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HEALTH CARE FINANCING ADMINISTRATION

Three Largest Medicare Overpayment Settlements Were Improper

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Madame Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the results of our recent investigation of the Health Care Financing Administration's (HCFA) negotiated settlements of large overpayments to three Medicare providers between 1991 and July 1999. (See *HCFA: Three Largest Medicare Payments Were Improper* [GAO/OSI-00-4, Feb. 25, 2000].) These settlements constituted 66 percent of all Medicare overpayment settlements since 1991 for which HCFA provided us records. In these three settlements, HCFA accepted $120 million for debt exceeding $332 million—about 36 percent of the total principal.

The depletion of the Medicare Trust Fund has been the subject of significant scrutiny in recent years. As we have reported previously, fraudulent and abusive practices have raised concerns about program vulnerabilities.[1] HCFA, an agency within the Department of Health and Human Services (HHS) that administers the Medicare program, is required to ensure that debts owed the program—generally caused by overpayments to providers—are paid. Historically, rather than collect the entire debt, however, HCFA often enters into settlement agreements with providers and accepts less than the full amount owed.

HCFA provided us with copies of 96 agreements reflecting Medicare overpayment settlements that it negotiated from 1991 through July 1, 1999, in which the overpayment exceeded $100,000. We found nothing improper in the settlement of 93 of the 96 matters. We did determine, however, that HCFA acted inappropriately in several respects as to the 1995, 1996, and 1997 settlements of the three largest matters.

In brief, we found that (1) former HCFA Administrator Bruce Vladeck's participation in the largest settlement raised conflict-of-interest concerns, (2) HCFA unilaterally chose not to obtain Department of Justice approval of the settlements and ignored its own regulations and internal guidance, (3) HCFA appears to have disregarded permissible settlement criteria established by regulation, (4) the settlement agreements contained questionable provisions, and (5) HCFA executed settlements without the benefit of legal counsel.

[1] See *Medicare: HCFA Faces Multiple Challenges to Prepare for the 21st Century* (GAO/T-HEHS-98-85, Jan. 29, 1998).

Actions by the HCFA Administrator Raised Conflict-of-Interest Concerns

We determined that HCFA Administrator Bruce Vladeck had directed subordinates to settle the three matters and that he had a prior professional association with two of the three providers immediately prior to being appointed HCFA Administrator. Mr. Vladeck's participation in the largest settlement—$25 million accepted for $155 million in overpayments to a hospital—raised conflict-of-interest concerns because he had previously served on the hospital's Board of Directors. In this instance, we learned that Kevin Thurm, then Chief of Staff to the HHS Secretary and the current Deputy Secretary, had instructed Mr. Vladeck to inquire about the status of the overpayments. As a result, Mr. Vladeck suggested to Charles Booth, then Director of Payment Policy, that "time was more important than money" and instructed him to move faster. Mr. Booth had told Mr. Vladeck that quickening the process could cost HCFA an extra $8 million to $10 million. Despite this being HCFA's largest settlement and unlike other settlements we reviewed, HCFA kept no records or documentation about it, not even a copy of the settlement agreement. We were fortunate to obtain records that the fiscal intermediary maintained. Mr. Vladeck also failed to disclose his previous affiliation with the other provider, a home health agency. In this instance, Mr. Vladeck did not reveal on the financial disclosure forms he filed upon his appointment that he had sat on the Advisory Committee to the home health agency. We could not resolve our questions about Mr. Vladeck's involvement in these settlements given his refusal to meet with us.

No Department of Justice Approval Sought

HCFA's regulations and internal guidance state that HCFA must refer all settlements over $100,000 to the Department of Justice for approval, in accordance with the Federal Claims Collection Act. HCFA unilaterally decided to settle the matters without Justice approval. HCFA should have obtained clarification from those charged with implementing the Federal Claims Collection Act, including Justice and/or GAO. Such clarification should have been sought because HCFA's own regulations required any compromise of a claim over $100,000 to be approved by Justice, and those who settled the matter thought approval was necessary. Mr. Booth chose not to seek Justice approval or HCFA's own Office of General Counsel (OGC) review because, as he told us, he was concerned that if he did, the "deals would go up in smoke." He also admitted to us that he knew that the settlements were not in the best interest of the government.

Two months prior to initiating the first of these three improper settlements, HCFA (and Mr. Vladeck) was notified that Justice had rejected a HCFA-proposed settlement for $3 million of a $58-million overpayment to a hospital. Justice rejected the proposal in September 1993 because it was "not sufficient" and "out of line with settlement

amounts from comparable institutions." It then took over the negotiations with the hospital, which continued until March 1994 when the hospital rejected Justice's offer to settle the matter for $12 million. After the hospital's rejection, Justice returned the matter to HCFA for collection. Ultimately, a $10-million settlement was made.

Permissible Claims Criteria Disregarded

Regulations implementing the Federal Claims Collection Act set forth criteria agencies must consider in determining whether to compromise a debt or claim for less than the full amount owed. These regulations permit compromise of claims only if one or more of the following reasons exist: (1) the debtor cannot pay the full amount within a reasonable time, (2) the debtor refuses to pay and the United States is unable to collect the full amount in legal proceedings, (3) there is real doubt that the United States can prove its case in court, or (4) the cost of collecting the claim does not justify seeking full recovery.[2] HCFA's regulations generally mirror the joint regulations.

Although HCFA chose not to seek a clarification or actual approval from Justice, it is not entirely clear that the Federal Claims Collection Act actually required Justice approval. The applicability of the Federal Claims Collection Act to the three settlements that we investigated depends upon whether the amount of overpayments determined by the fiscal intermediaries constitutes a "claim" or "debt" within the meaning of the act. The Federal Claims Collection Standards,[3] which implement the act, make clear that Justice approval is required only when a debt or claim is compromised.[4] In the claims context, we have previously said that "compromise" means accepting less than the full amount owed in full satisfaction of the claim.[5] Based upon the facts in the three improper settlements, we believe it is clear that HCFA accepted less than the full amount of the overpayments. It is not, however, as clear whether such overpayments constituted a claim or debt within the meaning of the act. The standards use the terms "claim" and "debt" interchangeably and define them as "an amount of money or property which has been determined by an appropriate agency official to be owed to the United States…."[6] The term "appropriate agency official" is not defined in the standards.

[2] 4 C.F.R. pt. 103.

[3] 4 C.F.R. ch.2.

[4] *Id.* § 103.1(b).

[5] *E.g., In re Economic Development Admin.*, 62 Comp. Gen. 489, 492-93 (1983).

[6] 4 C.F.R. § 101.2(a).

However, the meaning of this phrase is critical to whether the act applied to the settlement agreements under discussion here.

HCFA's regulations and manuals recognize that circumstances may exist in which compromise of a debt is appropriate. HCFA's Guide states,

"[C]ompromise of debts should not be considered until all administrative collection action to collect a debt in full has been exhausted, unless it becomes clear at some point during the collection activity that further action to collect the debt in full is not in the best interest of the Government."[7]

Circumstances that could lead to such a determination include HCFA's inability to collect the debt in full, a legal issue that raises doubts as to HCFA's ability to prove its case in court for the full amount, or the further cost of collecting the debt would exceed the amount of the debt.[8]

Although these provisions were promulgated pursuant to the Federal Claims Collection Act, we believe that government agencies should normally consider elements like these before agreeing to settle significant claims. It does not appear that these settlements, however, were negotiated after careful consideration of these factors. In apparently failing to consider these or similar elements before entering into these multimillion-dollar settlements, HCFA acted improperly, regardless of the applicability of the act and its associated regulations. Moreover, had HCFA considered these factors, it is unlikely that settlement would have been appropriate.

For example, HCFA appeared not to consider that all of the providers were able to pay the amounts owed. One of the providers, the home health agency, had established a reserve fund to pay most of the amount owed; and the fiscal intermediaries had already withheld the amounts owed by the other two providers by offset, so that no additional payment was necessary from them.

Further, it does not appear that there was a substantial risk of loss should HCFA or its intermediaries litigate these claims. In all three cases, the provider either claimed that it provided covered services or incurred bad debts; however all three providers lacked documentation to support any of these claims. Therefore it is unlikely that any of the providers could have mounted strong defenses. Moreover, the fiscal intermediaries, who would

[7] HCFA's Guide, § 0306-1-45(I).

[8] *Id.* § 0306-1-45(B); 42 C.F.R. § 405.376(d).

represent HCFA in any legal action to collect these debts, were confident in their ability to prevail. Although a risk in litigation always exists, consideration of "litigation risk" does not appear to justify settlement. Even if settlement had been appropriate, HCFA regulations require that the amount accepted in compromise be reasonable in relation to the amount that can be recovered by enforced collection proceedings.[9] Since it appears there was little litigation risk to HCFA to collect the full debt, the significant compromise of the amounts owed in these three matters is apparently unjustified.

Consideration of the cost of collection also would not justify these settlements. Under both HCFA and the Federal Claims Collection Standards, costs of collecting should not normally carry great weight in the settlement of large claims.[10] It is unlikely that the cost of collecting these debts, which collectively approximated $332 million, could outweigh their recovery.

Settlement Agreements Contained Questionable Provisions

The agreements contained several provisions that were not in accord with HCFA's guidance for settling claims. For example, HCFA agreed to waive interest in the settlement with the home health agency, despite contrary direction contained in its financial management guide.[11] It also permitted the home health agency to pay part of its debt in installments, which should be considered "only in rare instances."[12]

Moreover, two of the agreements explicitly permitted the providers to continue to be reimbursed for costs regardless of whether they were actually incurred. The settlement with the home health agency permits it to be reimbursed in the future for costs that might not be covered by Medicare, although capped at a specific level. Similarly, the 1996 agreement with the hospital permits it to be reimbursed for bad debts without documentation as otherwise required by regulation.[13] Mr. Booth disregarded the objections of knowledgeable HCFA and fiscal

[9] 4 C.F.R. § 103.4, 42 C.F.R. § 405.376(h).

[10] HCFA's Guide, § 0306-1-45(B)(4).

[11] HCFA's Guide directs HCFA to charge interest on all debts owed the government unless a different rule is prescribed but requires that interest be charged on all debts paid in installments. *Id.* § 0306-1-40(P)(1). Note, however, that HCFA's regulations provide for the adjustments to interest charges for overpayment determinations reversed administratively. 42 C.F.R. § 405.378(h)(2).

[12] HCFA's Guide, § 0306-1-45(E).

[13] 42 C.F.R. § 413.20(d).

intermediary officials who protested the settlements as setting bad precedents.

HCFA Eschewed Legal Review of Settlements

None of the three agreements were reviewed by HCFA's OGC or any other government attorney before they were executed, even though HCFA's internal guidance requires that debts of over $100,000 be referred to Justice through HCFA's central office and OGC.[14] The lack of legal review is further evidence of HCFA's failure to assess the litigation risks and other factors involved before settling these matters. We also believe that legal review is appropriate before government officials sign agreements relinquishing the government's right to recover tens of millions of dollars.

After we advised HCFA in advance of the specific questions we would be asking about its claims collection processes and compliance with the Federal Claims Collection Act, neither Chief Financial Officer Michelle Snyder nor Chief Counsel Sheree Kanner could answer those questions. Even more troubling is that after these interviews, we gave HCFA the opportunity to respond in writing to these questions, but the written response from Deputy Administrator Michael Hash was unresponsive to our questions.

The chronologies of the three improper settlements and our legal analysis of the applicability of the Federal Claims Collection Act to these settlements and the Medicare program can be found in our February 25, 2000, report.

Madame Chairman, this completes my prepared statement. I would be happy to respond to any questions that you or other members of the Subcommittee may have.

[14] HCFA's Guide, § 0306-1-20(C).

GAO Contacts and Acknowledgement

For further information regarding this testimony, please contact Robert H. Hast or Donald Fulwider at (202) 512-7455. William Hamel made a key contribution to this testimony.

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