



Congressional & State AG Investigations: Investigator and Investigated Perspectives

May 23, 2019



Moderator:

Anne Gerson, Venable LLP

Speakers:

Jimmy Rock, DC Office of the Attorney General

Eric Berman, Venable LLP

Alicia O'Brien, Venable LLP

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Today's Discussion

- Panel
- State AG Practice Overview
- Congressional Investigations Practice Overview
- Nuts & Bolts
- Q&A

Today's Panel

- **Jimmy Rock**

- Assistant Deputy Attorney General, Public Advocacy Division, DC Office of the Attorney General; Adjunct Professor, Georgetown University Law Center

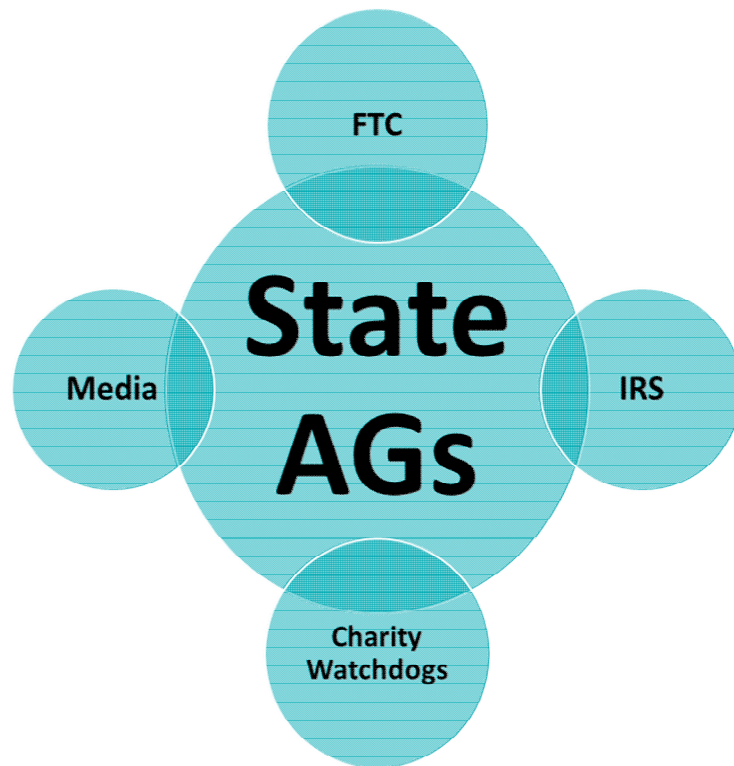
- **Eric Berman**

- Venable Partner, Nonprofit Organizations and Advertising Practice Groups

- **Alicia O'Brien**

- Venable Partner, Regulatory Practice Group; Former Associate Deputy Attorney General in DOJ's Office of the Deputy Attorney General under Sally Yates, and former Deputy Assistant Attorney General in DOJ's Office of Legislative Affairs

State AG Enforcement Authority Over Nonprofits



State AG Authority

- State Law
 - E.g., D.C. Code § 29-412.20 (grants DC OAG authority to seek dissolution or other equitable relief in DC Superior Court in certain cases)
- Federal Law
 - E.g., TSR, TCPA
- Common Law
 - Protection of donor's charitable intent; principle of fiduciary duty

Varied Patchwork at State Level

- Nonprofit oversight usually within state's office of attorney general or secretary of state
- Only thirteen states have dedicated charities bureaus within their AG offices (e.g., New York)
- In other AG offices, nonprofit oversight housed in consumer protection, public advocacy, or other divisions
- Resources vary greatly by state

How Do AGs Find You?

- Donor complaints
- Disgruntled board members or other insiders
- Media coverage
- Referrals from other law enforcers
- Filing review

And What Are They Looking For?

- Fraudulent solicitation
 - Telemarketing key enforcement driver
- Governance lapses
- Reporting violations
- Related-party transactions (self-dealing)
- Transactions
- Diversion of charitable assets
 - Outside of jurisdiction
 - Away from restricted use

State AG Case Selection Criteria

- Nature of harm/type of injury
- Deterrent value
- Characteristics of victims
- Severity of violation
- Who is the defendant?
- Likelihood of success/strength of case
- Is relief availability through other means?

Responding to a State AG Contact

- Type of outreach – dependent
- Negotiate scope of subpoena
- Identify areas of concern quickly
- Decipher relief sought
- Meetings with staff
 - When to move up the chain?
- White papers
- Litigation posture
- Non-legal considerations (e.g., publicity)

Ever wonder...

Who are the people behind the people on C-Span?



Congressional Investigations Overview

- Congressional investigations operate within a unique atmosphere of fast-moving considerations and factors:
 - Politics / Committee Agendas
 - Media Scrutiny / Public Relations
 - Member and Shareholder Reactions
 - Different “Rules”
 - Legal Considerations
 - Internal Investigations and Management Issues
 - Parallel Investigations

Congressional Authority

- Extremely broad authority and jurisdiction to investigate and obtain information
- While there is no express provision in the Constitution on congressional investigative power, the Supreme Court has firmly established that such power is essential to the legislative function of Congress
- Each committee operates differently, but all have many tools at their disposal:
 - Voluntary letters/inquiries
 - Document requests
 - Transcribed interviews and depositions
 - Public hearings
 - Committee reports
 - Press releases
 - Subpoenas (increase in unilateral subpoena authority)
 - Contempt

Nuts & Bolts I

Sample Timeline:

Chairman's Letter(s) or Subpoena for Records and/or Testimony→

Written Response(s)/Document Production→

Informal Interviews and/or Transcribed Interviews/Depositions→

Public Hearing→

Questions for the Record→

Investigative/Committee Report

At all stages, potential for press releases, leaks, and media interest

Nuts & Bolts II

- Value added by experienced counsel:
 - Negotiate from the start; value of relationships/trust; take down the temp and steer the investigation
 - Understanding of the players and process - resembles litigation in some ways, but very different
 - E.g., rules, privileges, judge, press, politics
 - “Do no harm” + positive messaging/story
 - At any/all stages, potential for press, leaks, media interest
 - Minimize risk to reputational harm and business impact (donors, stockholders, media coverage, professional position, etc.)

Who We Represent

- **Many different types of companies and individuals:**
 - **Nonprofit organizations** (including schools and universities)
 - **Trade associations**
 - Publicly traded and privately held companies and institutions
 - Boards of directors and execs
 - Government contractors
 - Government officials (current/former)
 - **Other individuals** involved in government investigations as witnesses, subjects, and targets

The 116th Congress – Senate

- **R-controlled Senate** has focused less on the private sector, but investigations on high-profile, bipartisan issues have continued
 - *Senate Intel*: Bipartisan; very active; casts a wide net, e.g., any organization, individual, or company touching Russia, Saudi Arabia, and a variety of other countries and issues – including nonprofits and trade associations
 - *PSI*: Bipartisan; recent examples include human trafficking, including unaccompanied children at the border; opioids
 - *SJC*: Nominations have become an exercise in oversight; any nominee with ties to X company, organization, association, or nonprofit
 - *SFC*: Former SJC Chairman Grassley now chairs Finance

The 116th Congress – House

- **D-controlled House** has focused heavily on investigations – including the private sector – with the power of the gavel, a substantial increase in staffing and budget, and in most, unilateral subpoena power
 - Dem Majority:
 - 14 of the 18 standing House committees have identified oversight/investigations as key priorities
 - More than half of the chairs have investigations re: Trump, including finances, foreign expenditures at Trump properties, and other issues
 - Special committees have been formed on other issues, such as climate change
 - Speaker Pelosi and D committee chairs are adept at turning investigations into political messaging
 - Any organization, association, or group with ties to this administration could be called on as a witness, target, and/or source of information

Key House Committees / Chairs

- **Key House Committees / Chairs**

- Energy and Commerce (E&C): Rep. Frank Pallone
- Financial Services (HFS): Rep. Maxine Waters
- Judiciary (HJC): Rep. Jerry Nadler
- Intel (HPSCI): Rep. Adam Schiff
- Oversight and Reform (COR): Rep. Elijah Cummings
- Ways and Means: Rep. Richard Neal



Q&A

Upcoming Program

Legal Structuring for Nonprofit Organizations: Creating Systems, Affiliates and Subsidiaries

Wednesday, June 26, 2019

12:00pm-12:30pm ET Networking Luncheon

12:30pm-2:00pm ET Program/Webcast

Speaker: Bob Waldman, Partner, Venable LLP



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