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Memorandum

APR 24 2003

To: Secretary
Deputy Secretary
Assistant Secretaries
Bureau and Office Heads

From: William G. Myers III
Solicitor

Subject: Impact of the Recent Changes to 18 U.S.C. § 1913 (The "Anti-Lobbying Act")

I. BACKGROUND

18 U.S.C. § 1913 ("Section 1913") is a criminal statute that restricts lobbying with appropriated funds and is applicable to all executive branch agencies. On November 2, 2002, Section 1913 was amended by the 21st Century Department of Justice Appropriations Authorization Act (the "Act").¹ The Act's amendments do three things: (1) they expand the

¹ Pub. L. No. 107-273, Div. A., Title II, § 205(b) (2002). Section 1913 is laid out in its entirety below. Language added by the Act's amendments is in **bold**. Language removed by the Act's amendments is in [brackets].

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 [by Congress], whether before or after the introduction of any bill, **measure**, or resolution proposing such legislation, **law, ratification, policy**, or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to **any such** Member[s of Congress on the] **or official, at his** request [of any Member of Congress], **or to Congress or such official**, through the proper official channels, requests for **any** legislation, **law, ratification, policy**, or appropriations which they deem necessary for the efficient conduct of the public business[.], **or from making any communication whose prohibition by this section might, in the**

scope of Section 1913; (2) they adjust the penalties for violating Section 1913; and (3) they provide a new category of communications that are exempt from Section 1913. This memorandum summarizes the Act's amendments to Section 1913 and supersedes the Department of the Interior's (the "Department") previous guidance on prohibited lobbying activities.

II. DISCUSSION AND ANALYSIS

A. The Scope of Section 1913

The previous version of Section 1913 prohibited using appropriated moneys "to influence in any manner a Member of Congress to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress." The Act's amendments greatly expand the scope of this prohibition. The current version of Section 1913 prohibits using appropriated moneys "to influence in any manner a Member of Congress, a jurisdiction, or an official of any government² to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation."

The Department of Justice's Office of Legal Counsel (OLC) has consistently interpreted the previous version of Section 1913 as prohibiting most government employees from engaging in substantial grass-roots lobbying campaigns using telegrams, letters, or other forms of communication that expressly encourage the public to contact members of Congress in support of, or in opposition to, pending legislation. However, the OLC has also interpreted the provision as allowing employees appointed by the President with the advice and consent of the Senate

opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.

[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.]

² The phrase "any government" should be interpreted to include state governments, local governments, territorial governments, and Indian tribes, but not foreign governments. See Smith v. United States, 507 U.S. 197, 204 (1993) ("It is a longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (noting Indian tribes are "separate sovereigns pre-existing the Constitution").

("PAS employees") to engage in grass-roots lobbying activities.³ The OLC has informally advised the Office that the Act's amendments to Section 1913 were intended to extend the prohibition on grass-roots lobbying to new entities and matters, not to change the traditional interpretation.

B. Penalties for Violating Section 1913

Under the previous version of Section 1913, penalties for violating Section 1913 were as follows:

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.

This language has been removed. In its place, Section 1913 now states that: "Violations of this section shall constitute violations of section 1352(a) of title 31." Section 1352(a) of title 31 ("Section 1352(a)") places limitations on the use of appropriated funds to influence certain Federal contracting and financial transactions. The penalty for violating Section 1352(a) is that "Any person who makes an expenditure prohibited by [it] shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each expenditure."⁴

Thus, the penalty for violating Section 1913 has changed from a criminal penalty (mandatory removal plus the possibility of a fine and/or imprisonment) to a civil penalty (a hefty fine). Section 1352 notes, however, that "An imposition of a civil penalty under this subsection does not prevent the United States from seeking any other remedy that the United States may have for the same conduct that is the basis for the imposition of such civil penalty."⁵

³ See, e.g., 1995 U.S. Comp. Gen. LEXIS 849, *18-19 (1995) ("[T]he Department of Justice has historically expressed the view that the President's constitutional role in the legislative process includes the duty to communicate with the citizens of the United States on matters that relate to legislation. . . . [L]obbying activities may not be limited when . . . personally undertaken by the President, . . . cabinet members within their areas of responsibility, and other Senate-confirmed officials appointed by the President within their areas of responsibility.") (quoting Office of Legal Counsel, U.S. Dep't of Justice, Anti-Lobbying Act Guidelines (1995)) (internal citations omitted).

⁴ 31 U.S.C. § 1352(c)(1).

⁵ Id. § 1352(c)(4). For example, because no funds are available for expenditures or obligations that violate Section 1913, if an officer or employee knowingly and willfully makes or authorizes an expenditure or obligation that violates Section 1913, he or she has automatically

C. New Category of Communications Exempt from Section 1913

Under both the previous and current version of Section 1913, communications that are deemed “necessary for the efficient conduct of the public business” are expressly exempt from Section 1913. The current version of Section 1913 adds a new exemption for communications “whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities.”⁶

D. Other Anti-Lobbying Statutes

The Department’s employees must comply with two anti-lobbying statutes in addition to Section 1913. These additional anti-lobbying statutes are: (1) the annual provision in the Treasury and General Government Appropriations Act prohibiting the use of appropriated funds for publicity or propaganda purposes⁷ (“Section 623”⁸) and (2) the annual provision in the Department of the Interior and Related Agencies Appropriations Act restricting lobbying with appropriated funds⁹ (“Section 302”¹⁰). The Act’s amendments do not affect the scope of either of these statutes.

exceeded the amount available in an appropriation or fund for the expenditure or obligation. He or she therefore may be prosecuted and receive a criminal penalty under the Anti-Deficiency Act. See 31 U.S.C. §§ 1341(a)(1)(A) & 1350.

⁶ The Attorney General has not issued advice on the meaning of this language.

⁷ Treasury and General Government Appropriations Act, 2003, Pub. L. No. 108-7, § 623 (2003) (“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.”).

⁸ Former versions of Section 623 were less specific (although its basic meaning has remained constant) and had different numbering.

⁹ Department of the Interior and Related Agencies Appropriations Act, 2003, Pub. L. No. 108-7, § 302 (2003) (“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.”).

¹⁰ Former versions of Section 302 had the same content, but different numbering.

The General Accounting Office (GAO) investigates alleged violations of appropriations acts and reports on its findings to Congress. It interprets Section 623 as prohibiting agency officials from making expenditures encouraging grass-roots lobbying, but allowing agency officials to express their views and agency policy on pending legislative and appropriative matters.¹¹

The GAO has interpreted Section 302 more expansively than Section 623 or the previous version of Section 1913.¹² As noted above, the GAO interprets Section 623—and Section 1913—as prohibiting agency officials from making expenditures directly encouraging grass-roots lobbying. On the other hand, the GAO interprets Section 302 as prohibiting government employees from engaging in lobbying campaigns or participating in events designed to support or oppose pending legislative goals (as set forth in bills and/or proposed presidential budgets) even where their activities or materials stop short of directly encouraging grass-roots lobbying.¹³ Like Section 623 and Section 1913, however, Section 302 prohibits neither good faith responses to requests for information nor public statements “that are strictly factual and devoid of positive or negative sentiment about pending legislation.”¹⁴

III. CONCLUSION

All employees of the Department must be aware of the amendments to Section 1913. First, the amendments expand the coverage of Section 1913 beyond members of Congress to jurisdictions, and/or government officials. Second, the amendments expand the type of Proposals about which lobbying is impermissible to include any legislation, law, ratification, policy, or appropriation. Third, the removal of Section 1913's mandatory removal provision may make the Department of Justice more willing to pursue violations than was previously the case. Finally, employees should remember that lobbying with appropriated funds is now permissible if the Attorney General determines that restricting the communication in question would violate the

¹¹ 1979 U.S. Comp. Gen. LEXIS 14, *6-7 (1979).

¹² See 1995 U.S. Comp. Gen. LEXIS 849, *11 (1995) (“[L]ike [other appropriations restrictions], [Section 302] applies to grass roots lobbying; however, unlike the other provisions, there is no requirement that the agency explicitly appeal to the public to contact Congress. Rather Section [302] has a broader reach, covering not only explicit but also implicit appeals to the public designed to promote public support for or opposition to pending legislation.”) (internal citations omitted).

¹³ See, e.g., 1999 U.S. Comp. Gen. LEXIS 157, *18-25 (1999) (concluding that communications by employees of the Forest Service that would “tend to promote public support” for a Forest Service Natural Resource Agenda violated Section 302).

¹⁴ 1995 U.S. Comp. Gen. LEXIS 849, *15 (1995) (internal quotation marks omitted); see also 1991 U.S. Comp. Gen. LEXIS 1601, *14-16 (1991).

Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities.

If you find that the amendments to Section 1913 create significant new obstacles to the Department's effective administration of its programs, please let me know of your specific problems. We will be happy to address questions you have about its impact.

I have appended to this memorandum helpful guidelines for use in complying with the requirements of the anti-lobbying statutes.

APPENDIX

Guidelines on Applying Anti-Lobbying Laws

1. *Presidentially-Appointed, Senate-Confirmed (PAS) Officials*

The anti-lobbying laws have traditionally been interpreted not to apply to activities personally undertaken by presidentially-appointed, senate-confirmed (PAS) officials within their areas of responsibility. There is no indication that the Act's amendments were meant to modify this interpretation. Section 1913's restrictions therefore apply to non-PAS employees engaging in grass-roots lobbying regardless of whether they are acting on their own initiative or at the behest of PAS or non-PAS employees. Accordingly, under Section 1913 and the other applicable anti-lobbying provisions, PASs may encourage the public to contact Congress, a jurisdiction, or an official of any government in speeches and similar public communications or in private communications such as letters, telephone calls, and meetings. PASs may not direct or request non-PAS employees to engage in activities that would violate the anti-lobbying laws.

2. *Non-PAS Employees*

Non-PAS employees, including SES, Excepted Service, and Competitive Service employees, may properly engage in activities that provide information about proposed and/or pending legislation, laws, ratifications, policies, or appropriations (collectively, "Proposals"). However, these activities are limited by the anti-lobbying statutes, including Section 1913. In general, non-PAS employees may not participate in activities or campaigns that are designed to generate public support for or opposition to Proposals. Both the content of what is said and the context of the activity are important in determining whether the activity violates the anti-lobbying statutes. Appeals to the public to support or oppose Proposals do not have to be explicit to violate the anti-lobbying statutes, taken together. Where an appeal for public support or opposition can be readily inferred from the context of the activity, even though words like "write your congressional representative to express outrage about this" are not used, the activity may be a violation. This is the most difficult area to apply these limitations. Factors that may be taken into account in determining whether an activity violates these laws include the type of activity, the audience, the timing relative to the status of the Proposals, and the nature of the forum. Improper expenditure of any amount of appropriated funds in any form -- salary, equipment, supplies, etc. -- constitutes a violation of the anti-lobbying statutes. The following specific examples of the effect of these statutes are included to provide guidance only. Please contact the Division of General Law (202-208-5216) if you need guidance on performing your duties within the boundaries of the anti-lobbying laws.

Non-PAS Employees MAY discuss Proposals with outside organizations and deliver speeches and make public remarks explaining Proposals and the Administration's position on Proposals. This includes participating in conferences or symposia to promote public awareness of Proposals, so long as they are not organized or designed for the purpose of advocating support for or opposition to such Proposals.

Non-PAS Employees MAY NOT participate in events or programs specifically designed to promote public support for or opposition to Proposals. For example, the GAO has concluded that participation by a non-PAS Departmental official in a press conference organized by non-governmental advocacy groups to criticize a legislative proposal under active consideration by Congress violated the predecessor to Section 302 of the Interior Appropriations Act.¹⁵

Non-PAS Employees MAY send information about Proposals to individuals or groups that have asked for this information, or that regularly receive information from the Department. This material may be sent by mail, facsimile, or Internet. This material may include information about the status of Proposals and the Administration's position on Proposals but **may not**, directly or indirectly, encourage the public to contact Members of Congress, jurisdictions, and/or government officials regarding the Proposals.

Non-PAS Employees MAY NOT engage in a grass-roots lobbying campaign involving expenditures for telegrams, letters, and other forms of communications that directly or indirectly encourage the public to contact Members of Congress, jurisdictions, and/or government officials in support of or opposition to Proposals.

Non-PAS Employees MAY NOT prepare or distribute letters, pamphlets, kits, booklets, publications, or television, radio, or film presentations that expressly or impliedly ask that anyone contact Members of Congress, jurisdictions, and/or government officials to support or oppose Proposals.

¹⁵ See 1995 U.S. Comp. Gen. LEXIS 849, *1 (1995). As was noted above, former versions of Section 302 had the same content, but different numbering.

Non-PAS Employees SHOULD NOT, regardless of cost, undertake "mass-mailings" or "mass faxes" on Proposals to individuals or groups that do not normally receive information on educational programs or legislation from the Department, and who have not asked for such information.

Non-PAS Employees MAY, through proper channels, initiate meetings or communicate directly with Members of Congress, jurisdictions, and/or government officials and their staffs regarding Proposals or transmit unsolicited constituent views to Members of Congress, jurisdictions, and/or government officials.

Non-PAS Employees MAY NOT initiate or coordinate meetings between members of the public and Members of Congress, jurisdictions, and/or government officials or their staff to discuss Proposals.

Non-PAS Employees MAY NOT provide members of the public with target lists of Members of Congress, jurisdictions, and/or government officials for the purpose of seeking to influence their position on Proposals.

Non-PAS Employees MAY write letters to the editor, "op-ed" articles, press releases, or other materials addressing (within the parameters of these Guidelines) Proposals and the Administration's position on Proposals so long as the materials identify the official's Federal Government title and position. They may also supply copies of remarks made by the Secretary or other PAS officials, press releases, or other relevant materials.

Non-PAS Employees MAY NOT "ghostwrite" letters to the editor, speeches, or other materials dealing with Proposals for anyone in a non-Federal position.

Non-PAS Employees MAY tell the public how they may obtain additional information regarding Proposals.

Non-PAS Employees MAY NOT request or recommend that a recipient further distribute materials regarding Proposals, or provide a large number of copies of such material for redistribution.

Non-PAS Employees MAY coordinate speeches and activities with other Federal officials.

Non-PAS Employees MAY NOT provide lists of, or correspondence from, persons who favor or oppose certain Proposals to groups that lobby Members of Congress, jurisdictions, and/or government officials, except where the material is requested and properly made available under the Freedom of Information Act.

Non-PAS Employees MAY, on their own time and with their own resources, take part in and/or advocate grass-roots lobbying to the extent that applicable ethics laws otherwise permit.