



G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-319075

April 23, 2010

The Honorable Charles E. Grassley
United States Senate

The Honorable John Boehner
The Honorable Jerry Lewis
The Honorable Dave Camp
The Honorable Joe Barton
The Honorable John Kline
The Honorable Todd Tiahrt
The Honorable Greg Walden
House of Representatives

Subject: *Department of Health and Human Services—Use of Appropriated Funds for “HealthReform.gov” Web site and “State Your Support” Web page*

This responds to your request for a legal opinion regarding the Department of Health and Human Services’s (HHS’s) use of appropriated funds for the *HealthReform.gov* Web site and a Web page within that site, the *State Your Support* Web page.¹ Specifically, you asked whether the opportunity for the public to sign electronic form letters stating support for the Administration’s health care reform initiative violated

¹ We received three letters from Members of Congress requesting our legal opinion regarding the *State Your Support* Web page. Letter from Senator Grassley, Senate Finance Committee, to Acting Comptroller General of the United States, Nov. 17, 2009; Letter from Minority Leader and Ranking Members of various House committees and subcommittees to Acting Comptroller General of the United States, Nov. 19, 2009; Letter from Ranking Member of House Committee on Energy and Commerce and Ranking Member of Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, to Acting Comptroller General of the United States, Dec. 1, 2009. The December 1 letter also asked for our opinion regarding the *HealthReform.gov* Web site and posed some factual questions regarding the formation and operation of the *HealthReform.gov* Web site, which are answered in the Background section of our opinion.

the prohibitions on the use of appropriations for grassroots lobbying, including 18 U.S.C. § 1913,² and for publicity or propaganda activities, as contained in the Omnibus Appropriations Act, 2009.³ As explained below, we conclude that HHS did not violate the grassroots lobbying prohibitions nor did it violate the publicity or propaganda prohibition.

Our practice when rendering legal opinions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006). By letter of January 27, 2010, the Acting General Counsel for HHS supplied relevant information and the department's legal justification for the *HealthReform.gov* Web site and *State Your Support* Web page. Letter from Acting General Counsel, HHS, to Assistant General Counsel for Appropriations Law, GAO, Jan. 27, 2010 (HHS Response).

BACKGROUND

In March 2009, at a time when Congress was considering several bills related to health care reform, HHS launched a new Web site dedicated to the Administration's position on health care reform. This Web site, *HealthReform.gov*, found at www.healthreform.gov, contained information regarding the Administration's stance on health care reform, reports and articles supporting this position, statements made by President Obama and HHS officials, and a forum for the public to provide comments and opinions. Prior to the enactment of the Patient Protection and Affordable Care Act, *HealthReform.gov* contained the *State Your Support* Web page, which offered Web users an opportunity to state their support for the Administration's position on health reform by signing a form letter addressed to the

² In addition to 18 U.S.C. § 1913, the prohibitions on use of appropriated funds for grassroots lobbying are contained in the Financial Services and General Government Appropriations Act, 2009, Pub. L. No. 111-8, div. D, title VII, § 717, 123 Stat. 524, 685 (Mar. 11, 2009) (section 717), and the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 2009, Pub. L. No. 111-8, div. F, title V, § 503(a) (section 503). Congress enacted similar prohibitions for fiscal year 2010. *See* Financial Services and General Government Appropriations Act, 2010, Pub. L. No. 111-117, div. C, title VII, § 717, 123 Stat. 3034, 3210 (Dec. 16, 2009); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 111-117, div. D, title V, § 503(a).

³ Pub. L. No. 111-8, div. D, title VII, § 720 (section 720). Congress enacted a similar prohibition for fiscal year 2010. *See* Pub. L. No. 111-117, div. C, title VII, § 720.

President.⁴ To “sign” this letter, the Web user was asked to submit contact information and to attest that the Web user was at least 13 years of age.

The letter to the President said, “We strongly support your commitment to comprehensive health reform.” The letter also stated support for eight “principles” of health reform, including protecting families’ financial health, improving the quality of patient safety and care, and reducing long-term growth of health care costs for businesses and government. Those who signed the letter pledged to support the President’s “budget with its reserve fund dedicated to achieving health care reform in a fiscally responsible manner.” The letter concluded with the following: “By signing this statement we affirm our commitment to work with you and our Congressional leaders to enact legislation this year which provides affordable, high quality coverage for all Americans.” There was no opportunity for Web users to amend or revise any of the statements in the letter. Under the caption “Show Your Support,” supporters were directed to provide their name, zip code, and e-mail address in the required fields.⁵

According to HHS officials, HHS employees, with the aid of HHS contractors,⁶ designed and operated the *HealthReform.gov* Web site and the *State Your Support* Web page. The department told us that no other parties were involved in the design or are currently involved in the operation of the site.⁷ The department told us that it stores the contact information provided by Web users in a secure electronic file on HHS’s e-mail system and only two technology specialists in the Office of the Assistant Secretary for Public Affairs have direct access to this information. HHS Response, Attachment at 1–2. HHS stated that it used this information to contact individuals when it updated the *HealthReform.gov* Web site with new information. *Id.* at 2. On occasion, some of the information was provided to the Special Assistant for Events

⁴ On March 23, 2010, the President signed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010). Since the enactment of this legislation, the *HealthReform.gov* Web site no longer contains a *State your Support* Web page. This opinion analyzes the Web site and Web page that appeared on the World Wide Web prior to March 23, 2010.

⁵ Other fields requested a mailing address and a telephone number. Supporters were not required to complete these fields, however.

⁶ The department engages a private service provider to assist the department with all Web-related efforts. The contract provides for a broad range of services within the department, including activities related to the design, operation, and maintenance of the *State Your Support* Web page. HHS Response, Attachment at 2.

⁷ Telephone Conversation between Assistant General Counsel and Senior Attorney, GAO, and HHS Acting General Counsel, HHS, Feb. 4, 2010 (Telephone Conversation, Feb. 4, 2010).

and Special Projects to notify individuals regarding upcoming events sponsored by HHS related to health reform in their geographical area.⁸ In an effort to contact the individuals, HHS utilized e-mail subscription services provided by the Federal Consulting Group⁹ pursuant to an interagency agreement. *Id.*

The department believes that the Web site was a valuable form of communication allowing the department “to gauge public opinion on its ongoing work and maintain connections with those citizens interested in further participation.” HHS Response at 1. It asserts that the *State Your Support* Web page engaged in no activity that is prohibited by the restrictions on the use of appropriated funds. *Id.* According to the department, the *State Your Support* Web page employed an important communications tool in an “e-environment” and such forms of communication should be encouraged as a means of enhancing public participation in government and policy matters. *Id.* at 5–6.

DISCUSSION

GAO case law addressing government communications reflects the legitimate objectives served by a robust exchange of information and ideas between the government and the public. *See* B-302504, Mar. 10, 2004. While often an agency’s responsibility to communicate and disseminate information may be associated with a statutory direction that an agency inform the public about its programs and activities, agencies have a general responsibility, even in the absence of specific direction, to inform the public of the agency’s policies. *Id.*, *citing* B-130961, Oct. 26, 1972. In this regard, policy-making officials may use government resources to explain and defend those policies. *Id.*

In the past, we have addressed communications in a number of forms, from televised public announcements to editorials written by public officials on behalf of the agency to public speeches emphasizing the virtues of the Administration’s policies. *See, e.g.*, B-303495, Jan. 4, 2005; B-284226.2, Aug. 17, 2000; B-118638, Aug. 2, 1974. We

⁸ HHS kept track of the number of Web users who visited *the HealthReform.gov* Web site and who signed up on the *State Your Support* Web page. Some HHS personnel expressed concern regarding the accuracy of the number of Web users signing statements because the database could not filter out false names and e-mail addresses. *See, e.g.*, HHS E-mail, *Subject: Statement of Support-4,013 10 am 3/13* (Mar. 13, 2009); HHS E-mail, *Subject: Small Issue with pledge numbers for health reform “State Your Support”* (Apr. 3, 2009).

⁹ The Federal Consulting Group is part of the National Business Center, a franchise fund of the Department of the Interior, which provides business consulting services to federal agencies pursuant to authority under the Government Management Reform Act of 1994, Pub. L. No. 103-356, § 403, 108 Stat. 3410, 3413–14 (Oct. 13, 1994).

historically afford agencies wide discretion in their informational activities. *See* B-302504, *citing* B-178528, July 27, 1973. The use of public funds to communicate and defend agency policies is not without limitation, however. While the plain language of neither the grassroots lobbying nor the publicity or propaganda prohibitions gives clear definitions as to the reach of the prohibitions, our case law has sought to provide guidance in a way to balance agency informational activities with the importance of transparency in government. *See, e.g.*, B-302504.

Lobbying Prohibition

Sections 717 and 503¹⁰ and 18 U.S.C. § 1913¹¹ prohibit the use of appropriated funds for a certain type of lobbying activity. GAO interprets these provisions as prohibiting indirect or “grassroots” lobbying aimed at defeating or supporting legislation

¹⁰ Sections 717 and 503 contain similar language concerning communications regarding legislation that is pending before Congress. Section 717 is a governmentwide prohibition on the use of appropriations:

“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.”

Section 503 applies only to the amounts appropriated in the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

¹¹ Section 1913 provides in relevant part the following:

“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, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation . . .”

Although section 1913 was originally enacted as a criminal statute, Congress amended it in 2002 by replacing the criminal sanctions with civil penalties. The Department of Justice continues to have enforcement responsibility for actions under this statute.

currently pending before Congress. *See* B-270875, July 5, 1996; B-229257, June 10, 1988. GAO has articulated a bright-line rule in determining whether an agency's communication violates these prohibitions, that is, evidence that the agency made a clear, explicit appeal to the public to contact Members of Congress in support of the agency's position on legislation pending before Congress. B-304715, Apr. 27, 2005.¹² The rule balances the activity that the prohibitions are intended to address with an agency's responsibility to communicate with the American people on policy and priorities.¹³

Our review of the *HealthReform.gov* Web site, *State Your Support* Web page, and the materials provided by HHS regarding subsequent contacts with Web users found no explicit or direct appeal to the public to contact Members of Congress in support of pending legislation. The form letter that Web users were asked to "sign" was addressed to the President solely and only briefly mentions Members of Congress in the last sentence. In that sentence the Web user affirmed "to work with Congressional leaders and the President to enact health care" reform legislation. There was no direct appeal to the public to contact Members on behalf of pending legislation. *Cf.* B-116331, May 29, 1961 (editorials asking public to contact Members of Congress to urge opposition to a bill violated restrictions on lobbying).

Arguably, some Web users may have inferred from this sentence a suggestion to contact Members of Congress. As recently as 2005, we considered whether we should relax the bright-line rule and apply the prohibition to statements from which a reader might infer a direction to contact Members of Congress. *See* B-304715, Apr. 27, 2005. Congressional requesters, referring to materials distributed by the Social Security Administration (SSA) regarding the Social Security program, asked whether a violation of the lobbying prohibitions would occur if the agency's communications would likely influence the public to contact Congress in support of the agency's position. The materials in question made several statements that

¹² The Department of Justice's Office of Legal Counsel (OLC) has also interpreted section 1913 and provisions in the annual appropriations acts that are similar to sections 717 and 503 as prohibiting indirect or "grassroots" lobbying aimed at defeating legislation currently pending before Congress, and has articulated the same bright-line rule for determining a violation. *See Application of 18 U.S.C. § 1913 to "Grass roots Lobbying" by Union Representatives*, Office of Legal Counsel, Nov. 23, 2005 (2005 OLC Memo).

¹³ In 2002, Congress amended section 1913 to cover activity aimed at influencing "a jurisdiction, or an official of any government" to support or defeat pending matters, including, for example, policy ratifications and appropriations legislation. While there is no case law addressing the 2002 amendment, GAO and OLC case law since 2002 have continued to find violations of section 1913 only when communications contain an explicit appeal to the public to contact Members of Congress in support of or in opposition to pending legislation. *See* B-304715; 2005 OLC Memo.

collectively asserted that, without some congressional action, the Social Security Trust Fund was in jeopardy of being exhausted by 2042. While recognizing that the materials did not include an explicit, direct plea to the public to contact Members of Congress, the requestors believed that the materials evidenced a larger SSA campaign to build public support for the President's initiative to reform the Social Security program. *Id.* We concluded that the plain language of the lobbying prohibitions and their legislative history do not support a more relaxed standard. Additionally, adopting a more subjective standard could restrict legitimate public discussion on issues of public policy. *Id.* Although some might infer from the last sentence of the form letter a suggestion to contact Members of Congress, the sentence is not a direct appeal and, therefore, does not violate the prohibition. As we concluded in 2005, the language of the prohibition, as well as public policy considerations, do not permit us to apply a more relaxed standard to the sentence.

We also reviewed copies of two e-mails that HHS sent to Web users who provided contact information on the *State Your Support* Web page.¹⁴ We found no evidence of a direct, explicit appeal for supporters to contact Members. According to HHS, the e-mails sent to recipients served only two purposes: to alert the recipient when HHS posted new information on *HealthReform.gov* Web site and to provide information regarding agency-sponsored events regarding health reform. The e-mails provided to us did not contain a clear, direct appeal for Web users to contact Members of Congress regarding pending health care reform legislation, and therefore did not violate the lobbying prohibitions.

Publicity or Propaganda Prohibition

You also asked about section 720, the governmentwide prohibition on using appropriated funds for publicity or propaganda purposes.¹⁵ Our case law has identified three categories of agency communications that are restricted by this prohibition: (1) covert propaganda, (2) purely-partisan materials, and (3) self-aggrandizement. B-316443, July 21, 2009. Communications are considered covert propaganda and violate the prohibition if they fail to disclose the agency's role as the source of information. *See, e.g.*, B-302710, May 19, 2004 (failure to identify agency as the source of prepackaged news stories to the target audience violated the

¹⁴ HHS stated that these e-mails are representative of the e-mails provided to Web users who signed statements of support. *See* HHS Response, Attachment 1 at 1. Our requestors provided us copies of similar e-mails. *See, e.g.*, E-mail from HHS/ASPA, *Subject: Health Reform Discussion with Secretary Sebelius*, June 10, 2009; E-mail from HHS/ASPA, *Subject Health Reform Event in NJ*, June 18, 2009; E-mail from HHS, *Subject: Health Reform Pledge Submission Update*, Sept. 10, 2009.

¹⁵ Section 720 provides: "No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by Congress."

prohibition). As discussed below, communications are considered purely partisan in nature if they were designed to aid a political candidate or party. *See* B-304228, Sept. 30, 2005 (media analysis to gauge whether the media had a favorable view of a particular political party was purely partisan in nature). Communications are considered self-aggrandizement or “puffery” if the materials emphasize the importance of the agency or one of its officials. *See* B-302504, Mar. 10, 2004.

We reviewed the *HealthReform.gov* Web site, *State Your Support* Web page, and the supporting documentation that HHS provided to GAO. First, the *HealthReform.gov* Web site and, in particular, the *State Your Support* Web page clearly state that HHS operates the Web site and is the source of the information provided within. As such, the Web site and Web page are not covert propaganda. *Cf.* B-316443 (providing special access to retired military officers working in the private sector as media analysts did not violate the prohibition where there was no evidence that the agency tried to conceal its role in providing information). Also, we find that neither the *HealthReform.gov* Web site nor the *State Your Support* Web page is self-aggrandizement. Nothing on the Web site or Web page appears to be designed to persuade the public as to the importance of HHS.

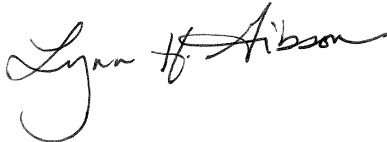
Moreover, while the Web site and Web page contain statements that some have characterized as having political content, we found no statements that are purely partisan. In a 2004 decision, we examined whether HHS’s use of appropriated funds for a flyer and advertisements regarding changes to the Medicare program violated the publicity or propaganda prohibition. B-302504. Much like the debate on health care reform, the Medicare program is “subject to a highly spirited discussion and debate on the national level.” *Id.* Although the Medicare materials omitted some information regarding the impact of legislation on Medicare beneficiaries’ coverage and costs and may have highlighted some of the positive aspects of Medicare changes, we found that the materials were not purely partisan. The prohibition does not bar materials that have some political content or express a certain point of view on a topic of political importance.

Agency communications are purely partisan where they are “completely devoid of any connection with official functions” or completely “political in nature.” B-147578, Nov. 8, 1962. In B-304228, we found that the Department of Education’s use of a media analysis to gather information to evaluate, among other things, media portrayal of a particular political party’s “commitment to education” as favorable or unfavorable violated the prohibition. Because the analysis focused solely on one political party, we could not determine any use for the information except for purely partisan reasons. While the *HealthReform.gov* Web site contains expressions of opinions from Members of both Democratic and Republican parties, we cannot say that such statements, unlike the materials in B-304228, are devoid of any connection with official agency functions or are completely political in nature. To find such statements of opinions restricted by the prohibition would severely curtail legitimate communications of an agency’s policies and its defense of those policies. *See* B-302504.

CONCLUSION

The use of appropriated funds to create and operate the *HealthReform.gov* Web site and the *State your Support* Web page did not violate the prohibitions on grassroots lobbying or publicity or propaganda. The Web site and Web page did not constitute grassroots lobbying because they contained no clear, direct appeal to the public to contact Members of Congress in support of or in opposition to health care reform. They also did not violate the publicity or propaganda prohibition because nothing within the Web site or Web page constituted communications that are purely partisan, self-aggrandizement, or covert.

HHS views the form letter as similar to a survey to gauge public interest in the President's policy proposals. HHS also asserts that the form letter was a more effective tool to communicate its policies because Web users, by signing the letter and submitting contact information, would be more likely to focus on the content of the message. HHS Response at 5. Asking Web users to sign a form letter may be an unorthodox tool to gauge public opinion or communicate policies, and we express no opinion as to the effectiveness of such a tool to achieve HHS's stated goals. However, in light of our determination that the communications did not constitute a violation of the prohibitions on lobbying or publicity or propaganda, and in keeping with the discretion we have historically afforded agencies in their information activities (*see* B-302504), we do not legally object to the department's use of appropriated funds for this activity.

A handwritten signature in cursive script that reads "Lynn H. Gibson". The signature is written in black ink and is positioned above the typed name and title.

Lynn H. Gibson
Acting General Counsel