
**Review of the Department of Education’s Outreach
Activities Related to the Student Aid and Fiscal
Responsibility Act of 2009 for Compliance with Restrictions
on Use of Appropriated Funds for Lobbying**

FINAL INSPECTION REPORT



**ED-OIG/I13K0003
December 2010**

Our mission is to promote the efficiency, effectiveness, and integrity of the Department’s programs and operations.



U.S. Department of Education
Office of Inspector General
Washington, D.C.

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

Evaluation and Inspection

December 29, 2010

Memorandum

TO: Anthony W. Miller
Deputy Secretary
Office of the Deputy Secretary

FROM: Wanda A. Scott /s/
Assistant Inspector General
Evaluation, Inspection, and Management Services

SUBJECT: Final Inspection Report
Review of the Department of Education's Outreach Activities Related to the Student Aid and Fiscal Responsibility Act of 2009 for Compliance with Restrictions on Use of Appropriated Funds for Lobbying (ED-OIG/I13K0003)

Attached is the final inspection report that covers the results of our Review of the Department of Education's Outreach Activities Related to the Student Aid and Fiscal Responsibility Act of 2009 for Compliance with Restrictions on Use of Appropriated Funds for Lobbying. We received your comments on December 27, 2010. A copy of these comments in their entirety is attached.

In accordance with the Freedom of Information Act (5 U.S.C. § 552), reports issued by the Office of Inspector General are available to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

We appreciate the cooperation given us during this review. If you or your staff have any questions, please contact W. Christian Vierling, Director, Evaluation and Inspection Services at 202-245-6964.

Enclosure

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EXECUTIVE SUMMARY

The objective of our inspection was to determine whether the Department violated 18 U.S.C. § 1913 (Section 1913) by improperly using appropriated funds for lobbying activities related to pending amendments to the Higher Education Act of 1965. We also reviewed whether the Department violated the lobbying restrictions of the Omnibus Appropriations Act, 2009. Our inspection is the result of a request from Representative John Kline, Ranking Member of the U.S. House of Representatives' Committee on Education and Labor.

To determine whether the Department improperly used appropriated funds for lobbying activities, we reviewed correspondence and statements identified by Representative Kline, internal and external email correspondence related to a letter the American Council on Education sent to Congress on April 21, 2009, and correspondence related to the *Student Aid and Fiscal Responsibility Act of 2009* between the Department and external entities that the Department provided to Congress in response to congressional requests. We found that based on existing guidance from the U.S. Department of Justice (DOJ) and U.S. Government Accountability Office (GAO), the correspondence and statements by Department officials did not violate the prohibitions on the use of funds for lobbying contained in Section 1913 or the Omnibus Appropriations Act, 2009.

DOJ has concluded that Section 1913 prohibits “substantial ‘grass roots’ lobbying campaigns of telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of Congress”¹ and “large-scale publicity campaigns to generate citizen contacts with Congress on behalf of an Administration position with respect to legislation or appropriations.”² According to DOJ, a violation of Section 1913 would require a substantial expenditure of appropriated funds, roughly equivalent to \$50,000 in 1989 dollars. Further, “there is no restriction on private communications with members of the public as long as there is not a significant expenditure of appropriated funds to solicit pressure on Congress.”³

The Department’s annual appropriation act has historically contained a restriction on the use of appropriated funds for publicity or propaganda designed to support or defeat legislation pending before Congress. For the time period of the activities under our review, the restriction is found in section 503(a) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2009, enacted as Division F of the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 802 (March 11, 2009). GAO has interpreted this and similar appropriations provisions as “applying primarily to indirect or ‘grassroots’ lobbying and not to direct contact with Members of Congress” and has stated that, “the statute prohibits appeals to members of the public suggesting that they in turn contact their elected representatives to indicate support of or opposition to pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner.”⁴

¹ DOJ Office of Legal Counsel, *Guidelines on 18 U.S.C. § 1913*, p. 2 (Apr. 14, 1995).

² Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to Dick Thornburgh, Attorney General, “Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts” p. 5 (1989) (Barr Memorandum)

³ Barr Memorandum, p. 1.

⁴ GAO *Principles of Federal Appropriations Law*, 3rd ed., p. 4-205.

GAO has also interpreted the prohibition to require a clear or explicit appeal to the public to contact Congress and rejected suggestions that the provision prohibits any statement “likely to influence” the public to contact Congress.⁵

⁵ Comp. Gen. Op. B-304715, *Social Security Administration – Grassroots Lobbying Allegation*, p. 4 (April 27, 2005).

BACKGROUND

On November 3, 2009, Representative John Kline, Ranking Member of the U.S. House of Representatives' Committee on Education and Labor, sent a letter to the Secretary of Education (Secretary) expressing a concern that officials from the Department of Education (Department) had engaged in lobbying activities related to the *Student Aid and Fiscal Responsibility Act of 2009* (SAFRA).⁶

Representative Kline requested that the Department provide his office with any and all documentation of communications between the Department and individuals not employees of the executive branch of the U.S. Government related to proposals included in SAFRA. The Department received similar letters from Representative Darrell Issa, Ranking Member of the U.S. House of Representatives' Committee on Oversight and Government Reform on November 12, 2009, and from Senator Michael B. Enzi, Ranking Member of the U.S. Senate's Committee on Health, Education, Labor, and Pensions on January 25, 2010.

On November 25, 2009, Representative Kline sent a letter to the Acting Inspector General requesting that the Office of Inspector General (OIG) perform a review to determine whether officials from the Department violated 18 U.S.C. § 1913 (Section 1913) or the restrictions in the Department's annual appropriations act.

The primary prohibitions on lobbying for Department employees are found in Section 1913, commonly referred to as the Anti-Lobbying Act, and in the Department's annual appropriation act. The U.S. Department of Justice (DOJ) has consistently concluded that Section 1913 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."⁷ In addition, the U.S. Government Accountability Office (GAO) has interpreted the appropriation act's provision on pending legislations to require an overt appeal to the public suggesting that they in turn contact their elected representatives to indicate support of or opposition to pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner.⁸ Further DOJ and GAO guidance on lobbying restrictions is provided in the Applicable Law and Guidance section of the report.

⁶ SAFRA proposed amendments to the Higher Education Act of 1965 (HEA) and was pending in the U.S. Congress at the time of Representative Kline's letter to the Secretary. SAFRA proposed to eliminate lending under the Federal Family Education Loan Program, make all new loans under Title IV of the HEA under the William D. Ford Federal Direct Loan Program beginning July 1, 2010, and increase the maximum annual Pell Grant scholarship. The legislation was introduced in the U.S. House of Representatives on July 15, 2009, and SAFRA's proposals were incorporated into the Health Care and Education Reconciliation Act, Pub. L. 111-152, which was signed into law on March 30, 2010.

⁷ Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to Dick Thornburgh, Attorney General, "Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts" p. 3 (1989) (Barr Memorandum).

⁸ GAO *Principles of Federal Appropriations Law*, 3rd ed., p. 4-205.

APPLICABLE LAW AND GUIDANCE

Section 1913 prohibits use of appropriated funds for activities designed to influence Congress:

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, 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 or official, at his request, 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 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.

DOJ, which is responsible for enforcing this statute, advised in a Memorandum for the Attorney General from William Barr, Assistant Attorney General, 13 Op. O.L.C. 361 (Sept. 28, 1989) (Barr Memorandum), that Section 1913 should be narrowly construed to avoid conflict with the President's responsibilities under the Constitution to communicate views on legislation to Congress and the public. DOJ advised that the statute should not 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 or to prohibit public speeches and writings designed to generate support for the Administration's policies and legislative proposals.

Based on these considerations and its analysis of the legislative history, DOJ concluded that Section 1913 prohibits "substantial 'grass roots' lobbying campaigns of telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of Congress"⁹ and "large-scale publicity campaigns to generate citizen contacts with Congress on behalf of an Administration position with respect to legislation or appropriations."¹⁰ According to DOJ, a violation of Section 1913 would require a substantial expenditure of appropriated funds, roughly equivalent to \$50,000 in 1989 dollars. Further, "there is no restriction on private communications with members of the public as long as there is not a significant expenditure of appropriated funds to solicit pressure on Congress."¹¹

⁹ DOJ Office of Legal Counsel, *Guidelines on 18 U.S.C. § 1913*, p. 2 (Apr. 14, 1995).

¹⁰ Barr Memorandum, p. 5.

¹¹ Barr Memorandum, p. 1.

The Department's annual appropriation act has historically contained a restriction on the use of appropriated funds for publicity or propaganda designed to support or defeat legislation pending before Congress. For the time period of the activities under our review, the restriction is found in section 503(a) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2009, enacted as Division F of the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 802 (March 11, 2009) (Omnibus Appropriations Act, 2009) and states:

No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or video presentation designed to support or defeat legislation pending before the Congress or any State legislature, except in presentation to the Congress or any State legislature itself.¹²

GAO¹³ has interpreted this and similar appropriations provisions as “applying primarily to indirect or ‘grassroots’ lobbying and not to direct contact with Members of Congress” and has stated that “the statute prohibits appeals to members of the public suggesting that they in turn contact their elected representatives to indicate support of or opposition to pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner.”¹⁴

According to GAO in a decision involving the Department, the appropriations provisions “do allow agencies to expend appropriated funds to communicate their views on pending legislation to the public or to meet with groups sharing their interest in legislation to exchange information and viewpoints.”¹⁵ GAO has found that “general requests for help or support in connection with spending initiatives the President wanted to include in the budget” made by Department officials in meetings with lobbying organizations and other organizations interested in education issues do not violate the appropriations provision.¹⁶

GAO has also interpreted the prohibition to require a clear or explicit appeal to the public to contact Congress and rejected suggestions that the provision prohibits any statement “likely to influence” the public to contact Congress:

We do not believe that the standard [suggested] offers a workable basis upon which to construe the law. Assessing whether an agency statement is “likely to influence” the public to contact Congress in support of the agency’s position is highly speculative and we harbor significant reservations about our ability to objectively make such a determination. More importantly, however, we are reluctant to apply such a standard to the prohibition on the use of appropriated funds that might limit or restrict public discussion on issues of public policy.

¹² A similar government-wide restriction appears in § 717 of Division D of the Omnibus Appropriations Act, 2009.

¹³ Although GAO decisions are not binding on the Executive Branch, DOJ has stated that the decisions are helpful in interpreting restrictions on use of appropriated funds.

¹⁴ GAO *Principles of Federal Appropriations Law*, 3rd ed., p. 4-205.

¹⁵ Comp. Gen. B-278413, *Department of Education Compliance with the Federal Advisory Committee Act and Lobbying Restrictions*, p. 16 (Dec. 30, 1989) (GAO Decision on Department Compliance with Lobbying Restrictions).

¹⁶ GAO Decision on Department Compliance with Lobbying Restrictions, p. 17.

Federal agencies and departments have a legitimate need to communicate with the public, as well as with Congress, regarding their policies and activities. This includes executive branch officials expressing their views regarding the merits or deficiencies of existing or proposed legislation, even when their objective may be to persuade the public to support the agency's position—so long as the public is not urged to contact Members of Congress. Indeed, we have been careful not to interpret the prohibitions on grassroots lobbying to overly restrict the use of public funds to disseminate to the public agency views on pending legislation or policy initiatives.

Under our established case law, we have required evidence of a clear appeal by the agency to the public to contact congressional members and to urge them to support the agency's position. This requirement was founded upon the language and legislative history of the grassroots lobbying provisions, and it is consistent with a proper respect for the right and responsibility of federal agencies to communicate with the public, as well as Congress, regarding agency policies and activities. We have no reason to think that Congress meant to preclude government officials from saying anything that might possibly cause the public to think about or take positions on the issues of the day and, as a result, contact their elected representatives. To the contrary, we see the free and open exchange of ideas and views as central to our political system and, accordingly, remain reluctant to construe these laws in such a way that would unnecessarily or excessively constrain agency communications with the public or Congress.¹⁷

¹⁷ Comp. Gen. Op. B-304715, *Social Security Administration – Grassroots Lobbying Allegation*, p. 4 (April 27, 2005). (Citations omitted.)

INSPECTION RESULTS

The objective of our inspection was to determine whether the Department violated Section 1913 by improperly using appropriated funds for lobbying activities related to pending amendments to the Higher Education Act of 1965 (HEA). We also reviewed whether the Department violated the lobbying restrictions of the Omnibus Appropriations Act, 2009.

To determine whether the Department improperly used appropriated funds for lobbying activities, we reviewed correspondence and statements identified by Representative Kline, internal and external email correspondence related to a letter the American Council on Education (ACE) sent to Congress on April 21, 2009, and correspondence related to SAFRA between the Department and external entities that the Department provided to Congress in response to congressional requests. We found that based on existing guidance from DOJ and GAO, the correspondence and statements by Department officials did not violate the prohibitions on the use of funds for lobbying contained in Section 1913 or the Omnibus Appropriations Act, 2009.¹⁸

FINDING – The Department Did Not Violate Prohibitions on the Use of Funds for Lobbying Contained in Section 1913 and the Omnibus Appropriations Act, 2009

Issues Specifically Identified by Representative Kline

In his letters to the Secretary and Acting Inspector General, Representative Kline identified four instances he believed indicated that the Department may have violated lobbying restrictions. We reviewed these four items, which were:

- A letter dated October 26, 2009, from the Secretary to the presidents of colleges and universities participating in the Federal Family Education Loan (FFEL) Program;
- The transcript of a conference call on October 2, 2009, between Department officials and community college presidents;
- A letter dated July 8, 2009, from the Chief Operating Officer for Federal Student Aid (FSA) to college presidents; and
- An email dated April 24, 2009, from the Deputy Assistant Secretary for External Affairs and Outreach to external organizations.

October 26, 2009 Letter

On October 26, 2009, the Secretary sent a letter to presidents of institutions participating in the FFEL Program. In the letter, the Secretary discussed institutions' transition from the FFEL Program to the William D. Ford Federal Direct Loan Program (Direct Loan Program) for the 2010-2011 academic year. The Secretary also stated that the most prudent course of action was

¹⁸ If appropriated funds were improperly used for prohibited lobbying activities, expenditure in violation of the prohibition would need to be reported to the President, Congress, and the Comptroller General. 31 U.S.C. § 1351; OMB Circular A-11, § 145 (2010).

for colleges and universities to ensure that their institutions were Direct Loan-ready for the 2010-2011 academic year and that President Barack Obama had proposed that Congress make the loan system more reliable by moving to a 100 percent Direct Loan delivery system. The Secretary explained how the Department could assist schools in transitioning to the Direct Loan Program.

The letter does not contain any appeal for the public to contact Congress concerning pending legislation, and therefore does not implicate Section 1913 or the appropriations restriction.¹⁹ There was no improper use of appropriated funds connected with this correspondence.

October 2, 2009 Conference Call

On October 2, 2009, eight Department officials held a conference call with community college presidents. The purpose of the call was to discuss some of the challenges facing community colleges and their students. Call participants discussed different aspects of SAFRA, then pending in the U.S. Senate.

During the call, the Under Secretary stated: “And so your voice is critically needed in this process. And we hope you’ll join us as we walk through opportunities before us, the largest of which right now is H.R. 3221 known as the American Graduation Initiative proposed by the President in June when he visited Warren, Michigan.” Later in the call, the Deputy Assistant Secretary for External Affairs and Outreach stated: “We will need your voices, your honest feedback and your support to be successful in this endeavor.”

These statements do not include an explicit request to contact Congress, and therefore, do not violate the lobbying restrictions of Section 1913 or the Omnibus Appropriations Act, 2009. GAO stated in its prior decision involving the Department that the appropriations restriction does not prohibit general statements by the Department requesting help or support for legislation.²⁰

July 8, 2009 Letter

On July 8, 2009, the Chief Operating Officer for FSA sent a letter to college presidents. In this letter, the Chief Operating Officer provided information about the Direct Loan Program, outlined President Obama’s Fiscal Year (FY) 2010 budget proposal, and described how the Department planned to assist institutions in transitioning to the Direct Loan Program.

The letter does not contain any appeal for the public to contact Congress concerning pending legislation, and therefore does not implicate Section 1913 or the appropriations restriction.²¹ There was no improper use of appropriated funds connected with this correspondence.

April 24, 2009 Email

On April 24, 2009, the Deputy Assistant Secretary for External Affairs and Outreach sent an email to several hundred individuals external to the Department.²² The email discussed the

¹⁹ See the Barr Memorandum and GAO decisions cited in the Applicable Law and Guidance section on page 4 of the report.

²⁰ GAO Decision on Department Compliance with Lobbying Restrictions, p. 17.

²¹ See the Barr Memorandum and GAO decisions cited in the Applicable Law and Guidance section on page 4 of the report.

President's FY 2010 budget proposal and stated that the President would be discussing the Direct Loan Program and his budget proposal later that day.²³ The email stated that many higher education organizations had expressed their support for the President's FY 2010 budget proposals for the Direct Loan Program and that organizations, led by ACE, had encouraged members of Congress to make Pell Grants an entitlement.

The email included the statement: "To help you communicate the merits of the President's proposal with your members and other audiences, the Department of Education offers the following information." The Deputy Assistant Secretary for External Affairs and Outreach told us that the term "members" in this statement is synonymous with the term "constituents" and that the term was not intended to mean "members of Congress." He also stated that the term "other audiences" referred to anyone with whom the email recipients communicate. The Deputy Assistant Secretary for External Affairs and Outreach said that the Department was trying to anticipate questions from the education community by providing information upfront.

The April 24, 2009, email includes no explicit appeal for email recipients to contact Congress. As previously noted, GAO decisions acknowledge that agencies can use appropriated funds to disseminate views on pending legislation.²⁴ GAO has further held that in the absence of an explicit appeal to contact Congress, when statements are "open to other interpretations," it would defer to an agency explanation if it appears reasonable under the circumstances.²⁵ Therefore, the email does not violate the restrictions on lobbying.

Communication between the Department and ACE Regarding a Letter to Congress

Background

The April 24, 2009, email discussed above contained a link to a letter ACE and 24 other higher education organizations sent to Congress on April 21, 2009, endorsing proposals to make Pell Grants an entitlement and convert from the FFEL Program to the Direct Loan Program. We reviewed emails that indicated prior communication between the Department and ACE regarding this letter to Congress, and we expanded the scope of our review to examine these communications.

²² The email was sent to 380 individuals representing 199 organizations generated from a list of individuals and organizations categorized as "higher education" in a database of subscribers for the Department's *ED Review* bi-weekly newsletter. The email recipients from this database often receive information from the Department and many have expressed interest in issues related to higher education.

²³ This email was sent before SAFRA's introduction. SAFRA (H.R.3221) was introduced in the U.S. House of Representatives on July 15, 2009. Any potential violation of Section 1913 or the Omnibus Appropriations Act, 2009, would have related to President Obama's proposed FY 2010 budget. President Obama released his FY 2010 Budget Proposal on February 26, 2009.

²⁴ GAO has also held that the appropriations restriction can be violated by using appropriated funds to provide assistance to private lobbying groups. (GAO *Principles of Federal Appropriations Law*, 3rd ed., pp. 4-213 – 214.) To the extent lobbying organizations were included in the email list, the information presented in the email does not rise to the level of assistance that GAO has found to be improper. (*Id.*) (Agency provided active assistance in the form of staff time, supplies and facilities for advertising campaign by lobbying organization that encouraged public to contact Congress.)

²⁵ GAO Decision on Department Compliance with Lobbying Restrictions, p. 21.

Specifically, we identified a series of email exchanges between the Deputy Under Secretary²⁶ and ACE's Senior Vice President for the Division of Government and Public Affairs (ACE's Senior Vice President) regarding the April 21, 2009, letter to Congress.

In email exchanges on April 1-2, 2009, ACE's Senior Vice President informed the Deputy Under Secretary that ACE sent a letter to the U.S. House of Representatives on April 1, 2009, in support of the House budget resolution's provisions on Federal student aid. ACE's Senior Vice President asked the Deputy Under Secretary if the Secretary could speak at an April 7, 2009, meeting of the Washington Higher Education Secretariat (WHES)²⁷ to make a personal appeal on the plans for higher education in the House budget resolution. In response, the Deputy Under Secretary offered to speak to WHES in the Secretary's place because the Secretary was not available. ACE's Senior Vice President responded that he was hoping the Deputy Under Secretary would make a "strong pitch" for Pell entitlement and the elimination of the FFEL Program and said that having someone from the Administration directly address WHES would help everyone support the President's plans for higher education.

In these same email exchanges, ACE's Senior Vice President informed the Deputy Under Secretary that he had plans for ACE to "have a letter on Budget Conference" that ACE would invite the organizations from the WHES to sign. ACE's Senior Vice President said that this letter would enable ACE and the Deputy Under Secretary to note that every major higher education organization was in favor of the President's FY 2010 budget proposal. ACE's Senior Vice President also told the Deputy Under Secretary to let him know if there was specific help that he needed prior to the WHES meeting on April 7, 2009.

On April 7, 2009, the Deputy Under Secretary spoke at the WHES meeting and discussed basic points about the President's proposals for higher education. Both the Deputy Under Secretary and ACE's Senior Vice President (who was present at the WHES meeting) told us that the Deputy Under Secretary did not ask those present at the meeting to contact Congress and did not discuss a potential letter from ACE to Congress.

On April 16, 2009, the Deputy Under Secretary emailed ACE's Senior Vice President about the status of the planned letter to Congress saying: "Is there a letter from the associations yet? It is important that you make clear that the Pell entitlement is the most important shift in aid policy in a generation (maybe two), and that it will only happen if we get the efficiencies of a single delivery system (for Pell, Stafford, Perkins) using federal capital." In the same email, the Deputy Under Secretary told ACE's Senior Vice President to let him know if he could help. The Deputy Under Secretary added that if there was any chance of a letter being complete on that day, he could "offer it up for the [Vice President's] event in St. Louis" the following day.

In his response to the Deputy Under Secretary's earlier email on April 16, 2009, ACE's Senior Vice President included a copy of the April 1, 2009, letter ACE sent to Congress and stated that

²⁶ The Deputy Under Secretary during the time period of our review began working at the Department in February 2009 but was not officially announced as the Deputy Under Secretary until April 20, 2009. He vacated that position in July 2010 for a position in FSA. For ease of reference in the text, we will refer to him as the Deputy Under Secretary throughout the report.

²⁷ WHES is coordinated by the office of the President of ACE and is composed of chief executives from approximately fifty associations, each of which serves a significant sector or function in postsecondary education.

there was a “trade off between moving quickly and having the entire community sign the letter.” The email stated three options ACE was considering for another letter to Congress. The first option was to send the April 1, 2009, letter to the House and Senate Budget Committees asking the conferees to maintain the provision to make Pell an entitlement in any conference deliberations. In the email, ACE’s Senior Vice President said that this letter would have no change in substance from the April 1, 2009, letter and could be complete the next day. ACE’s Senior Vice President also stated that this letter would have approximately 10 signatories, but would not have the National Association of Independent Colleges and Universities (NAICU).

The second option was the same as the first option, but instead of having only 10 signatories, ACE’s Senior Vice President would offer the letter to WHES to sign. In that case, there would be the potential for 30 or 40 signatories, but NAICU would not be able to sign. This option would have been complete by the following Monday.

The final option ACE’s Senior Vice President stated was to wait and send a letter with stronger language than the April 1, 2009, letter. This option would potentially have 30 to 40 signatories, including NAICU, since it would be sent after the NAICU Board meeting. The letter would have been completed by the end of the following week. ACE’s Senior Vice President concluded the email message: “Let’s discuss.”

Before responding to ACE’s Senior Vice President, the Deputy Under Secretary forwarded the ACE Senior Vice President’s email to three White House officials, one from the National Economic Council, one from the Domestic Policy Council, and one from the Office of Management and Budget, asking which of the three options they preferred. In email responses, two of the officials stated their preference for the third option and one official did not directly express a preference.

The Deputy Under Secretary wrote ACE’s Senior Vice President that “the current vote here” is to wait to have stronger, clearer language and to have support from NAICU. ACE’s Senior Vice President responded to the Deputy Under Secretary’s email that ACE would plan to go with that option.

Later on April 16, 2009, ACE’s Senior Vice President asked the Deputy Under Secretary: “Is it OK if I tell NAICU that I have been asked for a letter and that we will need to send one next week? I think it probably helps [NAICU’s President] to be able to tell his Board that he will need to make a decision about what to say by next week.” In the same email, ACE’s Senior Vice President said: “My assumption is that they [NAICU] will be very focused on [the Federal Perkins Loan Program] and that being with you on the big central issue (FFELP for Pell) may help them get a more sympathetic hearing from you on Perkins if there are specific issues that arise.”

The Deputy Under Secretary replied via email a short time later that ACE’s Senior Vice President could tell NAICU that he had been asked for a letter. The Deputy Under Secretary specifically responded to the ACE Senior Vice President’s question: “Yes. If we are going to win the Pell entitlement it needs to be absolutely clear that the community wants it, without wiggle words around the loan issue that will undermine that message.” ACE’s Senior Vice President responded that he would tell NAICU’s President that he had been asked for a letter and that it needed to be clear and unambiguous.

On April 17, 2009, ACE's Senior Vice President sent an email to a group of six organizations²⁸ stating that the "Administration has asked that we send a 'clear, unambiguous' letter to the Hill supporting the Pell entitlement / mandatory [Direct Loan] proposal." In the email, ACE's Senior Vice President said that ACE would start to prepare a letter which would be shared for revisions and comments.

ACE's Senior Vice President told us that he was also communicating with individuals in the White House at the time of this email and so his reference to the Administration may have referred to the White House.

On April 21, 2009, the Deputy Under Secretary sent an email to ACE's Senior Vice President and NAICU's Vice President for Government Relations and Policy Development asking, "What's the timing on a strong letter?" and stating, "It seems to be a critical moment." ACE's Senior Vice President responded that the letter would be going to Congress by noon that day.

Discussion

The email exchanges between the Deputy Under Secretary and ACE's Senior Vice President present two issues: 1) did the Deputy Under Secretary's inquiries about the status of ACE's letter and communication of views about the timing and strength of ACE's planned letter implicate the appropriations restrictions; and 2) did the Deputy Under Secretary's affirmative answer to ACE's Senior Vice President that he could represent that the Administration requested the April 21, 2009, letter constitute an improper appeal to the public to contact Congress.

For the first issue, we confirmed via interviews with both the Deputy Under Secretary and ACE's Senior Vice President that the idea for the April 21, 2009, letter was not initiated by the Deputy Under Secretary. ACE's Senior Vice President stated that the Deputy Under Secretary did not request the letter and had no role in ACE's decision to send the letter to Congress. This statement is consistent with the email exchanges we reviewed. ACE's Senior Vice President said that he sent the Deputy Under Secretary the three options for the letter in order to get the Administration's position on what it would prefer, but he was not asking the Administration if they wanted a letter to be sent. ACE's Senior Vice President said that he assumed the Administration would have an opinion about both the timing and strength of the letter but, ultimately, the final decisions were made by ACE.

The Deputy Under Secretary stated to us that his goal in working with ACE was to obtain public endorsements of the President's proposals for higher education and he was not necessarily interested in the form of the endorsement.

Although the inquiries and statement of views about a preferred letter indicated some involvement by the Deputy Under Secretary in the April 21, 2009, letter ACE sent to Congress, that involvement is not prohibited by the guidance issued by DOJ and GAO discussed in the Applicable Law and Guidance section on page 4 of the report. The guidance from DOJ and GAO emphasize that Section 1913 and the appropriations restriction are narrowly construed to

²⁸ The six organizations are the major higher education associations: ACE, NAICU, the Association of American Universities (AAU), the Association of Public and Land-grant Universities (APLU), the American Association of Community Colleges (AACC), and the American Association of State Colleges and Universities (AASCU).

prohibit grassroots lobbying in the form of express appeals to the public to contact Congress. Section 1913 and the appropriations restriction do not prohibit any effort that may influence public support for legislation.²⁹ In this case, ACE initiated, determined the contents of, and made the decision to send the April 21, 2009, letter to Congress. While the Deputy Under Secretary shared opinions (with input from White House officials) as to how the ACE letter could better support the President's legislative agenda, he did not request in those communications that ACE, other organizations, or their constituent members contact Congress.³⁰

For the second issue, the affirmative response from the Deputy Under Secretary that ACE's Senior Vice President could represent that the April 21, 2009, letter had been requested by the Administration occurred in a private email exchange. ACE's Senior Vice President stated that the representation would be used by ACE to convince another organization to join ACE's letter. This email contrasts significantly with an email exchange that GAO found to be a grassroots appeal in violation of the appropriations restriction: Comp. Gen. B-285298, *Lobbying Activity in Support of China Permanent Normal Trade Relations* (May 22, 2000). In that case, an official from the U.S. Department of Agriculture responded to an email report of a meeting with a member of Congress who stated he had not heard from any farmers in his district about a trade agreement with China. The official forwarded the message to several addresses, including two farmer organizations that represented over 600,000 farmers, with a message stating "We need to work on this ASAP. [The Member] needs to hear from the farmers in his district."³¹

Unlike the Deputy Under Secretary, the official from the Department of Agriculture initiated the message and clearly stated that farmers should contact the Congressman. The Deputy Under Secretary's message was not a similar express appeal to members of the public to contact Congress. During our review, we did not find any evidence that the Deputy Under Secretary directly requested that an organization sign the April 21, 2009, ACE letter to Congress or directly appealed to the public to contact members of Congress. Given the limited nature of the Deputy Under Secretary's communications with ACE and their context, the communications do not fit the description of prohibited grassroots lobbying that DOJ and GAO guidance indicate are prohibited, that is substantial expenditures of appropriated funds for large scale publicity campaigns or explicit appeals to members of the public to contact their elected representatives in support or opposition to pending legislation.

We concluded that the two issues presented by the email exchanges between the Deputy Under Secretary and ACE's Senior Vice President do not implicate Section 1913 or the appropriations restriction and there was no improper use of appropriated funds.

²⁹ In contrast to the restriction applicable to the Department, the Department of the Interior is subject to an appropriations restriction that prohibits not only grassroots lobbying, but "any activity . . . that in any way tends to promote public support or opposition to any legislative proposal." (GAO *Principles of Federal Appropriations Law*, 3rd ed., pp. 4-215 - 218.)

³⁰ According to the Barr Memorandum, White House officials are not subject to the restrictions on lobbying imposed by Section 1913. Those officials are also not funded by the Department's appropriation and would not be subject to the Department's restriction on use of appropriated funds.

³¹ Although GAO found the email to be a violation, it concluded that no further action was warranted as the expenditure of appropriated funds associated with the message was minimal. (Comp. Gen. B-285298, *Lobbying Activity in Support of China Permanent Normal Trade Relations* (May 22, 2000), p. 4.)

Documentation Provided to Congress

Senator Enzi and Representatives Kline and Issa requested that the Department provide them with all documentation of communications between the Department and individuals not employees of the executive branch of the U.S. Government related to proposals included in SAFRA. We reviewed all the items the Department provided to Congress, which were:

- An email dated November 16, 2009, from the Chief Operating Officer for FSA to presidents and chancellors of foreign institutions participating in the FFEL Program;
- An email dated October 26, 2009, from the Chief Operating Officer for FSA to financial aid administrators of institutions participating in the FFEL Program;
- A letter dated September 29, 2009, from the Chief Operating Officer for FSA to presidents of guaranty agencies;
- An email dated August 14, 2009, from the Chief Operating Officer for FSA to presidents of Historically Black Colleges and Universities (HBCUs);
- An email dated July 16, 2009, from FSA's Service Director of the Program Management Division to financial aid administrators; and
- An email dated July 10, 2009, from FSA's Director of Policy and Implementation to presidents and chancellors of foreign institutions.

We determined that none of the correspondence above contained any appeals for the public to contact Congress concerning pending legislation. We concluded, therefore, that these items did not implicate Section 1913 or the appropriations restriction and there was no improper use of appropriated funds.

November 16, 2009 Email

On November 16, 2009, the Chief Operating Officer for FSA sent a letter to presidents and chancellors of foreign institutions participating in the FFEL Program. The Chief Operating Officer stated that the purpose of the letter was to advise eligible participating institutions outside of the United States and the students attending those schools that the President's budget and SAFRA included specific provisions to allow for the participation of foreign schools in the Direct Loan Program. The Chief Operating Officer informed the institutions that the Department established a Foreign Schools Direct Loan Transition Team and that the Department was planning presentations and training sessions for foreign schools representatives. The Chief Operating Officer stated that the Department would provide additional information to schools on the specific actions they must take in order to participate in the Direct Loan Program.

October 26, 2009 Email

On October 26, 2009, the Chief Operating Officer for FSA emailed the financial aid administrators of institutions participating in the FFEL Program a copy of the October 26, 2009, letter the Secretary sent to presidents of institutions participating in the FFEL Program that discussed institutions' transition from the FFEL Program to the Direct Loan Program.

September 29, 2009 Letter

On September 29, 2009, the Chief Operating Officer for FSA sent a letter to guaranty agency presidents informing the agencies of the steps the Department would take to “ensure the ongoing stability of guaranty agency loan portfolios and to safeguard the interests of students, borrowers, and taxpayers.” The Chief Operating Officer provided an overview of changes to the FFEL Program due to the disruptions in the financial markets beginning in 2007 and an overview of the Ensuring Continued Access to Student Loans Act (ECASLA).

The Chief Operating Officer stated that schools’ shift to Direct Loans and the implementation of ECASLA had impacted guaranty agencies’ finances and that he had asked FSA staff to discuss with each agency its financial status, projections, and ideas for the future.

August 14, 2009 Email

On August 14, 2009, the Chief Operating Officer for FSA sent an email to HBCU presidents. The Chief Operating Officer stated that the Department had taken numerous steps to ensure a smooth transition for those schools entering the Direct Loan Program from the FFEL Program.

The Chief Operating Officer also said that the Department was aware of the concerns some HBCUs had about their transition and was committed to assisting HBCUs in their transition. The Chief Operating Officer said that the Department had met with several groups to provide one-on-one assistance, developed extensive training for financial aid administrators, and was providing webinars to assist new schools in the Direct Loan Program.

The Chief Operating Officer stated the Department was also working with software vendors to ensure they were prepared to provide their client institutions with the systems, training, and support needed for the transition to Direct Lending.

July 16, 2009 Email

On July 16, 2009, FSA’s Service Director for the Program Management Division (Service Director) sent an email to financial aid administrators outlining the steps FSA was taking to prepare schools for the transition to the Direct Loan Program. The Service Director stated that completion of the setup work did not obligate schools’ participation in the program.

July 10, 2009 Email

On July 10, 2009, FSA’s Director of Policy and Implementation sent an email to college presidents and chancellors informing them that the Department was working on transitioning to the Direct Loan Program.

DEPARTMENT COMMENTS

On December 15, 2010, we provided the Department with a copy of our draft inspection report for comment. We received the Department's comments to the report on December 27, 2010. The Department stated that it is encouraged that OIG found no violations of the applicable prohibitions against lobbying. The Department stated that it is committed to continuing to uphold the highest standards with respect to prohibiting lobbying activities and the proper use of appropriated funds, and it will be incorporating an analysis of this report into future training of key Department employees. The Department's response is attached in its entirety.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this inspection was to determine whether the Department violated 18 U.S.C. § 1913 by improperly using appropriated funds for lobbying activities related to pending amendments to the HEA. We also reviewed whether the Department violated the lobbying restrictions of the Omnibus Appropriations Act, 2009.

We notified the Office of the Deputy Secretary of our inspection on February 2, 2010, and began our fieldwork on February 4, 2010. We conducted an exit conference on December 8, 2010.

We reviewed applicable laws, regulations, and GAO cases related to the lobbying restrictions on executive branch employees. We also reviewed the following documents:

- GAO's *Principles of Federal Appropriations Law*, 3rd ed. (2004);
- A Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to Dick Thornburgh, Attorney General, *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts* (September 28, 1989);
- DOJ Office of Legal Counsel, *Guidelines on 18 U.S.C. § 1913* (Apr. 14, 1995), and
- Guidance entitled "Restrictions on Lobbying" from the Department's Office of General Counsel (2004).

We interviewed relevant officials from the Department and ACE's Senior Vice President.

We reviewed four items Representative Kline specifically identified as potential violations of lobbying restrictions in his letters to the Secretary and Acting Inspector General. These items were:

- A letter dated October 26, 2009, from the Secretary to the presidents of colleges and universities participating in the FFEL Program;
- The transcript of a conference call on October 2, 2009, between Department officials and community college presidents;
- A letter dated July 8, 2009, from the Chief Operating Officer for FSA to college presidents; and
- An email dated April 24, 2009, from the Deputy Assistant Secretary for External Affairs and Outreach to external organizations.

During our review of the April 24, 2009, email from the Deputy Assistant Secretary for External Affairs and Outreach to external organizations, we reviewed emails that indicated prior communication between the Department and ACE regarding an April 21, 2009, letter that ACE sent to Congress. We reviewed internal and external email correspondence related to this letter for the time period from February 1, 2009, through April 24, 2009.

After our initial review of this correspondence, we determined that the Deputy Under Secretary was the only Department official communicating with ACE related to the April 21, 2009, letter

to Congress. We identified 62 emails of interest and performed further examination of these emails.

Senator Enzi and Representatives Kline and Issa requested that the Department provide their offices with documentation of communications, including correspondence, call logs, emails, and presentations, between the Department and officials not employees of the executive branch of the U.S. Government related to SAFRA. We requested that the Department provide us with any documentation it provided to Congress in response to these congressional requests. We reviewed all the items the Department provided to Congress, which were:

- An email dated November 16, 2009, from the Chief Operating Officer for FSA to presidents and chancellors of foreign institutions participating in the FFEL Program;
- An email dated October 26, 2009, from the Chief Operating Officer for FSA to financial aid administrators of institutions participating in the FFEL Program;
- A letter dated September 29, 2009, from the Chief Operating Officer for FSA to presidents of guaranty agencies;
- An email dated August 14, 2009, from the Chief Operating Officer for FSA to presidents of HBCUs;
- An email dated July 16, 2009, from FSA's Service Director of the Program Management Division to financial aid administrators; and
- An email dated July 10, 2009, from FSA's Director of Policy and Implementation to presidents and chancellors of foreign institutions.

Our inspection was performed in accordance with the *Quality Standards for Inspections, 2005*, as appropriate to the scope of the inspection described above. These standards were adopted by the Council of the Inspectors General on Integrity and Efficiency in 2009.



UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

December 23, 2010

MEMORANDUM

TO: Wanda A. Scott
Assistant Inspector General
Evaluation, Inspection, and Management Services
Office of Inspector General

FROM: Anthony W. Miller

SUBJECT: **Draft Inspection Report on the** “Review of the Department of Education’s Outreach Activities Related to the Student Aid and Fiscal Responsibility Act of 2009 for Compliance with Restrictions on Use of Appropriated Funds for Lobbying” (ED-OIG/I13K0003)

Thank you for providing for comment your Draft Inspection Report regarding the Department of Education’s use of appropriated funds for lobbying activities related to amendments to the Higher Education Act of 1965. As we have discussed previously, we take our administrative responsibilities very seriously with regard to ensuring that our employees act consistently with the prohibitions against lobbying. We are also committed to the Department maintaining a high degree of integrity in carrying out all of its responsibilities, including ensuring that all appropriated funds to the Department are used appropriately. We have the highest respect for the need to act consistently with all applicable statutory and regulatory requirements, and we appreciate the hard work and quality of the inspection review conducted by the Office of Inspector General, and the thoroughness of the draft report.

We are encouraged that you found no violations of the applicable prohibitions against lobbying. We are committed to continuing to uphold the highest standards with respect to prohibiting lobbying activities and the proper use of appropriated funds. In that effort, we are incorporating an analysis of the report into future training of key Department employees.

Again, we thank you for your thoughtful preparation of the Draft Inspection Report. We look forward to continuing to work constructively with your office.

cc: W. Christian Vierling