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Antitrust After the Midterms: Planning for a Blue Wave of Congressional Investigations



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Following up on their webinar, now available on demand—"Antitrust After the Midterms: What Comes Next for Enforcement, M&A, and Business Strategy?"—Jimmy Attridge and Mary Helen Wimberly offer additional views about how to prepare for investigations in the next Congress.

With Democrats taking control of both the House and the Senate in January 2027, lawmakers have been clear that congressional investigations are coming. Current Ranking Member and presumptive incoming House Judiciary Committee Chair Jamie Raskin's Chief Counsel explained that "the cavalry is coming," while incoming House Oversight Committee Chair Robert Garcia simply stated: "lawyer up." Senator Elizabeth Warren and Representative Becca Balint, along with three of their colleagues, sent a letter to a company questioning its use of algorithmic pricing tools. They also co-authored a report with four other colleagues, *Settling for Less*, which criticized the Trump Administration's "weak antitrust enforcement and backroom deals . . . driving up costs" and identified areas that may be the targets of inquiries to come.

New Leadership, New Priorities

Prioritizing affordability. Ranking Member Raskin made his priorities clear in September, in his first-ever speech on antitrust issues. He described "decades of under-enforcement of antitrust law," which he tied to consolidation in "healthcare, big tech, agriculture, [and] financial

services," among other sectors. At the same event, Raskin's Chief Counsel said the Committee will go "industry by industry" to tell the story of how consolidation and lack of competition are affecting affordability. Senator Cory Booker's Competition Counsel similarly pointed to bipartisan support for antitrust-focused inquiries into affordability issues.

Probing past settlements and mergers. Beyond a bipartisan focus on affordability, Democrats have set their sights on the Trump Administration's merger and litigation settlements. The *Settling for Less* report targets what it calls "harmful corporate mergers" that the Trump Administration "rubber-stamp[ed]" and enforcement actions resolved "without meaningful remedies." Ranking Member Raskin expressed similar concerns and has already introduced legislation to expand judicial review of the Department of Justice's antitrust consent decrees, provide states with a formal role in that judicial-review process, and extend such judicial review to the Federal Trade Commission's antitrust consent decrees. More generally, with the Executive Branch unlikely to cooperate in congressional probes, oversight will likely focus on the companies themselves, which should be prepared for potential engagement on past deals and enforcement decisions, as well as engagement on deals undergoing agency review during the remainder of the Trump Administration.

Strategy for Practitioners and Companies

Before the 120th Congress begins, companies and counsel should prepare an oversight strategy.

- Assess potential exposure. Members of the current Congress have already previewed areas where oversight activity is likely in the next Congress. Ranking Member Raskin's September antitrust speech outlined the enforcement actions and industry sectors that he viewed as problematic. The recent congressional letter concerning the use of artificial intelligence to establish "optimal prices" demonstrates that algorithmic pricing is likely to remain a lawmaker focus. And the *Settling for Less* report offers a comprehensive view of what progressive antitrust oversight would most likely target, with the likelihood of that agenda becoming a reality increasing substantially if co-signatory Representative Balint takes the helm of the House Antitrust Subcommittee.

- Gather support. Do not wait until Congress comes calling to identify risk areas and shore up support. Companies involved in deals or enforcement decisions that may be the subject of congressional scrutiny should examine any settlement-related communications with federal enforcers to anticipate points of inquiry. They should locate contemporaneous documents that best convey the procompetitive benefits (and/or absence of anticompetitive effects) of the deal or action. And they should identify external allies and validators who can be deployed as needed either with congressional staff or as part of a parallel public relations strategy. Quick, accurate, and coordinated responses to congressional outreach can help keep the temperature low so that an informal inquiry or letter does not escalate into a formal investigation.

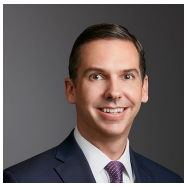
- Consider early engagement. Ranking Member Raskin's Chief Counsel offered his views on how companies should engage with a future Congress with a Democratic majority. He explained that "there is a premium on storytelling" and "breaking your message down to

very simple terms." He further offered his perspective to attorneys counseling clients about early cooperation: "There's going to be heroes and there's going to be villains, and which one would you like to be?" We would add to that statement a note that there are also neutrals and lesser villains (among others). Early engagement, rather than early resistance, can better position a company to shape how it is portrayed. If a hero narrative is unlikely to gain traction, the goal is to avoid becoming the villain of the story—which means finding the path to one of the other roles instead.

- Develop strategic narratives. A company's message should match its audience. Be strategic. But remember that messaging is not siloed, so the different versions of a narrative should all be reconcilable. The best story, as Ranking Member Raskin's Chief Counsel said, can be reduced to "very simple terms." The antitrust merits matter, and the narrative should have the depth of support that can withstand scrutiny in the event of escalation. But at the end of the day, what is going to resonate with a Senator, Member of Congress, or staffer is a common-sense and plain-language explanation that can be reduced to a few short, impactful sentences.



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