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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: State Justice Institute—Newsletter Advertising Charges

File: B-307317

Date: September 13, 2006

DIGEST

The State Justice Institute (Institute) may retain a fee for the use of advertising space in its semiannual newsletter. Congress established the Institute as a private, nonprofit corporation. 42 U.S.C. § 10702(a). Although the Institute has many aspects of a federal agency, its authorizing statute states that “[e]xcept as otherwise specifically provided . . . the Institute shall not be considered a department, agency, or instrumentality of the Federal Government.” 42 U.S.C. § 10704(c)(1). Nothing in the Institute’s authorizing legislation explicitly or implicitly requires application of the miscellaneous receipts statute, which states that all money received “for the government” must be deposited in the Treasury. 31 U.S.C. § 3302(b). Thus, the Institute is not subject to the miscellaneous receipts statute. Certain legal and policy considerations may inform the Institute’s choices regarding advertising it carries in its newsletter.

DECISION

The Executive Director of the State Justice Institute (Institute) has requested an advance decision under 31 U.S.C. § 3529 regarding whether the Institute may retain a fee for the use of advertising space in its semiannual newsletter. Letter from Kevin Linskey, Executive Director, Institute, to David M. Walker, Comptroller General, Dec. 30, 2005. The Director’s concern is rooted in the miscellaneous receipts statute, 31 U.S.C. § 3302(b), which dictates that in the absence of authority to the contrary, an agency receiving funds on behalf of the government may not retain those funds but must deposit them in the general fund of the Treasury. We conclude that the Institute is not subject to the miscellaneous receipts statute and under its authorizing statute the Institute may retain a fee for advertising space in its newsletter.

BACKGROUND

Congress provided for the establishment of the Institute in 1984. State Justice Institute Act of 1984, Pub. L. No. 98-620, title II, 98 Stat. 3335, 3336 (Nov. 8, 1984), *codified at* 42 U.S.C. §§ 10701–10713. The Institute’s purpose is to further “the development and adoption of improved judicial administration in State courts in the United States.” 42 U.S.C. § 10702(a). This statute establishes a private, nonprofit corporation. *Id.* It is incorporated in Virginia as a nonstock corporation under title 13.1, chapter 10 of the Code of Virginia Annotated. *Articles of Incorporation of State Justice Institute*, Sept. 24, 1986. The Board of Directors consists of 11 members appointed by the President and confirmed by the Senate. 42 U.S.C. § 10703(a)(1). The Institute carries out its mission primarily by providing funds to state court systems and affiliated organizations through grants, cooperative agreements, and contracts. 42 U.S.C. § 10705(a).

The Institute receives an annual appropriation from Congress. *E.g.*, Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, title V, 119 Stat. 2290, 2333 (Nov. 22, 2005) (appropriating a lump sum for Salaries and Expenses). The Institute is authorized to make purchases from the General Services Administration, and its employees are eligible to receive certain federal employment benefits. 42 U.S.C. § 10704. Except for limited purposes specified in its authorizing statute, the Institute is not a government agency or instrumentality, and its employees are not to be considered employees of the United States. *Id.*

ANALYSIS

Whether the Institute may retain a fee for the use of advertising space in its newsletter depends upon whether it is subject to the miscellaneous receipts statute, 31 U.S.C. § 3302(b).¹ This statute provides that in the absence of contrary authority “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury . . . without deduction for any charge or claim.” Thus, without statutory authority to retain for its own use funds it receives, an agency must deposit such funds in the Treasury. *See* B-300826, Mar. 3, 2005. Failure to do so would result in augmentation of its appropriation. *Id.*

¹ We accept, for purposes of our analysis, that the Institute may charge a fee for advertising space, since the Institute may exercise all the powers conferred upon it by the Virginia Nonstock Corporation Act, under which it is incorporated, 42 U.S.C. § 10702, and that Act authorizes the Institute to “exercise all powers necessary or convenient to effect any or all of the purposes for which [it] is organized.” Va. Code Ann. § 13.1-826. However, whether the Institute may retain these fees for its own use rather than remitting them to the Treasury is a separate issue.

To be subject to the miscellaneous receipts statute, the Institute must have “an official or agent of the Government receiving money for the Government.” The Institute has some aspects of a federal agency. It receives an annual appropriation, its Board of Directors is appointed by the President and confirmed by the Senate, its employees are eligible to receive certain federal employment benefits, and it may purchase items from the General Services Administration. However, the Institute’s authorizing statute makes it clear that except as otherwise explicitly provided, the Institute “shall not be considered a department, agency, or instrumentality of the federal government.” 42 U.S.C. § 10704(c)(1). We find nothing explicitly or implicitly in the Institute’s authorizing statute that would otherwise suggest or require application of the miscellaneous receipts statute to the Institute. Congress also made clear that, except for specific exceptions not applicable here, the officers and employees of the Institute “shall not be considered officers or employees of the United States.” 42 U.S.C. § 10704(d)(1). The Institute is not a government agency nor does it act on behalf of the government. Although Congress imposed on the Institute certain requirements typically applicable to a federal agency, it did so selectively, against the general backdrop of a private corporate entity. 42 U.S.C. § 10702(a). The Institute is therefore not “receiving money for the Government.”

As a private corporation, the Institute is generally not subject to the same restrictions and controls on its expenditures as are government agencies and establishments even though it receives appropriations directly from the Congress. B-131935, July 16, 1975. For the most part, it may conduct its business in the same manner as any other private, nonprofit corporation. *Id.* This includes retaining for its own use fees collected from the sale of advertising space in its newsletter. The Institute must, of course, adhere to its authorizing legislation, any restrictions contained in its appropriation acts, or other applicable law.²

While the Institute may retain a fee for the use of advertising space in its newsletter, its authorizing statute constrains the content of advertising the Institute chooses to carry. First, the Institute may not attempt to influence either the passage or the defeat of legislation pending in Congress or any state or local legislative body. 42 U.S.C. § 10707(a)(3). The Institute also may not identify itself with any political

² While the Institute is not constrained by the miscellaneous receipts statute by virtue of its status as a private, nonprofit corporation, the Institute should also consider the application of other law to its proposed fund-raising activity. For example, where “the government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.” *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding Amtrak is a government entity for purposes of individual rights guaranteed by the Constitution).

party or association, or any candidate for public or party office. 42 U.S.C. § 10707(c).

Federal policy considerations may also influence the content of advertising the Institute carries. Although there is no governmentwide legal restriction, federal policy is generally opposed to commercial advertising in federal publications. Joint Committee on Printing, United States Congress, *Government Printing and Binding Regulations*, § 13 (reprinted 1990). This policy is based on concerns that such advertising might create an unfair advantage for particular private entities by creating the impression of government endorsement. *Id.*

Although the Institute is not a government agency, this policy may still inform the Institute's choice of advertising. In addition to possessing some of the traditional indicia of a federal agency as discussed above, the Institute's public role also appears in many ways to be governmental. For example, the Institute awards grants and contracts primarily to state and local courts and nonprofits operating in conjunction with state judicial branches. 42 U.S.C. § 10705(b). These grants and contracts are intended to enhance the performance of state and local court systems. 42 U.S.C. § 10705(c). In addition, the Institute must follow notice and comment procedures before it issues rules and regulations and must publish new rules and regulations in the *Federal Register*. 42 U.S.C. § 10702(f). Thus, while the Institute is a private, nonprofit corporation, the principles supporting the federal policy against commercial advertising should inform the Institute's judgment in its choice of the nature and scope of advertising it will publish in its newsletter. We recommend that the Institute consult with the appropriate committees of Congress before adopting a policy concerning advertising.

CONCLUSION

Congress established the Institute as a private, nonprofit corporation. Under its authorizing statute, it is not considered a department, agency, or instrumentality of the federal government, nor are its officers and employees considered officers and employees of the United States. Thus, the Institute, by collecting fees for advertising in its newsletter, is not "receiving money for the Government." As such, it is not subject to the miscellaneous receipts statute. Accordingly, the Institute may retain a fee for the use of advertising space in its newsletter. In doing so, the Institute should be cognizant of the legal constraints and policy considerations regarding advertising it chooses to carry.

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke at the end.

Gary L. Kepplinger
General Counsel