Comptroller General
of the United States

Washington, D.C. 20548

B-270875

July 5, 1996

The Honorable William F. Clinger
Chairman
Committee on Government
Reform and Oversight
House of Representatives

Dear Mr. Chairman:

In your letter of May 22, 1996, you asked that we examine documents submitted in connection with hearings before the Committee on H.R. 3078, "The Federal Agency Anti-Lobbying Act." You asked that we look at these documents to determine whether the agencies involved—the Department of Energy, Labor, and Veterans Affairs (DVA), the Commodities Futures Trading Commission (FTC), and the Environmental Protection Agency (EPA)—expended federal funds lawfully. We have limited our analysis to the documents provided. We have not engaged in any additional investigative work concerning these matters. Nor have we asked for formal reports from any of the agencies involved. Accordingly, our conclusions are limited to our analysis of statements in the documents provided and applicable law.

BACKGROUND

Over the years, the Congress has imposed two types of restrictions on lobbying activities by Executive branch agencies and their officers or employees. First, in 1919, the Congress enacted what is now 18 U.S.C. § 1913, which makes the use of appropriated funds for some forms of lobbying a crime. Since section 1913 is a criminal provision, its enforcement is the responsibility of the Department of Justice and the courts. The General Accounting Office, therefore, does not decide whether a given set of facts constitutes a violation of section 1913. We may refer possible violations of section 1913 to the Justice Department for further investigation where we have reason to believe that Justice, in applying its view of the statute, may believe a potential violation exists.

The Justice Department has interpreted section 1913[1] to prohibit "large-scale publicity campaigns to generate citizen contacts with Congress on behalf of an Administration position" with respect to pending legislation. Memorandum for Dick Thornburgh, Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, September 28, 1989. In the views of the Justice Department, the statute prohibits "substantial 'grass roots' lobbying campaigns of telegrams, letters and other private forms of communication designed to encourage members of the public to pressure members of Congress to support Administration or Department legislative or appropriations proposals." Id.

The Justice Department does not believe section 1913 limits lobbying activities personally undertaken by the President, aides or assistants in the Executive Office of the President, the Vice President, cabinet members within their area of responsibility, and other Senate-confirmed officials appointed by the President within their areas of responsibility. Memorandum for the Attorney General and Deputy Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, April 14, 1995. Nor does the Justice Department view section 1913 as prohibiting communications with the public through public speeches, appearances, and published writings. Id. Further, the Justice Department has

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[1]Section 1913 reads,

> "No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.
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> "Whoever, being an officer or employee of the United States, or of any department or agency thereof, violates or attempts to violate this section, shall be fined under this title or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment."

suggested that a "substantial" grass-roots lobbying campaign is one costing about $50,000 or more. Id.

The second type of lobbying restriction, usually appearing in annual appropriations acts, prohibits the use of appropriated funds for certain lobbying activities. Over the years, these restrictions have applied at different times, to different agencies and have used different wordings. On occasion, the General Accounting Office has been asked to determine whether certain agency activity has violated annual appropriations act lobbying restrictions. The most common appropriations act restriction involved in our decisions was the governmentwide restriction prohibiting the use of appropriated funds for "publicity or propaganda purposes designed to support or defeat legislation pending before Congress" that until 1984 was contained in the annual Treasury, Postal Service, and General Government appropriations acts.[2] We have determined that this type restriction prohibits grass-roots lobbying in the form of agency appeals to the public to contact their elected officials concerning pending legislation. See 60 Comp. Gen. 423, 428 (1981); 56 Comp. Gen. 889, 890 (1977).

DISCUSSION

Of the five agencies involved, only the Department of Labor was subject to an appropriations act lobbying restriction at the time of the agency activities referred to in the materials you provided. Therefore, only the criminal statute, 18 U.S.C. § 1913, applied to the activities of the other agencies.

Commodity Futures Trading Commission (CFTC)

On March 23, 1995, CFTC Commissioner (and Chair of the CFTC Agricultural Advisory Committee) Joseph B. Dial wrote a memo to members and representatives of the Agricultural Advisory Committee expressing his opposition to pending legislation that would merge the CFTC with the Securities and Exchange Commission (SEC). Attached to the memo was a document entitled "Points of View on the Merger of the SEC and the CFTC," which argued against the proposed merger. The Commissioner's memo contained the following statement: "I urge you

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[2]The restriction in the annual Treasury, Postal Service and General Government appropriations act as it existed through fiscal year 1983 read as follows:

> "No part of any appropriation contained in this or any other Act . . . shall by used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

E.g. Section 607(a), Pub. L. No. 96-74, 93 Stat. 559, 575 (1979)

and/or your organization to make your position known to the co-sponsors of this Bill and to the following: [list of committee and subcommittee chairs and members]."

Although the memo does not specifically tell recipients what position they should make known to members of Congress, clearly Commissioner Dial intended and expected that they would argue in opposition to the pending legislation. This constituted grass-roots lobbying covered by section 1913. However, as interpreted by the Justice Department, the restrictions of section 1913 do not apply to Commissioner Dial's memo for two reasons. As discussed previously, the Justice Department believes that the criminal statute cannot constitutionally apply to Senate-confirmed Presidential appointees. Commissioner Dial is a presidential appointee confirmed by the Senate. Second, Justice believes that section 1913 is violated only by substantial lobbying campaigns (costing $50,000 or more). Although we have no information on exactly how much Commissioner Dial's memo may have cost, it is doubtful it cost anywhere near $50,000.

Department of Energy

On June 12, 1995, then-Deputy Secretary of Energy William H. White sent a letter to thousands of individuals and organizations. In the letter Deputy Secretary White set out his views on the condition of the energy industry. He indicated what he thought was the good news, the bad news, the role of the federal government, the Administration's policies, and "[t]he threat to a balanced energy policy." In the latter section of his letter, Deputy Secretary White pointed out that President Clinton (as did President Reagan) saw imports as the greatest danger to national security. He then stated:

> "Now, however, some in Congress want to eliminate over 80 percent of the federal funding for energy R&D of all types, sell the oil stockpiled in the Strategic Petroleum Reserve in competition with the private sector, and eliminate all tax incentives by labeling them 'corporate welfare.' We are fighting back."

Deputy Secretary White ended his letter by asking recipients to write him with their views on the direction the Administration was heading. Energy spent about $34,000 to prepare and send Deputy Secretary White's letter.

This communication does not constitute "grass-roots lobbying" as the Department of Justice has used that term in applying the criminal statute. Nowhere in the letter does the author encourage recipients to contact their elected representatives; he only invites them to write to him personally. Further, even if Deputy Secretary White's letter had constituted grass-roots lobbying, since he is a Senate-confirmed

presidential appointee, Justice would not consider his activities to be covered by section 1913.

Environmental Protection Agency (EPA)

In early 1995, EPA created a "Contract With America" working group. The working group was designed to formulate and communicate the agency's position on pending legislation to implement the "Contract With America". The group was (1) to develop talking points about the impacts on the environment of specific legislative provisions as they came up before the House and Senate; (2) to respond as issues come up as part of the budget process; and (3) to be a conduit to "their offices" (presumably within EPA) for information, review, etc. Minutes of January 5, 1995 meeting of EPA Contract with America group. The group was also to "[e]nsure that EPA's message about the impact of this gets out to the Hill, industry groups, editorial writers, other outside groups." Id. After the group's initial meeting, next steps included a coordinated outreach strategy—"pull together list of contacts or potential contacts . . . as part of developing a strategy for who to reach out to beyond EPA, particularly in the private sector." Id.

EPA engaged in various activities in opposition to legislation introduced to implement the "Contract With America". It compiled lists of members of the Congress considered political "moderates" and thus potential supporters of EPA's position. It distributed EPA fact sheets to various organizations setting forth the adverse effects that pending legislation would have on the environment. EPA officials directly lobbied the Congress. An EPA regional administrator wrote a strong anti-Contract op-ed article. However, in none of the materials we have received is there evidence of grass-roots lobbying, i.e., any direct appeal for people to contact members of Congress. Nor is there any clear indication in the materials provided that EPA provided direct support to lobbying organizations that supported its views, which would constitute a violation.

Although the EPA activities would probably meet the Justice threshold for "substantial" campaigns (involving expenditures of over $50,000), they do not constitute grass-roots lobbying which the Justice Department believes is covered by 18 U.S.C. § 1913. Although EPA engaged in a concerted effort to defeat legislation implementing the Contract with America, EPA's direct lobbying of Congress and informing the public of its position on legislation are permissible activities under Justice's interpretation of the statute.

Department of Veterans Affairs (DVA)

Secretary of Veterans Affairs Jesse Brown sends e-mail messages to DVA employees on a regular basis. At various times in 1995, these messages communicated that pending legislation would have an adverse effect on DVA programs and staffing, or

supported the President's budget. On August 29, 1995, DVA printed a statement from Secretary Brown on the back of DVA employees' earning and leave statements advising them that the President's budget was much better for veteran's programs than the congressional budgets.

Secretary Brown's communications to DVA employees do not constitute grass-roots lobbying as the Department of Justice interprets section 1913. They are not communications to the public, and they do not urge anyone to contact his or her elected representatives about pending legislation. The Secretary is within the group of federal officials that the Justice Department contends cannot be constitutionally constrained by section 1913, and the costs of Secretary Brown's communications are significantly less than the Justice Department's "substantial" threshold of $50,000.

Department of Labor (Labor)

Between February and August 1994, the Department of Labor prepared and distributed (by fax) a series of publications entitled "America's Job Fax." Labor faxed the publication to "key" congressional members and staff and to a wide variety of private sector organizations. Most of the publications strongly supported the Administration's "Reemployment Act of 1994." The series began before the legislation was introduced and continued while the Congress was considering it. In February 1995, the Department also prepared and distributed two issues of "The FAX on Better Jobs & Higher Incomes," which argued for the President's "Middle Class Bill of Rights" (Issue 1) and an increased minimum wage (Issue 2).

The faxes prepared and distributed by Labor do not constitute grass-roots lobbying under Justice's interpretation of section 1913. Although the Department of Labor clearly expressed its support for pending legislation, it did not urge members of the public to contact their elected representatives.

Unlike the other four agencies, the Department of Labor was subject to an appropriations act restriction during the period covered by the documents provided. Section 504(a) of both the fiscal year 1994 and 1995 appropriations acts for the Department of Labor provided as follows:

> "No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself."

Pub. L. No. 103-112, 107 Stat. 1082, 1112; Pub. L. No. 103-333, 108 Stat 2539, 2572 (emphasis added).

As discussed previously, we and the Justice Department have interpreted the traditional prohibition on the use of appropriated funds ("publicity or propaganda purposes designed to support or defeat pending legislation") to require an overt appeal to the public to contact Members of Congress. The Labor-HHS restriction differs from this traditional language by the presence of the three clauses highlighted in the above quotation. Of these three clauses, the first and the last only make it clear that the prohibition does not apply to communications directly to the Congress. The middle clause—"for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation"—explains what the Congress means by publicity or propaganda purposes. There is nothing in the language and legislative history of the prohibition indicating that the Congress intended this clause to have any other significance. Although section 504(a) is more detailed than the governmentwide publicity and propaganda restriction previously contained in the annual Treasury, Postal Service, and General Government appropriations acts (see fn. 3 on page 3), it appears to have the same legal effect.[3]

The Congress added what is now section 504(a) to the then Labor-HEW appropriations act for fiscal year 1974. The Joint Explanatory Statement accompanying the conference report on H.R. 8877 explained: "Inserts Section 410 proposed by the Senate to prohibit the use of funds for publicity or propaganda to influence legislation pending before Congress, except in presentation to Congress itself." H.R. Rept. 682, 93d Cong., 1st Sess. 30 (1973). In explaining its amendment to the bill, the Senate Committee on Appropriations said:

> "The committee has learned that information specialists and other Federal workers have been directed by their respective agencies to prepare documents solely for propaganda purposes. These documents serve as the basis for speeches, editorial pieces, and media broadcasts, aimed at lobbying for or against legislation pending before the Congress. In some cases, this material goes so far as to attack specific members of Congress. The committee is adamantly opposed to such activities, and has included general provision language to prohibit the use of funds for publicity or propaganda purposes."

S. Rept. 414, 93d Cong., 1st Sess. 101 (1973)(emphasis added).

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[3]The Justice Department has interpreted the Labor-HHS appropriations act restriction similarly. See Memorandum Opinion for the Counsel to the Director, Office of Management and Budget from Assistant Attorney General, Office of Legal Counsel, Theodore B. Olson, June 17, 1981.

The type of agency activities that caused the appropriations committee to include the restriction in the Labor-HEW appropriations act are revealed in an excerpt from the testimony of the Secretary of Health, Education and Welfare:

> "Senator Magnuson . . . . But we keep hearing how the White House has gone full circle on this issue [propaganda]. A few weeks ago, a group of writers at NIH were told to start working up press releases that could be used in editorials, magazines and smalltown newspapers. And some of the writers apparently were told to include certain derogatory statements about the Congress; and people in social security have been reprimanded for not complying with the orders.
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> "Now, if there's one agency that shouldn't be involved in this sort of thing, I think you will agree with me, it's social security.
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> "Secretary Weinberger. I certainly agree Senator. The problem there is a misunderstanding halfway or three-quarters of the way down the line as to what is desired in public information. There are a lot of complicated things being done in the health field by the National Institutes, and it is desirable that we advise the public of what progress is being made and what is being done.
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> "There is no suggestion and anyone who told anyone there was any suggestion that we should put out material that was useful simply for propaganda, or for attacking the Congress, is following totally incorrect instructions.
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> . . . .
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> ". . . But the simple fact of the matter is we don't want any propaganda. We do feel there is a legitimate field for advising the public on what we are doing, particularly in rapidly changing fields."

Hearings on H.R. 8877 before a Subcommittee of the Committee on Appropriations, United States Senate, 93d Cong., 1st Sess. 196-200 (1973).[4]

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[4]Senator Magnuson included in the hearing record three articles from the Washington Post describing Administration publicity campaigns. The campaigns involved government officials and employees producing large numbers of speeches and speech kits, "canned" editorials, and magazine articles to be used in supporting President Nixon's budget and opposing appropriations bills pending before the Congress.

As we indicated above, on numerous occasions we have interpreted this type of prohibition as applying only to agency grass-roots lobbying campaigns. We set forth our reasoning in a 1973 letter to the Chairman, Subcommittee on Communications and Power, House Committee on Interstate and Foreign Commerce:

> "We consider that in general section 608(a) [of the Treasury, Postal Service, and General Appropriation Act, 1973] is not violated by the dissemination by an agency of general comment on, or discussion of, pending legislation. This view is, we believe, necessarily implied by consideration of the nature of those public information functions of an agency which are legitimate and lawful. Thus, public officials may with propriety report on the activities of their agencies, may expound to the public the policies of those agencies, and of the administration of which they are members, and may likewise offer rebuttal to attacks on those policies. Expenditure of appropriated funds for dissemination of information in those categories is hence lawful. But it must be recognized that, to the extent to which the policy of an agency or administration is embodied in pending legislation, discussion by officials of that policy will necessarily, either implicitly or by implication, refer to such legislation, and will presumably be either in support of that legislation or in opposition to other non-administration legislation, or both. An interpretation of section 608 (a) which strictly prohibited expenditures of appropriated funds for dissemination of views on pending legislation would consequently preclude any comment by officials on administration or agency policy, a result which, as noted above, we do not believe was intended.
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> "We conclude, therefore, that the Congress did not intend, by the enactment of section 608(a) and like measures, to preclude all expression by agency officials of views on pending legislation. Rather, the prohibition of section 608(a) in our view applies only to expenditures involving direct appeals addressed to the public suggesting that they contact Members of Congress and indicate their support or opposition to pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. . . "

B-178648, September 21, 1973.

We have examined the Labor Department faxes in light of section 504(a) of the Labor-HHS appropriations acts. The series of publications entitled "America's Job Fax" contains excerpts from speeches by the President and Secretary Reich, schedules of public appearances by Secretary Reich, facts about conditions affecting employment in the United States, descriptions of the President's Reemployment Act of 1994, information about the progress of the Act through the Congress, statements of individuals and organizations supporting the Act, and Department of Labor

statements arguing both generally and specifically that passage of the Act would benefit American workers. None of the faxes, however, contain any suggestion that members of the public contact their congressional representatives to urge them to support the Reemployment Act.

Similarly, we find nothing in either of the issues of "The FAX On Better Jobs & Higher Incomes" that appeals to the public to contact members of Congress to support any pending legislation.

We note, however, that the bill you recently introduced, H.R. 3078, "The Federal Agency Anti-Lobbying Act," does not use the restrictive language ("for publicity and propaganda purposes") found over the years in many appropriations acts. Instead, it would prohibit the use of Labor (and other agency) funds "for any activity . . . that is intended to promote public support or opposition to any legislative proposal." (Emphasis added.) As we previously testified, H.R. 3078 is modeled on a lobbying restriction included since fiscal year 1979 in the Interior Appropriation Act. See "H.R. 3078, The Federal Agency Anti-Lobbying Act," Statement of Robert P. Murphy, General Counsel, United States General Accounting Office. The threshold test contained in H.R. 3078 and the Interior appropriation act reaches a variety of situations not reached by section 504(a) of the current Labor—HHS appropriations act. See B-262234, December 21, 1995. Accordingly, if Congress enacts H.R. 3078, the Labor Department's activities would be subject to a much broader prohibition than currently provided by section 504(a).

We trust that this letter is responsive to your request.

/s/James F. Hinchman
for Comptroller General
of the United States

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DIGEST

1. Activities of five agencies did not violated 18 U.S.C. § 1913, as that criminal statute has been interpreted by the Department of Justice. Justice has determined that section 1913 prohibits only substantial (costing $50,000 or more) agency grass-roots lobbying campaigns, i.e., campaigns in which appeals are made to members of the public to contact their elected representatives in favor of or opposition to legislation pending before the Congress. Further, Justice has determined that section 1913 does not apply to the activities of presidentially appointed officials whose appointment was confirmed by the Senate.

2. The series of publications entitled "America's Job Fax," prepared and distributed by the Department of Labor in 1994, did not violate section 504(a) of the annual Labor-HHS appropriations act. Section 504(a) prohibits using appropriated funds for grass-roots lobbying campaigns and is violated only by agency appeals to members of the public to contact their elected officials to support or oppose pending legislation.