

# GAO Issues Report on “Political Intelligence”; House and Senate Undertake Inquiries into “Political Intelligence” Activities

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## The GAO Report on “Political Intelligence”

On April 4, 2013, the Government Accountability Office (GAO) issued its long-anticipated report on “political intelligence,” its role in the financial markets and the potential benefits and costs of a regime of regulation and disclosure covering political intelligence-gathering activities. The GAO report did not make any recommendations for legislative action regarding political intelligence. Indeed, the GAO report discussed at some length the extent to which any potential benefits to be derived from political intelligence disclosure would have to be balanced against both financial costs and numerous practical and legal issues that would arise in attempting to implement a political intelligence disclosure regime. Nonetheless, in reacting to publication of the report, Senator Charles Grassley (R-IA) and Congresswoman Louise Slaughter (D-NY)—both proponents of legislation to regulate and require disclosure of political intelligence activities—stated: “This report shows the dire need for transparency in the political intelligence industry, which profits from the cozy relationship between Washington, DC, and Wall Street.”

The GAO report on “Political Intelligence: Financial Market Value of Government Information Hinges on Materiality and Timing” was mandated by the Stop Trading On Congressional Knowledge (STOCK) Act, signed into law in April 2012. For its study, GAO “interviewed individuals at political intelligence, media, financial services, and law firms; trade associations; advocacy organizations; and executive and legislative branch officials,” including ethics officials and officials at securities regulatory agencies.

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In its study, GAO employed the STOCK Act definition of political intelligence as information “derived by a person from a direct communication with an executive branch employee, a member of Congress, or an employee of Congress; and provided in exchange for compensation to a client who intends, and who is known to intend, to use the information to inform investment decisions.” In this regard, a significant finding of the report is that “[a]ttempts to quantify the prevalence of the sale of political intelligence . . . are complicated by a lack of consensus on the meaning of some of the terminology in the STOCK Act definition, including ‘direct communication’, and someone ‘who is known to intend to use information to inform investment decisions.’” GAO noted that Congress would need “to provide clarity regarding the definition of political intelligence” if it chose to require disclosure of political intelligence information.

The GAO determined “that individuals and firms value political intelligence and sometimes respond to such information through investment and business decisions,” but the report noted a number of other practical and legal difficulties and costs inherent in understanding the role of political intelligence in the financial markets and in regulating the use of political intelligence, including:

- The “extreme” difficulty inherent in measuring the extent to which investment decisions are based on a single piece of political intelligence isolated from other information sources.
- The difficulty in determining when government information is “material” and—in particular—when it stemmed from nonpublic, rather than public, sources at the time of the information exchange.
- The financial costs of establishing, administering and enforcing a political intelligence disclosure regime.
- The potential need for a media exemption.
- The potential chilling effect of requiring political intelligence disclosure on the appropriate exchange of government information and on First Amendment protected speech.

The GAO report also discussed potential benefits of a political intelligence disclosure regime, as pointed out in its interviews of representatives of public advocacy groups and Securities and Exchange Commission officials. The cited benefits include:

- Transparency of political intelligence activities.
- Promotion of investor confidence and the integrity of the markets through increased access to information for investors and for Securities and Exchange Commission enforcement staff.

Among its concluding observations, GAO noted in its report that “[w]hile no laws or ethics rules specifically govern the political intelligence industry, executive and legislative branch guidance and securities laws provide parameters for government officials to protect nonpublic information.”

As mentioned above, Senator Grassley and Congresswoman Slaughter stated publicly that the GAO report showed “the dire need for transparency” regarding the gathering of political intelligence. With respect to potential legislative proposals to require registration and disclosure by political intelligence professionals,

Senator Grassley and Congresswoman Slaughter noted in their joint statement: "This simple idea enjoyed strong bipartisan support from both houses of Congress last session, and when we re-introduce this disclosure requirement, we expect it to once again have widespread support among lawmakers and the public."

### **Senator Grassley and Congresswoman Slaughter Commence Inquiries into "Political Intelligence" Activities**

There is no currently pending legislation regarding political intelligence regulation or disclosure. Although they have not yet proposed new legislation in this Congress concerning political intelligence, both Senator Grassley and Congresswoman Slaughter have been active in undertaking inquiries into political intelligence activities.

On April 25, 2013, Congresswoman Slaughter sent a letter to the Greenberg Traurig law firm requesting information regarding its relationships within the political intelligence industry. In her letter, Congresswoman Slaughter stated: "On April 1, 2013, shares in health-care companies surged by more than \$660 million on a tip from the political intelligence firm Height Analytics LLC. According to press reports, as a result of providing market-moving political intelligence information to Height Analytics LLC, Greenberg Traurig has lost Humana Inc. as a client, its relationship with Height Analytics LLC has been terminated, and a preliminary investigation by the Securities and Exchange Commission . . . is now underway." According to other press reports, Greenberg Traurig has determined that it will no longer provide government relations services to firms in the political intelligence industry.

On April 4, 2013, Senator Grassley commenced the congressional focus on the political intelligence activities of Height Securities and on allegedly related market activity regarding health care firms. On that date, in his capacity as Ranking Member of the Senate Committee on the Judiciary, Senator Grassley wrote to Marilyn Tavenner, Acting Administrator of the Centers for Medicare and Medicaid Services (CMS), requesting information to determine if Height Securities improperly obtained political intelligence from CMS that allowed Height to issue an advisory correctly stating that "a deal has been hatched to protect Medicare Advantage rates . . . ." In his letter to Acting Administrator Tavenner, Senator Grassley stated that after this prediction by Height Securities, "volume for affected companies jumped to a total of \$662.8 million in the final minutes of trading and stocks rose as much as six percent . . . ." In a statement issued on April 23, 2013, Senator Grassley said that Acting Administrator Tavenner "has been responsive to [his] inquiries on this issue" and that he intended "to support her nomination and continue to work with her to get to the bottom of what led to the early release of information about the Medicare Advantage decision."

Congressional oversight and legislative activity regarding political intelligence will likely increase throughout this Congress. Wiley Rein's Election Law & Government Ethics Practice Group will monitor these developments closely.