Order Code 97-57 A

CRS Report for Congress

Restrictions on Lobbying Congress With Federal Funds

December 23, 1996

Jack Maskell
Legislative Attorney
American Law Division

Prepared for Members and Committees of Congress

Restrictions on Lobbying Congress With Federal Funds

Summary

There are several provisions of federal law, rule and regulation which limit or restrict the use of funds appropriated by Congress for the purposes of "lobbying" activities. This report provides a brief discussion of the major federal laws and rules which limit or restrict the lobbying of Congress with federally appropriated funds, as those restrictions apply to federal agencies and employees, and to private contractors and grantees of the federal government.

Officers and employees of the departments and agencies of the executive branch of the federal government are expected to communicate to Congress their need for certain legislation or appropriations, and to provide Members of Congress with Administration opinions, ideas, facts, figures and arguments concerning public policy issues and the legislation affecting or relevant to such policies. Similarly, the Administration and its officers and employees may engage in public discourse, discussion and exposition of Administration policy, and may legitimately provide public arguments for or against certain public policy issues and legislation. Federal officers and employees of departments and agencies, however, are generally restricted by a criminal provision (18 U.S.C. § 1913), as well as several appropriations riders, from using federal appropriations for certain types of significant "grass roots" lobbying, or publicity or propaganda campaigns, which urge or exhort persons to contact their Members of Congress. The Department of Justice has interpreted § 1913 narrowly, finding that the law bars only large-scale or significant expenditures of public funds on private communications expressly urging persons to contact Congress.

Persons who hold federal contracts and federal grants may generally not be reimbursed from that federal contract or grant, and may not use contract or grant funds directly, to lobby the United States Congress. In the first instance there are a few narrow and specific statutory restraints on certain program funds, and on some recipient agencies and organizations under specific federal programs, on the use of funds for such lobbying purposes. The restrictions of more general applicability to all grantees and contractors, however, come from the Federal Acquisition Regulations, cost principles for government contractors and grantees, and from the so-called "Byrd Amendment" regarding certain kinds of lobbying with federal monies by federal grant, contract, or cooperative agreement recipients. Section 18 of the Lobbying Disclosure Act of 1995 (P.L. 104-65), commonly called the "Simpson Amendment", although not dealing with limitations on the use of *federal* funds for lobbying, prohibits section 501(c)(4) civic leagues and social welfare organizations from engaging in certain "lobbying activities", with their *own* private funds, if the organization receives a federal grant, loan, or award.

Contents

Federal Agencies and Officials 1
- Criminal Provision 1
- Direct Lobbying 1
- "Grass Roots", Indirect Lobbying; Legislative History 2
- Communications to the Public 4
- De Minimis Expenditures 5
- Other Applications of the Statute 7
- Appropriations Restrictions 7
- De Minimis Use of Funds 9
- Assistance to Outside Groups 10

Grantees and Contractors of the Federal Government 10
- Appropriations Restrictions 10
- Byrd Amendment 11
- Acquisition Regulations and Cost Principles 12
- 501(c)(4) Organizations Receiving Grants 13
- Tax Implications of Lobbying by Nonprofit Organizations 14

Restrictions on Lobbying Congress With Federal Funds

There are several provisions of federal law, rule and regulation which limit or restrict the use of funds appropriated by Congress for the purposes of "lobbying" activities. This report provides a brief discussion of the major federal laws and rules which limit or restrict the lobbying of Congress with federally appropriated funds, as those restrictions apply to federal agencies and employees, and to private contractors and grantees of the federal government.

Federal Agencies and Officials

It is generally understood that it is proper for federal executive officials to communicate directly to Congress the need for legislation or appropriations, as well as to communicate the Administration's position for or against legislative proposals. Additionally, it is recognized that an Administration is allowed to engage in public discourse, discussion and exposition of Administration policy and positions, which may include public arguments for or against certain legislation and specific programs. However, statutory provisions and various appropriation riders prohibit such officers and employees of federal departments and agencies from using federal appropriations for certain "grass roots" type of lobbying, or publicity or propaganda campaigns, which urge or exhort the public to write or contact their Members of Congress to influence legislation.

Criminal Provision

The principal statutory prohibition on lobbying with appropriated funds is a federal criminal law at 18 U.S.C. § 1913, which prohibits officers and employees of the federal agencies from using appropriations to lobby or influence a Member of Congress on legislation. The prohibition is upon federal employees using appropriations to pay for any "personal services, advertisement, telegram, telephone, letter, printed or written matter ... intended or designed to influence" Members of Congress on legislation or appropriations.

Direct Lobbying

Although the payment for such activities with federal funds is barred, § 1913 expressly exempts from the prohibition the activities of officers and employees of the federal government "communicating to members of Congress on the request of any member", or to Congress "through the proper official channels, requests for legislation or appropriations" deemed necessary for the efficient conduct of the public business. This provision of law has thus been consistently interpreted in the past by

the Justice Department as permitting *direct* contacts and communications from federal executive officials and executive agencies to Members of Congress concerning pending or proposed federal legislation[1], but most likely would prohibit substantial letter-writing or other types of significant "propaganda" or publicity campaigns (also called "grass roots" lobbying campaigns) funded with appropriated monies which are directed at the general public and which specifically urge or exhort the public or individuals to write or contact their congressman on an issue before the Congress.[2]

In 1962, an informal opinion from Assistant Attorney General Henry J. Miller discussed the right and obligation within our constitutional framework for the President and the executive agencies, and their officers and employees, to communicate directly with Members of Congress to express their views and the Administration's arguments and positions in favor of or opposition to proposed or pending legislation. Finding that unsolicited contacts with Members of Congress from Sargent Shriver, then Director of the Peace Corps, urging Members to support Peace Corps authorization, did not violate the provisions of 18 U.S.C. § 1913, the Assistant Attorney General explained:

> Personal contacts with members of Congress by executive officers are both sanctioned and required by Article II, section 3 of the Constitution .... The power to recommend measures to Congress would appear clearly to comprehend and include the power to urge arguments on individual Members of Congress in support of such measures.[3]

Similarly, in 1989, the Office of Legal Counsel of the Department of Justice found that the prohibitions of the law do not apply to "direct communications" between agency personnel and Members or staff of Congress. That office of the Department of Justice explained that "there is no restriction on Department officials directly lobbying Members of Congress and their staffs in support of Administration or Department positions."[4]

"Grass Roots", Indirect Lobbying; Legislative History

The statute thus does not necessarily reach "direct" contacts by officers and employees of the executive branch of the federal government with Members and staff of Congress, but rather appears to be intended to reach certain indirect or "grass roots" lobbying efforts by agencies and their employees entailing publicity or propaganda campaigns directed at the public which urge, request or are intended to have persons contact their Congressman. In a 1978 opinion, the Office of Legal

---

[1] See Opinion of Assistant Attorney General of the United States, Henry J. Miller, (1962), printed at 108 *Congressional Record* 8449-8451, May 15, 1962; Department of Justice letter opinion of July 19, 1973, to Senators Humphrey and Muskie, from Assistant Attorney General Henry S. Peterson; 5 Op. O.L.C. 180, 185 (1981); 13 Op. O.L.C. 361 (1989).

[2] Note legislative history of § 1913, at 58 *Congressional Record* 404, May 29, 1919; see Department of Justice letter opinions cited in footnote #1, *infra*; 2 Op. O.L.C. 30 (1978).

[3] See 108 *Congressional Record* 8449-8451, May 15, 1962.

[4] 13 Op. O.L.C. *supra* at 361.

Counsel of the Department of Justice, in discussing the use by federal judges of resources associated with their official position to communicate with Members of Congress on pending legislation, noted concerning § 1913:

> 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.[5]

This general understanding and interpretation of the provision is consistent with the apparent legislative intent of the statute. The legislative history of the statute appears to indicate a congressional purpose to restrict and prohibit so-called "grass roots" lobbying or propaganda campaigns funded by federal appropriations. In a colloquy on the floor of the House, the sponsor of the original restriction in 1919,[6] Representative James Good of Iowa, responded to the question of Representative Smith of Idaho as to whether it is "intended by section 5 to prevent the employees or officers of the government from communicating directly with their representatives in Congress?", by stating that: "No; that is expressly reserved."[7] Explaining the purpose of the amendment, Representative Good stated:

> It is new legislation, but it will prohibit a practice that has been indulged in so often, without regard to what administration is in power -- the practice of a bureau chief or a head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. The gentleman from Kentucky, Mr. Sherley, former chairman of this committee, during the closing days of the last Congress was greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to write Congressman Sherley for this appropriation and for that. Now, they use the contingent fund for that purpose, and I have no doubt that the telegrams sent for that purpose cost the Government more than $7,500. Now, it was never the intention of Congress to appropriate money for this purpose, and section 5 of the bill will absolutely put a stop to that sort of thing.[8]

While the language and the intent of the criminal statutory provision may appear to cover a broad range of conduct and communications involving public issues, it should be noted that there has never been any recorded Department of Justice enforcement action, nor any criminal indictments ever brought under this provision since it was enacted into law in 1919. The precise conduct that might subject one to criminal prosecution, therefore, is somewhat a matter of conjecture. The Department of Justice, however, regardless of the political party of the Administration, has

---

[5] 2 Op. O.L.C. 30, 31 (1978). The opinion noted that the "limited legislative history demonstrates that its enactment was spurred by a single, particularly egregious instance of official abuse - the use of federal funds to pay telegrams urging selected citizens to contact their congressional representatives in support of legislation of interest to the instigating agency."

[6] Section 6 of the Third Deficiency Appropriation Act, fiscal year 1919, 41 Stat. 68, chapter 6, § 6, July 11, 1919.

[7] 58 *Congressional Record* 404, May 29, 1919.

[8] 58 *Congressional Record* 403, May 29, 1919.

consistently interpreted the statutory prohibition in a very narrow manner, and has questioned the constitutionality of the provision if interpreted broadly.[9]

Communications to the Public

While the focus of the prohibition is upon agency communications to the public, rather than on direct communications to Congress, not all agency communications to the public concerning pending legislation violate the anti-lobbying provision. Interpretations of § 1913 and similar prohibitions recognize that members of the Administration and other executive branch officers and employees are obviously not prohibited from all official public expressions of support or opposition, or expressions for the need for certain legislation or governmental programs. There is therefore an apparently accepted distinction between prohibited grassroots "lobbying" with federal funds regarding legislation, as opposed to permissible public "advocacy" for certain Administration programs, favored legislation, or policy.[10] As noted by one congressional commentator concerning an Administration's public expressions of opinions on policy: "Certainly, any Administration should be expected to use all legal means at its disposal to encourage acceptance of its programs."[11] A federal court found that a certain pamphlet published by a federal agency, although admittedly biased towards the nuclear energy program, did not violate the prohibition at § 1913 because the communication did not urge or request nor was it "likely to induce persons to contact their Congressmen".[12]

Similarly, in 1981, the Office of Legal Counsel of the Department of Justice explained in broad terms the proper, contemplated relationship and interchange between the executive branch and the Congress as well as between the executive branch and the public concerning legislation:

> The Constitution contemplates that there will be an active interchange between Congress, the Executive Branch, and the public concerning matters of legislative interest. For that reason alone, this Department has traditionally declined to read the criminal statute and the general rider as requiring federal officers and employees to use their own funds and their own time to frame necessary communications to Congress and the public. We have taken the view that the criminal statute and the general rider impose no such requirement. They

---

[9] See, 13 Op. O.L.C. *supra* at 367-368; and Office of Legal Counsel, Department of Justice, "Guidelines on 18 U.S.C. § 1913", at 1 (April 14, 1995).

[10] There is not necessarily any First Amendment "neutrality" requirement for the government in public policy issues akin to the neutrality required in the Establishment of religion clause. See *Buckley v. Valeo,* 424 U.S. 1, 92-93 (1976). As noted by a federal court: "What is condemned by the free speech guarantee of the First Amendment is not advocacy by the government, but rather conduct which limits similar rights guaranteed to individual members of society." *Arrington v. Taylor,* 380 F. Supp. 1348, 1364 (D.N.C. 1974), citing *Joyner v. Whiting,* 477 F.2d 456, 461 (4th Cir. 1973). As to expenditures, GAO has concluded: "[T]he courts have indicated that it is not illegal for government agencies to spend money to advocate their positions, even on controversial issues." General Accounting Office. *Principles of Federal Appropriations Law,* at 4-163 (1991).

[11] Ancher Nelson. "Lobbying by the Administration", in *We Propose: A Modern Congress,* at 145.

[12] *American Public Gas Association v. Federal Energy Administration,* 408 F. Supp. 640, 642 (D.D.C. 1976). The court found that under the criminal statute at 18 U.S.C. § 1913 it could not enjoin an executive branch activity at the behest of a private party, since a criminal remedy is provided for violation of the law; but noted in *dicta* that even if a remedy were available under the statute, the production and distribution of such pamphlet by a federal agency, even though the pamphlet is admittedly biased, would not violate § 1913.

> permit a wide range of contact between the Executive and the Congress and the Executive and the public in the normal and necessary conduct of legislative business.[13]

The 1989 opinion of the Office of Legal Counsel of the Department of Justice asserted also that general public expressions concerning legislation or other public policy issues by federal executive branch officials and employees, through "public speeches," appearances or published writings would not violate the anti-lobbying provisions of 18 U.S.C. § 1913:

> Accordingly, we do not believe the statute should be construed to prohibit the President or Executive Branch agencies from engaging in a general open dialogue with the public on the Administration's programs and policies. Nor do we believe the statute should be construed to prohibit public speeches and writings designed to generate support for the Administration's policies and legislative proposals.[14]

Public speeches were deemed to be exempt, even when expressly calling on the public to contact Congress, because they were seen to lack the requisite use of a "device" such as a telephone or telegraph or some other written communication, as expressed in the text of 18 U.S.C. § 1913.[15]

This opinion was reflected in the 1995 "Guidelines" issued by the Department of Justice's Office of Legal Counsel that the prohibition would cover only certain types of "private forms of communications", as opposed to public speeches and writings. That is, that the prohibition applied only to "substantial `grass roots' lobbying campaigns of telegrams, letters and other private forms of communication expressly asking recipients to contact Members of Congress, in support or opposition to legislation".[16]

De Minimis Expenditures

The criminal statute has thus been interpreted to apply to certain expenditures of federal funds for private communications through such devices as letters, telegrams or telephone calls to members of the public which expressly urge or request those persons to contact a Member of Congress on legislation. The statutory restriction at 18 U.S.C. § 1913 has been interpreted narrowly by the Department of Justice through the Administrations of both parties, however, so as to actually prohibit, in its view, only what the Department of Justice has described as "gross" solicitations of public support, or "significant" or "large scale" expenditures of public funds in these types of "grass roots" lobbying effort.

---

[13] 5 Op. O.L.C. 180, 185 (1981).

[14] 13 Op. O.L.C. *supra* at 366.

[15] 13 Op. O.L.C. *supra* at 363. In the opinion of the Department of Justice, also exempt from the law are "lobbying activities of Executive Branch officials whose positions typically and historically entail an active effort to secure public support for the Administration's legislative program ... [including] presidential aides, appointees, and their delegees...." *Id* at 363-364.

[16] OLC "Guidelines" of April 14, 1995, *supra* at 2.

The Department of Justice found, in an informal opinion in 1973, that the law was not intended to reach all public expression of views on legislation, but rather was directed at "gross solicitations of public support". In 1973, the White House withdrew "information" packets and "speech kits" it had distributed to agency and department heads concerning suggestions for a publicity campaign over budget legislation, after complaints from Congress, and a finding by the Comptroller General, that production of such "Battle of the Budget" kits appeared to violate appropriations restrictions on lobbying with federal funds.[17] In finding, however, that there was no criminality in such conduct under 18 U.S.C. § 1913, Assistant Attorney General Henry Peterson stated:

> The legislative history reflects the Congress sought to recognize its responsibility to legislate, and that of the President to exercise his views in an appropriate manner regarding the merit or deficiencies of legislation. The apparent intention of Congress in enacting 18 U.S.C. 1913 was to bar gross solicitations of public support, i.e., conduct that would propagandize and generate public backing, financed with appropriated funds.[18]

In 1989, Assistant Attorney General William Barr of the Office of Legal Counsel (OLC) of the Department of Justice advised Attorney General Dick Thornburgh that, in addition to the statute at 18 U.S.C. § 1913 *not* applying to direct contacts between executive agency officials and Members of Congress and their staff, the anti-lobbying act would also not apply to "speeches, appearances, or writings" of Administration officials, nor would the Act prohibit "private communications with members of the public as long as there is not a significant expenditure of appropriated funds to solicit pressure on Congress." Examining the legislative history of the provision, the OLC of the Department of Justice explained:

> These remarks [in the law's legislative history] demonstrate that Congress was concerned about the use of appropriated funds to implement "grass roots" mailing campaigns at great expense. [Footnote: "Our calculations indicate that an expenditure of $7500 in 1919 would be roughly equivalent to one of $50,000 today"] Based on this legislative history, this Office has consistently concluded that the statute was enacted to restrict the use of appropriated funds for *large-scale, high expenditure* campaigns *specifically* urging private recipients to contact Members of Congress about pending legislative matters on behalf of an administration position.[19]

The Department of Justice has thus expressly interpreted the anti-lobbying criminal statute as having a *de minimis* threshold as far as the expenditure of federal funds for conduct which apparently was intended to come within the statutory restriction, that is, communications such as letters and telephone calls from an executive official to the public to put pressure on Congress concerning legislation. The *de minimis* threshold amount of $50,000 suggested in the 1989 Barr

---

[17] Comptroller General Opinion, B-178448, April 30, 1973; 119 *Congressional Record* 13471 - 13476, April 30, 1973; 119 *Congressional Record* 14483 - 14485, May 7, 1973.

[18] Letter to Senator Hubert H. Humphrey, from Assistant Attorney General Henry S. Peterson, July 19, 1973; note Mike Causey, "No Action Planned Over Speech Kits," *Washington Post,* July 30, 1973, p. D11.

[19] 13 Op. O.L.C. *supra* at 365. Emphasis added.

memorandum to Attorney General Thornburgh has been cited and reiterated by the current Department of Justice in guidelines issued to General Counsels.[20]

Other Applications of the Statute

A further purpose of the prohibition at 18 U.S.C. § 1913 would appear to be to prohibit a federal agency from expending any federal funds or resources in assisting private parties or groups in their lobbying and attempts to influence Congress. In a federal district court case, the court indicated that the statute would appear to have as its purpose "to prevent corruption of the legislative processes through government financial support of an organization" which attempts to influence Members of Congress, "and thereby precludes the drowning out of the privately financed `voice of the people' by a publicly funded special interest group."[21]

The statutory provision at 18 U.S.C. § 1913 applies by its express language only to federal officials, and thus the criminal provisions would not reach private contractors or grantees of the Federal Government.[22] Furthermore, the restrictions apply only to the lobbying of Congress, and do not apply to lobbying by one executive agency of another agency, nor to "lobbying" of state legislatures by federal officials.[23]

Appropriations Restrictions

In addition to the criminal statute at 18 U.S.C. § 1913, there is often included in an appropriations bill for agencies or departments a rider in the form of a general restriction on the use of such funds appropriated in that act for "publicity or propaganda" purposes directed at "legislation pending before Congress."[24] As an appropriations measure, this restriction is subject to interpretation and enforcement by the Comptroller General of the United States General Accounting Office. In interpreting such anti-lobbying provisions, the Comptroller General has found that they apply to conduct similar to that covered by the criminal provision, that is, publicity and propaganda campaigns directed at the public at large which urge the public to communicate to Members of Congress to influence such Members on a legislative issue:

> In interpreting "publicity and propaganda" provisions ... we have consistently recognized that any agency has a legitimate interest in

---

[20] Office of Legal Counsel, Department of Justice, "Guidelines on 18 U.S.C. § 1913", p. 2, April 14, 1995.

[21] *National Association for Community Development v. Hodgson*, 356 F. Supp. 1399, 1404 (D.D.C. 1973). (The holding in *Hodgson* with regard to private "standing" to sue under § 1913 has been explicitly overruled in *National Treasury Employees Union v. Campbell*, 654 F.2d 784 (D.C.Cir. 1981)).

[22] *Grassley v. Legal Service Corporation*, 535 F. Supp. 818, 826 n.6 (S.D. Iowa 1982).

[23] See *Hall v. Siegel*, No. 77-1028, S.D. Illinois, June 8, 1977 (memorandum opinion).

[24] A general appropriations rider barring the use of *any* appropriations for "publicity or propaganda" directed at legislation pending before Congress used to be included in the annual Post Office, Civil Service and General Governmental Appropriations Acts. That practice, however, was subject to a successful point of order in 1983 as legislation on an appropriations measure, and has not been included since that time. See discussion in 64 Comp. Gen. 281-282 (1985).

> communicating with the public and with legislators regarding its policies. If the policy of an agency is affected by pending legislation, discussion by officials of that policy will necessarily, either explicitly or by implication, refer to such legislation, and will presumably be either in support of or in opposition to it. An interpretation of [the anti-lobbying restriction] which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy, a result we do not believe was intended.
>
> We believe, therefore, that Congress did not intend ... to preclude all expression by agency officials of views on pending legislation. Rather, the prohibition of [the anti-lobbying restriction], in our view, applies primarily to expenditures involving direct appeals addressed to the public suggesting that they contact their elected representatives and indicate their support of 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.[25]

Since there is no over-all anti-lobbying appropriations rider now applicable to the funds for all federal agencies and departments, when questions arise about an expenditure of funds for communications by an agency or department of the federal government, the particular appropriations legislation for that agency or department in question must be examined. There are a few different varieties of "publicity and propaganda" riders. The General Accounting Office has noted that the broader restriction on "publicity and propaganda not authorized by Congress", which appears in several appropriations laws, might be broad enough to cover those activities which are usually more narrowly and expressly restricted under riders aimed at "publicity and propaganda" campaigns concerning "legislation pending before Congress."[26]

In applying these restrictions to the particular facts before it, the Comptroller General has generally looked to determine if communications have expressly urged "the public to contact Members of Congress", by the use of such words and phrases as "let Congress know we support it" or "contact your representatives and make sure they are aware of your feelings concerning this important legislation".[27] When communications were made to the public concerning public policy matters, even if such communications gave arguments for or against specific legislation, no violation was found when the material was "essentially expository in nature" and did not urge or suggest anyone contact their Member of Congress.[28] In one example concerning Department of Transportation expenditures at the time Congress was considering passive restraint systems (airbags) for cars, the General Accounting Office noted:

---

[25] 56 Comp. Gen. 889, 890 (1977); Decisions of the Comptroller General, B-128938, July 12, 1976, at 5; B-164497(5), August 10, 1977, at 3; B-173648, September 21, 1973, at 3. See also 63 Comp. Gen. 626-627 (1984), similar language concerning federal judges.

[26] *Principles of Federal Appropriations Law, supra* at 4-172 (1991); but see 66 Comp. Gen. 707, 710-711 (1987). The broader restriction on "publicity or propaganda not authorized by Congress" has been applied to certain "self-aggrandizement" campaigns and to unauthorized covert propaganda. *Principles of Federal Appropriations Law, supra* at 4-164 to 4-167.

[27] Decisions of the Comptroller General, B-116331, May 29, 1961; B-178648, April 30, 1973; B-128938, July 12, 1976; see discussion in *Federal Appropriations Law, supra* at 4-172 to 4-174.

[28] *Federal Appropriations Law, supra* at 4-176 to 4-177, citing Comptroller General Decisions B-21639, January 22, 1985; B-212252, July 15, 1983; B-178648, December 27, 1973; B-139458, January 26, 1972.

"While, considering the timing and location of the displays, one would have to be pretty stupid not to see this as an obvious lobbying ploy, that did not make it illegal since there was no evidence that DOT urged members of the public to contact their elected representatives. ... The apparent intent alone is not enough; it must be translated into action."[29]

De Minimis Use of Funds

The conduct of an executive official calling, writing or wiring private individuals to expressly urge them to contact Members of Congress on a legislative issue may run afoul, regardless of any *de minimis* threshold amount, of appropriations riders on executive agency funding. The Department of Justice's Office of Legal Counsel has noted that the Comptroller General may interpret the appropriations restrictions on grass roots lobbying campaigns in a stricter fashion than the Department of Justice interprets the criminal counterpart. In a 1995 document, the Office of Legal Counsel advised that "agencies may wish to observe a more general restriction with respect to officials other than those listed in Section A [the President, his aides in the Executive Office of the President, the Vice President, cabinet members, and Senate-confirmed officials] against expressly urging citizens to contact Congress in support of or opposition to legislation."[30] The OLC guidelines stated:

> [T]he Comptroller General, following his understanding of the Department of Justice's historical interpretation of the Act before the 1989 Barr opinion, has construed the restriction as being triggered by explicit requests for citizens to contact their representatives in support of or opposition to legislation. Given the Comptroller General's interpretation, and given the difficulty of predicting what may be perceived as a grass roots campaign in a particular context, agencies may wish to err on the side of caution, by refraining from including in their communications with private citizens any requests to contact Members of Congress in support of or opposition to legislation.[31]

The Comptroller General has not expressly found any specific *de minimis* amount or requirement for a finding that funds were used improperly, but has noted in the past that funds expended may be small, and may be commingled with proper expenditures, and therefore no further action would be taken to recover the funds.[32] The General Accounting Office has noted that the extent to which GAO will investigate an alleged misuse of funds for lobbying "depends in large measure on the amount of money involved."[33]

---

[29] *Federal Appropriations Law, supra* at 4-177, citing Comptroller General Decision B-139052, April 29, 1980.

[30] "Guidelines on 18 U.S.C. § 1913", *supra* at 2.

[31] *Id.* at 3.

[32] Comptroller General Opinion, B-178448, April 30, 1973.

[33] *Principles of Federal Appropriations Law, supra* at 4-171.

Assistance to Outside Groups

Similar to the application of the statutory restriction, the Comptroller General has found that the anti-lobbying appropriations riders would apply to an agency's attempt to provide assistance to private lobbying groups, that is, that "an agency should not be able to do indirectly that which it can not do directly." While the Comptroller General has thus found that appropriated funds may not be used to "develop propaganda material to be given to private lobbying organizations to be used in their efforts to lobby Congress", the distinction was expressly made between the use of such funds and personnel to prepare material "not otherwise in existence to be given to a private lobbying organization", as opposed to the permissible use of stock information, position papers or educational material to service requests from outside groups.[34]

Grantees and Contractors of the Federal Government

Persons who hold federal contracts and federal grants may generally not be reimbursed from that federal contract or grant, and may not use contract or grant funds directly, to lobby the United States Congress unless there is clear congressional authorization to engage in such activities with federal funds. There are a few narrow and specific statutory restraints on certain program funds, and on some recipient agencies and organizations under specific federal programs, on the use of grant or program funds for such lobbying purposes.[35] The restrictions of more general applicability to all grantees and contractors, however, come from the Federal Acquisition Regulations, cost principles for government contractors and grantees, and from what is known as the "Byrd Amendment" regarding lobbying on certain specified matters by federal grant, contract, or cooperative agreement recipients.

Appropriations Restrictions

Provisions of some yearly appropriations laws provide an express limitation on the use of federal grant or contract funds from a federal agency to pay for lobbying activities. For example, the appropriations restriction at Section 504(b) of the Department of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 1995, provided that no part of "any appropriation contained in this Act shall be used to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient, relating to any activity designed to influence legislation or appropriations pending before the Congress."[36]

The precise wording of this particular appropriations restriction was interpreted by the Comptroller General to have been violated, for example, "when a local

---

[34] *Federal Appropriations Law, supra* at 4-167 to 4-169, citing Comptroller General Decision B-129874, September 11, 1978; 66 Comp. Gen. 707 (1987).

[35] See, e.g., 42 U.S.C. § 2996f(a)(5), re Legal Services Corporation.

[36] See P.L. 103-333, 108 Stat. 2572.

community action agency used grant funds for a mass mailing of a letter to members of the public urging them to write their Congressmen to oppose abolition of the agency."[37] The Comptroller General similarly found that the provision was "violated when a university, using grant funds received from the Department of Education, encouraged students to write to Members of Congress to urge their opposition to proposed cuts in student financial aid programs."[38]

While the Comptroller General has interpreted this appropriation rider on grantees and contractors in a similar manner as the "publicity and propaganda" riders on federal agencies, that is, to apply to "grassroots" lobbying campaigns where the public is urged to contact their Member of Congress, the Office of Legal Counsel of the Department of Justice has offered an opinion that the particular rider on grantees and contractors in the Labor, Education, and HHS Appropriations laws is broader than the general "publicity and propaganda" riders, and applies even to funding communications from contractors and grantees receiving funds under that particular Act directly to Members of Congress on pending legislation or appropriations.[39]

Byrd Amendment

There is an additional permanent federal restriction on grantees and contractors of the Federal Government, known as the "Byrd Amendment", which prohibits the use of grant or contract funds to lobby Congress or agencies concerning certain specified federal actions, that is, the awarding of federal contracts, the making of federal grants or loans, the entering into cooperative agreements, or the extension, modification, renewal, continuation or amendment of any such contract, grant, loan or agreement. The so-called "Byrd Amendment" is currently codified at 31 U.S.C § 1352, and government-wide "guidance" on regulations to be promulgated implimenting the new lobbying restrictions was issued by the Office of Management and Budget at 54 F.R. 52306, December 20, 1989, and clarified in final form at 55 F.R. 6736, February 26, 1990.

The "Byrd Amendment" applies to a "recipient of a Federal contract, grant, or cooperative agreement" (31 U.S.C. § 1352(a)(1)) and to the subcontractors and subgrantees of that contract or grant (31 U.S.C. § 1352(h)(1)(A)). The statutory restrictions prohibit the use of federal funds to "pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress ... in connection with" governmental decisions regarding the awarding of a federal contract, the making of a federal grant, loan, or cooperative agreement. When covered under the provisions of the Byrd Amendment, federal contractors or grantees have to disclose when they use their own funds to lobby on such specific matters.

---

[37] *Principles of Federal Appropriations Law, supra* at 4-182 to 4-183, citing B-202787(1), May 1, 1981.

[38] *Principles of Federal Appropriations Law, supra* at 4-183, citing *Improper Use of Federal Student Aid Funds for Lobbying Activities*, GAO/HRD-82-108 (August 13, 1982).

[39] 5 Op. O.L.C. 180 (1981).

As far as lobbying on *legislation* before Congress is concerned, the provisions of the Byrd Amendment would apply fairly narrowly, if at all, to such activities, since the Amendment is directed at lobbying only on specified federal actions concerning the making of grants, loans, contracts and agreements, and the extensions or modifications or such agreements, loans, contracts, or grants. While the provision would appear to bar the use of federal funds to lobby a Member of Congress to intervene with an agency concerning the making, extension, or modification of a grant, loan, contract or agreement, the "Byrd Amendment" does not appear to apply generally to the lobbying of the Congress concerning the consideration of federal legislation generally. In "further information" and guidance to "clarify OMB's interim final guidance", the Office of Management and Budget explained:

> The prohibition on use of Federal appropriated funds does not apply to influencing activities not in connection with a specific covered Federal action. These activities include those related to legislation and regulations for a program versus a specific covered Federal action.[40]

The Byrd Amendment prohibitions also do not prohibit grantees or contractors from using their own funds to lobby the government on any matter. If the entity has any monies or resources other than federal appropriated funds sufficient to cover lobbying activities, it is expressly to be assumed that non-federal monies were used in any lobbying effort.[41] Furthermore, any monies made available in a contract which are considered the "profit or fees earned" are not considered federal appropriated funds and may be used for lobbying activities.[42]

Acquisition Regulations and Cost Principles

In addition to these statutory restrictions are regulations and guidelines concerning government contractors and grantees, which implement cost and accounting principles attempting to insure that government contractors and grantees not be reimbursed from federal contract or grant money for the cost of lobbying and public advocacy activities which are not authorized by law. Provisions in the Federal Acquisitions Regulations apply to certain government contracts with businesses,[43] and principles and guidelines for non-profit grantees of the federal government are expressed in OMB Circular A-122, paragraph B21,[44] and incorporated by reference in the Federal Acquisition Regulations at 48 C.F.R. §31.701 *et seq.*

---

[40] 55 F.R. 24542, June 15, 1990. Although OMB *proposed* to modify this explanation to cover certain "program lobbying" before Congress when the legislation or report expressly "would direct" the funding of a specific covered action, that "proposed change" was not, as of this writing, acted on in final form. See 57 F.R. 1772, January 15, 1992. Certain "clarifications" made on January 15, 1992, were effective as of that date, see 57 F.R. 1773, but the "proposed changes" to earlier clarifications on "program lobbying" were only proposed and were not finalized.

[41] 55 F.R. 24542, June 15, 1990. But note "Simpson Amendment" on (26 U.S.C.) § 501(c)(4) non-profit grantee organizations, discussed below.

[42] *Id.*

[43] 48 C.F.R. § 31.205-22, see 49 F.R. 18278, April 27, 1984.

[44] As added at 49 F.R. 18276, April 27, 1984.

The relevant limitations on funding lobbying activities with federal grant or certain contract funds in the Federal Acquisition Regulations provide that costs for certain activities by contractors and grantees are not allowable and may not be charged to a federal contract or grant. These activities include "attempts to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure"; any attempt "to influence the introduction of Federal or State legislation or the enactment or modification of any pending Federal or state legislation" through direct communications with any public officials, or through "grass roots" publicity or propaganda campaigns; and any legislative liaison activities which are in support of efforts to engage in restricted lobbying activities.[45]

The prohibitions and limitations within the appropriations laws, statutory provisions and regulatory restrictions discussed above go to, follow, and regulate only the use of *federal appropriated funds* by the recipients, but do not necessarily restrict such *recipients* themselves from using their own or other non-federal monies, funds and revenues to engage in public advocacy or other lobbying activities.

501(c)(4) Organizations Receiving Grants

Restrictions on "lobbying activities" by certain non-profit groups, as a condition to receiving federal grants and loans, were enacted into law in 1995. This provision does not expressly address limitations on the use of *federal* funds for lobbying, the use of which is already restricted by the limitations discussed above, but rather applies to the use of an organization's own resources. Section 18 of the Lobbying Disclosure Act of 1995 (P.L. 104-65), commonly called the "Simpson Amendment", prohibits section 501(c)(4) civic leagues and social welfare organizations from engaging in certain "lobbying activities", with their *own* private funds, if the organization receives a federal grant, loan, or award.[46]

The legislative history of the provision clearly indicates that a 501(c)(4) organization may, however, separately incorporate an affiliated 501(c)(4), which would not receive any federal funds, and which could engage in unlimited lobbying.[47] The method of separately incorporating an affiliate to lobby, which was described by the amendment's sponsor as "splitting", was apparently intended to place a degree of separation between federal grant money and private lobbying, while permitting an organization to have a voice through which to exercise its First Amendment rights of speech and petition.[48]

---

[45] 48 C.F.R. § 31.205-22, "Legislative lobbying costs". See also 48 C.F.R. § 31.701 and OMB Circular A-122, ¶B21, as added at 49 F.R. 18276, April 27, 1984.

[46] 2 U.S.C. § 1611, as amended by P.L. 104-99, Section 129, removing government "contractors" from the original prohibition.

[47] H.R. Rpt. No. 104-339, 104th Congress, 1st Session, at 24 (1995). As stated by Senator Simpson: "If they decided to split into two separate 501(c)(4)'s, they could have one organization which could both receive funds and lobby without limits." 141 *Congressional Record*, S10555, July 24, 1995 (daily ed.).

[48] See comments by the sponsors of provision, Senator Simpson and Senator Craig, at 141 *Congressional Record*, at S10547, S10556, July 24, 1995 (daily ed.).

It may also be noted that while § 501(c)(4)'s which receive certain federal funds may not engage in "lobbying activities", the term "lobbying activities" as used in the "Simpson Amendment" is defined in Section 3 of the legislation to include only *direct* "lobbying contacts", and "efforts in support of such contacts", such as preparation, planning, research and other background work intended for use in such direct contacts.[49] Organizations which use their own private resources to engage *only* in "grass roots" lobbying and public advocacy (including all communications "made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication")[50] would, therefore, not be engaging in any prohibited "lobbying activities" under this provision. The Lobbying Disclosure Act definitions expressly exclude and do *not* independently apply to activities which consist only of "grass roots" lobbying and public advocacy. Similarly, since the term "lobbying activities" relates only to the direct lobbying of covered federal officials, the "Simpson Amendment" would not appear to limit in any way an organization's use of its own private resources to lobby state or local legislators or other state of local governmental bodies or units. While direct lobbying of the Congress, or of certain high level executive branch officials, is covered under the Lobbying Disclosure Act as a "lobbying contact", and thus by definition a "lobbying activity", the acts of testifying before a congressional committee, subcommittee, or task force, or of submitting written testimony for inclusion in the public record of any such body, or of responding to notices in the Federal Register or other such publication soliciting communications from the public to an agency, are expressly exempt from the definition of a "lobbying contact", and thus in themselves cannot qualify as a "lobbying activity."[51]

Tax Implications of Lobbying by Nonprofit Organizations

Although private groups may generally use their *own* resources and monies to engage in public advocacy activities protected by the First Amendment, non-profit charitable organizations which engage in "substantial" lobbying activities may encounter tax ramifications concerning their tax exempt status. Entities receiving a tax exempt status under § 501(c)(3) of the Internal Revenue Code (which allows them to receive contributions which are tax deductible to the donor under § 170) may not expend a "substantial" part of their resources on lobbying activities. 26 U.S.C. § 501(c)(3). Groups may generally elect to come within specific guidelines on the amount to be expended on lobbying, or to stay in the general "substantial part" test. See 26 U.S.C. §§ 501(h), 4911. The express limitations state that an organization may expend 20% of the first $500,000 of its exempt purpose expenditures, 15% of the next $500,000, 10% of the next $500,000, and 5% of any amount over $1.5

---

[49] 2 U.S.C. § 1602(7), P.L. 104-65, Section 3(7).

[50] Note this express exception to the term "lobbying contact", at 2 U.S.C. § 1602(8)(B)(iii), P.L. 104-65, Section 3(8)(B)(iii).

[51] See 2 U.S.C. 1602(8)(B), P.L. 104-65, Section 3(8)(B) for list of 18 express exceptions to the term "lobbying contacts". Broader limitations on public "advocacy" and lobbying by certain non-profit organizations receiving federal grant money, and on entities wishing to do business with federal grantees, which had passed the House as appropriations riders (commonly known as the "Istook Amendment", e.g., H.R. 2127, 104th Congress, H.J. Res. 114, 104th Congress), were not enacted into law in the 104th Congress.

million, up to $1 million a year on overall lobbying, with an additional limit for grass roots lobbying of 25% of the lobbying limit.[52] Other groups which have their tax-exempt status under different provisions of the tax code, such as trade associations, labor organizations, or civic leagues and social welfare organizations, are not specifically restricted by the tax code in the amount of lobbying activities in which they may engage (but contributions to such organization are not tax deductible for the donor).[53]

---

[52] 26 U.S.C. § 501(h), 4911(c); note generally, "Guiding Lobbying Charities Into a Safe Harbor: Final Section 501(h) and 4911 Regulations Set Limits For Tax-Exempt Organizations", 61 *Mississippi Law Journal* 157 (Spring 1991).

[53] See discussion in *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 545 (1983), also 461 U.S. at 552-553 (Blackman, J. concurring) (1983).