



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases

File: B-302710

Date: May 19, 2004

DIGEST

1. The Centers for Medicare & Medicaid Services's (CMS) use of appropriated funds to pay for the production and distribution of story packages that were not attributed to CMS violated the restriction on using appropriated funds for publicity or propaganda purposes in the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117 Stat. 11, 470 (2003).
2. CMS, in using appropriations in violation of the publicity or propaganda prohibition, incurred obligations in excess of appropriations available for that purpose. *See* B-300325, Dec. 13, 2002. Accordingly, CMS violated the Antideficiency Act, 31 U.S.C. § 1341, and must report the violation to the Congress and President in accordance with 31 U.S.C. § 1351 and Office of Management and Budget Circular No. A-11.

DECISION

In a March 10, 2004, opinion, we concluded that the Department of Health and Human Services's (HHS) use of appropriated funds to produce and distribute a flyer and print and television advertisements, as part of a campaign to inform Medicare beneficiaries about changes to Medicare under the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA), did not violate publicity or propaganda prohibitions in the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, Div. F, Tit. VI, § 624, 118 Stat. 3, 356 (2004), and the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117 Stat. 11, 470 (2003). B-302504, Mar. 10, 2004. During our development of that opinion, we learned that the Centers for Medicare & Medicaid Services (CMS), an agency in the Department of Health and Human Services, had prepared as part of this campaign video news releases or VNRs, including a news story for television broadcast, to provide information to the television medium. Letter from Dennis G. Smith,

Director, Center for Medicaid and State Operations, to Gary L. Kepplinger, Deputy General Counsel, General Accounting Office (GAO), April 2, 2004 (Smith Letter). The VNRs consist of (1) video clips known as B-roll film, (2) introductory and concluding slates with facts about MMA, and (3) prepackaged news reports referred to as story packages with suggested lead-in anchor scripts. Importantly, the prepackaged story packages and anchor scripts did not include statements noting that they had been prepared by CMS.

Our March 10, 2004, opinion addressed only the flyer and advertisements and did not address CMS's use of appropriated funds to prepare and distribute the VNRs. This decision addresses whether CMS's use of appropriated funds to produce and distribute the VNRs violated the publicity or propaganda prohibitions enacted in the Consolidated Appropriations Resolution of 2003, cited above. CMS told us that it used fiscal year 2003 CMS program management appropriations to produce and distribute the VNRs. Smith Letter, Enclosure 1 at 8. As we explain below, we conclude that of the three parts of the VNRs, one part--the story packages with suggested scripts--violates the prohibition. In neither the story packages nor the lead-in anchor scripts did HHS or CMS identify itself to the television viewing audience as the source of the news reports. Further, in each news report, the content was attributed to an individual purporting to be a reporter but actually hired by an HHS subcontractor.

To perform of our analysis, we requested information from CMS regarding the production, filming and distribution of the VNR materials. Letter from Gary L. Kepplinger, Deputy General Counsel, GAO, to Dennis G. Smith, Acting Administrator, CMS, March 17, 2004. CMS responded by letter dated April 2, 2004. Smith Letter. We met with agency officials to clarify their responses and to gain further factual information regarding the production and distribution of the VNRs at issue. In addition to the information CMS provided us, we also examined available information regarding the use of VNRs generally by the broadcast media and their current use as a public relations tool.

BACKGROUND

Use of VNRs

VNRs have become a popular public relations tool to disseminate desired information from private corporations, nonprofit organizations and government entities, in part because they provide a cheaper alternative to more traditional

broadcast advertising.¹ While the practice is widespread and widely known by those in the media industry, the quality and content of materials considered to constitute a VNR can vary greatly.² Generally, a VNR package may contain a prepackaged news story, referred to as a story package, accompanied by a suggested script, video clips known as B-roll film, and various other promotional materials.³ These materials are produced in the same manner in which television news organizations produce materials for their own news segments.⁴ By eliminating the production effort and costs of news organizations, producers of VNRs find news organizations willing to broadcast a favorable news segment on the desired topic.⁵

Since 1990, there has been a notable rise in the distribution of VNR materials.⁶ With growing use of VNRs, journalism scholars began questioning the effect of this third-party material upon the perception that news was derived from a neutral source.⁷ In particular, scholars raised concerns regarding the influence of third-party sources.⁸

¹ Eugene Marlowe, *Sophisticated "News" Videos Gain Wide Acceptance*, Pub. Rel. J. 17 (Aug./Sept. 1994).

² In 1991, it was reported that 78 percent of news directors polled used edited VNRs at least once a week in their broadcasts. Bob Sonenclar, *The VNR Top Ten: How Much Video PR Gets On the Evening News?*, Col. J. Rev. 14 (Mar. 1, 1991). In 1992, another source reported that 100 percent of polled stations admitted to using some VNR materials in their newscasts. Anne R. Owen and James A. Karrh, *Video News Releases: Effects on Viewer Recall and Attitudes*, 22 Pub. Rel. Rev. 369 (Winter 1996). In 2001, it was reported that approximately 800 television stations in the United States use VNRs. Mark D. Harmon and Candace White, *How Television News Programs Use Video News Releases*, 27 Pub. Rel. Rev. 213 (June 22, 2001).

³ Marlowe, *supra* note 1, at 17.

⁴ *Id.*

⁵ Glen T. Cameron and David Blount, *VNRs and Air Checks: A Content Analysis of the Use of Video News Releases in Television Newscasts*, 73 Journalism and Mass Comm. Q. 890, 891 (Winter 1996) (summarizes the logistic and resource constraints of the media industry attributed to the media's decision to utilize VNR material).

⁶ Sonenclar, *supra* note 2, noting the anticipated rise in the use of VNRs. Harmon and White, *supra* note 2, noting the new importance of using VNRs in the media industry in the late 1980s and into the 1990s.

⁷ See generally Harmon and White, *supra* note 2, summarizing the various studies in the 1990s regarding the ethics of using VNRs in the journalism industry.

⁸ *Id.*; see also Owen and Karrh, note 2, examining the credibility of news programming using messages derived from VNRs.

Given these ethical concerns, there have been a number of studies of the use of VNRs by the broadcast industry. Several journalism scholars attribute the rise in the use of VNRs to the economic circumstances of the industry.⁹ In smaller broadcast markets during the early 1990s, news stations suffered significant reductions in staff and budget, and had difficulty obtaining footage of certain public interest events.¹⁰ Footage from an outside source helped stations fill airtime with programming that would otherwise not be available and helped avoid depletion of already overextended funds.¹¹

Studies also show, however, that most news organizations using VNR materials often use only a portion or edited versions of the materials provided.¹² Still, parties interested in obtaining the maximum audience for VNR materials argue that, even if the story package or scripted materials are not used in full, the production of a professionally complete news story provides a framework for the message conveyed in the final broadcast.¹³ This allows the story package producer to assert some control over the message conveyed to the target audience.

Also, the use of VNRs may be attributed to the ease with which the materials may be distributed. While some packages are distributed directly from the source to the television stations, satellite and electronic news services such as provided by CNN Newsource facilitate distribution to a number of news markets in a short period of time.¹⁴ Broadcast stations subscribe to these services, which provide, in addition to VNR materials, journalist reports and stories, and advertising.¹⁵ While the news services label VNRs differently than independent journalist news reports, there apparently is no industry standard as to the labeling of VNRs. In fact, when

⁹ Marlowe, *supra* note 1, at 17. *See also* Cameron and Blount, *supra* note 5, at 893.

¹⁰ Owen and Karrh, *supra* note 2. Cameron and Blount, *supra* note 5, at 893.

¹¹ Cameron and Blount, *supra* note 5, at 893.

¹² *Id.* This study showed that most news stations, regardless of size of the market, did not use the prepackaged news stories on a wide scale basis. The study noted that, while most stations used part of the VNRs, very few stations used the prepackaged story with no alteration.

¹³ *Id.* at 901.

¹⁴ Harmon and White, *supra* note 2.

¹⁵ Zachary Roth, *Fact Check, CNN: Spinning PR into News*, CJR Campaign Desk, Mar. 22, 2004, *available at* <http://www.campaigndesk.org/archives/000318.asp>.

questioned about the use of the VNR materials at issue here, some news organizations indicated that they misread the label or they mistook the story package as an independent journalist news story on CNN Newsource.¹⁶

Professional journalism societies have noted in their codes of ethics that journalists should resist influence from outside sources, including advertisers and special interest groups.¹⁷ Because VNRs consist of information generated by a group with a distinct perspective on an issue, the unfettered use of VNRs may run afoul of these principles.¹⁸ Moreover, professional organizations warn against using materials that would deceive audiences.¹⁹ VNRs that disclose the source of information to the target audience alleviate these ethical concerns.

CMS's Medicare VNRs

The CMS VNRs consist of three videotapes with corresponding scripts. CMS informed us that these videotapes represent what a news organization would receive when obtaining the VNR materials. Two of the videotapes are in English, and one is in Spanish. The two English videotapes contain three items: (1) video clips, referred to as B-roll, (2) slates containing, among other things, title cards with facts on MMA, and (3) a video segment called a "story package."²⁰ The B-roll provides news

¹⁶ *Id.* The article also notes that most news directors that ran the VNRs at issue here expressed displeasure with the Administration, and some thought the distribution of the VNR took "advantage of the smaller stations' well-known lack of resources."

¹⁷ See Code of Ethics and Professional Conduct Radio-Television News Directors Association (RTNDA), *available at* <http://www.rtna.org/ethics/coe.html>; *see also* Society of Professional Journalists (SPJ) Code of Ethics, *available at* http://www.spj.org/ethics_code.asp.

¹⁸ SPJ Code of Ethics states: "Deny favored treatment to advertisers and special interests and resist their pressure to influence news coverage." SPJ Code of Ethics, *supra* note 17. RTNDA Code of Ethics states: "Gather and report news without fear or favor, and vigorously resist undue influence from any outside forces, including advertisers, sources, story subjects, powerful individuals, and special interest groups." Code of Ethics and Professional Conduct RTNDA, *supra* note 17.

¹⁹ RTNDA Code of Ethics states: "Clearly disclose the origin of information and label all material provided by outsiders." (Emphasis added.) SPJ Code of Ethics states: "Identify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability."

²⁰ In addition to these materials, one of the English-language videos contains footage of an advertisement that appeared on national television. Our legal opinion of March 10, 2004, B-302504, reviewed this material, and found that HHS's use of

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organizations with footage for use in developing their own news reports. The slate is a visual feed from CMS to recipient news organizations that contains some facts regarding MMA.²¹ The last slate in the VNR materials directs the receiving news station to contact CMS for information on the VNR materials. The story packages are news reports prepared by CMS rather than a news organization.

The B-roll clips on each videotape are exactly the same and contain footage of President Bush, in the presence of Members of Congress and others, signing MMA into law, and a series of clips of seniors engaged in various leisure and health-related activities, including consulting with a pharmacist and being screened for blood pressure. The English videotapes also include clips of Tommy Thompson, the Secretary of the Department of Health and Human Services (HHS), and Leslie Norwalk, Acting Deputy Administrator of CMS, making statements regarding changes to Medicare under MMA. The Spanish videotape includes clips of Dr. Cristina Beato of CMS offering statements about MMA's changes to Medicare, instead of Thompson and Norwalk.

The two English VNRs contain segments entitled "story packages" that consist of self-contained news reports regarding Medicare benefits under MMA. Although the English story packages contain several of the same B-roll video clips and the same narrator, identified as Karen Ryan, the contents of the two story packages vary. With each story package, CMS included a script for a news anchor of the recipient news organization to read as a lead-in to the CMS produced news report. One story package focuses on CMS's advertising campaign regarding MMA (Story Package 1). The suggested anchor lead-in states that "the Federal Government is launching a new, nationwide campaign to educate 41 million people with Medicare about improvements to Medicare." The lead-in ends with "Karen Ryan explains." The video portion of the story package begins with an excerpt of the television advertisement with audio indicating "it's the same Medicare you've always counted on plus more benefits." Karen Ryan explains, "That's the main message Medicare's advertising campaign drives home about the law." As more clips from the advertisement appear, Karen Ryan continues her narration, indicating that the campaign helps beneficiaries answer their questions about the new law, the administration is emphasizing that seniors can keep their Medicare the same, and the

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appropriated funds for the advertisement did not violate the publicity or propaganda prohibition.

²¹ In addition to the title cards, the slates contain the visual feeds of the B-roll and the story packages. Each slate may be separated and edited for individual use by the receiving television station. For example, the receiving station could separate the slate with the B-roll footage of seniors engaged in health-related activities from the other B-roll footage and the story packages. The station could then use this slate separately from the remaining VNR materials.

campaign is part of a larger effort to educate people with Medicare about the new law. The story package ends with Karen Ryan stating: “In Washington, I’m Karen Ryan reporting.”

The second English story package (Story Package 2) focuses on various provisions of the new prescription drug benefit of MMA and does not mention the advertising campaign of CMS. The anchor lead-in states: “In December, President Bush signed into law the first ever prescription drug benefit for people with Medicare.” The anchor lead-in then notes, “[t]here have been a lot of questions about” MMA and its changes to Medicare and “Karen Ryan helps sort through the details.” The video portion of the news report starts with footage of President Bush signing MMA. Karen Ryan’s voice narration indicates that when MMA was “signed into law last month, millions of people who are covered by Medicare began asking how it will help them.” Next, the segment runs footage of Tommy Thompson, in which he states that “it will be the same Medicare system but with new benefits . . .” Karen Ryan continues her narration, stating “most of the attention has focused on the new prescription drug benefit . . . all people with Medicare will be able to get coverage that will lower their prescription drug spending . . . Medicare will offer some immediate help through a discount card.” She also tells viewers that new preventive benefits will be available, low-income individuals may qualify for a \$600 credit on available drug discount cards, and “Medicare officials emphasize that no one will be forced to sign up for any of the new benefits.” Karen Ryan’s narration leads into clips of Secretary Thompson and Leslie Norwalk explaining other beneficial provisions of MMA. Similar to Story Package 1, Story Package 2 ends with “In Washington, I’m Karen Ryan reporting.”

The Spanish-language materials contain the same three items as the English language VNRs—a B-roll, slates and a story package (Story Package 3). After the B-roll segments, the story package segment appears. This segment is considerably longer than its two English counterparts. Similar to Story Package 2, Story Package 3 focuses on prescription drug benefits available under MMA. It does not mention that CMS is engaging in an advertising campaign. Here, the anchor lead-in is similar to Story Package 2, except the anchor indicates that Alberto Garcia “helps sort through the details.” The video segment begins with the footage of President Bush signing MMA into law as Alberto Garcia narrates that after signing the law, millions of people who are covered by Medicare began asking how the new law will help them. The remainder of the story package contains identical footage of Dr. Beato and of seniors engaged in various activities as in the B-roll footage. During the video clips of seniors, Alberto Garcia narrates that the focus of most of the attention to MMA is on the prescription drug benefit available in 2006. He also explains that prescription drug discount cards will be available in June 2004 and that “[p]eople with Medicare

may be able to choose from several different drug discount cards, offering up to 25 percent savings on certain medications.”²² Alberto Garcia concludes his report, stating: “In Washington, I’m Alberto Garcia reporting.”

In response to our request for more factual information on CMS’s practice of using VNRs, CMS forwarded to us a fourth videotape. This tape contains Story Package 2 and two VNRs, each of which CMS described as a “produced story segment,” that HHS produced and distributed in 1999 under then-Secretary Donna Shalala of the Clinton Administration. Smith Letter at 2. These two story packages were designed to inform beneficiaries of the Clinton Administration’s position on prescription drug benefits and preventive health benefits. CMS pointed out similarities between the story packages in current use and the earlier ones. Much like the story packages at issue here, the earlier story packages contain footage of seniors engaging in various activities, then-HHS Secretary Donna Shalala appearing to answer questions regarding the provisions of proposed legislation for a prescription drug benefits and preventive health benefits, and a report of the Administration’s proposal. The earlier story packages end with the phrase, “Lovell Brigham, reporting.”

Distribution of Medicare VNRs

CMS explained to us that HHS hired Ketchum, Inc., to disseminate information regarding the changes to Medicare under MMA. Specifically, HHS contracted with Ketchum to assist HHS and its agencies with a “full range of social marketing activities to plan, develop, produce, and deliver consumer-based communication programs, strategies, and materials.” Ketchum Contract at 2. Ketchum hired Home Front Communications (HFC) to create the VNR materials. HFC is a broadcast public relations firm specializing in producing video products. Smith Letter, Enclosure 1 at 6-7. HFC wrote the VNR scripts, which were reviewed, edited, and approved by CMS and HHS. *Id.* at 7. HFC completed all production work, including filming, audio work and editing. The final VNR packages were reviewed and approved by CMS and HHS. *Id.*

The VNR materials were then distributed to television stations via satellite, electronic services provided by CNN Newsource, and/or mail. *Id.* at 2. CMS and HFC staff members contacted some news directors by telephone to inform the stations that the materials were available. *Id.* Additionally, CMS e-mailed and faxed news advisories to news stations regarding the VNR availability. *Id.*; *see also* Smith Letter, Enclosure 4. The advisory indicated the satellite coordinates to obtain the materials, how to find the materials on CNN Newsource, and bullet-point key facts regarding the new benefits available. Smith Letter, Enclosure 4. The advisory further explains what the visual elements of the VNR consisted of, including

²² In Story Package 2, Leslie Norwalk, in one of her “interview” video clips, not Karen Ryan, the reporter, made this point.

interviews, a story package, and B-roll. *Id.* All stations could access satellite distribution. Smith Letter, Enclosure 1 at 6. Computers of the subscribing location stations' newsrooms could access CNN Newsource. *Id.* The advisory directed news stations to contact Robin Lane, an HFC employee, for more information on retrieving VNR materials. CMS also mailed videotapes of VNR materials to those television stations that requested the material. Smith Letter, Enclosure 4.

CMS provided us a list of television stations that aired at least some portion of the VNRs between January 22, 2004, and February 12, 2004. This list contained 40 stations in 33 different markets. Smith Letter, Enclosure 3. CMS did not identify what parts of the VNR each station broadcasted. One of the stations that aired the story package was WBRZ, Baton Rouge, Louisiana. According to transcripts published on the World Wide Web, WBRZ broadcast Story Package 2 and used the suggested anchor lead-in script on January 22, 2004, in its entirety.²³ At least two other television stations may have aired either Story Package 1 or 2 in their entirety. A review of excerpts of transcripts from Video Monitoring Services of America show that two stations, WMBC-TV in New Jersey (Story Package 1) and WAGA-TV in Atlanta (Story Package 2), aired MMA news stories ending with Karen Ryan's by-line.²⁴

DISCUSSION

This is the first occasion that we have had to review the use of appropriated funds by government entities to engage in the production of VNRs. At issue here is whether CMS's use of appropriated funds to produce VNR materials constituted a proper use of those funds. In its written response and during our informal interview, CMS contended that the production of the VNR materials constitutes a "standard practice in the news sector" and a "well-established and well-understood use of a common news and public affairs practice." Smith Letter at 2. While we recognize that the use of VNR materials, with already prepared story packages, is a common practice in the

²³ The transcript, available <http://www.2theadvocate.com/scripts/012304/noon.htm>, was accessed on April 7, 2004.

²⁴ The partial transcripts indicate the time each news item was broadcast, the topic discussed, some information on visual clips, and the reporter on the assignment. For example, the partial transcript for the WAGA-TV transcript indicated that the story ran for 1 minute and 22 seconds, contained video clips from the television campaign advertisements and a pharmacy checkout, an interview with Tommy Thompson, and Karen Ryan reporting from Washington. *See* Video Monitoring Services of America, Good Day Atlanta, February 4, 2004, *available at* www.nexis.com.

public relations industry and utilized not only by government entities but also the private and non-profit sector as well, our analysis of the proper use of appropriated funds is not based upon the norms in the public relations and media industry.

CMS told us that it used fiscal year 2003 CMS program management appropriations to produce and distribute the VNR package. Smith Letter, Enclosure 1 at 8. While CMS may have authority to use appropriated funds to disseminate information regarding the changes to Medicare pursuant to MMA,²⁵ this authority is subject to the publicity or propaganda prohibition appearing in the annual appropriation act.²⁶ Specifically, this prohibition states: “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.” Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117 Stat. 11, 470 (2003).

Our March 10, 2004, opinion noted that to date we have applied the publicity or propaganda restriction to prohibit the use of appropriated funds for materials that are self-aggrandizing, purely partisan in nature, or covert as to source. *See generally* B-302504. Of these three types, the VNR materials on MMA raise concerns as to whether they constitute “covert” propaganda because they are misleading as to source.²⁷

CMS asserts that, in keeping with the traditional practices in the media industry, CMS or the service it used to distribute the VNR materials clearly labeled the materials as VNRs. *See generally* Smith Letter. Because they are so labeled and easily identifiable among those in the media, CMS contends that the story packages could not be considered misleading as to source. CMS officials also assert that it was not their intent to distribute the VNR materials to the broadcast stations covertly and that the labeling of the entire VNR package clearly attributes the source of the information to HHS and CMS. Smith Letter, Enclosure 1 at 4.

²⁵ *See generally*, MMA § 101(a) (adding new sections to the Social Security Act and expanding HHS’s authority to engage in information dissemination activities to inform Medicare beneficiaries about their benefits).

²⁶ We need not speculate, and this decision does not address, what type of authorization an agency must have, and how specific that authority would have to be, to prepare and distribute a “news story” absent a prohibition on publicity or propaganda.

²⁷ We did not criticize the flyer and advertisements under consideration in our March 10, 2004, opinion as covert propaganda because all of the materials identified HHS or CMS as the source to every audience viewing the material.

The “critical element of covert propaganda is the concealment of the agency’s role in sponsoring the materials.” B-229257, June 10, 1988. In our case law, findings of propaganda are predicated upon the fact that the target audience could not ascertain the information source. For example, we found government-prepared editorials to be covert propaganda; although the newspapers who would have printed the suggested editorials should have been aware of the source, the reading public would not have been aware of the source. B-223098, Oct. 10, 1986. In that case, we examined materials concerning President Reagan’s proposal to transfer the Small Business Administration (SBA) to the Department of Commerce. *Id.* In support of the Administration’s proposal, SBA prepared and distributed a variety of materials, including suggested editorials. SBA prepared these editorials and provided them to newspapers around the country to run as the position of the recipient newspapers without disclosing to the readers of those editorials that SBA was the source of the information. Because the SBA-prepared editorials did not identify SBA as the source, SBA’s use of appropriated funds to prepare and distribute the editorials violated the publicity or propaganda prohibition.²⁸

In a 1987 case, the Department of State’s Office of Public Diplomacy for Latin America violated the prohibition by paying consultants to write op-ed pieces in support of the Administration’s policy on Central America for distribution to newspapers. B-229069, Sept. 30, 1987. The State Department did not advise the newspapers of its involvement in the writing of the op-ed pieces. The newspapers published these articles for distribution to an equally uninformed audience of individual readers. These materials were “propaganda” within the “common understanding” of the term, and they constituted “deceptive covert propaganda” designed to influence the media and public to support the Administration’s Latin American policies. *Id.*

In defending its VNRs, CMS fails to distinguish among the three separate parts of its VNRs and the intended audience for each part. We do not dispute the fact that CMS labeled the entire package of VNR materials so that the receiving news organizations could identify HHS or CMS as the source of the information, whether they were received directly from CMS through the mail or retrieved by the news organizations from CNN Newsource or other satellite services.²⁹ However, in both B-223098 and

²⁸ We compared SBA’s editorials to lobbying campaigns, attempting to manipulate the perception that public support for an issue was greater than it actually was. *Id.*; see also B-129874, Sept. 11, 1978 (criticizing a plan to distribute “canned editorial materials”).

²⁹ Some news organizations reported that the use of such information was a mistake due to their own misreading of the label on the materials received or some confusion as to the labeling by CNN Newsource. Later reports indicate that CNN Newsource has changed its cataloging and labeling of VNRs in response to these reports. See (continued...)

B-229069, the readers of the printed editorials and op-ed pieces would not have been aware of the government's influence. In analyzing whether the three separate materials that make up the VNR package are covert propaganda, we do not consider the VNR as a whole, because each of the three items that comprise the VNR was prepared for a different purpose and audience.

In its written response and during our interviews, CMS indicated that the 41 million Medicare beneficiaries, who may comprise the news stations' viewing audience, and not just the television stations themselves, were the intended audience of the VNR materials. Some VNR materials, including the B-roll and the slates, could not reasonably be targeted directly to a television viewing audience. By their very nature, the B-roll and slates were designed to be incorporated in a news story of the receiving stations' own creation. CMS clearly identified itself as the source of these materials to the television stations receiving them. CMS made efforts to notify the news stations of the availability of these materials via e-mail, telephone, and facsimile and the available distribution sources identified the materials as a VNR. Smith Letter at 2, Enclosure 1 at 2. Accordingly, the B-roll and slates do not violate the publicity or propaganda prohibition.

The story packages and lead-in scripts, however, were clearly designed to be seen and heard directly by the television viewing audience and not solely by the media receiving the package. CMS and HHS officials told us that the story packages were designed so that television stations could include them in their news broadcasts exactly as CMS had produced them, without any production effort by the stations. The suggested anchor lead-in scripts facilitate the unaltered use of the story package, announcing the package as a news story by Karen Ryan or Alberto Garcia. Importantly, CMS included no statement or other reference in either the story package or the anchor lead-in script to ensure that the viewing audience would be aware that CMS is the source of the purported news story.

The story packages, similar to the SBA editorials and the State Department op-ed pieces, could be reproduced with no alteration thereby allowing the targeted audience to believe that the information came from a nongovernment source or neutral party. The story packages of the VNRs consist of a complete message that could be reproduced directly by the news organizations to be viewed by the audience of the newscasts. As such, the viewing audience does not know, for example, that Karen Ryan and Alberto Garcia were paid with HHS funds for their work.

The receiving news organization's ability to edit the story packages to produce an independent news story does not negate the fact that CMS designed the segments to

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Zachary Roth, *Fact Check: CNN Cracks Down--on CNN*, CJR Campaign Desk, Mar. 31, 2004, available at <http://www.campaigndesk.org/archives/000358.asp>.

broadcast as CMS had produced them. CMS's effort to identify itself to the news organizations that received the VNRs did not alert television viewers that CMS was the source of the story package. CMS has acknowledged that the television viewer was the targeted audience. Because CMS did not identify itself as the source of the news report, the story packages, including the lead-in script, violate the publicity or propaganda prohibition.³⁰

In a modest but meaningful way, the publicity or propaganda restriction helps to mark the boundary between an agency making information available to the public and agencies creating news reports unbeknownst to the receiving audience. It is not the only marker Congress has placed in statute between the government and the American press, however. Consistent with the restrictions on publicity or propaganda "within the United States,"³¹ Congress has prohibited the U.S. Information Agency and its succeeding agency, Board of Broadcasting Governors, created by Congress for the purpose of producing pro-U.S. government news reports and print materials for international audiences, 22 U.S.C. § 1461, from broadcasting to domestic audiences, 22 U.S.C. §§ 1461(b), 1461-1a.³² In limiting domestic dissemination of the U.S. government-produced news reports, Congress was reflecting concern that the availability of government news broadcasts may infringe upon the traditional freedom of the press and attempt to control public opinion. *See* B-118654-O.M., Feb. 12, 1979. Congress also restricted government-produced programming for domestic audiences in the law creating the Public Broadcasting Corporation. 47 U.S.C. § 396. Although the mission of the Public Broadcasting Corporation includes instructional, educational and cultural purposes, the statute creating the Corporation prohibits the Corporation from directly producing any news programming. 47 U.S.C. § 396(g)(3)(A) & (B).³³ While Congress authorized HHS to

³⁰ As we noted in the background section of this decision, CMS forwarded to us a videotape including what CMS described as two story packages that HHS had produced and distributed during the Clinton Administration in October 1999. These two story packages were not brought to our attention at that time. Had we been aware of the use of story packages in this or other contexts, the principles discussed here would have been applicable. We note, however, that accounts of the government are settled by operation of law three years after the close of the fiscal year. 31 U.S.C. § 3526(c).

³¹ The prohibition restricts publicity or propaganda "within the United States." The Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117 Stat. 11, 470 (2003).

³² There are some limited exceptions in which Broadcasting Board of Governors and United States Information Agency materials could be viewed by a domestic audience. 22 U.S.C. § 1461(b). None of these exceptions are relevant here.

³³ The Administration and Congress have significant control over the Public Broadcasting Corporation (PBC). The President appoints and the Senate confirms

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conduct a wide-range of informational activities, CMS was given no authority to produce and disseminate unattributed news stories.

CMS makes two other arguments in support of its use of appropriated funds to produce and distribute the story packages. Neither argument is persuasive. CMS argues that the VNR materials cannot be covert propaganda because the VNR materials were not produced as a “purported editorial, advocacy piece or commentary.” Smith Letter, Enclosure 1 at 4. CMS asserts that the narration by Karen Ryan (and presumably Alberto Garcia) does not take a position on the MMA. *Id.* While we agree that the story packages may not be characterized as editorials, explicit advocacy is not necessary to find a violation of the prohibition.³⁴ As with the SBA-suggested editorials, the content of the story packages themselves would not violate the publicity or propaganda prohibition if identifying the source to the target audience were not an issue. *See* B-302504, Mar. 10, 2004.

Further, CMS refers to our recent opinion in B-301022, Mar. 10, 2004, regarding the Office of National Drug Control Policy’s (ONDCP) open letter to state-level prosecutors opposing efforts to legalize marijuana and other controlled substances.³⁵ Smith Letter, Enclosure 1 at 3. The open letter contained two attachments, one of which did not identify ONDCP as the source of the information. B-301022, Mar. 10, 2004. We found that the unidentified attachment was not a violation of the publicity or propaganda prohibition because the document was part of a package that clearly identified ONDCP as the source and because there was no attempt to portray the contents of the document as the position of an individual outside the agency. *Id.*

This reasoning cannot be applied to the story packages at issue here. The target audience of the ONDCP letter and attachments, the state prosecutors, had access to the entire package. The television viewing audiences, however, could not view the entire MMA VNR package. 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 the story packages were

(...continued)

the nine members of the Board of Directors. 47 U.S.C. § 396(c)(2). PBC is required to report annually to Congress regarding its operations, activities, financial condition and accomplishments. 47 U.S.C. § 396(i).

³⁴ Although the story package content may not contain strong editorial positions on the benefits of MMA, they are not strictly factual news stories as HHS contends. On balance, the contents of the story packages consist of a favorable report on effects on Medicare beneficiaries, containing the same notable omissions and weaknesses as the flyer and advertisements that we reviewed in our March 2004 opinion.

³⁵ The National District Attorneys Association sent the open letter and attachments with its own cover letter to the state-level prosecutors.

not in a position to determine the source from the other materials in the VNR packages. Unlike the ONDCP materials, the content of the message expressed in the story packages was attributed to alleged reporters, Karen Ryan and Alberto Garcia, and not to HHS or CMS. Nothing in the story packages permit the viewer to know that Karen Ryan and Alberto Garcia were paid with federal funds through a contractor to report the message in the story packages. The entire story package was developed with appropriated funds but appears to be an independent news story. The failure to identify HHS or CMS as the source within the story package is not remedied by the fact that the other materials in the VNR package identify HHS and CMS as the source of the materials or that the content of the story package did not attempt to attribute the agency's position to an individual outside the agency.³⁶

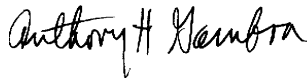
HHS's misuse of appropriated funds in violation of the publicity or propaganda prohibition also constitutes a violation of the Antideficiency Act, 31 U.S.C. § 1341(a). The Antideficiency Act prohibits making or authorizing an expenditure or obligation that exceeds available budget authority. *See* B-300325, Dec. 13, 2002. Because CMS has no appropriation available for the production and distribution of materials that violate the publicity or propaganda prohibition, CMS has violated the Antideficiency Act, 31 U.S.C. § 1341(a). *See* B-300325, Dec. 13, 2002. CMS must report its Antideficiency Act violation to the President and the Congress. 31 U.S.C. § 1351.³⁷ Office of Management and Budget Circular No. A-11 provides guidance to executive agencies on information to include in Antideficiency Act reports.

³⁶ CMS also argues that VNRs are similar to press releases as “[e]ach is designed to provide information to reporters and is crafted for the use by the media to which it is directed. Each provides quotes, facts and background that a reporter can use to write or produce a story. Each is created to provide context to the issue.” Smith Letter at 1. There may, indeed, be similarities between these two public relations tools. We are familiar with the practice of preparing press releases to include information useful to reporters who then prepare and produce their own news stories for publication. With the story packages, CMS prepared news stories using alleged reporters rather than simply offering information to reporters who would prepare their own stories.

³⁷ We were unable to identify the amount of HHS's violation. HHS advised that the English language story packages cost \$33,250, and that the Spanish language VNR cost \$9,500. Smith Letter, Enclosure 1 at 8. Although requested, HHS did not provide further documentation of these costs to us. We did not audit these amounts.

CONCLUSION

Although the VNR materials were labeled so that the television news stations could identify CMS as the source of the materials, part of the VNR materials—the story packages and lead-in anchor scripts—were targeted not only to the television news stations but also to the television viewing audience. Neither the story packages nor scripts identified HHS or CMS as the source to the targeted television audience, and the content of the news reports was attributed to individuals purporting to be reporters, but actually hired by an HHS subcontractor. For these reasons, the use of appropriated funds for production and distribution of the story packages and suggested scripts violated the publicity or propaganda prohibition of the Consolidated Appropriation Resolution of 2003, Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117 Stat. 11, 470 (2003). Moreover, because CMS had no appropriation available to produce and distribute materials in violation of the publicity or propaganda prohibition, CMS violated the Antideficiency Act, 31 U.S.C. § 1341. CMS must report the Antideficiency Act violation to the Congress and the President. 31 U.S.C. § 1351.



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