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United States Government Accountability Office
Washington, DC 20548

B-304715

April 27, 2005

The Honorable Frank R. Lautenberg
The Honorable Edward M. Kennedy
The Honorable Hillary Rodham Clinton
The Honorable Richard J. Durbin
The Honorable Mark Dayton
The Honorable Jon S. Corzine
The Honorable Carl Levin
The Honorable Jack Reed
United States Senate

Subject: *Social Security Administration—Grassroots Lobbying Allegation*

This responds to your joint letter requesting a legal decision regarding your concern that the Social Security Administration (SSA) may be engaging in grassroots lobbying designed to encourage members of the public to contact their senators and representatives in support of the President's Social Security initiative. Joint Letter to David M. Walker, Comptroller General, Jan. 26, 2005 (hereinafter, Joint Letter). Previously, as explained below, before we have found a violation of the prohibition on grassroots lobbying, we have required evidence of a clear appeal by the agency to the public to contact congressional members in support of the agency's position. However, none of the materials that you provided with your letter rises to the level of such an appeal to the public. Accordingly, absent evidence of a clear appeal by the agency, we do not plan to take any further action on this matter.

Your letter notes that each year SSA mails to over 140 million Americans a document entitled, "Your Social Security Statement." SSA uses this document to provide workers an annual report of SSA's records concerning the worker's employment history and an estimate of the benefits that the worker may expect to receive under the Social Security Act. Pages 1 and 2 of a Sample Statement[1] that you provided states that "the Social Security system is facing serious future financial problems and

[1] Sample Statement, Jan. 3, 2005 (hereinafter, 2005 Sample).

action is needed soon to make sure that the system is sound when today's younger workers are ready for retirement." 2005 Sample at 1. It adds that "[u]nless action is taken soon . . . in just 14 years we will begin paying more in benefits than we collect in taxes. . . . Without changes, by 2042 the Social Security Trust Fund will be exhausted." *Id.* It also notes that these estimates are based on current law and that "Congress has made changes to the law in the past and can do so at any time." *Id.* at 2. The 2005 Sample adds, "The law governing benefit amounts may change because, by 2042, the payroll taxes collected will be enough to pay only about 73 percent of scheduled benefits." *Id.* You note that this document is highly likely to be read, and you suggest that SSA may have deliberately couched this document in terms "designed to spur citizen contacts to Congress in support of President Bush's Social Security changes." Joint Letter at 4-5. Generally, the statements and activities you identify deal with the solvency issue of the Social Security system.[2]

You suggest that the statements in this document should be read within the context of what may be a larger SSA campaign to build public support for the President's present initiative to reform the Social Security program. In this regard, you provided several other documents that apparently instruct SSA officers and employees on how best to convince the public of the correctness of SSA's position on the need for immediate changes to the Social Security system, and you referred to some other SSA activities that also concerned you.

None of the materials and activities that you have cited calls on the public to contact Congress and urge it to support SSA's position on this or any other matter. Nevertheless, you ask whether, taken together, they reflect a grassroots lobbying plan in action in violation of 18 U.S.C. § 1913[3] and section 503 of the Consolidated

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[2] While there are disagreements over when and by how much it will fall short of its needs, we do not think that there is much room to doubt that the Social Security system has a funding problem that needs to be addressed. *See, e.g., GAO, Social Security Reform: Early Action Would be Prudent*, GAO-05-397T (Washington, D.C. Mar. 9, 2005.)

[3] Section 1913, often referred to as the prohibition on grassroots lobbying, states in relevant part that, except as expressly authorized by Congress, appropriated funds may not 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, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation."

Appropriations Resolution, 2005, Pub. L. No. 108-447, div. F, title V, 118 Stat. 2809, 3162 (Dec. 8, 2004) (hereafter, section 503).[4]

In the past, as your letter recognizes, before we would agree that the prohibitions on grassroots lobbying had been violated, we required evidence that the agency made a clear or explicit appeal to the public to contact congressional members in support of the agency's position. *E.g.,* B-285298, May 22, 2000; 56 Comp. Gen. 889, 890 (1977); B-114823, Dec. 23, 1974. Your letter asks us to dispense with that requirement.[5] You liken the requirement for a clear appeal to looking for "magic words" without which there can be no violation—that is, testing for the presence of particular words or phrases that clearly appeal to the public to contact Congress. Joint Letter at 4. You ask us to consider, instead, an approach that assesses the agency's "intent" and whether the agency's "message would be likely to influence the public to contact Congress" in support of the agency's position. Joint Letter at 4. Your letter suggests that *American Public Gas Ass'n v. FEA,* 408 F. Supp. 640, 641 (D.D.C. 1976), supports this view.

We do not read *American Public Gas* to require this lesser standard. There, private organizations sought to enjoin the Federal Energy Administration (FEA) from further publication and distribution of a booklet that the organizations claimed was biased (in favor of deregulating the price of natural gas) and violated 18 U.S.C. § 1913. *Id.* at 640-41. In determining whether an injunction was proper, the court "presumed" a "slight violation of the statute," but denied the request for an injunction on alternative grounds. *Id.* at 642. We have repeatedly concluded that *American Natural Gas* "dealt [not] with the merits of a grassroots violation, but [rather, was] concerned with

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[4] Section 503 also addresses grassroots lobbying, barring the use of appropriations:

> "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 video presentation designed to support or defeat legislation pending before the Congress . . . except in presentation to the Congress . . . itself."

[5] This is not the first time that we have been asked to dispense with that requirement. *See, e.g.,* B-284226.2, Aug. 17, 2000. Among other things, we based that requirement on a careful interpretation of the language and legislative history of the statutory provisions at issue. *See, e.g.,* B-270875, July 5, 1996; B-216239, Jan. 22, 1985; B-192658, Sept. 1, 1978; B-178648, Sept. 21, 1973.

peripheral issues."[6] 66 Comp. Gen. 707 (1987); B-229069.2, Aug. 1, 1988; B-229257, June 10, 1988; B-223098.2, Oct. 10, 1986; B-214455, Oct. 24, 1984. Accordingly, we remain unconvinced that *American Public Gas* supports a change in our standard for evaluating violations of the grassroots lobbying prohibitions.

We do not believe that the standard you suggest offers a workable basis upon which to construe the law. Assessing whether an agency statement is "likely to influence" the public to contact Congress in support of the agency's position is highly speculative and we harbor significant reservations about our ability to objectively make such a determination. More importantly, however, we are reluctant to apply such a standard to the prohibition on the use of appropriated funds that might limit or restrict public discussion on issues of public policy. Federal agencies and departments have a legitimate need to communicate with the public, as well as with Congress, regarding their policies and activities. *E.g.,* B-303495, Jan. 4, 2005; B-302992, Sept. 10, 2004; B-302504, Mar. 10, 2004. This includes executive branch officials expressing their views regarding the merits or deficiencies of existing or proposed legislation, even when their objective may be to persuade the public to support the agency's position—so long as the public is not urged to contact Members of Congress. *E.g.,* B-229257, June 10, 1988; B-216239, Jan. 22, 1985. Indeed, we have been careful not to interpret the prohibitions on grassroots lobbying to overly restrict the use of public funds to disseminate to the public agency views on pending legislation or policy initiatives. *E.g.,* B-270875, July 5, 1996; B-178648, Sept. 21, 1973.

Under our established case law, we have required evidence of a clear appeal by the agency to the public to contact congressional members and to urge them to support the agency's position. This requirement was founded upon the language and legislative history of the grassroots lobbying provisions, and it is consistent with a proper respect for the right and responsibility of federal agencies to communicate with the public, as well as Congress, regarding agency policies and activities. *See, e.g.,* B-270875, July 5, 1996; B-192658, Sept. 1, 1978. We have no reason to think that Congress meant to preclude government officials from saying anything that might possibly cause the public to think about or take positions on the issues of the day and, as a result, contact their elected representatives. To the contrary, we see the free and open exchange of ideas and views as central to our political system and, accordingly, remain reluctant to construe these laws in such a way that would unnecessarily or excessively constrain agency communications with the public or Congress.

On the record before us, we find no basis upon which to conclude that SSA may have expended appropriated funds in violation of the grassroots lobbying prohibitions.

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[6] The Justice Department's Office of Legal Counsel (OLC) has been even less charitable in its assessment of *American Public Gas,* characterizing it and several similar cases as providing "rather superficial analyses." 2 Op. Off. Legal Counsel 30, 31 (1978).

For this reason, we do not plan to take any further action on this matter. If you have any questions regarding this matter, please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-2667, or Thomas H. Armstrong, Assistant General Counsel, at 202-512-8257.

/signed/

Anthony H. Gamboa
General Counsel

DIGESTS

1. GAO declined to take further action on requests for a legal decision regarding whether the Social Security Administration engaged in a grassroots lobbying effort on behalf of the President's Social Security initiative in violation of the prohibitions in 18 U.S.C. § 1913 and section 503 of the Consolidated Appropriations Resolution, 2005, Pub. L. No. 108-447, div. F, title V, 118 Stat. 2809, 3162 (Dec. 8, 2004). GAO has long required evidence of a clear appeal by the agency to the public to contact congressional members in support of the agency's position before it would find that an agency violated these prohibitions. The materials submitted to GAO in this case did not evidence such an appeal. The requesters asked GAO to adopt a new, more relaxed standard in place of the established requirement, but GAO declined to do so.

2. GAO's requirement for evidence of a clear appeal by the agency to the public to contact congressional members in support of the agency's position before GAO will find that an agency violated the prohibitions on grassroots lobbying (contained in 18 U.S.C. § 1913 and section 503 of the Consolidated Appropriations Resolution, 2005, Pub. L. No. 108-447, div. F, title V, 118 Stat. 2809, 3162 (Dec. 8, 2004)) was founded upon the language and legislative history of the statutory provisions. This requirement is consistent with a proper respect for the right and responsibility of federal agencies to communicate with the public, as well as Congress, regarding agency policies and activities. GAO remains reluctant to construe these prohibitions in such a way that would unnecessarily or excessively constrain agency communications with the public or Congress.