Roll Call

Emboldened House Republicans to bring ESG scrutiny, experts say

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Now that they've gained control of the House in the next Congress, Republican lawmakers will launch a slew of congressional inquiries into environmental, social and governance issues, according to legal and financial experts.

The foremost targets will be financial institutions and companies promoting ESG, as well as the Securities and Exchange Commission, which is writing climate disclosure rules for public companies.

Jonathan Su, a partner at Latham & Watkins LLP who represents companies, corporate directors and others in congressional, government and internal investigations, said the increased scrutiny is turning the tables a bit in Congress.

"The historical perception is that a Republican Congress has traditionally been more friendly toward the business community in terms of oversight matters," Su said in a webinar hosted by the law firm on the subject. "The general observation is that with this upcoming Congress, that dynamic may change."

"Whether that's because of new membership with respect to particular congressional Republicans, or a change in the political cycle, there's very much an observation that they are very much prepared to and will conduct expansive oversight of the private sector," said Su, who was a White House counsel in the Biden and Obama administrations.

Republicans have indicated that such congressional inquiries would focus on whether ESG considerations harm shareholders and violate fiduciary duty and whether companies may be violating antitrust laws by participating in voluntary, industrywide ESG initiatives.

They have done so as Democrats have ratcheted up pressure on companies to incorporate material risks from ESG issues, such as climate risk and human capital management. Su noted this pressure is likely continue in the Senate, where Democrats will retain their majority.

Senate Republicans will have little ability to pursue their requests as individual minority members, but they could join their counterparts in the House in a joint investigation, Su added. And companies will have to contend with various requests for information and civil investigations from various state attorneys general as well.

“For many private sector entities, it’s understandable to feel a bit of whiplash in terms of having this issue come at them not only from both political parties, but also at differing levels,” he said.

The House Financial Services Committee, of which ranking member Patrick T. McHenry, R-N.C., is expected to become chairman next year, will keep busy with oversight hearings and inquiries, with a particular focus on SEC rule-making, said Jamie McGinnis, who previously was a senior policy adviser and lead securities counsel on the committee’s GOP staff.

Speaking last month at the Cato Institute’s 2022 Summit on Financial Regulation, McGinnis said, “Patrick McHenry is very interested in practicing vigorous oversight of the SEC, given their very, very extensive rule-making agenda in a relatively short time frame for comment periods.” McGinnis is now counsel in the asset management group at Ropes & Gray LLP.

Industry observers should expect ESG-specific scrutiny from the House Oversight Committee as well. “I would anticipate hearings involving asset managers, perhaps even ESG ratings agencies, proxy adviser hearings in the coming years,” McGinnis said.

Despite the potential for extra scrutiny on the asset management industry, the Securities Industry and Financial Markets Association, a trade association representing money managers as well as securities firms and banks, said it welcomes the oversight on the SEC and its flurry of proposed rules.

Asset managers have been concerned about their ability to implement the agency’s numerous rule-makings expected to be finalized next year. They include the SEC’s controversial climate risk disclosure rule and additional disclosures for ESG-focused funds and investment advisers, said Lindsey Keljo, managing director and head of the SIFMA Asset Management Group and the association's associate general counsel.

“With some of the climate rules, they’re all interrelated with one another,” Keljo said at the Cato Institute conference. “So the SEC is looking at them all individually, but that’s really from our perspective not the right way to be looking at it, when the same folks who will be looking to implement it, the same companies who will be required to implement it and they overlap in many ways.”

While companies and the SEC may find themselves defending ESG-related activities for at least the next two years, experts anticipate that Republicans’ anti-ESG crusade will stop at the House's probes.

“Ultimately, that is the extent of the federal effect on ESG rules and regulations from the change from the election,” McGinnis said. “I would not anticipate significant changes to what the Biden administration does as a result of that.”

A divided Congress means that legislation will not be passed either supporting or opposing ESG issues, Keljo said.

Hearings may slow things down for financial services companies and institutional investors pursuing ESG, she added, but a Republican-controlled House is not enough to ice out ESG investing or the SEC’s proposed regulations.

"These issues will continue to play out in the administrative state," Keljo said. "Ultimately, I think the biggest constraint is going to be judicial review and judicial challenges to rules."