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B-210545 June 6, 1983

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TO: Director, HRD

FROM: Acting General Counsel - Harry R. Van Cleve

SUBJECT: Use of Fiscal Intermediaries to Process and Pay Indian Health Service Contracts-- B-210545-O.M.

Dear Sir:

Based on an informal memorandum from the Department of Health and Human Services (HHS), Larry Horinko of your staff asked for legal advice on whether under its current statutory authority the Indian Health Service (IHS) may use fiscal intermediaries to pay the claims of those hospitals which serve the Indian population ("providers") under 42 U.S.C. Sec. 2001(b) (1976). There is presently no such specific statutory authority. For the reasons discussed below, we conclude that legislation authorizing the use of fiscal intermediaries would be required. We understand that HHS will seek legislative authority in its fiscal year 1984 legislation program.

IHS contract health services are services rendered to IHS beneficiaries at IHS expense by non-IHS hospitals and practitioners. IHS authorizes contract services either upon referral of a patient to a contract provider of medical care, or, in cases of emergency, when the patient goes directly to the provider, upon notification as required by regulations (42 C.F.R. Sec. 36.24 (1981)). IHS generally has paid billed charges for the services rendered and bills are currently processed for payment by IHS personnel. The IHS contract care program is authorized under the gnarl authority to conduct the Indian health program. 42 U.S.C. Sec. 2001.

IHS currently has separate contracts with numerous health care providers. During an audit of IHS, HRD staff discovered, based on a sampling, that some 20 percent of the claims paid by IHS employees are either incorrect or are paid twice. HRD staff also observed that the employees frequently failed to thoroughly identify and seek any third party insurance coverage before paying the claims. To correct these problems, HRD staff has suggest that IHS contract out the payment of claims to fiscal intermediaries. As an alternative to IHS contracting out, "piggy back" payments through fiscal intermediaries established under the Health Care Finance Administration's Medicare program, 42 U.S.C. Secs. 1395h, 1395u (1976) have been recommended.

Conversion to a system using fiscal intermediaries would allow IHS contract with

an intermediary instead of contracting directly with providers. The intermediary, in turn, would enter into agreements with providers agreeing to participate in this method of reimbursement. The intermediary, pursuant to its contract with the Government, would pay for service authorized by IHS on authorization forms sent to providers and in turn filled out by the providers for filing purposes. IHS would issue the authorization forms upon referral of a patient to a provider or, in cases of emergency when the patient to a provider or, in cases of emergency when the patient goes directly to the provider, upon proper notification. The intermediaries would also issue monthly reports as well as performing administrative tasks of the sort mentioned above.

For reasons discussed below, it is our view that IHS may not set up a fiscal intermediary program without statutory authority. As HHS itself recognizes, the principle hurdle is that there are statutes which hold disbursing officers personally liable for erroneous payments (31 U.S.C. Sec. 3325, formerly 31 U.S.C. Sec. 82b) and certifying officers personally responsible for the improper certification of vouchers (31 U.S.C. Sec. 3528, formerly 31 U.S.C. Sec. 82c). As we explained in B-201408, April 19, 1982, this Office has consistently opposed any interpretation of these officers' statutory responsibilities that would render them "a matter of form." Speaking particularly of a certifying officer's duties, we said:

"The certifying officer is personally responsible for determining that the voucher is legally correct and mathematically accurate (B-138602, January 18, 1960); that services have been performed or goods received (39 Comp. Gen. 548 (1960)); that payment thereon is not prohibited by law; that the voucher represents a valid obligation under the appropriation to be charged (B-193302, December 6, 1978). See also, GAO Policy and Procedures Manual, Chapter 3, section 54 and Chapter 7, section 29. Further, the certifying officer is pecuniary liable under section 82c for any illegal, improper or incorrect payment unless relieved by the Comptroller General."

As for disbursing officers, they may:

"***disburse moneys only as provided by a voucher certified by (A) the head of the executive agency concerned; or (b) an officer or employee of the executive agency having written authorization from the head of the agency to certify vouchers***."

We have consistently interpreted these statutory designations of responsibility for public funds as requiring that the certifying and disbursing officers be employees of the agency whose funds are to be disbursed. 44 Comp.Gen. 100 (1964). (Exceptions have been made only for Economy Act or similar arrangements under which one agency would be authorized to certify vouchers for another. See, e.g., 50 Comp.Gen. 471 (1980).) Otherwise, strict fiscal accountability for disbursements of public funds would be lost. There is no statutory authority to hold a fiscal intermediary's employees personally liable for errors they may have committed, nor could we hold the Government officer accountable for payments over which he had no control. Thus, even though a certification of the correctness of a payment could be made to a fiscal intermediary under the terms of a contract authorizing the intermediary to pay claims, accountable officers who relied on non-governmental fiscal intermediaries to actually make payments would not be relieved of liability for erroneous payments to beneficiaries or for improper certification of vouchers, in our view. The suggestion by HHS that payments might be provisional would not resolve this problem, as errors in

provisional payments still must be attributed to an accountable officer. See B-180264, March 11, 1974.

Because Medicare, 42 U.S.C. Secs. 1395h and 1395u, parallels so closely what has been proposed for IHS, the audit staff has asked whether it is possible to use the Medicare authority through the Economy Act, 31 U.S.C. Sec. 1535 (formerly 31 U.S.C. Sec. 686). However, the Economy Act requires that the requisitioning agency, IHS, have independent authority to conduct the transaction in question. Since IHS has no authority to contract for fiscal intermediaries, the Economy Act would not be available under such circumstances.

We also call to your attention the provisions of Office of Management and Budget (OMB) Circular A-76. Under section 5(f), a "governmental function" must be performed in-house "due to a special relationship in executing governmental responsibilities." Certain monetary transactions and disbursements fall within the classification of governmental functions. Monetary transactions and entitlements include "Government benefit programs; tax collection and revenue disbursements by the Government; control of the public treasury, accounts, and money supply; and the administration of public trusts." Section 5(f) (2) (Emphasis added.) While our Office is not bound, of course, to follow the policies set forth in A-76 if we conclude that a deviation would improve the efficiency and economy of paying claims due under the Indian health services, we should not recommend that IHS depart from the OMB Policy guidance unless the departure has express legislative sanction.

In summary, we conclude that IHS' proposed use of fiscal intermediaries requires legislative authorization prior to implementation of the program. Authority similar to that of the Medicare authority, 42 U.S.C. Secs. 1395h and 1395u, with regard to certifying officers and the advance of funds, would appear to meet these needs. Depending upon the actual legislative outcome of such a proposal, IHS might be able to ask the Health Care Finance Administration to process the IHS claims through the Economy Act, supra, although if it has the legislative authority to contract with intermediaries directly, there may be no need to go through the Health Care Financing Administration to achieve the desired results.