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March 10, 2004

The Honorable Frank R. Lautenberg
The Honorable Edward M. Kennedy
The Honorable John F. Kerry
The Honorable Jon S. Corzine
United States Senate

The Honorable Jan Schakowsky
The Honorable Frank Pallone, Jr.
The Honorable Pete Stark
The Honorable Charles B. Rangel
The Honorable Jim Davis
United States House of Representatives

Subject: Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of appropriated funds for flyer and print and television advertisements

This responds to your requests for our legal opinion regarding the Department of Health and Human Services's (HHS) use of appropriated funds to produce and distribute a flyer and print and television advertisements concerning the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA).[1] Specifically, you ask whether HHS's use of appropriated funds constitutes a violation of the "publicity or propaganda" prohibitions in the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, Div. F, Tit. VI, § 624, 118 Stat. 3 (2004), and the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117 Stat. 11, 470 (2003). The prohibitions in both Acts contain the same language: "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." 118 Stat. 3, 117 Stat. at 470.

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[1] Senator Frank R. Lautenberg's letter of January 29, 2004, requesting our legal opinion was subsequently joined by Senators Jon S. Corzine, Edward M. Kennedy, and John F. Kerry, and Representatives Jim Davis, Frank Pallone, Charles B. Rangel, Jan Schakowsky, and Pete Stark by letter of February 5, 2004. Both letters expressed concerns about the political nature of the two-page flyer and print and television advertisements that HHS produced.

As agreed, this opinion addresses the text of: (1) the cover letter and flyer that HHS provided us on February 25, 2004;[2] (2) a transcript of a television commercial entitled "The Right Answer," dated January 22, 2004; and (3) an advertisement placed in the February 5, 2004, issue of *Roll Call*.[3] We have enclosed copies of these materials. To respond to your requests, on February 6, 2004, we wrote HHS for factual information regarding its plans and its legal justification for its use of appropriations for this purpose. Letter from Gary L. Kepplinger, Deputy General Counsel, United States General Accounting Office (GAO), to Alex Azar, General Counsel, HHS, February 6, 2004 (Kepplinger Letter). Because of your concerns about the political nature of the flyer, we asked HHS to justify specific statements in the flyer, including references to Health Savings Accounts and the statement that MMA "preserves and strengthens" Medicare. At your request, we also met with the staff of concerned Members who wanted to express their views.[4] In addition, we had a telephone conversation with majority staff of the House Committee on Energy and Commerce for the same purpose.

On February 25, 2004, HHS replied. Letter from Dennis G. Smith, Acting Administrator, Centers for Medicare & Medicaid Services (CMS) to Gary L. Kepplinger, Deputy General Counsel, GAO, February 25, 2004 (Smith Letter). In its reply, among other things, HHS defended its use of the phrase "preserves and strengthens." It also made changes to the text of the flyer that was posted on its website and provided to us by Senator Lautenberg in his January 29, 2004, request. HHS deleted the references to Health Savings Accounts, which are not available to those eligible for Medicare. In addition, HHS revised the statement that Medicare beneficiaries could keep their coverage "exactly the same," and the flyer now reads that beneficiaries who are "happy with" their current Medicare coverage "can keep it."

As we explain below, HHS's use of its appropriations to produce and disseminate the materials at issue does not violate the publicity or propaganda prohibitions in the appropriation acts.[5] We note that HHS has explicit authority to inform Medicare

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[2] Letter from Dennis G. Smith, Acting Administrator, Centers for Medicare & Medicaid Services (CMS), to Gary L. Kepplinger, Deputy General Counsel, GAO, February 25, 2004. This reply was supplemented by discussions with CMS officials.

[3] As agreed, we did not obtain and evaluate information from beneficiaries concerning the utility to them of these materials.

[4] This meeting included members of your staff and the staffs of Senators Jon S. Corzine, Edward M. Kennedy, John F. Kerry, and Hillary Rodham Clinton, the staffs of Representatives Jim Davis, Frank Pallone, Jan Schakowsky, and Pete Stark, as well as minority staff of the House Committee on Ways and Means.

[5] We obtained information from HHS regarding the costs to HHS of printing and mailing the flyer and cover letter, producing and airing the television commercial, and producing and publishing the *Roll Call* advertisement. As agreed, we did not audit

beneficiaries about changes to Medicare resulting from MMA and, thus, its justification for the materials is afforded considerable deference. However, we point out that the HHS materials have notable omissions and other weaknesses. For example, enrollees for the drug discount card program to start in June 2004 may be charged an annual fee, and savings from the discount cards may vary across covered drugs. In our view, the materials are not so partisan as to be unlawful in light of our prior decisions and opinions.

In this legal opinion, we do not examine nor do we express a view on the overall economy, efficiency, or effectiveness of these print and television advertisements. We do question, however, the prudence and appropriateness of HHS's decision to communicate with Members of Congress and congressional staff by placing an advertisement in *Roll Call*. There are any number of more effective vehicles to communicate with Members of Congress, and at less cost, than advertising in a newspaper.

BACKGROUND

After lengthy and contentious debate, MMA was enacted on December 8, 2003. See Pub. L. No. 108-173, 117 Stat. 2066. It made numerous changes to Medicare, the federal health insurance program under title XVIII of the Social Security Act that serves beneficiaries 65 and older, certain disabled individuals under 65, and individuals with end-stage renal disease. Among other things, MMA established a voluntary prescription drug benefit program. *See* MMA § 101(a), 117 Stat. 2071-2150 (adding new sections 1860D-1–1860D-42 to the Social Security Act) (*to be codified at* 42 U.S.C. §§ 1395w-101–1395w-152). Beginning in 2006, the program will assist beneficiaries with the cost of outpatient prescription drugs by permitting them to enroll in private-sector prescription drug plans that meet requirements set out in MMA. *Id.* at 117 Stat. 2071-2131. In addition, MMA authorized Medicare to endorse prescription drug discount cards that beneficiaries may purchase beginning in June 2004 to obtain discounts on covered prescription drugs until the drug benefit becomes available. *Id.* at 117 Stat. 2131–48. Further, MMA established the Medicare Advantage Program to replace Medicare's managed care option known as Medicare+Choice, under which beneficiaries may elect to receive benefits through managed care organizations rather than through the traditional fee-for-service arrangement. *See* MMA §§ 201–241, 117 Stat. 2176–2221. MMA contains provisions unrelated to the Medicare program as well. For example, it amended the Internal Revenue Code to allow qualifying taxpayers to make tax-free contributions to Health Savings Accounts for their future medical expenses. *See* MMA § 1201(a), 117 Stat. 2469-2476 (adding new section 223 to the Internal Revenue Code) (*to be codified at* 26 U.S.C. § 223).

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that information. The unaudited cost information is provided in an enclosure to this opinion.

Flyer and Cover Letter

HHS has advised us that to inform beneficiaries of new Medicare program benefits, it will mail flyers to all Medicare beneficiaries. Smith Letter, Enclosure 1 at 7, Enclosure 2 at 1. This mailing will contain a cover letter signed by Secretary of HHS Tommy G. Thompson and a flyer entitled "The Facts about Upcoming New Benefits in Medicare." *Id.* The cover letter states: "As a result of a new law, Medicare is making some of the most significant improvements to the program since its inception in 1965." The cover letter also briefly explains some of the new benefits in three discrete sections. Specifically, it indicates that beneficiaries can save money on prescription drugs through Medicare-approved drug discount cards starting in June 2004, and through prescription drug coverage starting in 2006. It also states that Medicare will include benefits such as a "Welcome to Medicare" physical exam for beneficiaries when they join Medicare and screening tests for the early detection of heart disease and diabetes, which it characterizes as "better preventive care." Finally, it states that "the new law makes substantial investments in the health care system to promote the highest quality of health care for people with Medicare," with additional help for those in rural communities.

A two-page flyer, accompanying the letter, advises beneficiaries that "[t]his new law preserves and strengthens the current Medicare program, adds important new prescription drug and preventive benefits, and provides extra help to people with low incomes." The flyer then contains highlighted banners, announcing "Drug Discount Cards Start in 2004," "New and Improved Preventive Benefits Start in 2005," and "Prescription Drug Plans Start in 2006." Under each banner, brief statements appear about the relevant provisions of MMA. With respect to drug discount cards, the flyer contains very general information concerning the Medicare-approved drug discount cards, savings for low-income individuals with the drug discount cards, and the new Medicare Advantage plans. With respect to preventive benefits, the flyer identifies new preventive benefits, including screening for cardiovascular disease and diabetes and a one-time initial wellness physical exam within the first six months of enrollment. The section on prescription drug plans lists five general characteristics of the plans, although it notes that plans may vary. This section explains that "extra help will be available" for some people with low incomes and limited assets, and the choices will be expanded under Medicare Advantage to include regional preferred provider organization plans. The flyer also advises beneficiaries that the benefits are voluntary and that they can choose to remain in the traditional Medicare plan. Finally, a section entitled "Questions about Medicare?" directs beneficiaries to visit www.medicare.gov or to call 1-800-MEDICARE to obtain "the latest information about Medicare."

An earlier version of the flyer that you enclosed with your request and that had appeared on HHS's website, but was not mailed to beneficiaries, had an additional banner entitled "News for All Americans," which announced the availability of Health Savings Accounts, to which eligible taxpayers will make tax-free contributions, even though Health Savings Accounts will not be available to those eligible for Medicare. Our February 6, 2004, letter to HHS questioned the inclusion of this section in a flyer

to Medicare beneficiaries. Kepplinger Letter at 2. Subsequently, after receiving our letter, HHS edited the flyer and removed the reference to Health Savings Accounts. Smith Letter, Enclosure 1 at 11-12. The revised flyer contains other changes as well. For example, on the first page of the earlier version of the flyer, HHS had stated: "If you are happy with the Medicare coverage you have, you can keep it exactly the same." HHS deleted the phrase "exactly the same," and the flyer now reads: "If you are happy with the Medicare coverage you have, you can keep it."

Advertisements

HHS has already run advertisements on MMA in print media and on national television networks. On February 5, 2004, a full-page advertisement appeared in *Roll Call*,[6] a newspaper directed primarily to Members of Congress, congressional staff, and those whose work brings them into regular contact with these officials. Entitled "Same Medicare. More Benefits," this advertisement sets out five bolded questions with answers in smaller print. The advertisement emphasizes that beneficiaries may choose to keep the same coverage they currently have or take advantage of the new benefits available. The advertisement highlights the Medicare-approved drug discount card program to start in June 2004, prescription drug care coverage to start in 2006, and preventive benefits to start in 2005. Additionally, the advertisement directs beneficiaries to 1-800-MEDICARE and www.medicare.gov for more information regarding benefits.

Similar to the *Roll Call* advertisement, the television advertisement also contains a question and answer format, in which actors playing Medicare beneficiaries ask a series of questions that are answered by the announcer and title cards that follow each question. Like the print advertisements, the television advertisement involves the assertion that changes to Medicare involve the "Same Medicare. More Benefits." However, this advertisement focuses only on the new provisions allowing for savings on prescription drugs, specifically the drug discount card and the prescription drug benefit. Like the other materials, the television advertisement ends in a frame with the 1-800-MEDICARE telephone number on the screen and the announcer directing the public to call the number for more information.

DISCUSSION

At issue here is the prohibition on using appropriations for the purpose of publicity or propaganda. HHS has obligated fiscal year 2004/2005 CMS program management appropriations (a two-year appropriation) for the flyer and beneficiary mailing. Smith Letter, Enclosure 1 at 2. For the two advertisements, HHS obligated fiscal year 2003 CMS program management appropriations. *Id.* These program management funds are derived from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund. *See* MMA § 1015(a), 117 Stat. 2446

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[6] In addition to *Roll Call*, we understand from informal discussions with an HHS official that advertisements were placed in several other newspapers, including *The Hill*, *The Washington Post*, *The New York Times*, and *USA Today*.

(appropriating amounts from the trust funds for carrying out MMA under the heading "Funding start-up administrative costs for Medicare reform") and 117 Stat. 316-17 (appropriating amounts from the trust funds for carrying out Title XVIII of the Social Security Act, among other things, under the heading "Program Management"). The prohibition applicable for fiscal year 2003 was enacted in Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117 Stat. 11, 470 (2003) and the prohibition applicable to fiscal year 2004 was enacted in Pub. L. No. 108-199, Div. F, Tit. VI, § 624, 118 Stat. 3 (2004). The language of these provisions is the same: "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." 118 Stat. 3, 117 Stat. at 470.

History of Publicity or Propaganda Prohibitions

The prohibition on the use of appropriated funds for publicity or propaganda first appeared in the Labor-Federal Security Appropriation Act, 1952, Pub. L. No. 134, ch. 373, § 702, 65 Stat. 209, 223 (Aug. 31, 1951). The provision, in language almost identical to the prohibitions at issue here, provided that "[n]o part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not heretofore authorized by the Congress." 65 Stat. at 223. Congress did not define the phrase "publicity or propaganda" in the legislation nor is there a definition in the legislative history.

The legislative history does indicate that the sponsor of the provision, Representative Lawrence H. Smith, introduced it in reaction to 18 speeches made across the nation by Oscar R. Ewing, Federal Security Agency Administrator. 97 Cong. Rec. 4098 (1951). During the course of the debate on this provision, a Member, who was concerned that the use of the term "propaganda" might jeopardize the efforts of the Children's Bureau to distribute informational pamphlets on the growth and education of children, questioned Mr. Smith about a definition of "propaganda." Mr. Smith replied, in essence, that one can easily identify propaganda: "We can well distinguish between what is propaganda and what is educational matter." *Id.* At the same time, Congress was considering a similar provision that was eventually enacted as section 603 of the Independent Offices Appropriation Act, 1952, Pub. L. No. 137, ch. 376, § 603, 65 Stat. 268, 291 (Aug. 31, 1951). During debate on section 603, Senator Harry F. Byrd remarked that the restriction was needed to curtail the use of appropriated funds to produce materials that constituted "[i]ndividual glorification of bureaucrats." 97 Cong. Rec. 6734 (1951). Furthermore, Senate discussion regarding section 603 suggested that any prohibition should not impair the government's duty to keep its citizens "fully and accurately informed." *Id.*

Given the absence of definitional guidance in the statute and its legislative history, we have struggled over the years to balance the need to give meaning to this prohibition with an agency's right or duty to inform the public regarding its activities and

programs.[7] B-178528, July 27, 1973 (noting the difficulty of distinguishing between permissible informational activity and other activity constituting publicity or propaganda); B-212069, Oct. 6, 1983 (stating that the statute lacks guidelines to help distinguish between legitimate informational activity and proscribed publicity or propaganda). Our decisions reflect societal values in favor of a robust exchange of information between the government and the public it serves. B-184648, Dec. 3, 1975 (discussing an agency's "legitimate interest in communicating with the public"). This includes the right to disseminate information in defense of an administration's point of view on policy matters. B-223098, Oct. 10, 1986 (stating that public officials "may report on the activities and programs of their agencies, may justify those policies to the public, and may rebut attacks on those policies"); B-130961, Oct. 26, 1972 (noting that agencies "have a duty to inform the public on Government policies and, traditionally, policy-making officials have utilized Government resources to disseminate information in explanation and defense of those policies").

Accordingly, as part of our efforts to strike the right balance, we have historically afforded agencies wide discretion in their informational activities. We generally will defer to an agency's justification for such activities, only "overrid[ing] administrative determinations and justification of propriety . . . where they are so palpably erroneous as to be unreasonable." B-178528, July 27, 1973. In assessing an agency's justification, one important factor is the agency's statutory authority to disseminate information. The more explicit an agency's authority to carry out promotional or informational activities, the stronger is its ability to justify its activities. *See, e.g.,* B-301022, Mar. 10, 2004; B-184648, Dec. 3, 1975; B-161686, June 30, 1967.

This, of course, is not to say that the "publicity or propaganda" restriction is without meaning. We have, through 50 years of decisions, identified a number of inappropriate activities subject to the restriction. In this regard, we have noted that one of the main targets of the publicity or propaganda prohibition is one in which the "obvious purpose is 'self-aggrandizement' or 'puffery.'" *See, e.g.*, B-284226.2, Aug. 17, 2000; B-229257, June 10, 1988; B-223098, Oct. 10, 1986; B-178528, July 27, 1973. We have defined self-aggrandizement as "publicity of a nature tending to emphasize the importance of the agency or activity in question." B-212069, Oct. 6, 1983 (quoting 31 Comp. Gen. 311 (1952), our first decision interpreting the publicity or propaganda prohibition). For example, an agency would be prohibited from expending

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[7] In two audit reports in the 1970s, GAO characterized publications as propaganda from an audit, not a legal, perspective. U.S. General Accounting Office, *Problems With Publications Related to the Clinch River Breeder Reactor Project*, EMD-77-74 (Washington, D.C.: Jan. 6, 1978); *Evaluation of the Publication and Distribution of "Shedding Light on Facts About Nuclear Energy,"* EMD-76-12 (Washington, D.C.: Sept. 30, 1976). In neither report did GAO apply the publicity or propaganda prohibition; instead, the reports set out their own criteria against which to audit the publications. Consequently, these reports have limited value in understanding the prohibition.

appropriated funds to issue a press release that attempted "to persuade the public as to [its] importance . . . as a Government agency." B-212069, Oct. 6, 1983 (finding OPM press releases informing the public of the Administration's position on pending legislation unobjectionable).

In 2000, we concluded that a Department of Housing and Urban Development (HUD) brochure that was deeply critical of the HUD budget reductions proposed by the House Appropriations Committee was not "self-aggrandizement." B-284226.2, Aug. 17, 2000. The brochure purported to detail the consequences for HUD programs and communities nationwide if Congress enacted the funding reductions. HUD's use of appropriations to pay for the brochure did not violate the publicity or propaganda prohibition because the brochure did not "tend to emphasize the importance of HUD or HUD programs such that they constitute 'puffery' or 'self-aggrandizement.'" *Id.* We agreed with HUD that the brochure was "important and timely information about the impact of the reductions to HUD's programs . . . ." *Id.*

We also have interpreted the restriction on publicity or propaganda as prohibiting what we refer to as covert propaganda, that is, materials that "are misleading as to their origin." B-223098, Oct. 10, 1986. In 1987, the State Department hired consultants to prepare newspaper articles and op-ed pieces in support of the Reagan Administration's Central America policy. However, these pieces were published "as the ostensible position of persons not associated with the government . . ." 66 Comp. Gen. 707 (1987). We concluded that such activities violated the publicity or propaganda restriction because they were "misleading as to their origin." *Id.*

The publicity or propaganda restriction also prohibits the use of appropriated funds solely for partisan purposes. *See, e.g.*, B-178528, July 27, 1973;[8] B-147578, Nov. 8, 1962; B-144323, Nov. 4, 1960. Appropriated funds may never be used "in a general propaganda effort designed to aid a political party or candidates." B-147578, Nov. 8, 1962. However, "the lines separating the nonpolitical from the political cannot be precisely drawn." B-144323, Nov. 4, 1960. Agencies, of course, have a legitimate right to explain and defend their policies and respond to arguments against those policies. Our decisions recognize that as a practical matter, it can be difficult to distinguish between agencies' disseminating information "in explanation and defense" of their policies and "other activities, similar in nature but for purely political or partisan purposes." B-130961, Oct. 26, 1972. The use of appropriated funds is improper only if the activity is "completely devoid of any connection with official functions" or completely "political in nature." B-147578, Nov. 8, 1962. If, however, an agency justifies its activity as "made in connection with official duties," and we find a basis for that justification, we will not raise a legal objection to the use of appropriated funds. B-144323, Nov. 4, 1960.[9]

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[8] The date of this opinion is listed incorrectly in Westlaw as July 27, 1978. *See* 1978 WL 10850.

[9] For example, the White House arranged a series of regional conferences in 1962 in 12 cities across the country. Some argued that these conferences had political

Application of Publicity or Propaganda Prohibition to Flyer and Advertisements

In our view, the HHS materials are neither "covert propaganda" nor "self-aggrandizement." All the materials identify HHS as the source. Also, neither the flyer and its cover letter nor the advertisements attribute the enactment of new benefits to HHS or any of its agencies or officials.[10] *Cf.* B-212069, Oct. 6, 1983 (finding that OPM's press releases informing the public of the Administration's position on pending legislation was not self-aggrandizement; there was no attempt to persuade the public of the importance of OPM as a government agency). There remains, however, the concern that the materials violate the prohibition because they represent purely partisan activities.

HHS justifies its materials as an exercise in informing beneficiaries of new benefits provided by MMA. In his February 25, 2004, letter, the Acting Administrator said, "In our view, MMA not only authorizes, but in fact requires that we inform beneficiaries of the new benefits provided in the MMA. Our letter, print and broadcast advertisements are designed to meet this obligation and respond to the requirements of the statute." Smith Letter. With regard to the flyer and its cover letter, specifically, the Acting Administrator said, "[W]e were following this clear statutory mandate." *Id.*, Enclosure 1 at 7.

Indeed, MMA does require HHS to inform individuals about certain changes to Medicare made by the act. Like existing statutory provisions,[11] these provisions are designed to help beneficiaries make fully informed choices among the various options available to them. Specifically, a new statutory provision requires HHS to "conduct activities that are designed to broadly disseminate information" to eligible individuals regarding prescription drug coverage authorized under MMA. *See* MMA § 101(a), 117 Stat. 2075 (adding new section 1860D-1(c) to the Social Security Act) (*to be codified at* 42 U.S.C. § 1395w-101(c)). Among other things, it requires HHS's activities to be similar to those carried out in connection with the Medicare+Choice

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overtones. The White House justified the conferences as providing the opportunity to seek the views of state and local officials and interested citizens on federal programs. We found this justification reasonable, so we did not object to the use of appropriated funds. B-147578, Nov. 8, 1962.

[10] While the flyer credits the actions of "President Bush and Congress" with enacting the legislation and the new benefits, such a statement describes the constitutional process for enacting legislation.

[11] For example, HHS is required to prepare an annual notice to beneficiaries explaining the benefits available to them and to provide information via a toll-free telephone number. *See* 42 U.S.C. § 1395b-2 (2000). HHS is also required to provide information to enable Medicare beneficiaries to evaluate the value of Medicare supplemental policies and the relationship of such policies to Medicare benefits. *See* 42 U.S.C. § 1395ss(e).

program, including by disseminating comparative information regarding prescription drug plans.[12] *Id. See also* H.R. Conf. Rep. No. 108-391 at 432-3 (2003) (emphasizing the importance of public outreach in connection with the new benefit and instructing the Secretary to ensure that lower income beneficiaries are aware of the additional benefits available). Another provision requires HHS to conduct activities "to broadly disseminate information to discount card eligible individuals" regarding enrollment in the discount card program, the features of the program, and the transitional assistance available to certain low-income individuals. *See* MMA § 101(a), 117 Stat. 2136 (adding new section 1860D-31(d) to the Social Security Act) (*to be codified at* 42 U.S.C. § 1395w-141(d)). It also requires HHS to provide for the dissemination of comparative information about discount cards and, to the extent practicable, to coordinate these activities with the dissemination of educational information on other Medicare options. *Id.*

The flyer and advertisements do not provide beneficiaries with comprehensive information about the benefits available as a result of MMA, or comparative details about these benefits. In addition, they do not address the impact of MMA on those eligible for both Medicaid and Medicare and those with Medicare supplemental policies. They do, however, identify the new benefits, note when they will become available, and, as we relate in the "Background" section of this opinion, provide some information describing the new benefits. Notably, the materials refer beneficiaries to other sources for further information, including the toll-free telephone number and the Internet site for Medicare. According to HHS, the flyer and the advertisements are only one part of an overall campaign that began in the fall of 2003 to raise beneficiary awareness about important changes to the Medicare program. HHS expects this campaign to continue into the fall of 2005. Smith Letter, Enclosure 1 at 3-4. In this regard, the flyer's cover letter, which HHS has said it will mail to all beneficiaries, advises beneficiaries to "[l]ook for more information about these [drug discount] cards in the next few months. Then in 2006, Medicare will offer prescription drug coverage." In this context, we would not expect the flyer and advertisements to provide beneficiaries with details on the array of options available to them under the prescription drug benefit or drug discount card programs, or individualized information that a beneficiary may need to choose from among the available options.

On the other hand, given HHS's stated interest in informing beneficiaries of changes to Medicare, we observe several noteworthy omissions in HHS's materials. For example, while all materials mention the new drug discount cards, none of them mention that the cards may not be free--that is individuals enrolling may be charged an annual fee of up to $30--and that savings may vary across covered drugs. *See* MMA § 101(a), 117 Stat. 2131-48 (adding new section 1860D-31 to the Social Security Act)

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[12] HHS is required to provide annual mailings prior to each year's "open season" describing the various managed care plans and the traditional fee-for-service option in specific detail so that beneficiaries can compare the various options. It also is required to maintain a toll-free number and Internet site for information about the managed care program. *See* 42 U.S.C. § 1395w-21(d).

(*to be codified at* 42 U.S.C. § 1395w-141). These omissions are particularly notable in the flyer, where HHS supplies more detailed information about the 2006 prescription drug benefit than about the June 2004 discount cards.[13] Since beneficiaries may enroll in discount card plans beginning in May of this year, we would have expected at least as much information about the drug discount cards as about the prescription drug benefit.

The flyer suffers, too, we believe, in its discussion of the new prescription drug benefit. For example, the flyer indicates that beneficiaries will pay a premium of "about $35 a month" for the prescription drug benefit. This figure, however, is the estimated average premium to be charged rather than an established amount. Also, the flyer overstates the access beneficiaries will have to the prescription drug benefit program. In actuality, beneficiaries will have only a limited amount of time to enroll for the benefit program, and failure to enroll will result in penalties for late enrollment. *See* MMA §101(a), 117 Stat. 2072-75, 2104-06 (adding new sections 1860D-1(b) and 1860D-13(b) to the Social Security Act) (*to be codified at* 42 U.S.C. §§ 1395w-101(b) and 1395w-113(b)).

The omissions notwithstanding, we do not find the content of the flyer and its cover letter or the advertisements to be purely partisan in violation of the publicity or propaganda prohibition. This is not to say that the content is totally free of political tone. For example, the theme of both advertisements is "Same Medicare. More Benefits," and the flyer, apparently picking up on the same theme, announces that "[t]he new law preserves and strengthens the current Medicare program . . . ." Although one can rationalize these sentiments in light of the benefit-related provisions of the new law, they fail to recognize the legitimate concerns of many about the long-term financial implications of the recently enacted benefits on the Medicare program.[14] As noted in the fiscal year 2003 *Financial Report for the United States Government*, the Medicare program faces a funding gap of over $15 trillion in net present value terms based on the next 75-year period alone. The new drug benefit will add trillions to this funding gap.[15] In addition, some critics of MMA assert, for example, that provisions requiring Medicare beneficiaries to rely on private insurance plans or managed care organizations for prescription drug benefits reflect a

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[13] Moreover, with respect to the prescription drug coverage, the information supplied may lead beneficiaries to underestimate the amount they will need to pay for prescription drugs.

[14] *See, e.g.*, 149 Cong. Rec. S15899 (daily ed. Nov. 25, 2003) (statement of Senator John McCain); U.S. General Accounting Office, *Medicare: Financial Challenges and Considerations for Reform*, GAO-03-577T (Apr. 10, 2003).

[15] Department of Treasury, 2003 *Financial Report of the United States Government*, http://www.fms.treas.gov/fr/ downloaded on March 9, 2004; *Fiscal Year 2003 U.S. Government Financial Statements: Sustained Improvement in Federal Financial Management Is Crucial to Addressing Our Nation's Future Fiscal Challenges*, GAO-04-477T (March 3, 2004).

fundamental change in the nature of this public program.[16] Without a doubt, the future of the Medicare program is the subject of ongoing and highly spirited discussion and debate at the national level. In this context, the references in the flyer and print and television advertisements to "Same Medicare. More Benefits" and "preserve and strengthen" may appear to some as an attempt to persuade the public to the Administration's point of view regarding the newly enacted benefit.

The publicity or propaganda prohibition, however, does not bar materials that may have some political content or express support for a particular view. On the contrary, we have recognized that the publicity or propaganda prohibition does not preclude an agency from communicating with the public with materials that include some political content. In 2000, we concluded that an arguably more questionable information campaign by the Department of Housing and Urban Development (HUD) using a widely disseminated publication entitled, "Losing Ground: The Impact of Proposed HUD Budget Cuts on America's Communities"[17] had not violated the prohibition. B-284226.2, Aug. 17, 2000. In the publication, signed by HUD Secretary Andrew Cuomo, HUD criticized what it called "deep cuts" in appropriations that were proposed by the House Appropriations Committee for particular HUD programs. The publication stated that, if enacted, the "cuts would have a devastating impact on families and communities nationwide." We found the publication to be a legitimate informational activity. *Id.* Noting that the executive branch has a duty to inform the public regarding government policies, we said that "[p]ublic officials may report on the activities and programs of their agencies, may justify those policies to the public, and may rebut attacks on those policies." *Id. See also* B-223098, Oct. 10, 1986 (holding that SBA did not violate the prohibition when it printed and disseminated a pamphlet entitled, "The Future of SBA," designed to explain the Administration's proposal to transfer SBA to the Commerce Department and eliminate some of its small business assistance functions); B-178528, July 27, 1973 (holding that the U.S. Ambassador to Great Britain did not violate the prohibition with a mass mailing of a letter, on State Department letterhead, transmitting copies of editorials from British newspapers in support of United States policy).

In another case, we concluded that the Office of Personnel Management (OPM) had not violated the prohibition when it issued a press release criticizing members of the House Appropriations Committee for voting to delay implementation of proposed OPM pay-for-performance regulations. B-212069, Oct. 6, 1983. In the press release, OPM said that these members had "separated themselves from the President and the American people who want more efficient government." OPM also said that "they

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[16] *See, e.g.*, 149 Cong. Rec. S15750 (daily ed. Nov. 24, 2003) (statement of Senator Herb Kohl) (stating that the MMA "fundamentally changes the nature of Medicare"); 149 Cong. Rec. S15891-2 (daily ed. Nov. 25, 2003) (statement of Senator Patrick Leahy) (stating that the MMA could force seniors to leave the traditional Medicare program).
[17] HUD mailed the publication to HUD grantees, public interest groups, churches, mayors, National Urban League affiliates, Indian tribal leaders, public housing agencies, business groups, historically African-American colleges and universities, academics, newspapers and news organizations.

clearly do not represent the majority of the American people who are tired of obstacles being placed before the kinds of sensible management reforms that would make government work better." We viewed the press release as a legitimate piece of information, and said that "[p]ublic officials may with propriety report on the activities of their agencies, may expound to the public the policies of those agencies and of the administration of which they are members, and may likewise offer rebuttal to attacks on these policies." *Id.* We continued, "To the extent . . . that policy of an agency or Administration is embodied in pending legislation, discussion by officials of that policy may well necessarily refer to such legislation and be either in support of or against it." *Id.*

To restrict all materials that have some political content or express support for an Administration's policies would significantly curtail the recognized and legitimate exercise of the Administration's authority to inform the public of its policies, to justify its policies and to rebut attacks on its policies. It is important for the public to understand the philosophical underpinnings of the policies advanced by elected officials and their staff in order for the public to evaluate and form opinions on those policies. Viewed in light of our prior decisions and opinions, the HHS materials at issue here are not so partisan in nature and HHS's explanation "so palpably erroneous" as to violate the publicity or propaganda prohibition. Notwithstanding the omissions and other weaknesses in the materials, their content does not constitute a purely partisan message.

As a final note, we do have serious concerns with HHS's decision to place the advertisement in *Roll Call.* An HHS official informally told us that HHS placed the advertisement in *Roll Call* and *The Hill* newspapers as well as in several other newspapers, including *The Washington Post*, *The New York Times*, and *USA Today.* The official explained that HHS thought that publishing the advertisements in *Roll Call* and *The Hill* would make it easy for Members of Congress and congressional staff to have the information that it was providing to beneficiaries through advertisements in the other newspapers.[18] We question the prudence and appropriateness of HHS's decision to communicate with Members of Congress and congressional staff in this manner. There are any number of more effective vehicles to communicate with Members and staff, and at less cost, than advertising in a newspaper. The vehicle selected by HHS provided it with little assurance that Members and staff would receive and understand its message concerning information supplied to beneficiaries. In addition, the advertisement would not enable Members and staff to respond efficiently to questions or concerns about the new legislation.

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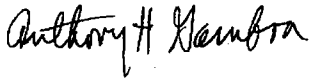
[18] Because we were not aware of the newspaper advertisements at the time of our February 6 letter to HHS, we did not include any questions about these advertisements.

CONCLUSION

Although the publications contain a number of omissions and raise certain concerns, the flyer and its cover letter and the print and television advertisements do not violate the publicity or propaganda prohibition. The content of these publications does not constitute a purely partisan message. Accordingly, HHS's use of appropriations to prepare and disseminate these materials does not violate the publicity or propaganda prohibitions of the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, Div. F, Tit. VI, § 624, 118 Stat. 3 (2004), and the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117, Stat. 11, 470 (2003). In this legal opinion, we do not examine nor do we express a view on the overall economy, efficiency, or effectiveness of these print and television advertisements. Further, other print and television advertising efforts may raise additional issues that we do not consider in this legal opinion.

If you have any questions, please contact Susan A. Poling, Associate General Counsel, or Thomas H. Armstrong, Assistant General Counsel, at (202) 512-5644.



Anthony H. Gamboa
General Counsel

Enclosures

Direct Mail - Secretarys Letter on Medicare Reform

THE SECRETARY OF HEALTH AND HUMAN SERVICES

WASHINGTON, D.C. 20201

As the result of a new law, Medicare is making some of the most significant improvements to the program since its inception in 1965. Now, for example, Medicare will provide benefits that can save you money on the life-enhancing and life-saving prescription drugs that you need.

It is important to know that Medicare will remain the health care program you have always counted on - only now with more benefits. The new benefits being offered are voluntary.

I am enclosing a fact sheet that outlines some of the new benefits that you will be able to choose under Medicare. These benefits will be phased in over the next two years. In brief, here's what the new benefits can do for you:

Save You Money on Prescription Drugs
The opportunity for savings will begin by this June when Medicare-approved drug discount cards become available. Look for more information about these cards in the next few months. Then in 2006, Medicare will offer prescription drug coverage. This voluntary benefit is expected to provide you with prescription drug savings. And people with Medicare who have lower incomes can save even more through both the Medicare-approved cards and the prescription drug coverage.

Provide Better Preventive Health Care
Starting in 2005, Medicare will offer new preventive benefits, which will include a "Welcome to Medicare" physical exam for people when they join Medicare. The benefits also include screening tests to find heart diseases and diabetes early.

Improve Your Access to Doctors and Medical Care You Choose
The new law makes substantial investments in the health care system to promote the highest quality health care for people with Medicare. And it provides even more help for those of you in rural America, by improving your access to doctors, hospitals, ambulance service, home health care, and other medical services in your communities.

In summary, the Department of Health and Human Services and our Centers for Medicare & Medicaid Services look forward to helping you better understand Medicare's new benefits. And you can always get answers to your questions by calling 1-800-MEDICARE or visiting www.medicare.gov on the web.

Sincerely,

Tommy G. Thompson

Tommy G. Thompson
Secretary

Enclosure I: HHS Cover Letter

The Facts about Upcoming New Benefits in Medicare

Medicare Modernization Act of 2003

MEDICARE is an essential health care program for people age 65 and older, people with certain disabilities, and people with End-Stage Renal Disease.

Recently, President Bush and Congress worked together to pass a new law to bring people with Medicare more choices in health care coverage and better health care benefits.

This new law preserves and strengthens the current Medicare program, adds important new prescription drug and preventive benefits, and provides extra help to people with low incomes. You will still be able to choose doctors, hospitals and pharmacies.

If you are happy with the Medicare coverage you have, you can keep it. Or, you can choose to enroll in new options described below. No matter what you decide, you are still in the Medicare program.

Drug Discount Cards Start in 2004

Medicare-Approved Drug Discount Cards will be available in 2004 to help you save on prescription drugs. Medicare will contract with private companies to offer new drug discount cards until a Medicare prescription drug benefit starts in 2006. A discount card with Medicare's seal of approval can help you save 10–25% on prescription drugs.

You can enroll beginning as early as May 2004 and continuing through December 31, 2005. Enrolling is your choice. Medicare will send you information soon with details about how to enroll.

People in the greatest need will have the greatest help available to them. If your income is no more than $12,569 for a single person, or no more than $16,862 for a married couple, you might qualify for a $600 credit on your discount card to help pay for your prescription drugs. These income limits change every year. Different rules may apply if you live in Puerto Rico or a U.S. territory. (You can't qualify for the $600 if you already have drug coverage from Medicaid, TRICARE for Life or an employer group health plan.)

Also new in 2004, Medicare Advantage is the new name for Medicare + Choice plans. Medicare Advantage rules and payments are improved to give you more health plan choices and better benefits. Plan choices might have improved already in your area. To find out more, call 1-800-MEDICARE (1-800-633-4227).

New and Improved Preventive Benefits Start in 2005

New Preventive Benefits will be covered, including:

- A one-time initial wellness physical exam within 6 months of the day you first enroll in Medicare Part B.
- Screening blood tests for early detection of cardiovascular (heart) diseases.
- Diabetes screening tests for people with Medicare at risk of getting diabetes.

These benefits add to the preventive services that Medicare already covers, such as cancer screenings, bone mass measurements and vaccinations.

Prescription Drug Plans Start in 2006

Prescription Drug Benefits will be added to Medicare in 2006. All people with Medicare will be able to enroll in plans that cover prescription drugs. Plans might vary, but in general, this is how they will work:

- You will choose a prescription drug plan and pay a premium of about $35 a month.
- You will pay the first $250 (called a "deductible").
- Medicare then will pay 75% of costs between $250 and $2,250 in drug spending. You will pay only 25% of these costs.
- You will pay 100% of the drug costs above $2,250 until you reach $3,600 in out-of-pocket spending.
- Medicare will pay about 95% of the costs after you have spent $3,600.

Some prescription drug plans may have additional options to help you pay the out-of-pocket costs.

Extra Help Will be Available for people with low incomes and limited assets. Most significantly, people with Medicare in the greatest need, who have incomes below a certain limit won't have to pay the premiums or deductible for prescription drugs. The income limits will be set in 2005. If you qualify, you will only pay a small co-payment for each prescription you need.

Other people with low incomes and limited assets will get help paying the premiums and deductible. The amount they pay for each prescription will be limited.

Medicare Advantage plan choices will be expanded to include regional preferred provider organization plans (PPOs). Regional PPOs will help more people with Medicare have multiple choices for Medicare health coverage, no matter where they live. PPOs can help you save money by choosing from doctors and providers on a plan's "preferred" list, but usually don't require you to get a referral. PPOs are among the most common and popular plans right now for working Americans.

All of these options are voluntary. You can choose to remain in the traditional Medicare plan you have today.

Questions about Medicare?

For the latest information about Medicare, visit www.medicare.gov or call 1-800-MEDICARE (1-800-633-4227). TTY users should call 1-877-486-2048.

To get a copy of this information in Spanish, call 1-800-MEDICARE (1-800-633-4227). TTY users should call 1-877-486-2048. Para una copia en español, llame gratis al 1-800-MEDICARE (1-800-633-4227). Los usuarios de TTY deben llamar al 1-877-486-2048.

CMS

Enclosure II: Two Page Flyer

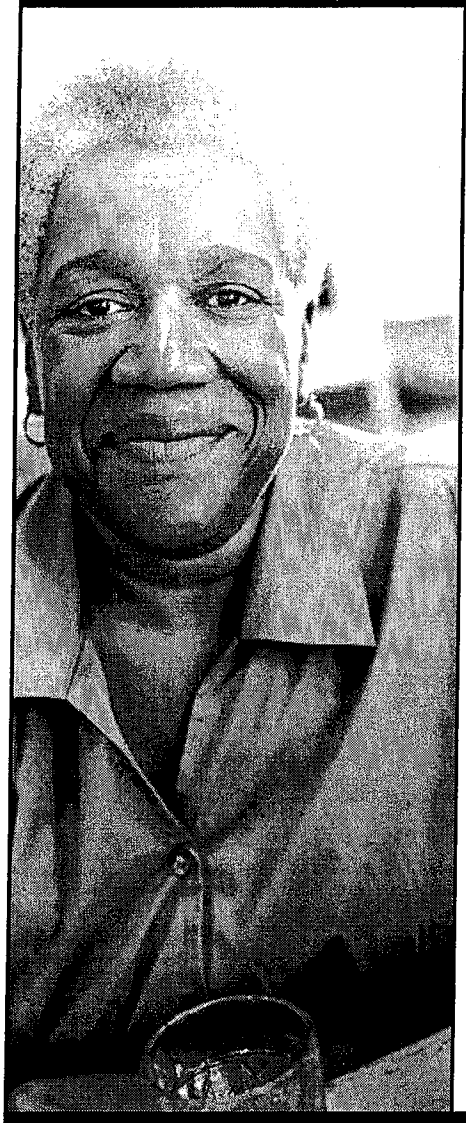
TELEVISION COPY

TITLE/LENGTH	**The Right Answer**	**CLIENT**	**CMS**
	:30	**ACCOUNT**	**Medicare**
DATE	**1/22/04**	**PRODUCT**	**Medicare**
		PROJECT	**Interim spot**

VIDEO	AUDIO
THIS IS A SIMPLE MONTAGE OF A DIVERSE GROUP OF SENIORS TALKING STRAIGHT TO CAMERA. THE BACKGROUNDS ARE NOT ELABORATE, YET THEY ARE ALL A LITTLE DIFFERENT. SOME OF THEM WILL BE IN HOME, SOME CAN BE OUTSIDE, ETC. IT'S ALWAYS A NICE, SMOOTH TRANSITION FROM ONE PERSON TO THE NEXT.	**SENIOR 1:** So how is Medicare changing?
	TITLE CARD: Same Medicare. More benefits.
	ANNCR: It's the same Medicare you've always counted on, plus more benefits like prescription drug coverage.
TITLE CARDS WILL BE INTERSPERSED THROUGHOUT, AS IF IN RESPONSE TO THEM. THEY WILL HAVE A NICE, CLEAN LOOK SO THAT THE MESSAGE WILL GET THROUGH. ANNOUNCER COPY COMPLEMENTS THE TITLE CARDS.	**SENIOR 2:** Can I keep my Medicare just how it is?
	TITLE CARD: You can always keep your same Medicare coverage.
	ANNCR: Yes, you can always keep your same Medicare coverage.
(DURING THE LONGER PORTIONS OF ANNOUNCER COPY, WE'LL CUT TO NICE CLOSE-UPS OF OUR SENIORS, LOOKING SATISFIED WITH THE ANSWERS THEY HAVE BEEN GIVEN.)	**SENIOR 3:** Will I save on my medicines?
	TITLE CARD: Medicare drug discount cards this June. New drug coverage in 2006.
	ANNCR: You can save with Medicare drug discount cards this June. And save more with new prescription drug coverage in 2006.
	SENIOR 4: So, my Medicare isn't different, it's just more?
	ANNCR Right. And you can learn more. Call 1-800-Medicare.
	ENDFRAME TITLE CARD: 1-800-Medicare

Enclosure III: Transcript of TV Ad "The Right Answer"

Same Medicare. More Benefits.



Answers about the new benefits from Medicare.

So how is Medicare changing?

Medicare is an essential health care program for people age 65 and older and people with disabilities. It will remain the same Medicare you've always counted on, plus now there will be more benefits available to you, like prescription drug coverage.

Can I keep my Medicare just how it is?

Of course. You choose what is best for you, whether it's keeping your same Medicare coverage or adding new benefits. It's entirely up to you.

Will I save on my medicines?

Yes. Starting this June, you can save with Medicare-approved drug discount cards. Those with the greatest need may qualify for a $600 credit on their card. And you may save even more with prescription drug coverage that begins in 2006.

What else can I get?

In addition to saving on prescription drugs, Medicare will offer other helpful benefits. New preventive services in 2005 will include a Welcome to Medicare physical exam and screening tests for heart disease and diabetes.

How can I learn more?

Call **1-800-MEDICARE** (1-800-633-4227), the official source to learn more. TTY users should call 1-877-486-2048. Or visit us at **www.medicare.gov**.

Paid for by the U.S. Department of Health & Human Services

Call 1-800-MEDICARE • Visit www.medicare.gov

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CAMPBELL-EWALD

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Various Pub(s)
L: 9.875 x 13.5
P4C

REQ 7623
2-3-04 CE-3/0
Production Artist: LEZ
Task: Fix and print.

Creative Directors: Stephan Pytel/Steve Platto
Art Director: Susie Campo
Writer: Michele Seymour-Lynch
Account Executive: Eric Ebejer
Production Supervisor: Stan Randolfov

Enclosure IV: Roll Call Advertisement

ENCLOSURE 5

COST INFORMATION PROVIDED BY HHS

In its February 25, 2004, letter, HHS provided the following data on costs incurred to date and estimated future costs of the flyer and its cover letter and the print and television advertisements. Letter from Dennis G. Smith, Acting Administrator, Centers for Medicare & Medicaid Services, to Gary L. Kepplinger, Deputy General Counsel, GAO, February 25, 2004. As agreed, GAO did not audit this data.

HHS estimated the cost of printing the flyer and its cover letter to be $3.2 million. HHS plans to mail the flyer and cover letter to all Medicare beneficiaries. HHS estimates the cost of mailing to be $6.8 million. In addition to these amounts, HHS has estimated the cost of printing the flyer in formats accessible to blind and low-vision Medicare beneficiaries at $3,400. An additional $41,900 was spent on printing flyers for distribution to local, state, and federal organizations, such as the Social Security Administration and area agencies on aging, which educate Medicare beneficiaries and their caregivers.

In its letter, HHS did not identify, specifically, the costs of the television commercial or the *Roll Call* advertisement. According to HHS, these advertisements were part of what it calls its Winter 2004 advertising campaign. The cost of the Winter 2004 advertising campaign, which includes media placement, production, research, creative development, earned media, account management, and fees, was $12,515,670. According to a February 3, 2004, HHS press release, HHS spent approximately $9.5 million of this amount to purchase network and cable air time for the television commercial, and $3 million for development and production of the commercial. Press Release, U.S. Dep't of Health and Human Services, HHS Unveils New Medicare Education Campaign (Feb. 3, 2004). HHS included in this $3 million, also, the cost of developing newspaper, radio, and Internet advertising.