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UNITED STATES GENERAL ACCOUNTING OFFICE

FOR RELEASE ON DELIVERY
EXPECTED AT 10:00 A.M. EST
MONDAY, APRIL 2, 1984

STATEMENT OF

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OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

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Mr. Chairman and Members of the Committee:

I would like to start with a few general comments about lobbying restrictions on Federal grantee or contractor activities. Then I'll try to answer your question about the authority of the Office of Management and Budget to promulgate such restrictions in the absence of statutory authority. I will then discuss the other specific issues you raised in your letter inviting the GAO to testify.

Let me emphasize at the outset that there is nothing inherently evil about lobbying. A House Select Committee investigating lobbying in 1950 put it this way:

> "Every democratic society worthy of the name must have some lawful means by which individuals and groups can lay their needs before the Government."

But there is no necessary nexus between the right to lobby and an entitlement to have the exercise of that right paid for with public funds. As the Supreme Court stated last year in Regan v. Taxation With Representation of Washington [103 S. Ct. 1997 (1983)]:

> "A legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right * * *."

This is an important distinction to keep in mind. It has been contended--notably by the Congressional Research Service, whose legal analysis of A-122 you sent to us--that an executive agency cannot bar "certain ideological activities" without a specific delegation of authority from Congress. * * *" [CRS-3-4 and 32]. In support of this proposition, CRS cites two Supreme Court decisions [Kent v. Dulles, 357 US 116 (1958) and Hampton v. Mow Sun Wong, 426 US 88 (1976)] which we find inapposite. In one case, the

Department of State refused to issue a passport to an acknowledged communist. The Court felt that was a deprivation of the plaintiff's fundamental right to travel. In the other case, the Civil Service Commission had issued regulations denying Federal employment to anyone, no matter how qualified, who was not a full fledged citizen. Again, the Court found that the agency had directly infringed a fundamental right--not to be denied employment by the Government solely because of the applicant's alien status.

The CRS contention might have had some merit had OMB persisted in promulgating its initial version of the A-122 amendments, which were published in January 1983. In what was perhaps an excess of zeal, OMB had gone too far and skirted dangerously close to a possible First Amendment violation. But that early version was withdrawn. In the months that followed, we worked closely with OMB staff,

reviewing and making recommendations for changes in a number of working drafts. The final product of those efforts--the proposed cost principles published on November 3, 1983, (the last version we have seen)--bears little resemblance to the initial version. Lobbying activities are not punished. They are treated as any other unallowable cost, such as advertising, or charitable contributions. Grantees are merely required to separate unallowable costs from properly reimbursable costs when submitting their vouchers to the granting agency.

In sum, we do not see the absence of a statutory directive as a Constitutional impediment to the issuance of the lobbying amendment to Circular A-122. As OMB points out in the Preamble to the November 3 proposed Circular, the responsibility for actually implementing grant programs has been delegated by the Congress to the grant-making agencies

themselves. Nevertheless, OMB has certain derived policy making and supervisory responsibilities, delegated by the President in Executive Order 11893 (December 31, 1975). It also has general management responsibilities assigned to OMB in a number of statutes. OMB circulars have been providing guidance to executive branch agencies for many years. The circulars are generally implemented swiftly by the various agencies concerned, through either promulgation of consistent regulations or incorporation of the principles involved into grant agreements.

By this time, Mr. Chairman, you must be wondering when I am going to tell you that the GAO does not support your bill, S.2251, the Uniform Lobbying Cost Principles Act of 1984. But I am not going to say that. As I've said, I see no constitutional problem and I do think it would be preferable to delay the introduction of legislation until there has been some operating experience with OMB's revised

Circular A-122. Yet, after reading the CRS arguments and those of others who have written to you in letters your staff shared with us, I can appreciate your desire to give lobbying cost principles a firm legislative basis.

As a general observation, though, I think that S.2251 may be overly detailed and specific. For example, I have some doubts that the State waiver provisions in section 4 are workable or desirable. The disclosure of funding provisions in section 5 also seem burdensome. There may well be provisions in the final OMB circular that present similar problems, but a regulation can be readily amended if experience bears out these misgivings. It is not that easy to amend a statute.

I would suggest that the bill be amended by retaining sections 2 and 6, with, perhaps, a briefer and more general

section 3 on definitions to establish broad principles but leave to OMB the spelling out of details.

You have asked me to comment on the need, from an auditor's perspective, for clear guidance on lobbying cost principles. An important premise underlying promulgation of a clear definition of lobbying activities is that contractors and grantees should be reimbursed only for the costs of contract or grant performance--that costs associated with the exercising of First Amendment rights to lobby are private and generally should not be financed with taxpayer funds. If we accept that premise, it is clear, given the many forms which lobbying may take, that a clear definition is essential to an understanding between the Government and its contractors and grantees as to the allowability of certain costs which might be incurred. It's as simple as that.

Our own legal cases and audit reports on alleged lobbying activities illustrate how badly the agencies and their auditors need comprehensive and consistent guidance on which activities may be federally-funded and which constitute unallowable lobbying. Grantees and contractors need this guidance just as much. In our experience, few violations of the lobbying rules by grantees and contractors are wilful. They result, for the most part, from confusion--from not knowing for sure when they are crossing an invisible line into unallowable activities. If we can draw the line more clearly, most so-called violations might never take place.

Your final question concerned whether generic differences between commercial procurement and a grant or contract with a non-profit organization might merit establishing different cost principles. There are, of course, some basis differences between the two kinds of relationships with the

Government but none that would seem to justify differential treatment of lobbying costs. Once it is decided that public funds should not be expended for lobbying costs, it makes little difference if the disallowance is made on presentation of a grant voucher or a for-profit contractor's voucher. The interest being protected--the taxpayer's money--is the same, regardless of the mechanism employed to disburse that money.

I will be happy now to answer any questions you may have.

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