

2006 Election Results: Some Likely Consequences

“As the Lord High Executioner said in The Mikado, ‘I have a little list.’”¹

—Rep. John Dingell of Michigan, discussing potential congressional investigation topics prior to the election

“We need to re-establish the legislative branch of Congress.... We have not had a legislative branch of government for six years.”²

—Sen. Harry Reid, incoming Majority Leader

Last week’s election turned Congress upside down, putting Democrats in control of the congressional agenda in both houses for the first time in 12 years. That result will inevitably affect the interests of many industries, through both the legislative process and oversight.

The dominant view among Democrats on the Hill is that this election was won from the center, and that to hold their new majority for more than two years, they need to avoid what they see as the Republicans’ mistake of alienating moderate and independent voters. This view may well translate into an early drive to identify issues on which the parties can find common ground, perhaps including items from Speaker Nancy Pelosi’s so-called “100-hour plan,” such as raising the minimum wage or cutting interest rates on student loans.

Still, the Democrats’ capacity to get legislation enacted will remain limited, owing both to the procedural rules of the Senate (e.g., the filibuster), which ensure that Republicans will still have substantial influence, and to the president’s veto power. Thus, the Democrats’ greatest leverage—which they have indicated they intend to use—is likely to come through (a) their control of committees, where they will have the power to conduct any hearings or investigations they wish, whether focused on legislative priorities or oversight; and (b) their control of the floor.

After years in which they could neither set the legislative agenda nor conduct oversight, Democrats have a long list of subjects they are interested in tackling. At the same time, their eagerness to hold the center and not appear excessive is likely to affect their choices about what hearings to hold and investigations to pursue. Indeed, there has been talk that Speaker Pelosi intends to exercise some control over the hearings committee chairmen hold. But with a lot of pent-up frustration regarding oversight undone, an engaged base of voters eager for action and a number of tough investigators

poised to take the gavel in important committees, it is a safe bet that there will be a good deal of hearing and investigative activity in the 110th Congress. As Rep. Henry Waxman, one of Congress’s most formidable investigators, has said, “[t]he most difficult thing will be to pick and choose.”³ Moreover, beyond actual hearings or investigations, committee chairs have considerable ability to influence agencies by way of measures such as letter requests to officials—a practice John Dingell made famous with his “Dingellgrams”—and requests made to the Government Accountability Office (GAO) to undertake investigations.

This memo will focus on the scrutiny that various industries are likely to receive from relevant committees and subcommittees. For companies and industries that may find themselves in the spotlight some months down the road, it would be prudent to begin planning early so that they can be ready to make their cases most cogently and effectively should the time come.

Committee Chairs

Committee chairs set the agenda for their committees, deciding what legislation to take up and what hearings to hold.

Final decisions on committee chairs have not yet been made, but the lineup in the House is likely to include:

- Rep. John Dingell (D-MI)—Committee on Energy and Commerce (including the Subcommittee on Oversight and Investigations)
- Rep. Henry Waxman (D-CA)—Committee on Government Reform
- Rep. Barney Frank (D-MA)—Committee on Financial Services
- Rep. John Conyers (D-MI)—Committee on the Judiciary

- Rep. Collin Peterson (D-MN)—Committee on Agriculture
- Rep. Charles Rangel (D-NY)—Committee on Ways and Means
- Rep. Fortney “Pete” Stark (D-CA)—Committee on Ways and Means, Subcommittee on Health
- Rep. Edward Markey (D-MA)—Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet

The Senate lineup is expected to include:

- Sen. Edward Kennedy (D-MA)—Committee on Health, Education, Labor and Pensions
- Sen. Carl Levin (D-MI)—Committee on Armed Services; Homeland Security and Government Affairs, Permanent Subcommittee on Investigations
- Sen. Patrick Leahy (D-VT)—Committee on the Judiciary
- Sen. Christopher Dodd (D-CT)—Committee on Banking, Housing and Urban Affairs
- Sen. Max Baucus (D-MT)—Committee on Finance
- Sen. Jeff Bingaman (D-NM)—Committee on Energy and Natural Resources
- Sen. Tom Harkin (D-IA)—Committee on Agriculture, Nutrition and Forestry
- Sen. Daniel Inouye (D-HI)—Committee on Commerce, Science and Transportation
- Sen. Joe Lieberman (I-CT)—Committee on Homeland Security and Government Affairs
- Sen. Barbara Boxer (D-CA)—Committee on Environment and Public Works
- Sen. John D. Rockefeller (D-WV)—Committee on Finance, Subcommittee on Health Care

Speaker Pelosi’s 100-Hour Plan

Speaker Pelosi and House Democrats have unveiled a 100-hour plan, to be introduced on the first day of the 110th Congress and passed within 100 legislative hours. This plan has been described somewhat inconsistently, but appears to include the following items:

- Establish new ethics rules to “break the link between lobbyists and legislation”
- Implement the recommendations of the 9/11 Commission
- Raise the minimum wage
- Cut student loan interest rates in half
- Repeal the provision in the Medicare prescription drug law

that precludes the government from negotiating directly with pharmaceutical companies over drug prices

- Broaden the kinds of stem cell research permitted with federal funding
- Roll back subsidies for oil companies

Potential Issues for Possible Congressional Hearings and Investigations

Oil/Energy Policy

Repeal of Subsidies for Oil

An element of Speaker Pelosi’s 100-hour plan is the repeal of subsidies to oil companies, including royalty relief programs granted by the Republican Congress.

Scrutiny of Profits

Already the subject of significant media attention, robust oil industry profits are an attractive target for congressional hearings, owing to the sensitivity of consumers to gas prices. Rep. Waxman has announced his intention to strengthen oversight of oil-company profits.

Subsidies for Alternative Fuels

A number of leading Democrats, including Rep. Dingell and Rep. Nick Rahall (D-WV), are likely to push for additional subsidies for alternative fuels, including ethanol infrastructure and production capacity.

Energy Efficiency and Renewables

Sen. Bingaman has been and will continue to be an active voice regarding the need to combat climate change and will doubtlessly pursue related issues, such as requiring utilities to generate more power from renewables and developing biofuels as a means both of reducing greenhouse emissions and decreasing reliance on oil. Rep. Dingell has also expressed interest in promoting energy efficiency, though he has historically resisted fuel economy standards for vehicles.

Environment

Rep. Dingell has mentioned a range of potential interests, including climate change and federal programs to clean up Superfund sites, brownfields and leaking underground storage tanks.

Sen. Boxer has said that holding hearings on global warming is a top priority, and she is also likely to pursue measures to regulate other kinds of air pollution from power plants.

Government Contracts

Rep. Waxman has made clear that he intends to investigate waste, fraud and “profiteering” with regard to government contracts related to Iraq reconstruction, recovery from Hurricane Katrina and homeland security. Leading Democrats, including Speaker Pelosi and Sen. Reid, have proposed related legislation that would increase public disclosure of major contract actions and overcharges, disallow no-bid contracts, and potentially create new civil and criminal penalties for fraud in government contracts.

Pharmaceutical Industry

Medicare Drug Pricing

House Democrats, including Reps. Waxman and Stark, have stated that they will address pharmaceutical pricing under the Medicare Part D drug benefit, including the “non-interference clause.” Hearings would likely address issues of access to medicines, price controls and pharmaceutical innovation. In the Senate, incoming Senate Finance Committee Chair Max Baucus supported the original Medicare drug benefit legislation and may be less likely to endorse changes to the drug pricing system.

FDA Reform/Drug Safety

Sen. Kennedy co-authored with Sen. Enzi the leading FDA reform bill addressing issues of drug safety. With an important reauthorization bill addressing pharmaceutical industry user fees already on the 2007 agenda (the Prescription Drug User Fee Act, or PDUFA), broader FDA reform is likely to be the subject of hearings in both the Senate and the House. Reps. Dingell and Waxman may also conduct additional drug safety hearings regarding specific industry practices and products. Sen. Kennedy has also indicated an interest in exploring drug re-importation issues as a mechanism to reduce drug prices for consumers.

Generic Drugs

Rep. Waxman, co-author of the Hatch-Waxman Act that paved the way for generic drugs in the 1980s, has shown an interest in revisiting generic drugs issues, potentially examining allegations of anticompetitive conduct by the industry to delay generic competition, as well as the intellectual property issues involved with the development of “follow-on” biologic therapies in the biotech industry.

Financial Services

Executive Compensation

Rep. Frank introduced a bill in 2005 that would require

greater disclosure of executive compensation packages in annual reports and proxy statements, and provide a mechanism for shareholder approval of executive compensation plans including “golden parachute” arrangements. House Democrats forced hearings on this topic in May 2006, but were not able to advance the bill further in committee. In the majority, Rep. Frank likely will reintroduce the bill, may hold additional hearings and could bring the bill to a vote before the House.

Mortgage Industry

Alleged predatory lending practices in the mortgage industry are a potential target of congressional hearings and legislation. In addition, Sen. Dodd and Rep. Frank likely will continue reform efforts in the regulation of Fannie Mae and Freddie Mac, which have been underway for the past two years. Rep. Frank has expressed an interest in requiring that a portion of both companies’ profits be placed in an affordable housing fund. However, a Democratic Congress is less likely to adopt a Republican proposal to place caps on the amount of mortgage-backed securities that these lenders may hold in their portfolios.

Banking

Rep. Frank raised sub-prime lending practices as a potential topic for hearings, which could place banks and credit card companies in a defensive posture. He also has expressed opposition to an application from Wal-Mart for a banking license, and has threatened legislation blocking licensure if regulators show a willingness to approve the application when an FDIC moratorium expires in January.

Sarbanes-Oxley

Rep. Frank, Sen. Dodd and Sen. Schumer have shown support for regulatory guidance from the SEC and the Public Company Accounting Oversight Board to simplify the internal controls requirements of the Sarbanes-Oxley Act. They may also support easing small business reporting requirements. It is not clear, however, whether legislative amendments to Sarbanes-Oxley would be favored under a Democratic Congress.

Other Issues

Other items on the House Financial Services and Senate Banking agendas include hearings to better understand the hedge fund industry and its impact on the financial markets, consideration of a federal charter for insurance companies and the possible renewal of the Terrorism Risk Insurance Act.

Port and Critical Infrastructure Security

Consistent with Speaker Pelosi's pledge to enact legislation to implement the 9/11 Commission's security recommendations, key Democrats, including Rep. Dingell and Rep. Bennie Thompson (Chair of Homeland Security Committee), have emphasized port security as a key oversight issue. Likewise, Rep. James Oberstar (Chair of Transportation and Infrastructure) has announced that port security will be a priority for his committee as well. Additionally, bipartisan interest in security for critical infrastructure beyond ports could lead to further action between Congress and the Department of Homeland Security.

Privacy and Internet Issues

Both Reps. Conyers and Waxman have indicated interest in pursuing investigations into the Bush Administration's terrorist-surveillance programs, including NSA wiretaps. Such investigations could include focus on private companies that participated in such programs.

Sen. Leahy also has indicated interest in additional investigation into the NSA's surveillance program. More broadly, Sen. Leahy has a longstanding interest in privacy issues and may hold aggressive hearings on corporate privacy practices.

Rep. Dingell has indicated that he is interested in holding hearings on online child pornography.

Ethics and Lobbying Reform

Speaker Pelosi has made lobbying reform part of the 100-hour plan, including a ban on lobbyist's gifts and sponsored trips. Other elements of the Democrats' reform package (the Honest Leadership and Open Government Act of 2006) include extended "cooling-off" periods limiting lobbying by former elected officials and senior staff, increased public disclosure for lobbyists, and required certifications that lobbyists have followed ethics rules, with criminal penalties for false disclosure.

The States

In addition to a Democratic shift in Congress, the states also shifted significantly with the election of new Democratic governors and state legislators. Democrats increased governorships from 22 to 28 and wrested control from Republicans in at least nine state legislative chambers. The Democratic shift at the state level may have implications for the 2008 presidential elections as well as redistricting in 2010. Additionally, the shift may signal increased regulation of business at the state level and the continuation of the trend towards activist attorneys general.

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NOTES

1. Alex Massey, "Democrats 'Have a Little List' of Investigations," *Telegraph.co.uk*, Sept. 11, 2006, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/08/wuspols308.xml>.
2. David Nather, "A Hill Full of Hard Looks," *CQ Weekly*, Nov. 13, 2006.
3. Erica Werner, "List of Bush Programs to Investigate Is Too Long, Waxman Says," *The Associated Press*, Nov. 11, 2006.

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