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**Congress****Congressional Oversight**

Given congressional Republicans' oversight agenda in tension with Obama administration programs, as well as the persistent threat of investigations led by a vocal Democratic minority, the private sector would be well-advised to prepare for a very active two years of congressional oversight.

Authors Steven Ross, Constance O'Connor and Thomas Moyer of Akin Gump Strauss Hauer & Feld LLP highlight some of the key factors and themes likely to drive Congress's scrutiny of the business community in 2015.

**Caught in the Crossfire: Congressional Oversight, the Private Sector, and the New Republican Congress**

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**A**s the 114<sup>th</sup> Congress convened in January, the nation was confronted with an even more divided government, anticipating some of the sharpest partisan divisions yet experienced during the Obama Administration. What's more, this new dynamic will empower Congress's active oversight committees to thrive. Following the trend set by Republican committee chairmen in the House during the 113<sup>th</sup> Congress, this new congressional term presents an opportunity for leaders in the House and Senate to collaborate on investigations of the Obama Administration, likely with an eye toward the 2016 Presidential election. Republican leaders in the House have already begun bolstering their oversight arsenal, reforming committee structures and amending rules to provide for expanded subpoena and deposition powers.<sup>1</sup>

<sup>1</sup> Beginning in the 114th Congress, new rules adopted by the House Energy & Commerce; Financial Services; Agriculture; Science, Space and Technology; and Judiciary Committees will allow the committees' chairmen to issue subpoenas without a vote of the panels' members. Additionally, the Rules of the House of Representatives have been amended to enhance staff deposition power for the House Energy & Com-

Yet, the reach of Congress's oversight authority does not end at 1600 Pennsylvania Avenue, or at the Capital Beltway. The potential for active and extensive congressional oversight of the private sector remains as real as ever, and it is important not to understate the likely impact that the 114<sup>th</sup> Congress will have on oversight of the business community. When one is anticipating the investigative agendas of the Republicans who will be chairing committees and subcommittees—many for the first time—it would be wise to keep in mind the investigative activities that some Republicans have historically pursued with regard to the business community.

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**Recent Congresses have seen Republican-led congressional committees conduct robust private sector oversight.**

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The Republican Party's traditionally more pro-business platform, when viewed through a historical lens, is not wholly inconsistent with active and extensive congressional oversight of the private sector. Rather, Congressional Republicans' oversight agenda has—and may again—implicate private sector interests in a number of respects, especially when such interests become intertwined with the political fortunes of a Democratic administration or raise basic consumer protection and privacy concerns. To this end, recent Congresses have seen Republican-led congressional committees conduct robust private sector oversight on issues including compliance with the Affordable Care Act (“ACA”); Department of Energy loan programs; allegations concerning the dissemination of confidential, market sensitive information; government contracting and whistleblower protections; financial market manipulation; and data security.

Given this track record for Congressional Republicans, as well as the persistent threat of investigations led by a vocal Democratic minority, the private sector would be well-advised to prepare for a very active two years of Congressional oversight ahead. Below, we highlight some of the key factors and themes that are likely to drive Congress's scrutiny of the business community in 2015 and beyond.

### **Collateral Damage**

Even as the Republican majorities in the House and Senate pursue investigations that are likely to target the Obama Administration, recent history suggests that the private sector will remain a key component of Congress's oversight agenda. Prominent Congressional Republicans, including Sens. Charles Grassley (R-Iowa), John McCain (R-Ariz.), Orrin Hatch (R-Utah), and Reps. Fred Upton (R-Mich.) and Darrell Issa (R-Calif.) have long championed investigations into waste, fraud, and abuse not only within the government, but also among private government contractors, grant recipients, and participants in government programs. Sen.

merce; Financial Services; Science, Space, and Technology; and Ways & Means Committees. *See, e.g.*, H. Res. 5, 114th Cong., § 3(b) (2015); Rules of the H. Comm. on Energy & Commerce, 114th Cong. (2015).

Grassley, in particular, has for many years been one of the most prolific investigative forces in the U.S. Congress. In this sense, real legal and reputational risks for the business community persist—and could even expand—under an entirely Republican-controlled Congress.

Throughout the 112<sup>th</sup> and 113<sup>th</sup> Congresses, as Republican chairmen in the House actively pursued the Obama Administration, private industry was often caught in the crossfire. In fact, such oversight has remained a constant reality for business interests since Republicans assumed control of the House in 2011. In September of that year, the high-profile collapse and investigation of Solyndra, a federally-backed solar energy company, sparked a wave of Congressional oversight of the energy industry that has persisted in recent years.<sup>2</sup> More recently, in connection with Congress's oversight of the ACA, committees in the House and Senate have launched extensive inquiries of the insurance industry, contractors associated with the construction and maintenance of the federally-facilitated insurance marketplace and state-based insurance exchanges, and related business interests.<sup>3</sup> With the ACA and America's energy future likely to remain highly controversial political issues as the 2016 presidential election approaches, congressional oversight in these areas is likely to continue.

Government contractors, also a perennial target of congressional oversight, are similarly vulnerable to extensive investigations during the 114<sup>th</sup> Congress. While legislators on both sides of the political aisle are likely to pursue enhanced whistleblower protections, key figures such as Sens. McCain and Claire McCaskill (D-Mo.)—longtime critics of waste and abuse in defense contracting—have assumed highly consequential posts in Congress's oversight infrastructure. McCain, in particular, now serves as Chairman of the Senate Armed Services Committee, having just concluded a two-year term as the Ranking Member on the active Senate Permanent Subcommittee on Investigations (“PSI”), where he pursued allegations of costly government waste in programs with heavy contractor involvement.<sup>4</sup>

In these and other areas, the business community—including those who deal extensively with the federal government—are susceptible to active and ongoing congressional oversight under the new Republican majority. Potential risks for the private sector only increase as the Republican majority in the Senate begins to exercise its newly-held subpoena power. Such power

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<sup>2</sup> *See, e.g.*, *Solyndra and the DOE Loan Guarantee Program: Hearing Before the Subcomm. on Oversight & Invest. of the H. Comm. on Energy & Commerce*, 112th Cong. (2011); *Department of Energy Oversight: Status of Loan Programs: Hearing Before the Subcomm. on Oversight & Invest. of the H. Comm. on Energy & Commerce*, 113th Cong. (2014).

<sup>3</sup> *See, e.g.*, Press Release, Sen. Comm. on Finance, GOP Oversight Leaders Demand Answers on CMS Contracts for HealthCare.gov (July 31, 2014); Press Release, H. Comm. on Oversight and Gov. Reform, ObamaCare: Why the Need for an Insurance Company Bailout? (Feb. 5, 2014).

<sup>4</sup> *See, e.g.*, Press Release, Sen. Perm. Subcomm. on Invests., Senators McCain and Levin Release Permanent Subcommittee on Investigations Report on Defense Acquisition Reform (Oct. 2, 2014). As further discussed below, Senator McCaskill now serves as PSI's Ranking Member.

complements the recent expansion of unilateral subpoena power for key committees in the House.<sup>5</sup>

## Conservative Populism: A Renewed Focus on Consumer Protection

Congressional oversight of the private sector in 2015 and 2016 will not be limited to areas of potential vulnerability for the Obama Administration. As in previous periods of Republican control in the U.S. Congress, when notable committee chairmen including Sen. Susan Collins (R-Maine) and others pursued significant investigations on issues including tax evasion, pharmaceutical marketing, and corporate fraud and abuse, the private sector should prepare for Congressional oversight in the 114<sup>th</sup> Congress to strike a similarly populist tone.

Consumer-minded oversight is especially likely in light of the current political dynamic within the Republican Party. As conservative factions in the House and Senate break with the traditional Republican establishment and private interests on issues ranging from immigration to banking recovery and reform following the 2008 financial crisis, the private sector should expect active congressional scrutiny of the business community on issues where consumer interests are at stake. The oversight implications of these fissures are already visible in the messaging of Republican-led committees in the House on issues such as the ACA, where Congressional leaders have actively framed elements of the law as an effective “bailout” of the insurance industry.<sup>6</sup> And nowhere has such messaging received more exposure than in Congress’s many hearing rooms, where GOP-led investigations during the 113<sup>th</sup> Congress emphasized increasingly populist themes and hearings took on titles such as: “Poised to Profit: How ObamaCare Helps Insurance Companies Even If It Fails Patients.”<sup>7</sup>

In 2015, Congressional oversight committees will likely continue to balance aggressive executive oversight with more populist endeavors, such as investigations of large-scale product recalls and data security breaches. These issues were already front and center in 2014, as the highly-influential House Committee on Energy & Commerce, chaired by Rep. Upton, convened hearings examining auto-related recalls at General Motors and Takata,<sup>8</sup> as well as massive data breaches at prominent companies like Target and Neiman Marcus.<sup>9</sup> All signs suggest a similar oversight focus in the coming years, particularly as Rep. Upton retains his chairmanship of the Energy & Commerce Committee. The Committee recently released an oversight plan that places the business community in a potentially key po-

sition on multiple oversight issues.<sup>10</sup> With anticipated legislative initiatives including a strong focus on energy, environmental, and telecommunications policy, business interests in these areas should be prepared for parallel oversight activities.

## New Chairmen & New Approaches

The 114<sup>th</sup> Congress also ushers in major leadership transitions for two of Congress’s most prominent oversight committees: the House Committee on Oversight & Government Reform and the Senate PSI. As the two high-profile chairmen of these committees have stepped down, newly installed congressional leaders are likely to set ambitious oversight agendas, seeking to establish or expand their credentials and national stature through aggressive oversight of the public and private sectors.

After a four-year tenure as Chairman of the House Oversight Committee, Rep. Issa stepped down from his chairmanship in January 2015. Filling the top position at the helm of arguably Congress’s most active investigatory committee is Rep. Jason Chaffetz (R-Utah), a fourth-term Congressman, who has chaired the Oversight Committee’s Subcommittee on National Security since 2011. Chaffetz, who served as Chief of Staff to former Utah Governor Jon Huntsman (R) before his election to Congress in 2008, emerged as a key figure on the Oversight Committee in recent years, taking a leading role on investigations, including the Committee’s recent probe of White House security breaches.

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### Early indications suggest that Rep. Chaffetz’s Oversight Committee may take a more active role in investigating private sector interests.

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In his new leadership role, Chaffetz has suggested that the Committee will pursue a more methodical, less media-driven approach to Congressional oversight.<sup>11</sup> Although many of Chaffetz’ top priorities—including reforming the role and authority of the nation’s inspectors general and reviewing the scope of discoverable information under the Freedom of Information Act<sup>12</sup>—appear to specifically target the Obama Administration, early indications suggest that Chaffetz’s Oversight Committee may take a more active role in investigating private sector interests. Among other significant structural changes Chaffetz has implemented, he has tapped Rep. Cynthia Lummis (R-Wyo.) to lead a new Interior Subcommittee focused on energy and environmental issues—two significant policy areas where congressio-

<sup>5</sup> See *supra* note 1.

<sup>6</sup> See *supra* note 3.

<sup>7</sup> *Poised to Profit: How ObamaCare Helps Insurance Companies Even If It Fails Patient: Hearing Before the H. Comm. on Oversight & Gov. Reform*, 113<sup>th</sup> Cong. (2014).

<sup>8</sup> See, e.g., *The GM Ignition Switch Recall: Why Did It Take So Long?: Hearing Before the Subcomm. on Oversight & Invest. of the H. Comm. on Energy & Commerce*, 113<sup>th</sup> Cong. (2014); *Takata Airbag Ruptures and Recalls: Hearing Before the H. Comm. on Energy & Commerce*, 113<sup>th</sup> Cong. (2014).

<sup>9</sup> See, e.g., *Protecting Consumer Information: Can Data Breaches Be Prevented?: Hearing Before the H. Comm. on Energy & Commerce*, 113<sup>th</sup> Cong. (2014).

<sup>10</sup> See Oversight Plan for the H. Comm. on Energy & Commerce, 114<sup>th</sup> Cong. (2015), available at <http://tinyurl.com/ovkr8w8>.

<sup>11</sup> Cf. Matt Fuller, *Chaffetz Lays Out Different Direction on Oversight*, ROLL CALL 218 BLOG (Dec. 16, 2014, 5:57 PM) <http://blogs.rollcall.com/218/chaffetz-lays-out-different-direction-for-oversight/?dcz=>.

<sup>12</sup> See Sarah Westwood, *Chaffetz, House Oversight and Government Reform Committee Face Big Challenges*, WASH. EXAM. (Jan. 4, 2015).

nal oversight has traditionally implicated private interests.

In the Senate, stalwart Sen. Carl Levin (D-Mich.) retired at the conclusion of the 113<sup>th</sup> Congress, marking the end of a long and illustrious legislative career that included a lengthy stint at the helm of the powerful Senate Permanent Subcommittee on Investigations. In Levin's place, the business community can expect two Republican members focused on active oversight. Sen. Ron Johnson (R-Wis.), a former businessman, will chair the full Senate Homeland Security and Government Affairs Committee, and Sen. Rob Portman (R-Ohio), a noted lawyer and former U.S. Trade Representative, has assumed the chairmanship of PSI. These members' business credentials, however, should not signal calm waters ahead for the private sector. Portman, in particular, has previously led congressional scrutiny of government contractors and related security clearance procedures.<sup>13</sup> We can expect that he will continue to pursue government contractors engaged in waste, fraud, and abuse—at a minimum—in popular fields for congressional oversight, such as health and energy.

These significant changes for two major Congressional oversight committees stand in contrast with the ascension of seasoned chairmen on other committees with strong oversight capacity. For example, Sen. Hatch, whose previous roles leading the Senate Committees on Judiciary and Health, Education, Labor and Pensions earned him valuable experience in an increasingly youthful Republican conference, has assumed the chairmanship of the powerful Senate Finance Committee. Hatch has already hired key oversight staff from the active House Ways and Means Subcommittee on Oversight, signaling a potential appetite for future investigations on tax policy and related matters. Similarly, Hatch's longtime friend and ally, Sen. Grassley, has assumed the chairmanship of the Senate Judiciary Committee, triggering a potential renaissance of investigations and oversight activity for that committee.<sup>14</sup>

### Oversight Without a Gavel

Just as the potential targets of Congressional oversight in the 114<sup>th</sup> Congress are likely to reach beyond the White House, those wielding Congress's oversight power are not necessarily always committee and subcommittee chairmen. As recent years have demonstrated, Members of Congress can be highly effective at pursuing oversight of the private sector with neither a gavel, nor subpoena power. There is, perhaps, no better example of this trend than the one set by Sen. Grassley, who has spent the past eight years aggressively pursuing investigations on issues ranging from abuse of non-profit status to insider trading, all as the ranking minor-

ity member of the Senate Finance Committee and later the Senate Judiciary Committee.

There are numerous Democratic members who stand ready to follow Grassley's example. Sen. McCaskill, long considered a likely successor to Carl Levin as Chairperson of PSI had the Democrats retained control of the Senate, will now serve as the Subcommittee's Ranking Member. A former prosecutor, McCaskill has greatly increased her oversight stature in recent years, executing high profile inquiries on whistleblower protections for government contractors and sexual assault on college campuses. As PSI's ranking member, McCaskill will likely take full advantage of a longstanding PSI custom which allows the Ranking Member to launch investigations on behalf of the full committee.

Other prominent Democrats such as Sens. Sherrod Brown (D-Ohio) and Elizabeth Warren (D-Mass.) will certainly promote a progressive populist agenda from their minority posts, likely to include written requests for information from private entities. Likewise, Rep. Elijah Cummings (D-Md.), ranking member of the House Oversight Committee will undoubtedly continue scrutinizing private entities on consumer protection related issues. Following an example set by members such as Sen. Grassley, these minority party legislators can be effective in pursuing inquiries that pose significant reputational risk for the business community by leveraging the coercive power of an effective media strategy.<sup>15</sup>

### Conclusion

The examples highlighted above represent only a sampling of potential oversight activity expected in the 114<sup>th</sup> Congress, but they illustrate a common principle: the Republican majorities in the House and Senate are apt to pursue—and even embrace—an active and extensive oversight agenda, while the vocal Democratic minorities in the House and Senate will likely continue to pursue traditional oversight aims. Although the current political dynamic in Washington will most certainly invite enhanced oversight of the Obama Administration, the attendant risks for the private sector must not be ignored. Rather, business interests stand to face significant congressional interest in 2015 and beyond, both in connection with Executive oversight and growing populist political goals.

An effective strategy to anticipate and respond to these concerns requires individualized risk assessment by experienced counsel. Private sector entities that attract the attention of one of Congress's oversight panels would be wise to recognize that these situations pose significant risks and should avoid the impulse to treat such situations as a routine legislative affairs challenge. Proper knowledge and navigation of the congressional investigations process can help businesses avoid legal, business, and political pitfalls.

<sup>13</sup> See Letter from Sen. Rob Portman to The Honorable Patrick E. McFarland, Inspector General, U.S. Office of Personnel Mgmt. (2013).

<sup>14</sup> Sen. Grassley has recently suggested that he intends to expand the Judiciary Committee's oversight activities. See Humberto Sanchez and Niels Lesniewski, *Grassley to Ramp Up Oversight at Judiciary*, ROLL CALL LOG (Jan. 26, 2015, 5:00 AM) <http://blogs.rollcall.com/wgdb/grassley-to-ramp-up-oversight-at-judiciary/?dcz>.

<sup>15</sup> See Steven R. Ross, Raphael A. Prober, and Megan L. Greer, *Minority Rules: Why Companies Should Take Seriously the Increasing Trend of Minority Party-Led Congressional Investigations*, BLOOMBERG DAILY RPT FOR EXECUTIVES (Feb. 27, 2013).