

E-ALERT | Government Affairs

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THE OUTLOOK FOR CONGRESSIONAL INVESTIGATIONS IN THE NEW CONGRESS

► SUMMARY

Congressional investigations are poised to thrive in the new Congress as the House Republican majority focuses its investigative powers on the Obama administration. Industries that were targeted for oversight by the former Democratic Congress should not be lulled into false comfort by the new Republican majority. Instead, Republican Congressional investigators may now use corporations in those same industries as tools to highlight perceived failures of oversight by the Obama Administration.

Any company that is regulated by the federal government, any company that benefited directly or indirectly from Stimulus or TARP funds, any company that participated in recent legislative overhauls like health care and financial reform, any recipient of a federal contract or grant, or any public company regulated by the SEC could be swept into the Republicans' investigative agenda in 2011.

► CHANGES IN LEADERSHIP

House of Representatives

The new Republican majority in the House of Representatives brings leadership changes across all committees likely to have a role in the new Congress's investigative agenda. The lineup of new Republican chairmen will be finalized over the coming weeks and months. The outlook for particular chairmen may change as members begin to secure the most coveted positions, leading to a cascading effect in other slots. Beyond the leadership changes, the new Republican majority will also bring significant staff changes, as the Republicans double their committee budgets and the Democrats cut theirs in half, under the House's traditional one-third/two-thirds budgetary split.

In the most prominent leadership change relevant to investigations, Rep. Darrell Issa (R-Cal.) will become chairman of the House Committee on Oversight and Government Reform. The current chairman, Rep. Ed Towns (D-N.Y.), is expected to become the ranking minority member. Issa has already spoken at length about his investigative agenda in the new Congress, which we address in the section below.

On the House Energy and Commerce Committee, the current ranking Republican member, Rep. Joe Barton (R-Tex.), is seeking to become chairman. The rules of the Republican conference, however, impose a six-year term limit at the top of a committee – which Barton has now met. Barton has petitioned his colleagues for an exemption based on the years he served as ranking minority member, and the outcome is not yet certain. If Barton fails to receive a waiver, most observers expect Rep. Fred Upton (R-Mich.) to become the chairman, although he may face challenges from

other committee members. The panel's current chairman, Rep. Henry Waxman (D-Cal.), will become the ranking minority member.

The Energy and Commerce Subcommittee on Oversight and Investigations plays a central role in the committee's investigative agenda. The leadership of the subcommittee is not yet clear because it hinges on the outcome of the race for chairman of the full committee. The subcommittee's current ranking minority member, Rep. Michael Burgess (R-Tex.), is relatively new to the position, and he has less seniority on the full committee than several other members. One of these more senior members could possibly assume the chair of the subcommittee. The subcommittee's current chairman, Rep. Bart Stupak (D-Mich.), retired this year, and Stupak's vice chairman, Rep. Bruce Braley (D-Iowa), is likely to be the ranking minority member.

Given the ongoing fallout from the financial crisis, including the recent foreclosure controversies, the House Financial Services Committee and the House Judiciary Committee are likely to have active investigations in the new Congress. At Judiciary, the current chairman and ranking members are expected to switch positions, with Rep. Lamar Smith (R-Tex.) becoming chairman and Rep. John Conyers (D-Mich.) becoming the ranking minority member. In the Financial Services Committee, the current ranking minority member, Rep. Spencer Bachus (R-Ala.), is expected to face a challenge from Rep. Ed Royce (R-Cal.) for the chair. The latest indications are that Bachus will fend off this challenge because he enjoys the support of incoming Speaker John Boehner (R-Ohio).

Senate

With the Democratic majority continuing in the Senate, committee leadership will change very little. At the Committee on Homeland Security and Governmental Affairs, Sen. Joe Lieberman (I-Conn.) and Sen. Susan Collins (R-Me.) will remain as chairman and ranking minority member, respectively. The leadership of its Permanent Subcommittee on Investigations will also likely remain the same, with Sens. Carl Levin (D-Mich.) as chairman and Sen. Tom Coburn (R-Okla.) as ranking minority member.

For the leadership the Senate Finance Committee and the Senate Judiciary Committee, the Democrats will almost certainly retain Sen. Max Baucus (D-Mont.) as the chairman of Finance and Sen. Patrick Leahy (D-Vt.) as chairman of Judiciary. The ranking Republicans on these committees, however, will undergo a shuffle following the departure of Sen. Arlen Specter (D-Pa.). (Specter had been ranking on Judiciary, but he moved to the Democratic Party and then lost his primary election.) Sen. Charles Grassley (R-Iowa) will likely move from the Finance Committee to become the ranking minority member on the Judiciary Committee. Sen. Orrin Hatch (R-Utah) is expected to become ranking on Finance. During Grassley's tenure on Finance, Baucus gave him great leeway to pursue his own investigations. Grassley, for example, maintained his own investigatory staff and conducted his own investigations independent of Baucus. It remains to be seen whether Hatch will take a similar approach. Grassley may also seek to continue his independent investigations from his new position on the Judiciary Committee.

At the Senate Committee on Commerce, Science and Transportation, very little will change. Sens. Jay Rockefeller (D-W.Va.) will remain as chairman and Kay Bailey Hutchison (R-Tex.) a ranking.

► ISSUES ON THE INVESTIGATIVE AGENDA – RISKS FOR CORPORATIONS

Congressional investigations thrive when the House of Representatives is held by a different party than the White House, and that will hold true in 2011. The incoming chairmen of several major committees have already indicated a desire to investigate the activities of the Obama administration. Although Democratic investigations in the last Congress focused on the practices of major

multinational corporations – Bank of America, BP, Toyota, Goldman Sachs, Johnson & Johnson, and numerous others – corporations should not take too much comfort from the new Republican majority. Instead, many industries that were formerly the targets of Democratic investigations will now become examples that the Republicans use in their investigations of the Obama administration.

House Republicans are likely to examine TARP and Stimulus spending and review the activities of recipients of funds under these programs, looking for waste, fraud, and abuse. They will examine USDA's and FDA's oversight of food safety programs by looking at the practices of private entities in the food supply and distributions system. In the context of a repeal or modification of the Obama health care legislation, they are likely to examine the deals that the White House struck with drug companies and other participants in the health care system. As part of the Republican agenda to constrain spending, they may examine the activities of federal contractors in key sectors. And they will look at the SEC's enforcement activities with respect to banks and other institutions in the national spotlight.

In short, any company that is regulated by the federal government, any company that benefited directly or indirectly from Stimulus or TARP funds, any company that participated in recent legislative overhauls like health care and financial reform, any recipient of a federal contract or grant, or any public company regulated by the SEC could be swept into the Republicans' investigative agenda in 2011.

House Committee on Oversight and Government Reform

Congressman Issa has provided several indications of his investigative agenda in the new Congress. In September 2010, he released a staff report outlining Congress's constitutional obligation to conduct oversight and identifying several areas where he felt that oversight had been lacking. In early October, he authored an op-ed in *USA Today* that again argued for vigorous oversight. Most recently, he gave several interviews in which he discusses the oversight agenda.

While the press has generally highlighted Issa's intent to investigate the Obama administration, the areas highlighted by Issa also have significant implications for private entities. Issa has indicated a need for investigation and oversight in the following areas relevant to corporations:

- Food safety.
- Fannie Mae and Freddie Mac.
- Health care reform and Medicare/Medicaid spending.
- Spending under the American Recovery and Reinvestment Act (the Stimulus).
- Contracts for natural resources extraction on federal land.
- Mortgages and foreclosures.
- EPA's regulatory actions on climate change.
- The independence and subpoena authority of agency Inspectors General.
- Federal spending on information technology.
- Oversight of the use of TARP funds.
- SEC investigations and enforcement.

In his recent public statements, Issa has sought to preempt criticisms that he is seeking partisan gain by investigating the Obama White House. For example, he has pledged to investigate the activities of the Bush administration on issues such as the financial crisis and the federal government's response. "My job is not to bring down the president; my job is to make the president

a success,” he said in a recent interview. Issa is generally regarded as smart and politically savvy, and he has a strong television presence. He served on the committee under the leadership of both Rep. Dan Burton (R-Ind.) – criticized for his hard charging investigations of President Clinton – and Rep. Tom Davis (R-Va.) – criticized for his lack of investigations of President Bush. Issa will work hard to avoid either extreme.

It is likely that the expanded Republican ranks of the committee will be filled with new members who were elected on platforms that included anti-government, anti-stimulus, and anti-TARP positions. These members and their desires for activist oversight present an opportunity for Issa to harness their energy and initiative. Conversely, he may face very real challenges of reigning in the more aggressive instincts of some new members as he tries to avoid the charges of partisanship that plagued Burton’s time as chairman.

Senate Permanent Subcommittee on Investigations

The Permanent Subcommittee on Investigations of the Senate Homeland Security and Governmental Affairs tends to have less aggressive and partisan investigations, but its investigations also tend to be longer, more thorough, and present greater legal risks to the companies under investigation. Most recently, the subcommittee has been conducting a multiyear investigation of Wall Street and the financial crisis that involved millions of documents, more than 100 interviews and depositions, and multiple hearings. The investigation has generally been done on a bipartisan basis, with Senators Levin and Coburn releasing joint memoranda and reports throughout the process.

The subcommittee’s agenda for the new Congress is not yet clear. We anticipate that the actions of the Republican investigators in the House may have a significant effect on the subcommittee leaders. For example, Chairman Levin may find it beneficial to elevate the activities and profile of the subcommittee’s corporate investigations as a counterweight to the investigations undertaken by Republicans in the House. As the issues raised in its Wall Street investigation evolve into other areas – such as the recent foreclosure controversy – Levin may seek to expand the subcommittee’s work in that area.

Other Committees

Given the many substantive areas discussed above, additional committees could have significant investigative agendas that bring risks to corporations. The continuing fallout from the financial crisis could spur investigations in the Senate Banking Committee or the House Financial Services Committee, and the foreclosure issues could lead to investigations in the House and Senate Judiciary Committees. Health care issues could spark the interest of the Senate Finance Committee, the Senate Health, Education, Labor, and Pensions (HELP) Committee, or the House Energy and Commerce Committee. The HELP Committee, although it got off to a slow start under new the new chairman, Sen. Tom Harkin (D-Iowa), now has in place a dedicated, full time investigative staff.

Issues on the Horizon

Activities related to campaign spending in the 2010 elections may lead to congressional investigations in the new Congress. The 2010 elections brought record levels of campaign spending, allegations of foreign money in the political process, and substantial campaign spending by independent groups. Democratic candidates regularly decried the Supreme Court’s decision in *Citizens United* and alleged that it ushered in a new wave of corporate spending on political activity. Recipients of federal bailout funds were criticized for spending money in support of candidates that attacked the bailouts. These issues may prove ripe for investigations, particularly by Democratic

leaders in the Senate. Corporations, trade associations, PACs, and 501(c)(4)s may find that their political, fundraising, or lobbying activities are under increased scrutiny.

► **STRATEGIES FOR ENTITIES THAT MAY BECOME TARGETS**

Companies identified above – such as regulated entities, recipients of Stimulus or TARP funds, and participants in recent legislative overhauls – should work now to develop a clear understanding of areas that present potential risks for congressional investigations. That assessment should be conducted by counsel familiar with the unique challenges of congressional investigations, such as Congress’s position that it need not recognize the attorney-client privilege.

Companies that are engaged in the political process, either through campaign activity or substantial Washington lobbying, should conduct periodic reviews and audits of their operations to ensure compliance with the law and assess practices that may prove embarrassing under the spotlight of a congressional investigation.

► **COVINGTON & BURLING’S CONGRESSIONAL INVESTIGATIONS PRACTICE**

The practitioners at Covington & Burling LLP have deep experience representing companies and individuals in congressional oversight investigations. Our clients have included many Fortune 100 and 500 companies responding to investigations before nearly every committee in Congress. We have prepared many CEOs and other senior corporate officers to testify before congressional oversight panels. We draw on the firm’s significant experience in criminal law, litigation, government relations, political law, and specific regulated industries. Our lawyers are particularly adept at balancing the risks associated with a congressional investigation, potential civil or criminal litigation, and regulatory enforcement actions. Our practitioners include veterans of the House and Senate, the White House, and numerous federal agencies, on a bipartisan basis.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our congressional investigations practice:

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