

Congress of the United States

Washington, DC 20515

July 1, 2003

The Honorable Ann M. Veneman
Secretary
Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-0003

Dear Madam Secretary:

We are writing to call your attention to a new General Accounting Office (GAO) report and to previously unreleased e-mail communications that raise serious questions about tobacco activities at USDA. Since fiscal year 1994, Congress has prohibited USDA's Foreign Agricultural Service from spending any funds to "promote the sale or export of tobacco or tobacco products." The new information we have received leads us to conclude that USDA may have repeatedly violated this law.

GAO found that the Foreign Agricultural Service has prepared numerous analyses of international markets that "can be useful to tobacco exporters." Among the examples cited by GAO are analyses that specifically address the potential market for younger smokers in developing nations for U.S. tobacco companies, such as an analysis showing that "[y]ounger Malaysians prefer to smoke American-blended cigarettes" and an analysis that "younger smokers" in South Korea "tend to be more-image conscious and less swayed by taxes applied on more expensive products."

In addition, GAO found that Foreign Agricultural Service officials have participated in trade negotiations that led to the elimination of tobacco tariffs, such as the recent trade agreement with Chile. E-mail communications that we have obtained from the United States Trade Representative also show that a Foreign Agricultural Service analyst participated in trade talks with South Korea worth "over \$100 million" to Philip Morris.

These issues should be investigated fully. In the meantime, we urge you to suspend all analysis of international tobacco markets and end the participation of Foreign Agricultural Service staff in trade negotiations on tobacco. The rest of this letter explains our concerns in more detail.

The Durbin Amendment

In 1992, Congress prohibited USDA from using the Market Promotion Program to promote the sale and export of U.S. tobacco abroad. In 1993, Congress broadened this prohibition to apply to the entire Foreign Agricultural Service within USDA. This provision, which is known as the Durbin Amendment for its original sponsor, has been included in appropriations legislation from fiscal year 1994 to the present.

From the beginning, Congress intended that the Durbin Amendment prohibit a broad range of export promotion activities. The legislation was first proposed in the House

Appropriations Committee as an amendment to H.R. 2493, the fiscal year 1994 agriculture appropriations bill. In its report on the bill, the Committee noted that the Foreign Agricultural Service employs several different mechanisms to “maintain[] and expand[] foreign markets for agriculture products.” In addition to “special export programs,” these included “a worldwide agricultural intelligence and reporting system” involving a “continuous program of analyzing and reporting foreign agricultural production, markets, and policies,” as well as efforts to help “secure international trade conditions that are favorable toward our products.”¹

According to GAO, USDA has never specifically spelled out what activities are prohibited by the Durbin Amendment. GAO found that from 1994 to 1997, the Foreign Agricultural Service “did not provide any written guidance to its overseas staff regarding the restrictions on its tobacco-related activities.”² Starting in fiscal year 1998, USDA relied on cables from the Department of State as a way to inform its foreign staff of the Durbin Amendment. However, GAO found that these cables:

do not specifically address . . . continuing activities related to (1) collecting and disseminating information on foreign tobacco markets or (2) participating in negotiations on tobacco-related trade agreements.³

GAO did not specifically address the legality of actions by the Foreign Agricultural Service under the Durbin Amendment, stating, “We did not seek to determine whether ongoing agency activities are, or are not, prohibited under the appropriations restrictions.”⁴ GAO did, however, find that the Foreign Agricultural Service is providing important assistance to tobacco companies in two areas: tobacco market analyses and tobacco trade negotiations. The legality of both of these activities is questionable under the Durbin Amendment.

Tobacco Market Analyses

One of the ways that GAO found that the Foreign Agricultural Service helps U.S. tobacco companies is by producing tobacco market analyses. Every year, the Foreign Agricultural Service produces hundreds of “attaché reports” that describe and assess the foreign markets for dozens of agricultural commodities. GAO found that general guidance for these reports “encourages posts to view the countries as markets for U.S. products and competitors to U.S.

¹House Report 103-153, at 127.

²GAO, *Tobacco Exports: USDA’s Foreign Agricultural Service Lacks Specific Guidance for Congressional Restrictions on Promoting Tobacco*, 5 (May 30, 2003).

³*Id.* at 7.

⁴*Id.* at 2.

products.”⁵ Despite the passage of the Durbin Amendment, GAO found that the Foreign Agricultural Service is producing these attaché reports on tobacco markets around the world.

According to GAO, these reports “can be useful to tobacco exporters.”⁶ The recent tobacco reports go beyond the provision of publicly available data. They also include analysis that provides advice for U.S. tobacco exporters. For example, these reports have addressed:

- **Smoking Preferences of Young People.** A 2003 report noted that “[y]ounger Malaysians prefer to smoke American-blended cigarettes. With about half of the population below age 25, the demand for these cigarettes should continue to climb.”⁷ A 2002 report on South Korea’s market found that “younger smokers . . . tend to be more-image conscious and less swayed by taxes applied on more expensive products.”⁸ Another report the same year described “new packaging . . . and new presentations” as methods used in Taiwan to “target young smokers who prefer imports.”⁹
- **The Outlook for U.S. Exports.** In 2002, an attaché report projected that “[p]rospects for U.S. tobacco into the Italian market . . . are unfavorable”¹⁰ and another advised that in Austria, “there are no market development opportunities for cigarettes imported from the U.S.”¹¹ By contrast, the 2002 Malaysia report found “the outlook for cigarette consumption is brighter in this current year”¹² and a 2002 Taiwan report noted “U.S. flue-cured is forecast to have a 50 percent import share. . . . U.S. tobacco is competitive with tobacco imported from other countries.”¹³

⁵*Id.* at 11.

⁶*Id.* at 9.

⁷Foreign Agricultural Service, *Malaysia: Tobacco and Products*, 12 (May 16, 2003).

⁸Foreign Agricultural Service, *Korea, Republic of: Tobacco and Products*, 3 (May 1, 2002).

⁹Foreign Agricultural Service, *Taiwan: Tobacco and Products*, 4 (June 3, 2002).

¹⁰Foreign Agricultural Service, *Italy: Tobacco and Products*, 8 (Apr. 26, 2002).

¹¹Foreign Agricultural Service, *Austria: Tobacco and Products*, 12 (May 22, 2001).

¹²Foreign Agricultural Service, *Malaysia: Tobacco and Products*, 11 (May 10, 2002).

¹³Foreign Agricultural Service, *supra* note 9, at 3.

- **Tactics of Competing Exporters.** In a section entitled “Competitor Activities,” a 2003 report on Malaysia noted that “[m]ost competitor countries do little in the way of market promotion but use lower prices as a selling point.”¹⁴ Similarly, a 2003 report on South Korea warned, “U.S. tobacco is expected to be utilized less in the future because competing product from other countries is priced more attractively.”¹⁵
- **Potential U.S. Marketing Strategies.** A 2002 report on Mexico noted that “it is expected that the future Mexican market conditions will largely be dictated by price sensitivity.”¹⁶ A 2002 report on South Korea advised, “Hard packs and lively packaging designs ... are grabbing attention as consumers perceive these package characteristics as indicators of quality.”¹⁷ And a 2001 report stated that “burley tobacco” from the United States was considered “indispensable” in the Netherlands, and that sales would be especially high during a recession.¹⁸
- **The Political Climate for Tobacco Control.** A 2003 report on Zimbabwe advised that the government “does not discourage the production of tobacco products and the anti-smoking campaign is very low key.”¹⁹ And a 2001 report noted that in Austria, “no major anti-smoking campaigns took place in 2000 and in 2001 none are expected.”²⁰

As Congress has recognized, the “worldwide intelligence and reporting system” of the Foreign Agricultural Service is an important part of the agency’s efforts to “maintain[] and expand[] foreign markets for agricultural products.”²¹ The use of this system to increase foreign markets for U.S. tobacco companies — through the specific mechanism of these tobacco market analyses — would appear to violate the Durbin Amendment’s prohibition on any activity by the Foreign Agricultural Service that promotes the sale or export of tobacco products.

¹⁴ Foreign Agricultural Service, *supra* note 7, at 10.

¹⁵ Foreign Agricultural Service, *supra* note 8, at 2.

¹⁶ Foreign Agricultural Service, *Mexico: Tobacco and Products*, 13 (Mar. 7, 2002).

¹⁷ Foreign Agricultural Service, *supra* note 8, at 4.

¹⁸ Foreign Agricultural Service, *Netherlands: Tobacco and Products*, 6 (Aug. 10, 2001).

¹⁹ Foreign Agricultural Service, *Zimbabwe: Tobacco and Products*, 12 (May 23, 2003).

²⁰ Foreign Agricultural Service, *supra* note 11, at 4.

²¹ House Report 103-153, at 127.

Trade Negotiations

Another way in which Foreign Agricultural Service officials promote exports of U.S. agricultural products is by providing expert assistance to U.S. negotiators and the Department of State during trade talks on agricultural commodities. As part of its report, GAO found that this assistance is also routinely extended to international negotiations on tobacco and tobacco products and has included the provision of “tobacco-related data and information on production, supply and demand, and tariff-rate quotas.”²²

For example, GAO found that Foreign Agricultural Service officials supported the U.S. Trade Representative in a recent free trade negotiation with Chile. This agreement was notable for its last-minute reversal of a U.S. position not to lower tobacco tariffs. On the eve of the final day of negotiations, the United States and Chile agreed to eliminate tariffs on tobacco products entirely.²³

We have recently obtained from the U.S. Trade Representative previously unreleased e-mail communications between senior Philip Morris officials and U.S. government employees about a trade dispute with South Korea on tobacco. These documents also show that the Foreign Agricultural Service may have been directly involved in federal efforts to promote tobacco exports.

In early 2001, the South Korean government voted to end its national tobacco monopoly and permit foreign investment in domestic tobacco production. Along with this change, South Korea proposed new rules for companies interested in manufacturing cigarettes domestically and a 40% tariff on imports. These rules were strongly opposed by Philip Morris, which took the position that rules for foreign investment were too restrictive and that the tariff was imposed too quickly.²⁴

The U.S. government, led by the U.S. Trade Representative Robert Zoellick, aggressively lobbied South Korea to change its new tobacco plan. Earlier this year, Rep. Waxman and Sen. Durbin wrote Mr. Zoellick for more information about this effort. In response, the U.S. Trade Representative Office released a series of e-mail communications between Philip Morris’s senior

²²*Id.* at 13.

²³*Rep. Doggett and Rep. Waxman Assail Midnight Deal to End Tariffs on U.S. Cigarettes in Trade Agreement with Chile* (Dec. 11, 2002). The specific role played by the Foreign Agricultural Service in this outcome is not publicly known.

²⁴Philip Morris, *Philip Morris’ Position Paper on Issues Pertinent to the Proposed Amendments to the Presidential Decree of the TBA* (2001).

executive for trade policy and U.S. officials. A Foreign Agricultural Service analyst was one of a small number of recipients of many of these e-mails.

These e-mails show that on February 13, 2001, the Philip Morris executive wrote to the Foreign Agricultural Service analyst and four others that “unless the [U.S. Government] intervenes soon, we’re going to lose this market that took over \$100 million in U.S. exports in the first eleven months of the year 2000.”²⁵ Throughout the South Korean negotiation, Philip Morris sent at least four additional e-mails urging action or providing information to U.S. officials, including the Foreign Agricultural Service analyst.²⁶ Several months later, the Philip Morris executive wrote to an official in the U.S. Trade Representative’s office, “many thanks for your efforts to ensure meaningful market access. And good luck!”²⁷

The inclusion of a FAS analyst in these e-mails suggests that the Foreign Agricultural Service may have participated in the U.S. efforts to reduce the South Korean tobacco tariffs and increase cigarette exports. Doing so would appear to be a direct violation of the Durbin Amendment’s prohibition on promoting tobacco sales abroad.

USDA’s Response

In its comments on the GAO report, USDA has claimed to be in compliance with the Durbin Amendment. USDA has apparently taken the position that its attaché reports analyzing foreign tobacco markets are permitted because “legislative history . . . does not address this activity” and “an interagency task force considered it to be outside of the scope” of the Durbin Amendment.²⁸

In fact, as described above, the legislative history supports the position that the Durbin Amendment applies to providing analysis and advice to U.S. tobacco exporters. In addition to the original House Appropriations Committee report, numerous subsequent House and Senate

²⁵E-mail communication from Donald Nelson of Philip Morris to Peter Burr of the Foreign Agricultural Service and representatives from USTR and the Department of State (Feb. 13, 2001).

²⁶E-mail communications from Donald Nelson of Philip Morris to Peter Burr of the Foreign Agricultural Service and representatives from USTR and the Department of State (Jan. 3, 2001, Jan. 31, 2001, Feb. 23, 2001, and Feb. 26, 2001);

²⁷E-mail communication from Donald Nelson, Philip Morris, to B. Weisel, USTR (June 6, 2001).

²⁸Letter from A. Ellen Terpstra, Administrator of the Foreign Agricultural Service, to Dr. David B. Gootnick, General Accounting Office (May 14, 2003).

committee and conference reports have reiterated that one of the key export-promoting roles of the Foreign Agricultural Service is to “analyze[] agricultural information essential to the assessment of foreign supply and demand conditions in order to provide estimates of the current situation and to forecast the export potential for specific U.S. agricultural commodities.”²⁹ At the same time that this role was recognized, these committees specifically barred the use of any funding for tobacco promotion by officials of the Foreign Agricultural Service through the Durbin Amendment.

Notably, USDA failed to provide GAO with any support for its contention that legislative history or an “interagency task force” meeting legitimates its tobacco market analysis reports.³⁰ USDA also failed to address the participation of Foreign Agricultural Service officials in trade negotiations that eliminate or reduce tariffs on U.S. tobacco products.

Conclusion

As the original author of the Durbin Amendment and as a member of Congress with a long interest in tobacco policy, we believe that GAO’s findings and the recent e-mail communications between Philip Morris and USDA raise serious questions about whether the Department has violated congressional prohibitions on the use of federal funds to promote tobacco exports.

This matter should be investigated fully. For this reason, we ask that you provide:

- All documents related to contact between U.S. tobacco companies and the Foreign Agricultural Service, including written communications, e-mail communications, and minutes of meetings with dates and lists of attendees since January 2001.
- A report of the “interagency task force” meeting in which marketing advice to tobacco companies was apparently considered to be consistent with the Durbin Amendment, including minutes of the meeting, date, and a list of attendees.
- A detailed description of the assistance of Foreign Agricultural Service staff in the trade negotiations with South Korea, Chile, and other nations regarding tobacco products since January 2001, including all e-mails and documents from Foreign Agricultural Service personnel, minutes of meetings attended by Foreign Agricultural Service personnel, and notes of phone conversations involving Foreign Agricultural Service personnel.

²⁹See, e.g. Senate Report 103-102, at 128–9.

³⁰According to GAO, “During the course of our review, we asked Foreign Agricultural Service for, *but did not receive*, documentation that supports their contention that such reporting falls outside the scope of the restrictions. GAO, *supra* note 2, at 15 (emphasis added).

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- All internal documents, e-mails, and minutes of meetings in which compliance with the Durbin Amendment was discussed since January 2001.

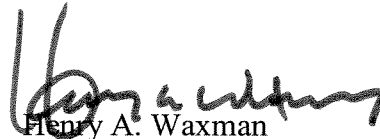
Until this matter is resolved, we also urge you to suspend all Foreign Agricultural Service assistance to trade negotiations that have the goal of lowering tobacco tariffs or reducing trade barriers to U.S. tobacco companies. We also ask that you suspend any analysis of international markets for tobacco products.

Finally, we ask that you reply to this letter by July 15, 2003.

Sincerely,



Richard A. Durbin
Ranking Minority Member
Subcommittee on Oversight of Government
Management, the Federal Workforce, and
the District of Columbia
Committee on Governmental Affairs
U.S. Senate



Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
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