United States General Accounting Office
Washington, DC 20548

Office of the General Counsel

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August 17, 2000

The Honorable Susan Gaffney
Inspector General
Department of Housing and
Urban Development

Subject: Application of Anti-Lobbying Restrictions to HUD Report Losing Ground

Dear Ms. Gaffney:

By letter of March 27, 2000, you requested that we reconsider our informal views which we provided to the staff of Congressman F. James Sensenbrenner, Jr., regarding the Department of Housing and Urban Development's (HUD) publication of Losing Ground: The Impact of Proposed HUD Budget Cuts on America's Communities. The Congressman was concerned that HUD Secretary Andrew Cuomo had, through the issuance of the Losing Ground report, violated anti-lobbying laws. After careful consideration of the analysis contained in your letter, we continue to believe that neither the Losing Ground report itself, nor the Secretary in issuing it, violated applicable anti-lobbying laws.

BACKGROUND

The Losing Ground report, dated August 1999, criticized the "deep cuts" in HUD programs proposed by the House Appropriations Committee in the fiscal year 2000 HUD appropriations bill. The report stated that the "cuts would have a devastating impact on families and communities nationwide" and purported to detail the consequences on HUD's programs if the funding cuts were enacted. Two appendices to the report gave further details on the funding reductions, as well as the consequences of the reductions that, according to HUD, would have been visited on communities nationwide. Accompanying the report was a letter dated September 3, 1999, with the salutation "Dear Colleague," and signed by Secretary Cuomo. In the letter, the Secretary noted that the Losing Ground report provided "important and timely information about the impact of the reductions to HUD's programs that are currently being proposed in the House of Representatives."

A HUD official informed us that the Government Printing Office printed 30,000 copies of the Losing Ground report at a cost of $13,282. HUD produced an additional 2,300 copies in-house. The official did not know the specific printing cost of the in-house copies. HUD mailed 27,000 copies of the report at a cost of $7,352. Thus, HUD's total printing and mailing cost for the report (excluding the unknown cost of the in-house printing) was $20,634.[1]

We were also informed that HUD used its main distribution list in mailing the report. The main distribution list is used by HUD to distribute reports of general interest to its main constituencies, including grantees, public interest groups, churches, mayors, National Urban League affiliates, tribal leaders, public housing agencies, various business groups, historically black colleges, academics, as well as newspapers and news organizations. The HUD official informed us that no additional press representatives were added to the main distribution list of the Losing Ground report.[2]

After gathering the above facts, we determined that three anti-lobbying provisions were applicable to Secretary Cuomo's issuance of the Losing Ground report—the criminal provision, 18 U.S.C. § 1913, and two civil provisions, sections 637 and 642 of the Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-480 (1998). In our briefing, we told Congressman Sensenbrenner's staff that we did not believe that the Secretary had violated these three anti-lobbying restrictions by issuing the report. You dispute this conclusion and offer a number of arguments. We first provide our analysis and we then address your arguments.

ANALYSIS

Anti-Lobbying Provisions – Criminal Statute

Over the years, the Congress has imposed two types of restrictions on lobbying activities by Executive Branch agencies and their officers and employees. The first is a criminal provision enacted in 1919, which prohibits the use of appropriated funds

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[1] HUD was unable to provide us with the preparation costs of Losing Ground. The Office of Policy Development and Research (PD&R), the office within HUD that authored the report, does not track preparation costs of individual reports. A HUD official noted, however, that the preparation of Losing Ground involved little, if any, original research. Rather, PD&R analyzed existing data.

[2] The official also stated that another 5,300 copies of the report were not mailed, but were made available for direct distribution through HUD User, which is a research report clearinghouse within HUD. Of these, 3,607 copies had been distributed at the time we spoke with the HUD official. (HUD still had possession of the remaining copies.) The report was also posted on the Internet at the time it was mailed in early September 1999.

for some forms of lobbying. 18 U.S.C. § 1913 (1994).[3] Since section 1913 is a criminal provision, its enforcement is the responsibility of the Department of Justice and the courts, and we do not decide whether a given set of facts constitutes a violation of section 1913. If we have reason to believe that a potential violation of section 1913 occurred, based on Justice's interpretation of that statute, we will refer the matter to the Justice Department for further investigation.

The Justice Department has interpreted section 1913 to prohibit "large-scale publicity campaigns to generate citizen contacts with Congress on behalf of an Administration position" with respect to pending legislation.[4] In the view of the Justice Department, the statute prohibits "substantial 'grass roots' lobbying campaigns of telegrams, letters, and other private forms of communication designed to encourage members of the public to pressure members of Congress to support Administration or Department legislative or appropriations proposals." That is, section 1913 "bar[s] high expenditure campaigns in which members of the public are expressly urged to write their Senators or Representatives" in support, or in opposition to, legislation.[5]

The Justice Department does not interpret section 1913 as applying to lobbying activities personally undertaken by the President, aides or assistants in the Executive Office of the President, the Vice-President, cabinet members within their area of responsibility, and other Senate-confirmed officials appointed by the President within

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[3] Section 1913 provides that no appropriated funds may be used

> "directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation . . . .
>
> "Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined under this title or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment."

[4] Memorandum for Dick Thornburgh, Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, September 28, 1989.

[5] Memorandum for the Attorney General and Deputy Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, April 14, 1995 (emphasis supplied).

their areas of responsibility. Nor does the Justice Department view section 1913 as prohibiting communications with the public through public speeches, appearances, and published writing. Further, the Justice Department has suggested that a "substantial" grass-roots lobbying campaign is one costing about $50,000 (in 1989 dollars) or more.

As discussed above, the HUD materials went out under Secretary Cuomo's signature. Nowhere in either the letter or the report are recipients expressly encouraged to contact their elected representatives. Thus, the materials do not constitute grass-roots lobbying as the Department of Justice has used that term in applying the criminal statute. Further, even if the letter or the report had constituted grass-roots lobbying, since Secretary Cuomo is a cabinet member, Justice would not consider his activities to be covered by section 1913. Therefore, we do not believe that referral of this matter to the Department of Justice would be warranted.

Anti-Lobbying Provisions – Appropriations Law Restrictions

The second type of lobbying restriction, usually appearing in annual appropriations acts, prohibits the use of appropriated funds for certain lobbying activities. Over the years, these restrictions have applied at different times to different agencies and have used different wordings. Two appropriations act anti-lobbying restrictions were applicable to HUD in FY 1999. Both appear in the Treasury and General Government Appropriations Act, 1999 in sections 637 and 642.[6]

Section 637 states:

> "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. 105-277, 112 Stat. 2681, 2681-525.

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[6] Pub. L. No. 105-277, 112 Stat. 2681, 2681-525, 2681-526 (1998). This appropriations act was enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. Pub. L. 105-277, 112 Stat. 2681 (1998). By virtue of the "funds appropriated in this or any other Act" language of sections 637 and 642, HUD's fiscal year 1999 appropriations are covered by these two anti-lobbying provisions. HUD's own fiscal year 1999 appropriations contained no anti-lobbying provisions. See Pub. L. 105-276, 112 Stat. 2461 (1998).

We have consistently held that this language prohibits indirect or grass-roots lobbying through appeals to the public to contact their elected representatives. See B-285298, May 22, 2000; Department of Education: Compliance with the Federal Advisory Committee Act and Lobbying Restrictions, GAO/GGD/OGC-00-18 (Dec. 1999); B- 270875, July 5, 1996; B-202787, May 1, 1981. We examined the Losing Ground report and the Secretary's letter in light of this analysis and found that neither the report nor the letter contained any express appeals that members of the public contact their congressional representatives. Under these circumstances, we conclude that Secretary Cuomo did not violate section 637.

The next appropriations act restriction that is applicable to HUD is contained in section 642, which states as follows: "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." Pub. L. No. 105-277, 112 Stat. 2681, 2681-526 (1998).

We have interpreted language similar to section 642 on a number of occasions and have held that it was intended to prohibit "publicity of a nature tending to emphasize the importance of the agency or activity in question." 31 Comp. Gen. 311, 313 (1952). The restriction is directed typically toward activities whose obvious purpose is "self-aggrandizement" and "puffery." B-212069, Oct. 6, 1983. On the other hand, we have concluded that statutes similar to section 642 do not prohibit an agency's legitimate informational activities. Id. Public officials may report on the activities and programs of their agencies, may justify those policies to the public, and may rebut attacks on those policies. See B-114823, Dec. 23, 1974. The executive branch has a duty to inform the public regarding Government policies and, traditionally, policy-making officials have used Government resources in explanation and defense of their policies. B-194776, June 4, 1979.

In our view, the Losing Ground report and the accompanying letter did not tend to emphasize the importance of HUD or HUD programs such that they constitute "puffery" or "self-aggrandizement." HUD justified those materials as providing "important and timely information about the impact of the reductions to HUD's programs that are currently being proposed in the House of Representatives." We conclude that, as with section 637, Secretary Cuomo did not violate section 642.

RESPONSE TO INSPECTOR GENERAL'S ARGUMENTS

You disagree with our conclusion that Secretary Cuomo did not violate, through his issuance of the Losing Ground report, the relevant anti-lobbying statutory provisions. Specifically, you argue that section 637 should not be interpreted to require explicit appeals to the public to contact Members of Congress, that the Community Builder activities violated the anti-lobbying prohibition, and that the Losing Ground mailing was to the public at large in violation of a HUD General Counsel memorandum. We will discuss each in turn.

In your letter you express the view that section 637 does not require explicit appeals to the public to contact Members of Congress. Specifically, you dispute our conclusion with regard to section 637. In essence, it is your position that because 18 U.S.C. § 1913 and section 642 have "been the law for years upon years," you "believe that it is intuitive that Congress intended Public Law 105-277 § 637 to have effect beyond the historic confines of sections 1913 and 642," even though the legislative history is silent with regard to section 637. You argue that our conclusion "effectively considers these three statutes to be equivalent." We disagree with your arguments for the following reasons.

First, provisions almost identical to section 637 have appeared in appropriations acts since 1974. See Pub. L. No. 93-517, 88 Stat. 1634, 1651 (1974); Pub. L. No. 103-112, 107 Stat. 1082, 1112 (1993); Pub. L. No. 103-333, 108 Stat. 2539, 2572 (1994). We have interpreted them on a number of occasions as applying only to grass-roots lobbying. See, e.g., B-270875, July 5, 1996; B-202787, May 1, 1981. Thus the language that Congress used in section 637 already had its own "historic confines" or interpretations.

Also, as the discussion in the previous section makes clear, the three anti-lobbying provisions are different in the circumstances that they cover. It is true that section 637 and 18 U.S.C. § 1913 both prohibit grass-roots lobbying. Indeed, we have made it clear that our construction of an appropriations restriction prohibiting grass-roots lobbying found in previous Treasury, Postal Service and General Government appropriations acts, has been "greatly influenced by the legislative history and judicial construction of the anti-lobbying penal statute, 18 U.S.C. § 1913…." 59 Comp. Gen. 115, 117 (1979). However, there are differences between the two provisions.

While grass-roots lobbying in both the Justice Department's and GAO's views involves government employees' express appeals to the public to contact members of Congress in support or opposition to legislation, additional factors must be present before the Justice Department will conclude a violation of 18 U.S.C. § 1913 exists. The Justice Department draws a distinction between "private" and "public" communications. According to the Justice Department, grass-roots lobbying under 18 U.S.C. § 1913 "does not include communication with the public through public speeches, appearances, or writings."[7] GAO has drawn no such distinction in its interpretation of section 637 and its variations.[8] Furthermore, a grass-roots lobbying campaign must be "substantial" before it violates 18 U.S.C. § 1913. According to the Justice Department, "substantial" is roughly equivalent to $50,000 in 1989 dollars. On

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[7] Memorandum for the Attorney General and the Deputy Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, April 14, 1995.

[8] See Department of Education: Compliance with the Federal Advisory Committee Act and Lobbying Restrictions, GAO/GGD/OGC-00-18 (Dec. 1999), p. 16.

the other hand, GAO has not interpreted the various anti-lobbying provisions as requiring a minimum expenditure to trigger a violation. Finally, and most importantly, 18 U.S.C. § 1913 is a criminal provision whose violation results in a fine or imprisonment, or both. GAO's action with respect to expenditures of appropriated funds in violation of law is limited to recovery of the amounts illegally expended. B-178648, Sept. 21, 1973.

As the above discussion makes clear, sections 637 and 642 are not identical. The two sections prohibit different activities—the former, grass-roots lobbying and the latter, "self-aggrandizement." Furthermore, section 637 and section 642 appeared in the same statute. To hold that both prohibited the same activities would be to hold one of the provisions to be mere surplusage. We decline to do so.

In maintaining that section 637 prohibits more than grass-roots lobbying, you cite as support a Comptroller General decision. Specifically, you believe that we failed to reconcile our conclusion with respect to section 637 with our decision in 59 Comp. Gen. 115 (1979). In that decision, we held that National Endowment for the Arts (NEA) materials violated the anti-lobbying restriction contained in section 304 of the 1979 Interior appropriations act, even though NEA had made no express appeal for the public to contact members of Congress. According to you, section 637 should be viewed as equally broad as section 304 since both "prohibited the publication and/or distribution of literature."

Section 304 provided:

> "No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete, in accordance with the Act of June 25, 1948 (18 U.S.C. 1913)."[9]

We first note that section 304 does not refer to information "for publicity or propaganda purposes" as is contained in section 637. Secondly, we note that section 304 is more expansive in that it refers to information "that in any way tends to promote public support or opposition" to legislation while section 637 refers to information "designed to support or defeat legislation." We consider these differences in language and the legislative history accompanying section 304 to be significant. See 59 Comp. Gen. 115 (1979).

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[9] This restriction was first enacted in 1977 and has been in every Interior Department appropriations law since. Without explanation Congress eliminated the phrase "in accordance with the Act of June 25, 1948 (18 U.S.C. 1913)" in 1982 and years thereafter; we have previously held that this deletion did not change the reach of the statute. B-262234, Dec. 21, 1995.

In 59 Comp. Gen. 115, we considered an NEA mass mailing of an information packet concerning NEA's "Living Cities Program." The packet did not directly exhort the public to contact Congress. However, among other things, the cover letter to the information was highly supportive of the program, describing it as a "unique piece of legislation" and highlighting the fact that the only obstacle that remained in the way of program implementation was a favorable House vote on program funding. Moreover, the NEA timed its mailing to coincide with reconsideration of the program's appropriations after the conference committee failed to agree on the funding. We concluded that the mailing was designed to promote public support for the funding, thereby violating the Interior appropriations act anti-lobbying provision.

At the time that section 304 was enacted, two other anti-lobbying restrictions applied to actions of federal agency employees covered by the Interior Department appropriations act: 18 U.S.C. § 1913 and a provision that, like section 637, prohibited grass-roots lobbying. We noted the existence of these two prohibitions at the time section 304 was enacted, as well as the differences in wording between section 304 and the grass-roots provision. For example, Section 304 did not use the term "publicity or propaganda purposes" as did the grass-roots lobbying provision, 59 Comp. Gen. 115, at 119 (and as does section 637).

Furthermore, the legislative history of section 304 emphasized that the purpose of the provision was to prohibit certain public information activities. We concluded that section 304 was meant to cover actions not reached by these other two restrictions. Thus, we held that the statute was designed "to cover particularly egregious examples of 'lobbying' by Federal agencies," even though the material stops short of actually soliciting the reader to contact his Member of Congress in support of or opposition to pending legislation.

Our holding in 59 Comp. Gen. 115 is not applicable to the question of whether Secretary Cuomo's issuance of Losing Ground violated anti-lobbying prohibitions. As discussed above, section 637 has the same legal effect as the grass-roots prohibition on the use of appropriated funds for lobbying.[10] That is, section 637 requires an explicit appeal that the public contact their members of Congress. Section 304, on the other hand, does not. The fact that both section 304 and section 637 prohibited the publication and distribution of certain kinds of materials is not dispositive. As illustrated by both 59 Comp. Gen. 115 (1979) and B-270875, July 5, 1996, in analyzing the activities prohibited by an anti-lobbying restriction, we have looked to the entire wording of the particular provision, its legislative history, as well as the legislative

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[10] See B-285298, May 22, 2000; Department of Education: Compliance with the federal Advisory Committee Act and Lobbying Restrictions, GAO/GGD/OGC-00-18 (Dec.1999); B-270875, July 5, 1996; B-202787, May 1, 1981.

context (i.e., the presence of other anti-lobbying provisions) in which the provision arises.

In B-270875, we construed a provision virtually identical to section 637, section 504(a) of the 1994 and 1995 Labor-HHS appropriations acts, which prohibits grass-roots lobbying in the form of agency appeals to the public to contact their elected officials concerning pending legislation. In that decision we noted that the Interior appropriations act restriction found in section 304 reached a variety of situations not reached by section 504(a) of the current Labor-HHS appropriations act. See B-262234, Dec. 21, 1995. Thus, we have distinguished virtually identical language to that found in section 637 from the Interior appropriations act restriction.

The second reason you asked us to reconsider our conclusion was because of HUD's Community Builders. Much of your letter outlines facts surrounding activities of Community Builders to publicize the Losing Ground report and the budget. As we explained in our April 16, 2000 meeting with members of your staff, the actions of the Community Builders were outside the scope of our review. Investigating possible lobbying violations is a very fact intensive and time intensive task. As agreed with Congressman Sensenbrenner's staff, we focused exclusively on the question of whether Secretary Cuomo, as signer of the cover letter, and the Losing Ground report itself violated the applicable anti-lobbying provisions.

Finally, you note the HUD General Counsel warned about the restrictions imposed by 18 U.S.C. § 1913 in a memorandum, dated March 11, 1998, directed at HUD Principal Staff. In the memorandum, the General Counsel pointed out that employees were prohibited from engaging in activities aimed at encouraging members of the public to lobby members of Congress concerning proposed legislation. The memorandum also instructed employees "to avoid any actions which may create the appearance that the HUD employee is attempting to circumvent the anti-lobbying restriction." Attached to the memorandum was a list of permitted and prohibited conduct. The second item listed under the heading "Prohibited Activities" states that HUD officials "may not engage in unsolicited mass mailings of press releases, fact sheets and copies of speeches to the public at large." According to you, Losing Ground falls within this prohibition.

As pointed out above, Losing Ground was distributed to HUD's main constituencies. Hence, the prohibition listed in the HUD General Counsel's memorandum against "mass mailings . . . to the public at large" would not be applicable. Rather, the distribution of Losing Ground appears to fit under the fourth item under "Permitted Activities": "The Department may send unsolicited materials, such as press releases, fact sheets and copies of speeches to persons and organizations that may be reasonably expected to have an interest in the matter."

In any event, the memorandum was issued to help HUD staff not only comply with 18 U.S.C. § 1913, but also to "avoid creating even the appearance of a violation." The activities listed as prohibited in the attachment to the memorandum are not

necessarily violations of 18 U.S.C. § 1913. To determine whether the criminal statute has been violated, we must apply the Justice Department's decisions and guidelines. Having done so, we, as discussed above, do not believe a referral to the Justice Department regarding Losing Ground is warranted.

CONCLUSION

The HUD report Losing Ground and an accompanying letter from Secretary Cuomo raised numerous objections to proposed cuts in HUD's budget. We have examined the letter and report to determine whether Secretary Cuomo had violated any or all of three anti-lobbying prohibitions—18 U.S.C. § 1913 and sections 637 and 642 of Public Law 105-277. We found no violations.

Neither the letter nor the report explicitly appealed to the public to contact members of Congress to express opposition to the budget cuts. Accordingly, the materials violated neither 18 U.S.C. § 1913 nor section 637. Furthermore, because Secretary Cuomo is a cabinet member who, in the context of the letter and report, raised objections in an area of his responsibility, the HUD budget, he did not, under the Justice Department guidance, violate 18 U.S.C. § 1913. Finally, the protestations of budget cuts contained in the letter and report do not constitute "self-aggrandizement" of HUD so as to constitute a violation of section 642.

In reaffirming the informal views provided to the staff of Congressman Sensenbrenner, we have considered the arguments you raised in your letter but have found them unpersuasive. Our precedents are clear with regard to the section 637 appropriations restriction. We have found that the Interior Department appropriations act prohibition is broader than the section 637 prohibition, but it is not applicable to HUD.

Thank you for your interest in this matter.

Sincerely yours,

Robert P. Murphy
General Counsel