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October 19, 2010

The Honorable Darrell Issa
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Dave Camp
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services—Use of Appropriated Funds
for Technical Assistance and Television Advertisements*

This responds to your request for our legal opinion regarding whether the Department of Health and Human Services's (HHS) use of funds to pay contractors for technical assistance and to produce and air television advertisements violated the prohibition on publicity or propaganda. Agencies may not use funds for publicity or propaganda purposes. Financial Services and General Government Appropriations Act, 2010, Pub. L. No. 111-117, § 720, 123 Stat. 3034, 3159, 3210 (Dec. 16, 2009). In 2009, HHS contracted with an economist for technical assistance in estimating costs of various health care proposals. Following the enactment of the Patient Protection and Affordable Care Act¹ and the Health Care and Education Reconciliation Act of 2010² (hereinafter referred to jointly as PPACA), HHS produced and aired three television advertisements concerning the law's changes to the Medicare program.

As explained below, we conclude that HHS did not violate the publicity or propaganda prohibition when it contracted with the economist for the provision of technical assistance or when it produced and aired the television advertisements. Although the economist made public statements and authored opinion pieces on health care policy, HHS did not contract for these services and had no involvement with these activities. The publicity or propaganda prohibition applies to HHS's activities. The television advertisements did not violate the publicity or propaganda

¹ Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010).

² Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010).

prohibition because they clearly identified their source, were not self-aggrandizing, and were not a purely partisan activity. We note, however, that two of the advertisements overstate one of PPACA's benefits when they state that beneficiaries will "have [their] guaranteed benefits." Although beneficiaries who participate in Medicare Advantage are guaranteed original Medicare benefits, the other benefits offered by Medicare Advantage plans could change at a plan's discretion. In this legal opinion, we do not examine nor do we express a view on the overall economy, efficiency, or effectiveness of the advertisements.

BACKGROUND

On March 25, 2009, HHS awarded a contract to Dr. Jonathan Gruber, an economist at the Massachusetts Institute of Technology, to "produce a series of technical memoranda on the estimated changes in health insurance coverage and associated costs and impacts to the government under alternative specifications of health system reform."³ HHS Contract No. HHSP233200900181P, at 3. The contract required Dr. Gruber to consult with senior HHS officials "to develop detailed specifications of alternative proposals to increase health insurance coverage" and to use the specifications to "develop estimates of the change in the number of individuals with health insurance coverage . . . and the costs to the government and the private sector associated with these estimated changes in coverage." *Id.* This was a firm, fixed-price contract for \$95,000. *Id.*, at 1. On June 19, 2009, HHS awarded another firm, fixed-price contract to Dr. Gruber for similar services for \$297,600. HHS Contract No. HHSP23320094301EC.

Subsequent to the award of the HHS contracts, Dr. Gruber authored opinion pieces on health care policy that were published in national newspapers. *E.g.*, Jonathan Gruber, *Reform requires consumer pressure*, Boston Globe, Sept. 3, 2009, at 17; Jonathan Gruber, *A Loophole Worth Closing*, N.Y. Times, July 12, 2009, at WK-10. Several media outlets quoted Dr. Gruber in articles regarding health care policy. *E.g.*, Alec MacGillis, *Would Tax on Benefits Rein In Spending?*, Washington Post, July 30, 2009, at A1; Lisa Wangsness, *Mass. health overhaul offers lessons for US program; Employees not being dumped on public plan*, Boston Globe, July 10, 2009, at 2. In 2009, Dr. Gruber twice testified before a Senate committee on health care policy

³ Our practice when rendering legal opinions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. HHS supplied relevant information and its legal views related to the contract for technical assistance and the television advertisements. Letter from Acting General Counsel, HHS, to Assistant General Counsel for Appropriations Law, GAO, Sept. 20, 2010 (HHS Response). In addition, we had a telephone conversation with Dr. Gruber regarding services he provided HHS. Telephone Conversation with Professor of Economics, Massachusetts Institute of Technology, Oct. 8, 2010.

issues. *Increasing Health Costs Facing Small Businesses: Hearing before the Senate Committee on Health, Education, Labor, and Pensions*, Nov. 3, 2009, video available at help.senate.gov/hearings; *Healthcare Reform: Hearing before the Senate Committee on Health, Education, Labor, and Pensions*, June 11, 2009, available at help.senate.gov/hearings.

After the enactment of PPACA, HHS contracted with Porter Novelli Public Services, Inc. to produce and air three 30-second television advertisements featuring the actor Andy Griffith. HHS Contract No. HHSM-500-2006-000171 / HHSM-500-T0001, Modification 000001; Telephone Conversation with Deputy General Counsel, HHS, Oct. 13, 2010. The entire script for the first advertisement is as follows:

“1965, a lot of good things came out of that year, like Medicare. This year, like always, we’ll have our guaranteed benefits, and with the new healthcare law, more good things are coming: free check-ups, lower prescription costs, and better ways to protect us and Medicare from fraud. See what else is new. I think you’re gonna like it.”

HHS Response, Enclosure (Recorded Script, *My Health, My Medicare: 1965—Featuring Andy Griffith*).

The entire script for the second advertisement is as follows:

“Hi Andy Griffith here. Our new health care law sure sounds good for all of us on Medicare. Starting next year, we’ll get free checkups, cancer screenings, lower prescription costs. And better ways to protect us and Medicare from fraud. So it will stay strong for our kids and grandkids. Now, that is music to my ears.”

E-mail message from Deputy General Counsel, HHS, to Assistant General Counsel, GAO, *Subject: RE: GAO inquiry re: Gruber Griffith*, Oct. 12, 2010 (HHS E-mail), Attachment (Recorded Script, *My Health, My Medicare: Music to My Ears*).

The entire script for the third advertisement is as follows:

“As soon as this handbook comes in the mail, I pull up a nice cozy chair and go through it. See every year during Open Enrollment we can make changes to our Medicare. While we always have our guaranteed benefits, there are other choices to think about each year. And, with the new healthcare law, we have lower costs, free checkups and screenings. It’s worth looking into.”

HHS E-mail, Attachment (Recorded Script, *My Health, My Medicare: Cozy Chair*). At the beginning of each advertisement, the words “An Important Message from Medicare” appear in clearly readable typeface for approximately 4 seconds. At the end of all three advertisements, the HHS seal, the telephone number “1-800-MEDICARE,” the Internet address “medicare.gov,” and a TTY telephone number

appear for approximately 3 seconds. In addition, the words “Paid for by the U.S. Department of Health and Human Services” appear at the end of the second and third advertisements. HHS states that it paid approximately \$754,000, \$1,112,000, and \$1,390,000 for the production and airing of the first, second, and third advertisements, respectively.⁴ HHS also placed the first advertisement on the main page of the government’s Medicare website,⁵ and it placed all three advertisements on a YouTube page which features several videos from the HHS Centers for Medicare and Medicaid Services.⁶

DISCUSSION

At issue here is whether HHS violated the prohibition against using appropriations for publicity or propaganda purposes when it awarded the contract for technical assistance and when it used appropriated funds to produce and air the television advertisements. The applicable prohibition states that “[n]o part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by Congress.”⁷

Our case law has identified three categories of agency communications that are restricted by the publicity or propaganda prohibition: (1) covert communications, (2) self-aggrandizement, and (3) purely partisan activities. B-319834, Sept. 9, 2010. Communications are considered covert and violate the prohibition if they fail to disclose the agency’s role as the source of information. *See, e.g.*, B-302710, May 19, 2004 (failure to identify agency as source of prepackaged news stories). Communications are considered self-aggrandizement or “puffery” if the materials emphasize the importance of the agency or one of its officials. *See* B-284226.2,

⁴ Mr. Griffith provided his services to the government at no charge pursuant to a gratuitous services agreement. HHS Response, at 5; Telephone Conversation with Deputy General Counsel, HHS, Oct. 8, 2010.

⁵ www.medicare.gov (last visited Oct. 12, 2010).

⁶ “1965,” “1965 Music To My Ears,” and “1965 Cozy Chair,” *available at* www.youtube.com/user/CMSHHSgov (last visited Oct. 12, 2010).

⁷ HHS paid for the contract for technical assistance using a fiscal year 2009 appropriation, and it paid for the three television advertisements using a fiscal year 2010 appropriation. HHS Response, at 2, 5; E-mail message from Deputy General Counsel, HHS, to Assistant General Counsel, GAO, *Subject: RE: GAO inquiry re: Gruber Griffith*, Oct. 13, 2010. In both years, Congress enacted a substantially identical provision barring the use of appropriations for publicity or propaganda purposes. Financial Services and General Government Appropriations Act, 2009, Pub. L. No. 111-8, § 720, 123 Stat. 524, 630, 686 (Mar. 11, 2009); Pub. L. No. 111-117, § 720.

Aug. 17, 2000 (Department of Housing and Urban Development (HUD) materials did not emphasize the importance of HUD or HUD programs and so did not constitute puffery or self-aggrandizement). Communications are considered purely partisan in nature if they are completely devoid of any connection with official functions and completely political in nature. *See, e.g.*, B-304228, Sept. 30, 2005, at 2, 9 (the Department of Education's use of a media analysis to gather information to evaluate the media's portrayal of a particular political party's "commitment to education" as favorable or unfavorable was a purely partisan activity); B-147578, Nov. 8, 1962 (appropriated funds may never be used "in a general propaganda effort designed to aid a political party or candidates thereof").

Contract for technical assistance

In our view, the Gruber contracts constitute neither self-aggrandizement nor a purely partisan activity. The HHS contracts with Dr. Gruber called for him to produce a "series of technical memoranda on the estimated changes in health insurance coverage and associated costs and impacts to the government under alternative specifications of health system reform." HHS Contract No. HHSP233200900181P, at 3; *see also* HHS Contract No. HHSP23320094301EC, at 4. The contracts did not constitute self-aggrandizement as they did not call for Dr. Gruber to emphasize the importance of HHS or any of its officials. The contracts also were not a purely partisan activity because they were not completely devoid of any connection with HHS's official functions; the Gruber contract helped HHS analyze various health reform proposals and identify cost and coverage implications. At issue is whether HHS engaged in covert communications because Dr. Gruber wrote opinion pieces that appeared in national newspapers and testified before Congress, purportedly without disclosing his contractual relationship with HHS.

Dr. Gruber was not acting at the behest of HHS when he testified and wrote opinion pieces. In our review of the contracts, we found nothing that called for him to make any public statements or to have any contact with media outlets. Further, HHS states that it had "no involvement" with Dr. Gruber's contacts with media outlets and that HHS never contracted with him to make comments to Congress or to the public. HHS Response, at 4. HHS states that it "was not invited to provide a witness" at the congressional hearings at issue and that it "had no involvement with Dr. Gruber's testimony before Congress, and never asked him to make statements favorable to any policy it favored." *Id.*, at 2, 4. In fact, HHS stated that Dr. Gruber's "views were not those of HHS." *Id.*, at 4. HHS also states that it did not "have any opportunity to review, comment or control the testimony he provided." *Id.*, at 2.

Dr. Gruber told us that when he testified and wrote opinion pieces, he did so on his own, not under contract to HHS nor at the request of HHS. He said that such activities are part of his work as a health care economist. Telephone Conversation with Professor of Economics, Massachusetts Institute of Technology, Oct. 8, 2010. The publicity or propaganda prohibition applies to the activities of HHS in its use of its appropriation. B-304829, June 6, 2005. HHS did not use its appropriation to procure any media-related services from Dr. Gruber or to make any public

statements. Instead, HHS used its appropriation to procure technical services from Dr. Gruber in order to understand possible changes in health insurance coverage and costs as a result of various health reform proposals.

HHS's contract with Dr. Gruber stands in contrast to the Department of Education contract with Armstrong Williams that we examined in 2005. B-305368, Sept. 30, 2005. In that case, we concluded that the department violated the publicity or propaganda prohibition because it contracted for Armstrong Williams to comment regularly on the No Child Left Behind Act without assuring that the department's role was disclosed to the targeted audiences. In the HHS contract with Dr. Gruber, HHS did not contract, or pay, Dr. Gruber to write opinion pieces, testify, or otherwise speak on health reform. Dr. Gruber acted on his own behalf. Therefore, we conclude that the HHS contract for technical assistance did not violate the publicity or propaganda prohibition.

Television advertisements

In our view, the television advertisements constitute neither covert communications nor self-aggrandizement. The advertisements clearly identify HHS as their source, with the words "An Important Message from Medicare" appearing at the beginning of each advertisement and with the HHS seal and contact information for HHS appearing at the end of each advertisement. The advertisements do not attribute the enactment of new benefits to HHS or any of its agencies or officials; nor do the advertisements appear to be designed to persuade the public as to the importance of HHS. B-319834, at 6.

At issue is whether the advertisements constitute a purely partisan activity. Communications are purely partisan if they are completely devoid of any connection with official functions and are completely political in nature. *See, e.g.*, B-304228; B-147578. We recently examined the contents of an HHS brochure to determine whether it violated the publicity or propaganda prohibition. B-319834. The brochure informed Medicare beneficiaries about changes in Medicare resulting from PPACA. *Id.*, at 1. The brochure contained statements concerning benefits of PPACA and, although "some may view such statements as an attempt to persuade the public to the Administration's point of view," we did not find them to be purely partisan in nature. *Id.* We noted that "HHS has a responsibility to inform the public about its programs and activities" and that several statutory provisions "are designed to help beneficiaries make fully informed choices among the various options available to them." *Id.*, at 7. We concluded that—

"the content of the [HHS] brochure does not constitute a purely partisan message. HHS has established a nexus to its responsibility to inform the public, and the content of the brochure is not solely political. HHS also has directed readers to additional sources of information for more details about the program."

Id., at 10. We did note, however, that the brochure “presents a picture of PPACA that is not universally shared” and that the brochure “overstates some of PPACA’s benefits.” B-319834, at 9. For example, the brochure stated that “guaranteed Medicare benefits won’t change—whether you get them through Original Medicare or a Medicare Advantage plan.” *Id.*, at 10. However, “[b]eneficiaries who participate in Medicare Advantage are guaranteed original Medicare benefits, but the specific benefits beyond original Medicare offered by Medicare Advantage plans are not guaranteed and could change at a plan’s discretion.” *Id.*

The first advertisement at issue here begins with a reference to 1965, the year Congress created the Medicare program.⁸ The first and third advertisements state that beneficiaries will “have [their] guaranteed benefits.” All the advertisements mention changes PPACA made to the Medicare program, such as “free checkups,” “cancer screenings,” “lower prescription costs,” and “better ways to protect us and Medicare from fraud.” Each advertisement concludes by providing telephone and Internet contact information for HHS. In our view, the advertisements are linked to HHS’s responsibility to inform beneficiaries about Medicare. Each television advertisement, though brief, provides beneficiaries with some information regarding changes contained in PPACA, while directing beneficiaries to additional sources of information.

Nevertheless, the first and third advertisements, like the brochure in B-319834, overstate one of PPACA’s benefits. The advertisements state that beneficiaries will “have [their] guaranteed benefits.” As we pointed out when we considered the brochure, although beneficiaries who participate in Medicare Advantage are guaranteed original Medicare benefits, the other benefits offered by Medicare Advantage plans could change at a plan’s discretion. According to HHS, the advertisements are only one part of an overall campaign to inform Medicare beneficiaries of their available choices in the annual Medicare open enrollment period. HHS Response, at 7. In this context, we would not expect the advertisements to provide beneficiaries with full details on the changes contained in PPACA. *See* B-302504, Mar. 10, 2004, at 10 (although it did not provide comprehensive information, an HHS flyer describing changes in Medicare did not violate the publicity or propaganda prohibition). Indeed, the advertisements clearly identify sources for more detailed information. However, it is reasonable to expect an advertisement to provide sufficient details so that members of the audience may ask appropriate questions as they seek additional information.

Communications are purely partisan if they are completely devoid of any connection with official functions and are completely political in nature. Here, HHS has established a connection to official functions, that is, its responsibility to provide Medicare beneficiaries information about the program. Notwithstanding the lack of detail, the content of the advertisements does not constitute a purely partisan message. Because nothing in the advertisements constitutes communications that

⁸ Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (July 30, 1965).

are purely partisan, self-aggrandizing, or covert, we conclude that the advertisements did not violate the publicity or propaganda prohibition.

If you have any questions, please contact Susan A. Poling, Managing Associate General Counsel, at (202) 512-2667, or Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, at (202) 512-8257.

Sincerely yours,

 for

Lynn H. Gibson
Acting General Counsel