



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

FEB - 2 2010

MEMORANDUM

SUBJECT: Guidance on Indirect Lobbying Restrictions

FROM: Scott C. Fulton
General Counsel

A handwritten signature in blue ink that reads "Scott C. Fulton".

To: Administrator
Deputy Administrator
Assistant Administrators
Regional Administrators
Chief Financial Officer
Inspector General
Associate Administrators
Regional Counsels
Associate General Counsels

With the passage of EPA's annual appropriations act, I am providing guidance regarding the restrictions on the use of appropriated funds for indirect lobbying activities. In general, indirect lobbying (also known as "grassroots" lobbying) refers to indirectly appealing to the legislative branch of a government by means of appeals to members of the public to in turn lobby the Congress. For example, an EPA employee asking members of the public to contact Congress to express support for or opposition to legislation constitutes indirect lobbying.

Two appropriations act provisions prohibit EPA's use of appropriated funds for indirect lobbying. One provision, in EPA's annual appropriations act,¹ is referred to as the "**tends to promote**" provision because it prohibits the use of appropriated funds "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." The other provision, applicable government-wide, is in the annual Financial Services and General Government Appropriations Act.² It is referred to as the "**pending legislation**" provision because it prohibits the use of appropriated funds for "publicity or propaganda purposes, and for

¹ Section 402 of the Department of Interior, Environment, and Related Agencies Appropriations Act, 2010 (Pub. L. 111-88, 123 Stat. 2955 (Oct. 30, 2009)).

² This provision is in section 717 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111-117).

the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation designed to support or defeat legislation pending before Congress.” Both provisions are expected to continue to appear in annual appropriations acts.

The Government Accountability Office (GAO), whose opinions can serve as guidance on appropriations law, has expressed the view that the two appropriations act provisions, taken together, prohibit employees from explicitly or implicitly encouraging the public to contact Congress in support of, or in opposition to, a federal legislative proposal.³

The **Anti-Lobbying Act**⁴ (ALA) also restricts the use of appropriated funds for indirect lobbying activities. Under the DOJ Office of Legal Counsel’s interpretation of the ALA, it is narrower in some respects (*e.g.*, it prohibits only explicit requests) and broader in other respects (*e.g.*, it applies to indirect lobbying regarding state legislation) than the appropriations act provisions.

In general, this means that to comply with the appropriations act provisions (as interpreted by GAO) and the ALA, EPA employees may not explicitly or implicitly encourage the public to contact Congress in support of, or opposition to, a legislative proposal, nor explicitly encourage the public to contact state or local governments for that purpose. **Please refer to the attached table for a summary of each of these laws.**

Despite these limitations, Agency employees and officials, acting within the scope of their official duties, may:

- Educate and inform the public of the Agency’s or the Administration’s position on legislative proposals, and
- Directly contact or lobby members of Congress and their staffs or the legislative branch of another government, such as a State legislature, regarding the Agency’s or the Administration’s position on legislation (*i.e.*, direct lobbying).

For example, EPA personnel may explain the Agency’s view of a legislative proposal in discussions with outside organizations, speeches, and public remarks, and may participate in conferences or symposia to raise public awareness of a legislative proposal (provided the event is not designed to gain public support or opposition to the proposal). EPA officials also may contact members of Congress or their staffs directly to urge them to support or oppose pending legislation. Before engaging in these educational or direct lobbying activities, Agency employees and officials should coordinate with the Office of Congressional and Intergovernmental Relations and the Office of Public Affairs, as appropriate.⁵

³ The Department of Justice (DOJ), to whom executive branch agencies and departments typically look for final guidance on appropriations law issues, has not provided an interpretation or an opinion relative to the “tends to promote” provision. DOJ has, however, adopted GAO’s interpretation of the “pending legislation” provision.

⁴ 18 U.S.C. § 1913.

⁵ Nothing in this memorandum is intended to interfere with an employee’s right to engage in protected whistleblower activities. See, *e.g.*, the Administrator’s memorandum on Transparency in EPA’s Operations, April 23, 2009.

If you have additional questions regarding the ALA or the appropriations act provisions on indirect lobbying or would like to consult with OGC regarding a particular situation, please contact Richard Feldman, Assistant General Counsel, at 202-564-5434, or Leslie Darman, Attorney-Advisor, at 202-564-5452.

cc: Justina Fugh

Attachment

Summary of Indirect Lobbying Restrictions	Anti-Lobbying Act	“Pending Legislation” provision (GAO interpretation)	“Tends to Promote” provision (GAO interpretation)
Prohibits the use of appropriated funds* for:	Explicit requests to members of the public to contact lawmaking entity in support of, or in opposition to legislation	Explicit requests to members of the public to contact lawmaking entity in support of, or in opposition to pending legislation Providing assistance (e.g., preparing new fact sheets or similar materials) for persons or groups that EPA knows will be used to lobby Congress	Explicit and implicit requests** to members of the public to contact lawmaking entity in support of, or in opposition to a legislative proposal Providing assistance (e.g., preparing new fact sheets or similar materials) for persons or groups that EPA knows will be used to lobby Congress
Types of proposals covered	“any bill, measure, or resolution [that] propos[es] legislation, [a] law, ratification, policy or appropriation”	Any legislation pending before Congress	Any legislation pending in Congress and legislative proposals, including proposed appropriations and legislation in the President’s budget .
Type(s) of lawmaking entities covered	Congress, state, and local governments	Congress	Congress
When	Before or after the introduction of any bill, measure or resolution	After legislation is formally introduced in Congress	After legislation is formally introduced in Congress or, for proposed appropriations and legislation in the President’s budget, after it is submitted to Congress.
Exceptions	Acts undertaken personally by presidentially-appointed and Senate confirmed (PAS) officials Published written statements or public speeches urging support for or opposition to legislation Non-substantial grass roots lobbying campaigns (campaigns of less than \$50,000)	None recognized by GAO	None recognized by GAO

* The use of appropriated funds includes funds used for salaries, travel expenses, and government equipment such as computers and telephones.

** Factors GAO uses to determine whether an activity constitutes an **implicit request** to members of the public and therefore is indirect lobbying include: (1) timing; (2) setting; (3) audience; (4) content; (5) reasonably anticipated effect; and (6) intent.