

A Divided Congress May Increase Companies' Political Risks

By **Kristina Moore and Alexander Miehl** (November 3, 2022, 4:32 PM EDT)

In one of the most tumultuous periods in recent political memory, voters in the U.S. will return to the polls next week to select their representatives and decide majority control of the U.S. Congress, including the gavels of its most impactful and influential committees.

Given the current dynamics, many political analysts predict Republicans will win control of at least one congressional chamber.[1] If so, the Biden administration will find itself in the new position of operating within a divided government.

So, too, will corporate America. During the next two years, political risk for corporations and their leadership will likely escalate as the Biden administration, and the new Congress, deploy their investigation and enforcement authorities.

In this environment, companies can be caught in the crossfire and will have to think carefully about how to engage with investigatory and enforcement bodies, as well as an emboldened Congress.

If government is divided, as Congress and enforcement agencies go toe-to-toe, their actions will affect not only companies' license to operate — or in other words, the ongoing acceptance of their business practices in Washington — but also their broader reputations in the capital and commercial markets in the U.S. and abroad.

From the Democrats

The divided government dynamic means that federal enforcement agencies such as the U.S. Securities and Exchange Commission, the Federal Trade Commission and the U.S. Department of Justice will likely continue to use regulation, investigations and enforcement actions to advance the Biden administration's policies on competition,[2] climate[3] and equity.[4]

For example, companies should expect the SEC, led by Chair Gary Gensler, to continue moving forward[5] with ESG standards and climate disclosure policies for a wider sector of the U.S. economy. [6]

Additionally, the FTC, led by Chair Lina Khan, will certainly continue its scrutiny of competition issues



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implicating technology companies as well as data brokers, energy producers, agriculture and health care.[7]

Khan, backed by the president, has been guiding the agency to move past the consumer welfare standard and to focus instead on competition and quality, and the impact on other stakeholder groups, like employees.[8]

She has also reexamined and deployed unused statutes, such as the Robinson-Patman Act, to apply pressure to pharmacy benefit managers to bring down the cost of drugs, and e-commerce businesses, which can theoretically negotiate preferred pricing from their vendors.[9]

Lastly, companies should expect that Democratic state attorneys general, possessing broad investigatory authorities and guided by the well-funded National Association of Attorneys General, will engage in investigations that seek to hold corporations accountable for their actions.[10]

This would continue a trend in AGs launching investigations and litigation to accomplish policy outcomes, as they have recently embarked on investigations into chemical and plastics manufacturers,[11] the nicotine industry[12] and technology companies.[13]

Utilizing the expansive public nuisance theory, state AGs could expand inquiries into contamination by polychlorinated biphenyl, per- and polyfluoroalkyl substances, or 1,4-Dioxane, or they could pursue investigations into perceived monopolies, complementing the FTC's efforts to reign in technology giants.

From the Republicans

Should Republicans win a majority in Congress or win at least one congressional chamber, it is likely that U.S. House of Representatives leaders would have to navigate two sets of political incentives: their traditional oversight philosophy of checking federal bureaucracy, and their electoral base's appetite for congressional investigations into both the Biden administration and prominent advocates of the Biden administration's policies.[14]

The latter will be a key driver for the incoming freshman class as they channel the populist passions of today's Republican voters, who are as skeptical of corporate America as the Democratic Party.[15]

Two highly anticipated targets of Republican oversight are inquiries into the increased focus on stakeholder capitalism in corporate America, and what some Republicans see as anti-conservative bias on tech platforms.

Republican interest in environmental, social and governance stems from the argument that ESG requirements are a means for activists to promote environmental policy through financial regulations.[16]

In addition, Republicans have expressed concerns that ESG requirements will not produce higher returns for shareholders and that the new requirements undermine the quality of the current SEC disclosure framework.[17]

To pursue these questions, Republicans could, for example, act to bolster the multistate investigation into the U.S.'s six largest banks about their efforts to reduce greenhouse emissions by sending letters demanding documents and testimony.[18] The targets of the state AG investigation

are Bank of America Corp., Wells Fargo & Co., Morgan Stanley, JPMorgan Chase & Co., Goldman Sachs Group and Citigroup Inc.[19]

Alternatively, Congress could probe corporations and investment banks that have promoted stakeholder capitalism urged by the FTC and SEC to identify self-dealing.

Technology companies who may be accused of bias against conservatives should revisit the investigation into the IRS during the Obama administration.

House Republicans investigated the agency over accusations that it was purposefully delaying the processing of applications by certain conservative groups and requesting information that was later deemed unnecessary when they applied for tax-exempt status.

The investigation dragged out over a number of years as the constant drumbeat of new findings suggesting both wrongdoing and a cover-up kept the scandal alive.[20]

For additional targets, the Republicans' so-called Commitment to America outlines the party's plans for oversight should they win the midterms, and echoes letters sent by House members during the first two years of the Biden administration.[21]

These areas include all things China,[22] ranging from Chinese investment in U.S. companies and reliance on Chinese supply chains, to the relationship between Hunter Biden and Chinese business interests[23] that paid his firm over \$5 million in less than a year.[24]

Other hot topics include the Biden administration's pandemic policies, such as sourcing for protective equipment or experimental testing with the COVID-19 virus; actions related to climate change; the withdrawal from Afghanistan and the subsequent Taliban takeover;[25] and immigration policies.[26]

Republicans have also signaled that they would be eager to review benefits that private sector actors have received over the first two years of the Biden administration, including recipients of federal funding, loans and tax breaks made available through the CHIPS and Science Act and the Inflation Reduction Act.[27]

Republicans would also likely launch investigations into content moderation and data security practices by major tech companies.

Experienced investigators will be able to leverage public hearings, the power to compel documents and testimony, as well as the ability to conduct depositions and transcribed interviews to extract information from the private sector and define a public narrative aligned with their policy agenda.

Private Sector Caught In Between

As a result, some companies may face investigative and regulatory scrutiny and pressure from both the left and the right.

For example, all public companies will have an obligation to disclose their greenhouse gas emissions and other climate-related information per the SEC's proposed climate disclosure rules.[28]

Corporate advocates of this policy could be investigated over the proposed rule, receiving document requests and invitations to testify in order to probe their suspected influence over the regulation and identify any self-dealing.[29]

Similarly, corporate advocates of ESG policies could easily find themselves answering to Congress about how these policies benefited their shareholders.

If the results of the 2022 election result in a Republican Congress, corporate America will have to recalibrate its perceptions of political risk so that they can avoid getting caught in between competing political and policy agendas and investigations.

Companies would be wise to begin planning a strategy now to protect their interests and their critical stakeholders.

Internally, companies should practice careful communications strategies, while also creating bridges between traditionally siloed offices, such as the offices of general counsel, investor relations, government affairs and communications.

Additionally, a political risk analysis, coupled with media monitoring and political-intelligence gathering, would uncover potential vulnerabilities and allow for strategic planning to narrow the window for criticism.

For companies that have determined they are likely to receive scrutiny, preparedness and tabletop exercises can assist the company in providing a more nimble and attuned response, should they receive Congressional scrutiny.

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