

# CRS Report for Congress

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## Medicare Advertising: Current Controversies

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### Summary

The Department of Health and Human Services' (HHS's) advertisement of the 2003 alterations to the Medicare program has been controversial. In 2004, Members of Congress requested that the U.S. General Accounting Office (GAO) issue a legal opinion on advertisements purchased by HHS to determine if these advertisements violated the "publicity or propaganda" prohibitions in appropriations law. GAO issued its first opinion on March 10. Though finding the advertisements to have "notable omissions and weaknesses," GAO did not judge them sufficiently partisan to be in violation of the Consolidated Appropriations Act of 2004 (P.L. 108-199). GAO then examined HHS's use of a video news release (VNR) to promote the new Medicare benefits. GAO issued its opinion May 19, judging the VNRs to be in violation of the publicity or propaganda prohibition of the Consolidated Appropriations Resolution of 2003 (P.L. 108-199) and the Antideficiency Act (31 U.S.C. 1341). This report will be updated as events warrant.

### Government Advertising: Inherently Controversial

The executive branch is expected to keep citizens and Congress abreast of its activities. Yet government advertising is inherently controversial. As one of the Hoover Commission task forces wrote a half-century ago:

Apart from his responsibility as spokesman, the department head has another obligation in a democracy: to keep the public informed about the activities of his agency. How far to go and what media to use in this effort present touchy issues of personal and administrative integrity. But of the basic obligation [to inform the public] there can be little doubt.<sup>1</sup>

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<sup>1</sup> The Commission on Organization of the Executive Branch of the Government, *Report of the Task Force on Departmental Management: Prepared for the Commission on Organization of the Executive Branch of the Government* (Washington: GPO, 1949), Appendix E, p. 57.

On the other hand, some persons bristle at the government using taxpayers' money to urge individuals to change their behavior or to promote governmental agencies, programs, or public officials.<sup>2</sup>

Generally speaking, there are few government-wide restrictions on government advertising.<sup>3</sup> As GAO has written:

Whether an agency's appropriations are available for advertising, like any other expenditure, depends on the agency's statutory authority. Whether to advertise and, if so, how far to go with it are determined by the precise terms of the agency's program authority in conjunction with the necessary expense doctrine and general restrictions on the use of public funds for the various anti-lobbying statutes.<sup>4</sup>

Under the "necessary expense doctrine," an agency may use a general appropriation to pay any expense that is: (1) necessary or incidental to the achievement of the underlying objectives of the appropriation; (2) not prohibited by law; and (3) not otherwise provided for by statute or appropriation.<sup>5</sup>

However, federal appropriations laws typically forbid agencies from using appropriated funds for "publicity or propaganda."<sup>6</sup> The current controversies regarding recent Medicare advertisements have arisen in relation to this latter restriction.

Appropriation laws have contained "publicity or propaganda" prohibitions for at least 50 years. Usually, the prohibition is worded like this: "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."<sup>7</sup> Since Congress has never defined the scope of the terms "publicity" and "propaganda," GAO has had to delineate acceptable and unacceptable forms of agency use of funds for promotional activities on a case-by-case basis.<sup>8</sup> Generally speaking, GAO has held that the "publicity or propaganda" prohibition forbids any activity that:

- involves "self-aggrandizement" or "puffery" of the agency or activities of that agency;
- is completely "political in nature"; or,

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<sup>2</sup> For an introduction to the subject of government advertising, see CRS Report RS21746, *Governmental Advertising Expenditures: An Overview*, by Kevin R. Kosar.

<sup>3</sup> *Ibid.*, pp. 5-6.

<sup>4</sup> U.S. General Accounting Office, *Principles of Federal Appropriations Law, Volume 1*, p. 4-188.

<sup>5</sup> On the necessary expense doctrine, see *ibid.*, pp. 4-14 - 4-28.

<sup>6</sup> A federal criminal statute (18 U.S.C. 1913), meanwhile, forbids the use of appropriated funds for lobbying. The Department of Justice is responsible for prosecutions under it. See *ibid.*, pp. 4-156 - 4-161.

<sup>7</sup> FY2004 DOD Appropriations Act (P.L. 108-87 § 8001).

<sup>8</sup> For a dated but useful introduction to GAO's "publicity or propaganda" decisions, see GAO, *Principles of Federal Appropriations Law, Volume 1*, pp. 4-161 - 4-166.

- is “covert propaganda.”<sup>9</sup>

## Recent Controversy and Congressional Responses

President George W. Bush signed P.L. 108-173, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), on December 8, 2003. The law, which emerged after lengthy negotiations between the houses of Congress and the President, made significant alterations to the Medicare program.<sup>10</sup>

Shortly after MMA was passed, the Department of Health and Human Services, which administers the new program, announced the creation of an advertising campaign to inform Medicare recipients about it. The scope of the advertising campaign is, reportedly, considerable: “\$12.6 million for advertising this winter [2003-2004], \$18.5 million to publicize drug discount cards this spring, about \$18.5 million this summer, \$30 million for a year of beneficiary education starting this fall and \$44 million starting in the fall of 2005.”<sup>11</sup>

On January 29, 2004, Members of Congress requested a GAO legal opinion on HHS’s expenditure of appropriated funds on flyers, and print and television advertisements for MMA. Critics charged that these materials violated the “publicity or propaganda” prohibitions of the Medicare appropriations of the past two years.<sup>12</sup> They asserted that the advertisements and flyers (which were to be mailed to 36 million recipients) are inappropriate on two counts.<sup>13</sup> First, they alleged that the advertisements and flyers inaccurately portray the alterations to the law, accentuating the benefits and not mentioning potential cost increases for Medicare recipients; second, critics argued that the advertisements and flyers are effectively campaign advertisements for President Bush because they effectively attribute the new law to his efforts.

In response, HHS asserted that these expenditures were appropriate measures for informing both Medicare recipients and Congress about the new law. Additionally, HHS

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<sup>9</sup> See U.S. General Accounting Office, *Decision of the Comptroller General*, B-223098, Oct. 10, 1986, pp. 8-9; and U.S. General Accounting Office, *Application of Anti-Lobbying Laws to the Office of National Drug Control Policy’s Open Letter to State Level Prosecutors*, B-301022, Mar. 10, 2004, decision available at [<http://www.gao.gov/decisions/appro/301022.pdf>].

<sup>10</sup> For an overview of the reform, see CRS Report RL31966, *Overview of the Medicare Prescription Drug, Improvement, and Modernization Act*, by Jennifer L. O’Sullivan, Hilda Chaikind, Sibyl Tilson, and Paulette Morgan.

<sup>11</sup> Robert Pear, “U.S. Videos, for TV News, Come Under Scrutiny,” *New York Times*, Mar. 15, 2004, pp. A1, A16.

<sup>12</sup> Both P.L. 108-199 and P.L. 108-7 contain the prohibition, “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 Congress.” P.L. 108-199, Div. F, Title IV, § 624, and P.L. 108-7, Div. J, Title VI, § 626.

<sup>13</sup> See, for example, Senator Lautenberg, press release, “Senators Lautenberg and Kennedy Announce GAO Legal Investigation of Misleading HHS Medicare Campaign,” Feb. 6, 2004, available at [<http://lautenberg.senate.gov/~lautenberg/press/2003/01/2004206934.html>].

noted that it would have been remiss if it had not undertaken these actions, since the new law requires HHS to inform recipients of changes to Medicare.<sup>14</sup>

GAO issued its opinion on March 10, 2004.<sup>15</sup> GAO found that “there were several noteworthy omissions in HHS’s materials” and that the flyer “overstates the access beneficiaries will have to the prescription drug benefit program.”<sup>16</sup> Nevertheless, GAO concluded that the expenditure of funds — appropriated under P.L. 108-199 — for the advertisements and flyers did not violate the publicity or propaganda prohibition because the “the content of these publications does not constitute a purely partisan message.”<sup>17</sup>

On March 15, GAO announced it would issue an opinion on HHS expenditures on another form of advertisement, a “video news release,” copies of which were distributed to local television news stations.<sup>18</sup> The VNRs contain newscast-like interviews and reports — often called “story packages” in the media and public relations industry — that were scripted and purchased by HHS’s Centers for Medicare & Medicaid Services (CMS) and produced by Home Front Communications, a public relations firm.<sup>19</sup>

Some members of Congress have taken issue with the VNRs, saying that they are “covert propaganda.” They believed the VNRs looked so similar to typical news segment that local news stations might mistakenly air them not realizing they were produced by HHS.<sup>20</sup> “Covert propaganda,” as intimated above, is a term not found in the two appropriations laws in question. Rather, “covert propaganda” is a concept that GAO discerned in the nature of publicity or propaganda prohibitions. Essentially, any government-produced or commissioned media that “are misleading as to their origin” may

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<sup>14</sup> See statement of HHS Assistant Secretary for Public Affairs, Kevin Keane, in Amy Goldstein, “GAO to Probe Ads Publicizing Medicare Changes,” *Washington Post*, Feb. 7, 2004, p. A3. On HHS’s legal obligations to inform beneficiaries, see 42 U.S.C. §1395b-2 and §1395ss(e), and MMA, 117 Stat. 2075 § 101.

<sup>15</sup> U.S. General Accounting Office, *Medicare Prescription Drug, Improvement, and Modernization Act of 2003 — Use of Appropriated Funds for Flyer and Print and Television Advertisements*, B-302504, March 10, 2004, decision available at [<http://www.gao.gov/decisions/appro/302504.pdf>].

<sup>16</sup> *Ibid.*, pp. 10-11.

<sup>17</sup> *Ibid.*, p. 14.

<sup>18</sup> Vicki Kemper, “Medicare Ads Set Off Debate; Democrats Say White House ‘Video News Releases’ Mislead. The GAO Will Investigate,” *Los Angeles Times*, Mar. 16, 2004, p. 24.

<sup>19</sup> The VNRs also contain “B-roll,” that is, assorted footage that news stations might want to put into their newscasts (President Bush signing the new Medicare law, a pharmacist filling prescriptions, senior citizens receiving blood pressure tests, etc.) and “slates,” still shots of text providing facts about the new Medicare program. HHS contracted with Ketchum, Inc., which hired Home Front Communications; the videos were then distributed by the Centers for Medicare & Medicaid Services of HHS.

<sup>20</sup> Edward Kennedy, press release, “Senator Edward M. Kennedy and Democratic Colleagues Send Letter to Network Heads Over HHS Medicare Ads,” Mar. 15, 2004. In fact, “forty television stations nationwide are known to have run portions of the Medicare video.” Michael Doyle, “Medicare Ad Aired in Fresno Draws Scrutiny,” *Modesto Bee*, Mar. 18, 2004, p. A12.

constitute covert propaganda.<sup>21</sup> Thus, for example, GAO found in 1986 that the Small Business Administration (SBA) had violated publicity or propaganda prohibitions when it circulated pro-SBA “suggested editorials” to newspapers in the hope that the newspapers would publish them without SBA attribution.<sup>22</sup>

The Administration responded that the “use of video news releases is a common, routine practice in government and the private sector.”<sup>23</sup> HHS has bolstered this argument by providing the media with videocassettes which showed VNRs on Medicare produced by HHS under both the present Administration and that of President William J. Clinton. Both sets of videos are similar in style in that they use voice-overs (implying that a reporter is narrating — not the case in either video), offer scripted interviews with the Secretary of HHS, and present the respective Administrations’ views on various aspects of Medicare.<sup>24</sup>

However, the videos also differ in two critical respects: First, the video produced by the current Administration does not clearly state that it was produced by HHS; the previous Administration’s video does. Second, the current Administration’s video promotes the *current* Medicare law; the previous Administration’s video advocated *reforms* to law, stating that “Republican congressional leaders” had “recently announced their intention to postpone efforts to reform Medicare until next year.”

GAO issued its opinion on the VNRs on May 19. GAO judged that the use of funds appropriated under the Consolidated Appropriations Resolution of 2003 (P.L. 108-7) to create the VNRs violated the publicity or propaganda provision of the law.<sup>25</sup> While the B-roll and the slates were not inappropriate, the story packages constituted covert propaganda because CMS did not identify itself as the source. “Evidence shows, and CMS acknowledges, that the story package could be broadcast without edit or alteration, and actually was broadcast unedited in some markets. Television audiences viewing

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<sup>21</sup> U.S. General Accounting Office, *Decision of the Comptroller General*, B-223098, Oct. 10, 1986, p. 9.

<sup>22</sup> Ibid.. Similarly see General Accounting Office *Decision of the Comptroller General*, B-229069, Sept. 30, 1987, where GAO found that “op-eds articles” commissioned by the Office of Public Diplomacy for Latin America and the Caribbean (OPDLAC) constituted covert propaganda. The pieces were attributed to academics hired by OPDLAC but failed to note the writers had been paid to write them.

<sup>23</sup> See statement of HHS Assistant Secretary for Public Affairs, Kevin Keane, in Pear, “U.S. Videos, for TV News, Come Under Scrutiny,” pp. A1, A16.

<sup>24</sup> In each case, the voice-over scripts were composed by HHS and read by individuals paid to do so (e.g., Karen Ryan in the Bush video is the head of the Karen Ryan Group, a private public relations firm that produces VNRs). Zachary Roth, “The Campaign Desk: Karen Ryan: ‘I Feel Like Roadkill,’” *Columbia Journalism Review* (online), Mar. 18, 2004, available at [<http://www.campaigndesk.org/archives/000305.asp>].

<sup>25</sup> U.S. General Accounting Office, *Department of Health and Human Services, Centers for Medicare & Medicaid Services — Video News Releases*, B-302710, decision available at [<http://www.gao.gov/decisions/appro/302710.pdf>].

the story packages were not in a position to determine the source” and therefore might have mistaken them for actual news broadcasts.<sup>26</sup>

GAO further found that because “CMS has no appropriation available for the production and distribution of materials that violate the publicity or propaganda prohibition,” CMS violated the Antideficiency Act (31 U.S.C. 1341(a)), which prohibits making or authorizing an expenditure or obligation that exceeds available budget authority.<sup>27</sup> CMS is required by 31 U.S.C. 1351 to report its violation of the Antideficiency Act to the President and Congress.

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<sup>26</sup> Ibid., pp. 13-15, quote on pp. 14-15.

<sup>27</sup> Ibid., p. 15. On the Antideficiency Act, see CRS Report RL30795, *Government Management Laws: A Compendium*, Clinton T. Brass, coordinator, pp. 93-97.