



## Decision

**Matter of:** U.S. Department of Agriculture—Anti-Lobbying Provisions

**File:** B-330095

**Date:** July 22, 2020

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### DIGEST

In September 2017, the U.S. Secretary of Agriculture made statements urging state foresters to contact Congress to support a “permanent fire funding fix,” and the U.S. Department of Agriculture (USDA) subsequently published a press release that included those statements. These communications constituted grassroots lobbying prohibited by two provisions in the Consolidated Appropriations Act, 2017. USDA violated these provisions when it obligated and expended funds appropriated by the act to prepare and deliver the Secretary’s statements and to develop and publish the associated press release. USDA’s obligation and expenditure of appropriated amounts for this prohibited purpose also violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A).

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### DECISION

The Counsel to the Inspector General (OIG), U.S. Department of Agriculture (USDA), requested a decision as to whether remarks made by the Secretary of Agriculture (Secretary) at the National Association of State Foresters’ (NASF) annual meeting violated any anti-lobbying provisions included in the Consolidated Appropriations Act, 2017. Letter from Counsel to the Inspector General, USDA, to General Counsel, GAO (May 15, 2018) (Request Letter). During that meeting, the Secretary made statements urging the meeting participants to contact Congress to support a “permanent fire funding fix.” *Id.*

As explained below, we conclude that USDA violated both a government-wide and an agency-specific anti-lobbying provision in the Consolidated Appropriations Act, 2017, when it obligated and expended fiscal year (FY) 2017 funds appropriated by such act to prepare and deliver the Secretary’s statements and to develop and publish a press release that quoted and included audio links to those statements. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. E, title VII, § 715, 131 Stat. 135, 380 (May 5, 2017); Pub. L. No. 115-31, div. A, title VII, § 754, 131

Stat. at 178. USDA's obligation and expenditure of appropriated amounts for this prohibited purpose also violated the Antideficiency Act. See 31 U.S.C. § 1341(a)(1)(A); B-326944, Dec. 14, 2015, at 26. USDA should determine the costs associated with the prohibited conduct and report it as an Antideficiency Act violation.

In accordance with our regular practice, we contacted USDA for factual information and its legal views on this matter. Letter from Managing Associate General Counsel, GAO, to Principal Deputy General Counsel, USDA (Nov. 1, 2018); GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP). USDA provided its legal analysis and factual information on the issue. Letter from Associate General Counsel, USDA, to Managing Associate General Counsel, GAO (Apr. 2, 2019) (USDA Letter). The factual record for this opinion consists of information both from the USDA Letter and from the Request Letter from the USDA OIG.

## BACKGROUND

According to USDA, in recent years the U.S. Forest Service (Forest Service) has occasionally needed to supplement its wildfire-fighting appropriations through congressionally authorized "fire transfers," which are transfers of funds from the Forest Service's other appropriations to its wildfire-fighting appropriations. USDA Letter. Because these fire transfers have depleted appropriations available for the Forest Service's other programs, USDA has sought legislation to change the legal framework for funding for wildfire suppression operations. *Id.*, at 3.

Amid USDA's pursuit of this legislative action, the Secretary of Agriculture (Secretary) made a speech at the National Association of State Foresters' (NASF) annual meeting on September 20, 2017. Request Letter, at 1. During the speech, the Secretary made two statements urging the directors of forestry agencies in the states, U.S. territories, and the District of Columbia who were in attendance at the meeting to contact Members of Congress to support a "permanent fire funding fix." *Id.*, at 2. First, the Secretary made the following request: "I hope that you'll leave this meeting today and contact your legislative and congressional delegations and say, ' . . . Now's the time to give us a permanent fire funding fix, so we can make sure we get ahead of these forest fires.'" *Id.* Following his first request, he asked the following of the meeting attendees:

"Every one of you has a member of Congress, and you all are well-respected in your states and in your industry. You've got influence there . . . I want to implore you to leave this meeting and just write a note to your Congressional delegation saying, 'Please support the permanent fire funding fix so the U.S. Forest Service can manage its forests in a way to get ahead of these forest fires.'"

*Id.*

Following the Secretary's speech, officials in USDA's Office of Communications prepared a press release, titled "Secretary Perdue Urges State Foresters to Call on Congress to Fix Fire Funding Problem." Request Letter, at Encl. 2. The press release explained that, at NASF's annual meeting, Secretary Perdue urged state foresters to call on Congress to address funding for major wildfires, and specifically directed that Congress should fund wildfire disasters with emergency funds. *Id.* The press release also quoted the second request the Secretary made at the meeting, and contained links to audio clips of his first request and the third sentence of his second request. *Id.*

At the time of the Secretary's speech and press release, there were at least two bills pending before Congress that would amend permanent law to facilitate the appropriation of additional funds for wildfire suppression activities. In his remarks before the NASF, the Secretary expressed his support for the funding mechanism contained in one of the bills, titled the Wildfire Disaster Funding Act.<sup>1</sup> H.R. 2862, 115<sup>th</sup> Cong. (2017). Congress ultimately enacted that provision into law. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. O, § 102, 132 Stat. 348, 1059–60 (Mar. 23, 2018).

According to the USDA OIG, it received a letter on October 13, 2017, from the then-Ranking Member of the Committee on Natural Resources of the U.S. House of Representatives<sup>2</sup> and the then-Ranking Member of the Committee's Subcommittee on Oversight and Investigations, asking the OIG to investigate whether the Secretary's remarks at the NASF annual meeting were consistent with any anti-lobbying provisions in the Consolidated Appropriations Act, 2017. Request Letter, at 1. The OIG conducted an initial review of the request, including a compilation of facts and review of relevant GAO case law, and requested a formal GAO decision as to whether USDA violated these provisions. *Id.*, at 3.

## DISCUSSION

At issue here is whether the preparation and delivery of certain statements made by the Secretary at the NASF annual meeting and the subsequent publication of those

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<sup>1</sup> This funding mechanism would amend the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA) to authorize adjustments to the discretionary spending caps for appropriations for wildfire suppression operations. The other bill, titled the Resilient Federal Forests Act of 2017, would have (1) authorized the President to make a declaration for a "major disaster for wildfire on federal lands"; and (2) created a new account to fund assistance for such a declaration. H.R. 2936, 115<sup>th</sup> Cong. §§ 1001–1003 (2017).

<sup>2</sup> As of the 116<sup>th</sup> Congress, the then-Ranking Member is now the Chair of the Committee on Natural Resources of the U.S. House of Representatives.

statements in a press release violated the government-wide and agency-specific anti-lobbying provisions contained in the Consolidated Appropriations Act, 2017. First, we analyze whether the preparation and delivery of the Secretary's statements violated the provisions. Then, we assess whether the development and publication of a press release that included the Secretary's statements violated the provisions.

### **A. Secretary's Statements**

USDA's appropriations are subject to two anti-lobbying restrictions. Section 715 of the Financial Services and General Government Appropriations Act, 2017, applies to all funds appropriated in the Consolidated Appropriations Act, 2017, and prescribes that:

“No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and 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. 115-31, div. E, title VII, § 715. Additionally, section 754 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2017, applies to funds appropriated to USDA by such act, and provides that: “None of the funds appropriated by this Act may be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913.” Pub. L. No. 115-31, div. A, title VII, § 754. Because the agency-specific provision prohibits the use of appropriations to “directly or indirectly” influence any congressional action on pending legislation or appropriation matters, it is broader than the government-wide anti-lobbying provision. B-329504, Aug. 22, 2018, at 9. Specifically, it applies to both explicit and implicit appeals to the public that are intended to bolster support for or opposition to pending legislation. B-262234, Dec. 21, 1995, at 7.

The specific provisions cited above applied to amounts appropriated to USDA at the time of the statements at issue. Although these provisions generally applied only to amounts appropriated for fiscal year 2017, Congress typically enacts identical provisions in the annual appropriations acts. See, e.g., B-331262, June 17, 2020; B-329368, Dec. 13, 2017; B-325248, Sept. 9, 2014 (prior decisions concerning similar statutory prohibitions). Indeed, Congress enacted the same provisions in the Financial Services and General Government Appropriations Act, 2020 and the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2020, and the House Appropriations Committee included these provisions in its drafts of the Financial Services and General

Government Appropriations Act and Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for fiscal year 2021.<sup>3</sup>

These provisions prohibit the obligation or expenditure of appropriated funds on indirect or grassroots lobbying in support of, or in opposition to, legislation pending before Congress. B-326944, at 17. An agency's actions constitute indirect or grassroots lobbying where there is evidence of a clear appeal by the agency to the public to contact Members of Congress in support of, or in opposition to, pending legislation. *Id.*; B-325248, Sept. 9, 2014, at 4. It is not required that the appeal specify a particular piece of legislation. B-326944, at 17; B-192746-O.M., Mar. 7, 1979, at 16.

GAO's interpretation of these provisions is derived from the statutory language as well as the legislative history of grassroots lobbying prohibitions and is consistent with a proper respect for an agency's right to communicate with the public and Congress about its policies and activities. B-326944, at 17. See also B-317821, June 30, 2009. For example, GAO concluded that the Environmental Protection Agency (EPA) violated anti-lobbying provisions when EPA hyperlinked to external webpages that had link buttons to contact Members of Congress in support of a pending rule while several bills that would prevent implementation of the rule were pending before Congress. B-326944, at 17. Conversely, GAO found that the EPA Administrator did not violate anti-lobbying provisions when he made comments in a published video that expressed his position on a rule, explained EPA's role in changing the rule, and encouraged public comment on the rule because the comments merely expressed his policy views. B-329504, Aug. 22, 2018, at 7, 14.

GAO has also previously articulated a bright-line rule in determining whether an agency's communications constitute grassroots lobbying in violation of these provisions. Specifically, we have said that there are two elements of a violation. The agency must obligate or expend appropriated funds to (1) make a clear appeal to the public to contact Members of Congress and (2) such appeal must be in

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<sup>3</sup> Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. C, title VII, § 715, 133 Stat. 2317, 2487-88 (Dec. 20, 2019); Consolidated Appropriations Act, 2020, Pub. L. No. 116-194, div. B, title VII, § 737, 133 Stat. 2534, 2651 (Dec. 20, 2019); House Committee on Appropriations, *Appropriations Committee Releases Fiscal Year 2021 Financial Services and General Government Funding Bill*, July 7, 2020, available at <https://appropriations.house.gov/news/press-releases/appropriations-committee-releases-fiscal-year-2021-financial-services-and> (see embedded link to bill text - last visited July 16, 2020); House Committee on Appropriations, *Appropriations Subcommittee Approves Fiscal Year 2021 Agriculture-Rural Development-FDA Funding Bill*, July 6, 2020, available at <https://appropriations.house.gov/news/press-releases/appropriations-subcommittee-approves-fiscal-year-2021-agriculture-rural> (see embedded link to bill text – last visited July 16, 2020).

support of, or in opposition to, pending legislation. B-322882, Nov. 8, 2012, at 4. USDA's actions met both elements.

The first element requires the agency to make a clear appeal to contact Members of Congress. Here, the Secretary used statements like "I hope that you'll leave this meeting today and contact your legislative and congressional delegations and say, ' . . . Now's the time to give us a permanent fire funding fix . . . '" and " . . . I want to implore you to leave this meeting and just write a note to your Congressional delegation saying, 'Please support the permanent fire funding fix.'" Request Letter, at 2. This language constituted a clear appeal to the audience to contact Members of Congress. See, e.g., B-325248, Sept. 9, 2014, at 3 (agency communication stating that "I am humbly asking you to let your Senators . . . know how important it is that the cloture motion passes" constituted a clear appeal); B-285298, May 22, 2000, at 3 (agency representative's communication to private organizations stating that a Member "needs to hear from the farmers in his district" constituted a clear appeal).

In addition, the first element of a violation requires the agency to make its clear appeal to members of the public. The grassroots lobbying prohibition does not apply to communications directly between agency officials and members of Congress. B-192658, Sept. 1, 1978 (no violation of grassroots lobbying prohibition where an agency official sent a letter to all members of the House of Representatives). Rather, the prohibition applies to agency communications with members of the public suggesting that they in turn contact Congress. An agency violates this prohibition when it asks members of industry associations to contact members of Congress. See, e.g., B-285298, at 4 (e-mail sent to two farmers' organizations asking organizations to direct farmers to contact Members of Congress to support the China permanent normal trade relations legislation was a clear appeal to the public to support pending legislation). Here, the Secretary made his remarks to a group of industry officials. USDA Letter, at 7. Accordingly, the Secretary's statements constituted a clear appeal to the public to contact Members of Congress.

The second element of a violation requires that a clear appeal be in support of, or in opposition to, pending legislation. An appeal need not highlight specific legislation to constitute grassroots lobbying. B-326944, at 17; B-192746-O.M., at 16. Rather, if Members of Congress could reasonably infer contact from members of the public as a directive to support or oppose specific pending legislation, then an agency's appeals to the public to make such contact constitute grassroots lobbying. B-192746-O.M., at 16 (Maritime Administration's use of appropriated funds to pay for an advertising campaign that urged members of the public to support a strong U.S. merchant marine constituted grassroots lobbying even though the campaign did not mention specific legislation). Here, at the time of the Secretary's remarks, there were at least two bills pending before Congress that would amend permanent law to

facilitate the appropriation of additional funds for wildfire suppression operations.<sup>4</sup> A Member of Congress contacted by a member of the public who attended the Secretary's speech to support a "permanent fire funding fix" could fairly perceive the contact as encouragement to vote for either of these two bills—both of which proposed to amend permanent law to facilitate the appropriation of additional resources to fight wildfires. Accordingly, although the Secretary did not make reference to specific legislation, his statements constituted a clear appeal to the public to contact Members of Congress in support of pending legislation.

USDA argues that the Secretary's statements urging support of a "permanent fire funding fix" were a recitation of a policy view that adequate funding should be provided to the Forest Service to fight wildfires, and therefore, do not violate the anti-lobbying provisions. USDA Letter, at 6. In support of its position, USDA notes that we have previously concluded that "where an agency makes a good faith effort to respond to a public inquiry and does not offer the agency's views on a legislative proposal, the agency's action does not violate the [anti-lobbying] prohibition." *Id.* (citing B-329504, at 9). We agree with USDA that the anti-lobbying provisions do not preclude agency officials from voicing their position on pending legislation directly to Members of Congress, nor do we interpret such provisions as constraining agency communications with the public on pending legislation. See, e.g., B-329199, Sept. 25, 2018, at 18 ("An expression of a view on pending legislation, without a clear appeal to contact Congress, is not a violation of the prohibition."); B-319075, Apr. 23, 2010, at 9 (obligation and expenditure of appropriated funds on a government website that contained information regarding the Administration's stance on health care reform did not constitute grassroots lobbying because it did not contain a direct appeal to contact Members of Congress in support of pending legislation). We also agree with USDA that the Secretary discussed policy views during his speech.

However, the Secretary's statements at issue do more than convey the agency's policy position on funding for wildfire suppression operations. Instead, the Secretary went further and made statements explicitly exhorting members of the public to contact Members of Congress to support legislation pending before Congress concerning funding for wildfire fighting. For example, the meeting attendees were urged to tell Members of Congress "to give us a permanent fire funding fix," and to "write a note to your Congressional delegation saying, 'Please support the permanent fire funding fix . . .'" Request Letter, at 2. Accordingly, the Secretary's statements constituted grassroots lobbying.<sup>5</sup>

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<sup>4</sup> Resilient Federal Forests Act of 2017, H.R. 2936 (introduced June 20, 2017); Wildfire Disaster Funding Act, H.R. 2862 (introduced June 8, 2017).

<sup>5</sup> Section 754 of the Agriculture, Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2017 prohibits the obligation and expenditure of appropriations to influence congressional action on "any legislation or appropriation matters" pending before Congress (emphasis added). USDA cites this

Because the Secretary's statements urged members of the public to contact Members of Congress to support a "permanent fire funding fix," the statements constituted grassroots lobbying, and USDA's obligation and expenditure of FY 2017 appropriated funds to prepare and deliver those statements violated the anti-lobbying provisions applicable to USDA in the Consolidated Appropriations Act, 2017. USDA's obligation and expenditure of appropriated amounts for this prohibited purpose also violated the Antideficiency Act. See 31 U.S.C. § 1341(a)(1)(A); B-326944, at 26 (obligation and expenditure of amounts in violation of specific prohibitions also violates the Antideficiency Act).

## **B. Press Release**

Consistent with our conclusion that the Secretary's statements at the NASF annual meeting constituted prohibited grassroots lobbying, the agency's subsequent publication of those statements in a press release posted to its public website, [www.usda.gov](http://www.usda.gov), also constituted prohibited grassroots lobbying. The press release included the following quote made by the Secretary: "I want to implore you to leave this meeting and just write a note to your Congressional delegation saying, 'Please support the permanent fire funding fix so the U.S. Forest Service can manage its forests in a way to get ahead of these forest fires.'" Request Letter, at Encl. 2. The press release also included a link to an audio clip of this quote and an audio clip of the Secretary's first statement in which he made the following request: "I hope that you'll leave this meeting today and contact your legislative and congressional delegations and say, ' . . . Now's the time to give us a permanent fire funding fix, so we can make sure we get ahead of these forest fires.'" *Id.*

As previously discussed, the statements constituted grassroots lobbying because they made a clear appeal to the public to contact Members of Congress to support pending legislation related to a "permanent fire funding fix." USDA's inclusion of these statements in a press release posted on its public website does not alter its substance nor change the potential effect on the members of the public reading it. Accordingly, we conclude that the incorporation of these statements in the press release also constituted grassroots lobbying.

USDA states that the press release memorialized the remarks made at the meeting, and was not intended to generate additional support for specific legislation. USDA Letter, at 5. Accordingly, USDA asserts that the press release did not constitute

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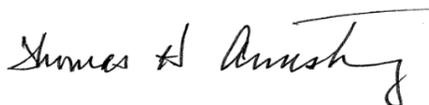
language in support of a curious argument that the communications did not violate section 754 because the legislation pertained to a budgetary rather than an appropriations matter. USDA Letter, at 8-9. This argument is contrary to the text of the statute. USDA's communications clearly pertained to "legislation," and the statute's use of the word "or" indicates that this nexus is sufficient to violate section 754, regardless of whether the communications also related to "appropriation matters."

grassroots lobbying. *Id.* We disagree. USDA did not simply quote the fact that the meeting had occurred or repeat the Secretary's policy position on the issue of a "permanent fire funding fix." Instead, USDA chose to publish specific exhortations by the Secretary that attendees contact Congress on the issue. USDA's publication of these comments on its public website further communicated the Secretary's appeals to a much wider audience and could have had the effect of generating additional support for legislation that would provide a "permanent fire funding fix."

Because USDA's press release included the Secretary's statements urging members of the public to contact Members of Congress to support a "permanent fire funding fix," the press release constituted grassroots lobbying, and USDA's obligation and expenditure of FY 2017 appropriated funds to prepare and publish the press release violated the anti-lobbying provisions applicable to USDA in the Consolidated Appropriations Act, 2017. USDA's obligation and expenditure of appropriated amounts for this prohibited purpose also violated the Antideficiency Act. See 31 U.S.C. § 1341(a)(1)(A); B-326944, Dec. 14, 2015, at 26.

## CONCLUSION

USDA violated both the government-wide and agency-specific anti-lobbying provisions in the Consolidated Appropriations Act, 2017, when it obligated and expended FY 2017 appropriated funds to prepare and deliver the Secretary's statements urging members of the public to contact Members of Congress to support a "permanent fire funding fix." In addition, USDA violated these anti-lobbying provisions when it obligated and expended FY 2017 appropriated funds to develop and publish a press release that included quotes and audio clips of these statements. USDA's obligation and expenditure of appropriated amounts for this prohibited purpose also violated the Antideficiency Act. See 31 U.S.C. § 1341(a)(1)(A); B-326944, at 26. USDA should report the Antideficiency Act violation as required by law. 31 U.S.C. § 1351. The agency should determine the cost associated with the prohibited conduct and include the amount in its report of its Antideficiency Act violation.



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