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## Unreasonable and Inequitable

*The United States Office of Personnel Management (“OPM”) fails to reconcile the Federal Employees Health Benefits Act (“FEHBA”) final year rates. As a result, health plans that have withdrawn from the Federal Employees Health Benefits Program (“FEHBP”) may have claims for millions of dollars due them by the US Government.*

. . .

Congress enacted the FEHBA in 1959 to provide subsidized health insurance to active and retired federal employees and their families. OPM is the federal agency responsible for administering the FEHBP, which is the largest health plan in the nation.

OPM negotiates with insurance carriers (including managed care companies) annually to provide healthcare benefits to federal employees for the next year. In the course of each year, the proposed rates are adjusted to “reasonably and equitably reflect the cost of the benefits provided” as required by law.<sup>1</sup>

For community-rated plans, this reconciliation process involves comparing the rates originally proposed by the health plan to the rates charged by the plan to the two similarly sized subscriber groups (“SSSGs”) closest in membership size to the federal employee group. This reconciliation process is used to determine whether the Government either underpaid or overpaid for the benefits provided by the plan. After the reconciliation is completed, the Government either adjusts the carrier’s contract, or the carrier pays the difference depending on the determination made.

# CLIENT ALERT

However, pursuant to OPM regulations, OPM is not required to reconcile rates when a contract with an insurance carrier is not renewed.<sup>2</sup> Additionally, OPM includes a contractual provision, which reaffirms that it is not required to perform reconciliation in the final year of the contract in all FEHBA contracts.

The failure to perform reconciliation results in a financial loss to either the Government or the carrier, depending on the accuracy of the original proposed rates. Neither side is receiving a price adjustment, since reconciliation is not occurring in the carrier's final contract year.

As a result, this regulation either overpays carriers and wastes taxpayer dollars or, at other times, results in an unjust underpayment to the carrier for services provided to the Government. It is possible that large sums of money are at stake, because approximately 200 plans have been terminated by the carriers or OPM over the last decade or so.

Recently, OPM's Final Year Regulation was successfully challenged by GHS Health Maintenance Organization, d/b/a BlueLincs HMO (to whom Brown Rudnick is serving as counsel), and others at the Court of Federal Claims.<sup>3</sup> The Court of Federal Claims held that OPM's Final Year Regulation, "is arbitrary, and violates the intent of

the statutory language in the FEHBA, 5 U.S.C. § 8902(i), which requires rates charged by FEHBP carriers to reasonably and equitably reflect the cost of the benefits provided."<sup>4</sup>

The Government unsuccessfully tried to argue that the regulation was necessary based on its experience that adequate data could not be obtained from carriers in their last year. However, to support this claim, the Government was only able to point to two carriers out of hundreds that had this problem.

The plaintiffs successfully countered this argument by demonstrating that this claim is merely one of "administrative convenience," and is, therefore, "inconsistent with the statute, and must fail as a matter of law."

The court found that OPM's regulation was contrary to the statute's requirement that rates must "reasonably and equitably reflect the cost of the benefits provided." Also, the rationale for the regulation conflicted with other OPM regulations that required carriers to maintain their records even for the final year.<sup>5</sup>

Consequently, the court held that the plaintiffs are entitled to the reformation of their healthcare contracts with OPM. The result will be reconciliation for a carrier's last year of

participation in the program and, in this case, payment by the Government to the carriers for the full amount of underpayment plus interest.

This decision was recently appealed by the US Government to the United States Court of Appeals for the Federal Circuit. At the oral argument, the three-judge appellate panel expressed some skepticism regarding OPM's positions. Although the appellate court is still deliberating, a decision could be rendered before the end of 2008.

An affirmation by the Federal Circuit would pave the way for other insurance carriers who have similar claims. Any carrier who has closed down an OPM contract where the final year was never reconciled may have a claim for monies.

The general statute of limitations for claims against the Government is six years. It is expected that the three plans litigating the GHS case will be paid more than \$4 million combined if they prevail. Other plans may also be due monies as a result of termination/withdrawal decisions they made. Carriers should be reviewing their rights and claims with competent counsel.

Moreover, the significance of this case goes beyond the validity of the Final Year Regulation. Potential claims are not limited to those involving failure to

reconcile for the final year of the contract. The appellate court's line of questions revealed a concern for OPM's compliance with the statutory mandate to establish "fair and equitable" rates for the program.

This will impact many OPM audit findings in a variety of circumstances. The case has the potential to change many of the ways OPM does business. It is possible that the Federal Circuit's decision will include a significant analysis of this statutory language. Therefore, the decision could be applied broadly to all of the OPM auditing and reconciliation practices that result in rates that are not "fair and equitable."

#### Footnotes

**1** See OPM Federal Employees Health Benefits ("FEHB") Acquisition Regulation, 48 C.F.R. § 1652.216-70 (Oct. 1, 1998), titled *Accounting and Price Adjustment*. This portion of the regulations describes the procedures for annual reconciliation of the plan's rates.

**2** See OPM FEHB Acquisition Regulation 48 C.F.R. § 1652.216-70(b)(6) (Oct. 1, 1998) ("Final Year Regulation").

**3** See *GHS Health Maintenance Organization Inc., d/b/a BlueLincs HMO, et al. v. United States*, 76 Fed.Cl. 339 (April 17, 2007).

**4** See *GHS Health Maintenance Organization Inc. citing Title 5 United States Code section 8902(i)*. This statute represents the codification of the Federal Employees Health Benefits Act. Specifically, section (i) declares that the rates must reasonably and equitably reflect the costs of the benefits provided.

**5** The court is referring to OPM's FEHB Acquisition Regulation, 48 C.F.R. § 1652.204-70, titled *Contractor Records Retention*.

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We represent clients in matters related to government contracts across a diverse industry span: health care, defense, energy, environment, technology, real estate and construction. Applying the strong client-oriented litigation philosophy that distinguishes us, we staff to deliver cost-effective representations and routinely call upon the strong pool of talent within the firm, as well as the most sophisticated technologies available to assist in accomplishing our clients' objectives.

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