

October 10, 1986

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DELAYED DISTRIBUTION
DIGESTS

RELEASED

MT/AF

1. Public information materials of the Small Business Administration (SBA), provided to GAO for review, do not appear to violate the criminal anti-lobbying statute, 18 U.S.C. § 1913, such that referral to the Justice Department is warranted. The Department of Justice interprets 18 U.S.C. § 1913 to apply only when funds are spent in a "grass roots" lobbying effort—where an attempt is made to induce members of the public to contact their representatives in Congress to persuade them to either support or oppose pending legislation. Those circumstances are not present here. No civil anti-lobbying statute is applicable to the SBA in these circumstances.
2. "Suggested editorials" prepared by the Small Business Administration (SBA) for distribution to newspapers violate section 601 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136, 1168 (1985), which prohibits the use of SBA appropriations for "publicity and propaganda." The editorials, prepared by SBA for publication as the ostensible editorial position of the recipient newspapers, are misleading as to their origin and reasonably constitute "propaganda" within the common understanding of that term. The SBA "suggested editorials" are beyond the range of acceptable agency public information activities and, accordingly, violate the "publicity and propaganda" prohibition of section 601.



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-223098, B-223098.2

October 10, 1986

RELEASED

The Honorable Lowell Weicker, Jr.
Chairman, Committee on Small
Business
United States Senate

Dear Mr. Chairman

This is in response to your letter dated May 7, 1986, requesting that this Office examine recent public information activities of the Small Business Administration (SBA) to determine whether those activities have resulted in any violation of law. Of particular concern to you is one specific SBA publication, a pamphlet entitled, "The Future of SBA." As set forth below, we conclude that none of the SBA informational material provided to us for review violates the law, with the exception of certain "suggested editorials" prepared by SBA for distribution to newspapers, which we conclude violate the prohibition in section 601 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 90-180, 99 Stat. 1136, 1168 (1985), on the use of appropriated funds for "publicity and propaganda."

Mr. Charles L. Heatherly, Acting Administrator of the SBA, has also requested the opinion of this Office regarding the propriety of "The Future of SBA." We intend to respond to Mr. Heatherly by providing SBA with a copy of this letter when it is released to the public.

BACKGROUND

The President's fiscal year 1987 budget submission proposes to transfer the SBA to the Department of Commerce and to eliminate SBA's finance and investment programs and some management assistance activities. See "Budget of the United States Government, Fiscal Year 1987," Office of Management and Budget, 5-64 - 5-65.

A substantial amount of SBA public information material has been submitted to us by your staff for review. You are most interested, however, in the propriety of an SBA pamphlet entitled, "The Future of SBA." "The Future of SBA," according to the SBA submission, is intended "to inform interested small businesses of the effect that the passage of the President's proposal would have on them." SBA has printed 120,000 copies of "The Future of SBA" and many copies have already been distributed. According to the SBA submission:

"SBA intends to distribute these pamphlets to small business representatives attending the White House Conference on Small Business, to small business representatives attending the State conferences on small business in preparation for the White House Conference, to 77 national small business organizations and trade associations, to approximately 220 state and regional small business organizations, and to anyone else requesting information from SBA regarding the President's budget proposal."

Following distribution to SBA regional offices, SBA, in a May 8, 1986 notice, instructed regional offices not to disseminate the pamphlet further.

"The Future of SBA" includes a short introduction followed by a series of questions and answers. It concludes with a summary. The introduction notes that in his fiscal year 1987 budget, President Reagan "proposes to relocate the SBA in the Commerce Department, keeping many of SBA's important functions and activities but eliminating the Agency's finance and investment programs and its business development (management assistance) activities." The introduction goes on to outline the major effects of the proposal: the transfer of SBA to the Department of Commerce, the reassignment of the SBA Administrator as an Under Secretary of Commerce, predicted budget savings, and the transfer of the SBA loan portfolio to the Department of the Treasury.

The question and answer portion of "The Future of SBA" poses, and then answers, several questions concerning the effect and operation of the Administration's proposal. Some typical examples are as follows:

"Q. What does the Administration's Fiscal 1987 budget propose for SBA?"

"A. The budget proposes to transfer SBA to the Commerce Department effective October 1, the start of the 1987 fiscal year. SBA's Loan Portfolio Management function would be transferred to the Treasury Department, also on October 1.

"Q. In the transfer to Commerce, would some SBA functions be eliminated?"

"A. Yes. The Agency's finance and investment programs would be eliminated. So would all business development (management assistance)

functions except for SCORE and ACE. Disaster lending also would end.

"Q. How much would be saved by the proposals?

"A. \$1.4 billion in Fiscal 1987.

* * * * *

"Q. Wouldn't some present and future small businesses be hurt by elimination of the finance, investment and business development programs?

"A. Only minimally. Remember, most important SBA activities and programs would continue. The private sector is in excellent position to take up the slack from elimination of SBA's lending, investment and business development activities. A key factor is related to policies instituted at SBA over the past years, encouraging private sources to widen their assistance to small firms.

* * * * *

"Q. When would SBA's lending and investment activities stop?

"A. On September 30.

"Q. When would the business development activities stop?

"A. On September 30. Remember, SCORE and ACE would be part of the transfer of activities to Commerce.

"Q. And when would disaster lending stop?

"A. On September 30."

"The Future of SBA" concludes with a summary, putting forth several "points." Typical examples are as follows:

"The Small Business Administration will continue to exist.

* * * * *

"The elimination of SBA's financial, investment and management assistance efforts will have a minimal negative effect on small firms.

* * * * *

"Small business will continue to benefit from the Reagan Administration's continuing efforts to reduce the overall budget deficit, further cut spending, further reduce paperwork and red tape and continue deregulation efforts."

Also submitted to us for review was a substantial quantity of other SBA public informational material, including suggested editorials, suggested "letters to the editor," a draft letter to administrators of state trade associations and state and local government officials, a draft letter to congressional staff members, a copy of the SBA agency newsletter, "Network," and a "Public Communications Plan," evidently prepared by SBA. The material, in general, puts forth the Administration's position regarding the proposed reorganization of SBA. The suggested editorial begins: "The Reagan Administration's proposal to transfer the Small Business Administration to the Commerce Department deserves the support of the American taxpayer, the Congress and the small business community." In the following paragraphs, the editorial discusses the advantages of the reorganization proposal. The suggested letters to the editor contain comparable material. The points made in the suggested editorial and suggested letters to the editor are substantially similar to the points put forth in "The Future of SBA," detailed above. The draft letter to "field congressional staffers" is a transmittal letter for "a packet of materials concerning the Small Business Administration and the Reagan Administration's SBA budget proposals."

The issue of "Network" provided to us included an article entitled "Budget Proposes Transfer," which detailed the Administration's budget proposal, but noted that "the President was expected to soon sign the Reconciliation Bill which includes the 3-year reauthorization for SBA programs for Fiscal Years 1986-87-88." Also included in the issue of "Network" was an article entitled "Budget Questions and Answers" in a question and answer format, much like that of "The Future of SBA," discussed above. It included the following questions and answers:

"Q. What can SBA's field offices expect in the area of early retirement?"

"A. No decisions have been made in this area. Staffers, of course, will be informed of such decisions as they are made.

"Q. Is SBA still in business?"

"A. The Agency is funded through September 30."

The "Public Communications Plan" appears to be an internal SBA document, setting forth a plan for an "overall and concerted effort to win support for the Administration's Fiscal 1987 budget proposal for SBA." According to the Plan,

"The audiences, in addition to the media, include the general public, federal and state legislators, trade associations, policymakers and opinion leaders in Washington and around the country. The communications plan should also be aimed at Agency employees."

The plan, in general, calls for each of the targeted audiences to receive a great variety of SBA promotional material supporting the Administration's reorganization plan.

In none of the SBA materials submitted to us for review were there any suggestions or calls for the reader or listener to contact any member of Congress to urge him or her to support the Administration's budget proposal.

ANTI-LOBBYING LEGISLATION

The only anti-lobbying legislation relevant in these circumstances is 18 U.S.C. § 1913, which reads, in part, as follows:

"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 official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."

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Section 1913 further provides for penalties of a fine, imprisonment, and removal from Federal Service.

Because 18 U.S.C. § 1913 provides for criminal penalties, its interpretation and enforcement is the responsibility of the Department of Justice. This Office may, however, refer appropriate cases of apparent violation of 18 U.S.C. § 1913 to the Justice Department for prosecution. See, e.g., ~~B-212235(1), November 17, 1983 (Commerce Department publication favoring revision of Export Administration Act referred to Justice). To our knowledge, there has never been a prosecution under this statute. B-217896, July 25, 1985. In addition, only a few court decisions have cited the statute and generally they have not dealt with the merits of a violation, but have been concerned with peripheral issues. See, e.g., National Association for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973); American Public Gas Association v. Federal Energy Administration, 408 F. Supp. 640 (D.D.C. 1976). See B-214455, October 24, 1984.~~

The Department of Justice interprets 18 U.S.C. § 1913 to apply only when funds are spent in a "grass roots" lobbying effort, where an attempt is made to induce members of the public to contact their representatives in Congress to persuade them to either support or oppose pending legislation. ~~B-216239, January 22, 1985; 63 Comp. Gen. 624, 625-266 (1984). In 1978, the Attorney General obtained from his legal counsel an opinion on the propriety of comments by judicial officers on legislation directly affecting the judiciary in light of 18 U.S.C. § 1913. That Memorandum Opinion for the Attorney General, (Applicability of Anti-lobbying Statute (18 U.S.C. § 1913) - Federal Judges, 2 Ops O.L.C. 30, 31 (1978)), concluded as follows:~~

"The limited legislative history demonstrates that [the enactment of 18 U.S.C. § 1913] was spurred by a single, particularly egregious instance of official abuse--the use of Federal funds to pay for telegrams urging selected citizens to contact their congressional representatives in support of legislation of interest to the instigating agency. See 53 Cong. Rec. 403 (1919). The provision was intended to bar the use of official funds to underwrite agency public relations campaigns urging the public to pressure Congress in support of agency views." (Emphasis added.)

In our view, the Department of Justice's interpretation of 18 U.S.C. § 1913 permits officials of the executive branch to express their views regarding the merits or deficiencies of legislation. ~~B-217896, July 25, 1985; 63 Comp. Gen. 624, 626 (1984).~~ The objective of expressing those views may even be to persuade the public to support the agency's position, provided the public is not urged to contact members of Congress. See ~~B-216239, January 22, 1985.~~ There is no statement in "The Future of SBA" or other SBA material provided to us for review urging members of the public to contact members of Congress to support the President's reorganization proposal. Accordingly, we do not believe that any of the SBA informational material provided to us for review violates section 1913 as that statute has been interpreted by the Attorney General. We conclude, therefore, that referral of this case to the Justice Department would not be appropriate in these circumstances.

There is no civil anti-lobbying statute relevant in the case at hand. No anti-lobbying provision was included in the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136 (1985), which provided fiscal year 1986 funding for the SBA (99 Stat. 1165-66). In recent years, ~~prior to~~ fiscal year 1984, the annual Treasury, Postal Service, and General Government Appropriation Act typically included a provision prohibiting lobbying with appropriated funds. See, e.g., Pub. L. No. 96-74, 607(a), 93 Stat. 559. Because that prohibition was expressly applicable to appropriations contained in all appropriation acts for the particular fiscal year, all appropriations, including those of SBA, were covered by the prohibition. See, e.g., ~~63 Comp. Gen. 624, 626 (1984)~~ (prohibition applicable to appropriations for the Federal Judiciary). During floor debate in the House on the fiscal year ~~1984 Treasury, Postal Service and General Government Appropriation Act~~, however, a point of order was raised against the anti-lobbying provision which caused it to be stricken from the bill. See 129 Cong. Rec. H8735, October 27, 1983. The stricken provision has not reappeared in the fiscal year ~~1985 or fiscal year 1986 Treasury, Postal Service and General Government Appropriation Act.~~ See ~~64 Comp. Gen. 281, 282 (1985)~~ (Member of Congress informed that no anti-lobbying provision applies to fiscal year 1985 appropriations for TVA); ~~B-217896, July 25, 1985~~ (Member of Congress informed that

anti-lobbying provision had been dropped from annual Treasury, Postal Service and General Government Appropriation Act).

THE SELF-AGGRANDIZEMENT RESTRICTION

Section 601 of the ~~Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136, 1168 (1985),~~ which provided fiscal year 1986 funding for the SBA (~~99 Stat. 1165-66~~), reads as follows:

"Sec. 601. No part of any appropriation contained in this Act shall be used for publicity or propoganda purposes not authorized by the Congress."

The legislative history of section 601 is silent as to the intended effect of the restriction. See H.R. Rep. No. 197, 99th Cong. 1st Sess. 78 (1985); S. Rep. No. 150, 99th Cong. 1st Sess. 90 (1985). This Office, however, has had numerous occasions in the past to interpret language similar to Section 601. We have consistently held that it was intended to prohibit "publicity of a nature tending to emphasize the importance of the agency or activity in question." 31 Comp. Gen. ~~311~~, 313 (1952). The restriction is directed typically toward activities whose obvious purpose is "self-aggrandizement" or "puffery." ~~B-212069, October 6, 1983. See, e.g., B-161686, June 30, 1967 (anti-puffery restriction not violated by State Department publications concerning Vietnam War); B-184648, December 3, 1975 (anti-puffery restriction not violated by Commerce Department advertising campaign to increase understanding of the American economic system).~~

Section 601 and similar statutes do not prohibit an agency's legitimate informational activities. B-212069, October 6, 1983. We have consistently held that public officials may report on the activities and programs of their agencies, may justify those policies to the public, and may rebut attacks on those policies. See ~~B-114823, December 23, 1974. The executive branch has a duty to inform the public regarding Government policies and, traditionally, policy-making officials have used Government resources in explanation and defense of their policies. B-194776, June 4, 1979.~~

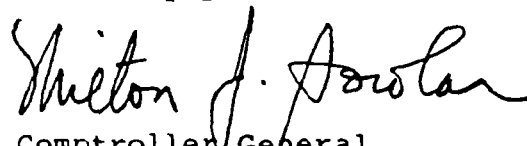
In the present case, the SBA informational materials, in general, do not tend to emphasize the importance of SBA or SBA programs such that they constitute "puffery" or "self-aggrandizement." The SBA has justified these materials as necessary "to inform interested small businesses of the

effect that passage of the President's proposal would have on them." Under the circumstances, we cannot find that these materials violate section 601.

However, we have serious difficulties with SBA's distribution of "suggested editorials" supporting the Administration's reorganization plan. The editorials, prepared by SBA for publication as the ostensible editorial position of the recipient newspapers, are misleading as to their origin and reasonably constitute "propaganda" within the common understanding of that term. In ~~B-129874~~, September 11, 1978, this Office criticized a similar plan to distribute "canned editorial materials" to the media. We distinguished such materials from legitimate agency public information activities and noted that they had "been traditionally associated with high-powered lobbying campaigns in which public support for a particular point of view is made to appear greater than it actually is." See also 60 Comp. Gen. 423 (1981). Here, we conclude that the SBA "suggested editorials" are beyond the range of acceptable agency public information activities and, accordingly, violate the "publicity and propaganda" prohibition of section 601.

In view of the relatively small amount involved, and the difficulty in determining the exact amount expended illegally as well as the identity of any particular voucher involved, we conclude that it would be inappropriate in these circumstances to attempt to recover any misappropriated funds. See 59 Comp. Gen. 115, 121 (1979). We recommend, however, that the Administrator of the Small Business Administration take action to ensure that future violations do not occur.

Sincerely yours,

for 
Comptroller General
of the United States