

ADVISORY | Congressional Investigations Election and Political Law

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THE SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS REPORTEDLY PLANS CAMPAIGN FINANCE INVESTIGATION

A blockbuster congressional investigation of campaign finance activities by corporations, trade associations, and high net worth individuals may be coming soon. In [announcing](#) his retirement recently, Senator Carl Levin (D-MI) announced that the Senate's [Permanent Subcommittee on Investigations \(PSI\)](#), which he chairs, would "tackle . . . the use of secret money to fund political campaigns." The new Ranking Member on the Subcommittee is Republican Senator John McCain (R-AZ), the author of the McCain-Feingold campaign finance reform legislation and a vocal critic of corporate money in elections. On an issue like campaign finance, Senators Levin and McCain could be a potent bipartisan combination.

In his statement, Chairman Levin said that the Subcommittee would examine "the failure of the IRS to enforce our tax laws" related to political activities. He also decried the "flood of hundreds of millions of secret dollars flowing into our elections." His language suggests that the investigation initially may target political spending by tax-exempt organizations, such as major trade associations and Section 501(c)(4) "social welfare" organizations. Because the Subcommittee's investigations tend to sweep broadly, however, it is possible that any such investigation would entail discovery requests concerning, or even directed to, the corporations and individuals who fund the tax-exempt groups.

For a number of reasons, a PSI campaign finance investigation could present serious challenges for politically active corporations and major donors. PSI, which views itself as having sweeping jurisdiction, has been quicker than other congressional committees to issue subpoenas. This is especially consequential because Congress does not recognize the attorney-client privilege.

This client advisory highlights the context in which the investigation would occur, and some of what clients should expect to see, if and when an investigation is launched.

ACTIVISTS ARE SEEKING TO COMPEL DISCLOSURE

Chairman Levin's statement about a PSI campaign finance investigation was made against a backdrop of increased activity by critics of corporate and tax-exempt organization political spending. Tax-exempt groups generally are not required publicly to disclose the names of their donors or members. Proponents of greater disclosure have deployed a variety of strategies – largely unsuccessful to date – to compel increased disclosure, including the following:

- Proposing federal legislation that would increase corporate political disclosure, such as the [Democracy is Strengthened by Casting Light On Spending in Elections Act \("DISCLOSE Act"\)](#), introduced by Senator Sheldon Whitehouse (D-RI) and cosponsored by nearly half the Senate.

- Attacking the Federal Election Commission's regulations that limit disclosure, such as Congressman Chris Van Hollen's (D-MD) [challenge in D.C. federal court](#).
- Filing FEC complaints against tax-exempt organizations alleging that they failed to register as political committees, including Public Citizen's [complaint against Crossroads Grassroots Political Strategies](#).
- Encouraging the Internal Revenue Service (IRS) to change its regulations to further restrict the political activities of tax-exempt groups. The IRS [announced](#) last fall that it would consider proposed changes in its regulations.
- Promoting shareholder resolutions that would require public companies to disclose information about their contributions to tax-exempt groups on their websites. A [model shareholder resolution](#) was published by the Center for Political Accountability.
- Suing public companies under state corporate law on behalf of shareholders, alleging a right to review the company's books and records concerning contributions to tax-exempt groups, such as [the New York State Common Retirement Fund's recent suit against Qualcomm](#) ("CRF"). (Covington's Election & Political Law Practice Group represented Qualcomm in that suit, which has since been dismissed by the CRF.)
- Pressuring the Securities and Exchange Commission to promulgate rules requiring public companies to disclose information about their contributions to these groups, as previously reported in Covington's [InsidePoliticalLaw](#) blog.
- Urging more disclosures through the Federal Communications Commission's regulation of television advertising, [as Senator Bill Nelson \(D-Fla.\) suggested in March](#).

In light of this lengthy list of mostly failed efforts to increase disclosure, Chairman Levin and Senator McCain may view a deep and probing congressional investigation as the most effective way to compel disclosure.

THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

PSI is known for conducting lengthy, thorough, and very complex investigations that can extend for years. Although these investigations have some attributes of litigation – such as document productions and witness testimony – congressional investigations are notable for the absence of real rules. “Due process” is often in very short supply. There are no procedures, for example, for obtaining protective orders or limiting the scope of discovery. There is no guarantee of confidentiality for information submitted to Congress, apart from informal, non-binding agreements that can sometimes be negotiated with congressional committees.

As noted above, Congress has for many years adamantly insisted that it need not respect attorney-client privilege or the work product doctrine, and contends that it can compel production of privileged documents or testimony. Given the reality that Congress often publicly releases documents and information obtained during its investigations, this can have serious legal and reputational consequences for those that comply with congressional discovery requests.

Most congressional investigations begin with a letter requesting that the recipient voluntarily provide information. In this case, the request, which could also take the form of a subpoena, may seek highly sensitive information, including documents supporting the target's tax filings with the IRS, documents relating to its political activities and contributions, and communications between tax-exempt groups and members or donors. The Subcommittee might also pose formal questions to the target, or ask to interview executives and employees. Depositions, though relatively rare, are also a possibility. Indeed, depositions were used extensively in the Senate's last major campaign finance

inquiry, which we discuss briefly below. Congressional investigations also frequently include oversight hearings, at which executives would testify under oath, with extensive televised and streamed media coverage and attention.

Chairman Levin is in a particularly strong position to pursue an investigation because PSI's rules provide him with unilateral authority to issue subpoenas. Under those [rules](#), Chairman Levin may issue a subpoena for witness testimony, documents, or records, subject only to providing notice to Senator McCain.

The Subcommittee's recent investigation of a major bank provides a useful example of the scale, scope, and approach of a major PSI investigation. Conducted in just over nine months, the Subcommittee reportedly collected 90,000 documents, reviewed over 200 recorded telephone conversations and instant messaging exchanges, and conducted over 25 interviews of bank and regulatory agency personnel. In addition, the Subcommittee reportedly received more than 25 briefings from the bank and its regulators. The investigation concluded with an oversight hearing (five current and former senior executives testified), and the Subcommittee released a 300-page report and an additional 600-page compendium of internal e-mails, documents, and other sources.

The Subcommittee's massive report was authored jointly by the Democratic and Republican staff, indicating the strong working relationship between Chairman Levin and Senator McCain. Investigations in which the Democratic and Republican staffs are working in concert often carry the greatest risks for outside interests. Significantly, the Subcommittee also reviewed non-public bank examination materials. In its campaign finance investigation, the Subcommittee might attempt to compel the IRS to produce confidential tax information such as the non-public portions of tax-exempt groups' annual Form 990 filings.

The Senate last conducted a major campaign finance investigation in 1997, following allegations that President Clinton and the Democratic National Committee had engaged in improper campaign fundraising in the 1996 reelection campaign. That investigation was conducted by the full Senate Committee on Governmental Affairs, rather than its Permanent Subcommittee on Investigations, under a special authorization to conduct a dedicated inquiry. Over nine months, the Committee issued 427 subpoenas, reviewed more than 1.5 million pages of documents, took 200 depositions and conducted an additional 200 interviews, and held 32 days of hearings with 72 witnesses. Throughout the investigation, the Democratic and Republican Senators took vastly different views of the evidence. Indeed, the Committee's final report was issued on a sharply partisan vote, and the Democratic Senators in the minority issued lengthy and detailed reports of their own. In total, the reports and exhibits of the majority and the minority spanned some 10,000 pages. Senator Levin served on the Committee during this investigation and was deeply involved in leading the Democratic Senators' efforts. The next time around, given the current leadership of the Subcommittee, there is likely to be far closer cooperation between the Chairman and Ranking Member.

GETTING READY

Covington has assembled a cross-disciplinary team of campaign finance lawyers, congressional investigation litigators, political tax and tax-exempt organization lawyers, and government affairs advisers, who are already advising clients on preparing for the anticipated PSI investigation. Though it is too soon to predict the scope of the investigation with confidence, we are available to help clients assess their exposure and begin to position themselves to manage whatever lies in store.

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

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