On Congressional Subpoenas to Accounting Firms

By Brian P. Ketcham

Recently, a midsize accounting firm that had prepared financial statements and reports for President Donald Trump and various entities associated with him for many years received a subpoena from the House of Representatives Committee on Oversight and Reform seeking a broad array of documents and communications regarding the firm's work in that capacity. The subpoena, which seeks six years of personal and corporate financial records, may lead to troubling precedent and a sharp increase in broad subpoenas to accounting firms in all manner of cases. Indeed, although the subpoena itself is not yet publically available, a letter from Elijah Cummings (D-Md.), the chairman of the Oversight Committee, to the chairman and CEO of the accounting firm can be found online, and excerpts from the subpoena are quoted in publically filed court documents. The subpoena, if ultimately enforced, will have a chilling effect on the relationship between taxpayers and their accountants.

The Oversight Committee's requests appear to seek nearly every aspect of the accounting firm's work for the President and numerous entities associated with him, including "all statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, complied, reviewed, or audited by" the accounting firm. The requests go on to include "all underlying, supporting, or source documents" related to the statements and reports, and—perhaps most troubling—"all memoranda, notes, and communications related" to the statements and reports, including "all communications between" the lead CPA on the matter and the President or any employee or representative of the President's company. In other words, the Oversight Committee does not want to just review financial and source documents (commonly the only items requested from accountants in federal subpoenas); it wants to know about any discussions between the CPA and the client about those documents.

In some cases, the scope of a subpoena (Congressional or otherwise) can be negotiated to limit the disclosure of information. This should always be the first step. If an agreement cannot be reached, however, the subpoena itself—or its scope—can be challenged in federal court. This article explores possible ways by which a similar subpoena might be quashed or, at a minimum, modified so as not to effectively become a "fishing expedition."

Improper Purpose Challenge

One potential challenge to the subpoena has already been undertaken by the President's personal attorneys, who filed a lawsuit in federal court seeking declaratory and injunctive relief with regard to the Oversight Committee's requests. In the lawsuit, which was brought in the President's personal capacity as a private citizen, the President argued that the subpoena is invalid and unenforceable on the basis that the Oversight Committee had no "legitimate legislative purpose" underlying the issuance of the subpoena. Rather, the President argued, the true purpose underlying the subpoena was to uncover dirt about the President's finances for political gain and, for that reason, the Oversight Committee should be enjoined by the court from enforcing the subpoena.

In addition, the President's lawyers point out that the subpoena has placed the accounting firm in an ethical quandary. Specifically, on the one hand, the accounting firm is bound by the AICPA's prohibition on the disclosure of client information without the client's consent, while on the other hand, the firm may be held in contempt for refusing to comply with a validly issued subpoena.

On May 20, the federal district court in Washington, D.C. issued an opinion rejecting the President's improper purpose challenge and found that Congress enjoys very broad authority to conduct investigations as long as the subjects of the investigation fall within the power to legislate, which is in turn also given a broad interpretation. Notably, the court reasoned that Congress's true motives in issuing a subpoena—for example, political advantage—are irrelevant to the question of whether Congress acted legislatively when it did so. The court does not appear to have considered the ethical conflict raised by the plaintiffs; presumably, compliance with a court order to turn over materials sought by a subpoena subsequently found valid by a federal court will provide the accounting firm with a defense against any claims that it violated AICPA ethics standards. Of course, the President has a right to appeal the court's decision (and in fact filed an appeal the day after the court issued its ruling), but the court refused to grant a stay of its ruling pending appeal. Thus, unless the court of appeals reverses and finds that a stay pending the appeal is warranted, it appears that the accounting firm will have little choice but to comply with the subpoena.

Kovel Challenge

Of course, while the argument described above may ultimately have merit in the context of a Congressional subpoena issued to a president's accountants, it is unlikely that a similar argument can be made in the case of an accounting firm that is on the receiving end of a similarly broad subpoena seeking information from a less high-profile client. Therefore, more traditional approaches to responding to a subpoena should be explored.

One of the most common responses to a subpoena seeking underlying work product and communications between an accountant and a client is the privilege recognized in *U.S. v. Kovel* [296 F.2d 918 (2d Cir. 1961)]. In *Kovel*, an accountant refused to answer questions posed by a grand jury investigating one of the accountant's clients for tax violations and asserted that his communications with the client were protected by the attorney-client privilege. Although most jurisdictions do not recognize an accountant-client privilege, the court of appeals in *Kovel* recognized an exception when an accountant communicates with a client in confidence for the purpose of obtaining legal advice. It is unclear from the public record whether or not the accounting firm worked with attorneys in connection with its work for the President. If this is the case, at the very least the firm might argue that its communications with the President and his staff concerning the firm's accounting work fall within the *Kovel* privilege; as such, the subpoena should be modified to omit those communications. One way or the other, the case offers a useful reminder that, when working with a high-profile client or otherwise engaged in a potentially sensitive matter, it often makes sense to work closely with tax counsel to help ensure that the *Kovel* privilege is available in any subsequent litigation.

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Other Challenges

Finally, a party may seek to quash or modify a subpoena if it can show that it seeks irrelevant information or is unreasonably cumulative or duplicative, or to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. Courts are generally hesitant to limit discovery, and the individual or entity seeking relief bears the burden of showing that the subpoena should be quashed or modified; however, the burden is generally lower in cases seeking to modify rather than to quash. In the May 20 opinion described above, the court reasoned that it lacked the authority to engage in a line-by-line review of the subpoena in an attempt to narrow its scope. In this context, however, it would appear that, at the very least, the accounting firm may argue that a subpoena seeking essentially all aspects of the firm's work for the President over a period of multiple years represents an undue burden and that retaining attorneys to compile, review, and produce such a vast amount of financial information presents an undue expense. There may also be a valid argument that a request seeking both finalized statements and reports, as well as all underlying source material, is unreasonably cumulative and duplicative.

A Question of Trust

CPAs are trusted advisors who often enjoy long-term and close relationships with clients and become intimately familiar with clients' personal financial lives. The Oversight Committee's subpoena to the President's accountants includes requests for detailed financial information during a period when Mr. Trump was a private citizen and operated private companies. If ultimately enforced in all respects, the subpoena will establish a troubling precedent that is likely to undermine future relationships between accountants and their clients. It is hoped that Congress or the courts will endeavor to limit future subpoenas that threaten to undermine the special relationship of trust between CPAs and their clients. ❑

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