Committee requested that the four companies produce information in response to its request by March 18, 2021. Depending on the companies’ responses, it is possible that the Committee will hold hearings, pursue a legislative solution, or take other action. But as of the date we published this post, that deadline had passed and the Committee had neither commented on whether the companies had satisfied its request nor announced any next steps it would be taking.

Healthcare and pharmaceutical companies will likely continue to face scrutiny for behavior that is illegal or, in the view of Congress, improper. Drug pricing was a major investigative target of the 116th Congress, and the 117th appears inclined to maintain a focus on the healthcare industry. In addition, it is likely that Congress will investigate potential fraud and abuse of pandemic relief measures across various industries.

## ERCOT Investigation

On March 3, 2021, the House Subcommittee on the Environment, chaired by Representative Ro Khanna (D-CA), sent a letter to Bill Magness, the CEO of the Electricity Reliability Council of Texas (ERCOT), requesting information and documents regarding ERCOT’s lack of preparation for the late-February winter storm that left at least ten dead and millions in the state without power.

Cold weather had previously caused similar, albeit less destructive, outages in Texas. In February of 2011, as Chairman Khanna noted in his letter, 210 generating units experienced disruption due to extremely cold temperatures, leaving over three million ERCOT customers without power. And in 1989, cold weather caused outages of 56 generating units. Chairman Khanna expressed concern that Texas had not implemented the lessons that had been learned from the 1989 and 2011 outages, and sought documents from ERCOT relating to preparations for an extreme weather event, records describing every power generation unit that experienced failure during the recent winter storm, documents relating to rolling blackouts during the same, and documents relating to the 2011 and 1989 outages.

In his letter, Chairman Khanna also addressed the link between climate change and extreme weather events, as well as the disproportionate effect of the outages on low-income and minority communities. Chairman Khanna, a co-sponsor of the Green New Deal resolution, has in the past taken [a broad view](#) of the effects of climate change and the scope that a response to the problem requires. For his part, then-nominee Biden campaigned on [a plan](#) to secure environmental justice and equitable economic opportunity through energy and environmental policy. In their current roles, Chairman Khanna and President Biden are likely to place a greater emphasis both on climate change and its unevenly distributed effects than did the prior administration. The concerns expressed by Chairman Khanna in his letter to ERCOT will likely continue to animate the investigatory activity of the House Subcommittee on the Environment.

ERCOT has expressed its intention to comply with the Subcommittee’s request for information and documents. ERCOT’s response was due by March 17, 2021. As of the date of this post, however, there has been no news regarding ERCOT’s compliance or further steps from

the Subcommittee.

## Antitrust Reforms

The House Judiciary Antitrust Subcommittee continues to hold a [series of hearings](#) on proposals to curb the dominance of online platforms and modernize the antitrust laws. The hearings launched the Committee's competition agenda in the 117th Congress following its 16-month, bipartisan investigation into the state of competition online. As part of the investigation, the Subcommittee obtained 1.3 million internal documents and communications from online platforms; received submissions from 38 antitrust experts; interviewed more than 240 market participants, former employees of the investigated platforms, and other individuals; and held seven hearings, including one with the Chief Executive Officers of Apple, Amazon, Google, and Facebook. The current hearings are intended to focus on addressing concerns raised during the investigation, modernizing and strengthening the tools available to federal antitrust enforcers, and other potential improvements to the antitrust laws.

This is just the beginning. We will continue to monitor Congress as it flexes its investigatory resources, policing perceived misconduct by private entities and laying the groundwork for its legislative agenda.

### RELATED PRACTICES

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