

"4 Keys to Litigating In An Active Regulatory Environment," *Law360*

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In an article for *Law360*, Partner Will Weaver, Associates Isabel Farhi and Ben Hand, and Policy Assistant John Menton examine the increasing intersection between litigation and regulatory risks that are reshaping the legal landscape in the US, a trend anticipated to intensify under the current Trump administration.

Highlighting recent cases, the authors discuss four key principles for companies to adapt to handle these challenges effectively: understanding the regulatory and political dimensions of their cases, fostering collaboration between litigators and regulatory counsel, leveraging litigation findings to anticipate regulatory vulnerabilities, and making strategic decisions on how to address related risks across different forums.

The politically charged atmosphere in the run-up to the 2024 U.S. presidential election and its aftermath will exacerbate a recent trend in litigation in the U.S. Increasingly, litigation risks and regulatory risks have converged, and this trend will likely accelerate as the Trump administration takes the reins.

In October, 14 **state attorneys general sued** TikTok and its owner, ByteDance Ltd., claiming that the app is contributing to the teen mental health crisis. The states allege that the companies violated the respective state consumer protection statutes through deceptively representing the TikTok platform as safe and appropriate for minors when in reality they knew it was not.

These lawsuits did not arise in a vacuum: they followed lengthy regulatory scrutiny of the companies.

In March 2023, TikTok CEO Shou Zi Chew **testified** before the House Energy and Commerce Committee, where he discussed, among other topics, TikTok's effect on minors. Earlier, in October 2021, Michael Beckerman, TikTok vice president and head of Americas public policy, testified before the Senate Subcommittee on Consumer Protection, Product Safety and Data Security about online protections for children.

Years later, the states would use statements made in that testimony, contrasted with internal documents that allegedly show the testimony's falsity, as evidence of deceptive conduct in their complaints in *The People of the State of New York v. TikTok*.

This intersection between a congressional inquiry and a subsequent, related lawsuit represents a growing convergence between litigation risk and regulatory and oversight risks that come from Congress, federal agencies and other regulators. That convergence will likely accelerate and take on new forms in the coming Trump administration.

Companies should prepare for this increased overlap, particularly in the current politically charged atmosphere. The fallout from the 2024 U.S. election continues to reverberate for businesses and other organizations that are, and will continue to be, affected by the resulting increased partisanship and public debate. Some of that effect is likely to come in the form of litigation, while other aspects might stem from oversight by Congress and regulators, due to policy decisions made by companies in the private sector.

While in years past, many organizations have used separate teams to handle litigation and regulatory and oversight risks, that is no longer a prudent strategy because the risks have further converged in recent years. That convergence accelerated during this year's election season, and organizations should be ready for politically charged litigation that may have significant overlap with regulatory and oversight risks, which can give rise to congressional hearings, regulatory investigations and compliance challenges.

In addition to the TikTok children's online safety lawsuits, examples abound where government action influences subsequent litigation.

After Live Nation Entertainment Inc. drew complaints for its ticket sales for Taylor Swift's Eras Tour, the Senate brought Live Nation's executives before Congress to investigate. Sen. Amy Klobuchar, D-Minn., even accused the company of being a monopoly. In May, the U.S. Department of Justice **sued the company** for violating antitrust laws in *U.S. v. Live Nation Entertainment Inc.*, in the U.S. District Court for the Southern District of New York.

More recently, TikTok itself utilized House Committee reports in its complaint in *TikTok Inc. v. Merrick B. Garland*, in the U.S. Supreme Court, challenging Congress' Protecting Americans from Foreign Adversary Controlled Applications Act, also known as the TikTok ban, to justify its arguments about being targeted by the law.

Conversely, Congress often probes the previous litigation positions of companies testifying before it, especially when those positions may appear to conflict with the public positions represented by a testifying witness and their organization.

For example, in a Senate hearing on prescription drug prices in February 2024, Sen. Maggie Hassan, D-N.H., **questioned** the Bristol Myers Squibb CEO about whether the company had used litigation to block generic entry of certain drugs until 2028, suggesting a conflict with the company's position of openness to generic drugs. She asked, "There are zero generic versions of Eliquis available to patients, even though the original patents on the medication began to sunset in 2019. Because your company has sued to block two approved generics from the US market until 2028[] [a]t the earliest, isn't that right?" The CEO responded: "Senator, we have allowed for generic entry in 2028. That's correct."

In 2021, Rep. Jamie Raskin, D-Md., **questioned** the ExxonMobil Corp. CEO during a House Oversight Committee hearing on the climate crisis. When Raskin asked the CEO specifically about litigation that the company had brought against then-Attorney General Maura Healey in the U.S. District Court for the Northern District of Texas related to climate change, the CEO responded that the company was "aware that [Exxon] [] had several suits filed against [it], and [Exxon had] hired lawyers to defend [their] rights." Representative Raskin then suggested the company had "lie[d] ... in legal filings about climate change" by denying that climate change even existed.

In 2019, Rep. Katie Porter, D-Calif., asked the Equifax Inc. CEO to do just one thing: explain why his lawyers were arguing in court that Equifax's data breach caused no harm to consumers. Equifax's CEO responded: "It's really hard for me to comment on what our lawyers are doing."

Organizations involved in active litigation related to the subject of congressional inquiry should therefore be prepared to be questioned about their litigation positions when testifying before Congress.

There are four key principles that can help companies align litigation strategy with broader public positioning in the regulatory and oversight context. Operating with these principles in mind can help align risk mitigation strategies to consider related risks that could appear in a civil complaint filed by a rival, a civil investigative demand from a regulator or a congressional subpoena.

First, litigators must understand the regulatory and political angles of their cases. If litigation pertains to a divisive political issue, then developing a comprehensive strategy is beneficial to avoid being blindsided by state or federal oversight. Issues like diversity and inclusion or Section 230 immunity for online content moderation may fall into that bucket. But even if litigation seems to involve issues that are less politically salient, a regulatory and oversight strategy may still be necessary to preempt any public attention that could arise.

Second, litigators and regulatory lawyers must collaborate. In the modern political climate, it does not serve companies well when legal, government relations and regulatory departments operate in

siloes. Without collaboration, none of the departments can anticipate or mitigate risks that could adversely affect their organizations. Those divisions therefore need to coordinate on a comprehensive strategy and, at a minimum, communicate about their priorities. This avoids conflicting positions in different forums and creates an opportunity to speak with a unified voice.

Third, litigators must leverage information they uncover during litigation to identify potential regulatory or oversight soft spots. In the course of internal fact gathering during a lawsuit — such as investigating the merits of allegations, reviewing documents during discovery and gathering facts to determine defenses — litigators are often the first to discover information that, if it becomes public, could give rise to regulatory or oversight risks. Sharing that information with a company's regulatory and government relations teams can allow them to preempt, strategize, and minimize future regulatory and oversight issues.

Fourth, organizations must make high-level strategic decisions regarding how and when they address related regulatory or oversight and legal risks in different forums. Timing, scale of the risk, importance of the jurisdiction and many other factors may mean prioritizing a litigation strategy over a regulatory strategy, or vice versa — but in either case, knowledge that the litigation and regulatory and political landscape interacts is the first step to making sound global strategic decisions.

Organizations that understand the current hyperpolarized political environment and work to streamline their litigation and regulatory strategies will have a competitive advantage as high-risk issues arise. They can develop a litigation strategy while mitigating regulatory and oversight risks. And even if oversight occurs, they will not be blindsided by their litigating positions when the company finds itself in the hot seat.

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