# Audit Report

OFFICE OF THE INSPECTOR GENERAL

**COMPLIANCE BY UNIFORMED SERVICES TREATMENT FACILITIES WITH GOVERNMENT LOBBYING RESTRICTIONS**

Report No. 95-306 September 15, 1995

**Department of Defense**

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**Acronyms**

| | |
|---|---|
| OMB | Office of Management and Budget |
| OASD(HA) | Office of the Assistant Secretary of Defense (Health Affairs) |
| USTF | Uniformed Services Treatment Facility |

**INSPECTOR GENERAL**
**DEPARTMENT OF DEFENSE**
**400 ARMY NAVY DRIVE**
**ARLINGTON, VIRGINIA 22202-2884**

September 15, 1995

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE (HEALTH AFFAIRS)
DIRECTOR, DEFENSE PROCUREMENT

SUBJECT: Audit Report on Compliance by Uniformed Services Treatment Facilities With Government Lobbying Restrictions (Report No. 95-306)

We are providing this report for your information and use. We conducted the audit in response to a request by the Assistant Secretary of Defense (Health Affairs). Comments on a draft of this report were considered in preparing the final report.

We revised a recommendation on the imposition of penalties for violations of the Byrd Amendment. Management's indicated actions conform to the requirements of DoD Directive 7650.3, and there are no unresolved issues. Therefore, no additional comments are required.

We appreciate the courtesies extended to the audit staff. Questions on the audit should be directed to Mr. Garold E. Stephenson, Audit Program Director, at (703) 604-9332 (DSN 664-9332) or Mr. John M. Gregor, Audit Project Manager, at (703) 604-9321 (DSN 664-9321). See Appendix E for the report distribution. The audit team members are listed inside the back cover.

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Deputy Assistant Inspector General
for Auditing

## Office of the Inspector General, DoD

**Report No. 95-306** **September 15, 1995**
(Project No. 4CH-5061)

# Compliance by Uniformed Services Treatment Facilities With Government Lobbying Restrictions

## Executive Summary


**Introduction.** This audit was performed as a result of a request from the Office of the Assistant Secretary of Defense (Health Affairs). Public Law 101-121, section 319, commonly referred to as the Byrd Amendment, prohibits recipients of Federal contracts, grants, loans, and cooperative agreements from using Federal funds for lobbying activities and requires such recipients to file a disclosure form if private funds are used for lobbying activities performed by consultants. The Byrd Amendment also requires recipients that request or receive a contract, grant, loan, or cooperative agreement to certify that no prohibited payments were or will be made.

**Objectives.** The primary audit objective was to evaluate compliance by the Uniformed Services Treatment Facilities (USTFs) with restrictions on lobbying activities imposed by the Byrd Amendment and by USTF participation agreements with the Government. Specific objectives were to determine whether the USTFs properly disclosed lobbying activities and whether the USTFs used Federal funds for lobbying. We also evaluated management controls applicable to the audit objectives.

**Audit Results.** The audit showed that the USTFs had not submitted to DoD the certifications and disclosure forms required by the Byrd Amendment regarding USTF lobbying activities. Also, five of the seven organizations operating USTFs could not show that private funds were used to pay for all of their lobbying activities. In addition, disclosure forms filed by the USTFs during the audit were incomplete. As a result, the DoD reports to the Congress required by the Byrd Amendment were not complete or accurate, and five USTFs may not have complied with prohibitions on the use of Federal funds for lobbying (see Part I for details). The Office of the Assistant Secretary of Defense (Health Affairs) management control program needs improvement, because material weaknesses existed related to implementing requirements of the Byrd Amendment.

Recommendations in this report, if implemented, will improve compliance with the requirements of the Byrd Amendment and USTF participation agreements with the Government.

**Summary of Recommendations.** We recommend that the Assistant Secretary of Defense (Health Affairs) clarify the applicability of Byrd Amendment requirements to the USTFs and require the USTFs to show private funds were used to pay lobbying costs when the USTF incurs an operating loss. We also recommend that the Assistant Secretary of Defense (Health Affairs) request the USTFs to amend previously filed disclosures and initiate action to assess penalties, as appropriate, if the USTFs fail to amend their prior disclosures or use Federal funds for lobbying costs.

**Management Comments.** The Assistant Secretary of Defense (Health Affairs) concurred with recommendations to clarify the applicability of the Byrd Amendment to the USTFs and to require USTFs to demonstrate that private funds were used to cover lobbying costs. The Assistant Secretary also agreed that penalties should be assessed if USTFs violate Byrd Amendment requirements, but stated that penalties should apply to violations of the use of appropriated funds, as well as of disclosure requirements of the Byrd Amendment. The Assistant Secretary also stated that the Office of the Assistant Secretary of Defense (Health Affairs) did not have final authority for assessing penalties. See Part I for a discussion of management comments and Part III for the complete text of those comments.

**Audit Response.** Based on management comments, we revised the recommendation on the assessment of penalties to clarify that personnel in the Office of the Assistant of Defense (Health Affairs) should initiate action to assess penalties for violations of the prohibition on use of appropriated funds or the disclosure requirements of the Byrd Amendment. The actions indicated by the Assistant Secretary of Defense (Health Affairs) are responsive to the recommendations, and no additional comments are required.

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# Part I - Audit Results

# Audit Background

**Audit Request.** The audit was requested by the Office of the Assistant Secretary of Defense (Health Affairs) (OASD[HA]) to determine whether Uniformed Services Treatment Facilities (USTFs) were complying with lobbying restrictions imposed by the Byrd Amendment and the associated participation agreements. The request stemmed from concerns by the OASD(HA) that three USTFs were sending form letters to people enrolled for health care encouraging them to contact members of Congress and request action against proposed increases in copayments for medical care provided by the USTFs. The OASD(HA) believed the actions may have violated the prohibition on the use of Federal funds for lobbying.

**Uniformed Services Treatment Facilities.** The USTFs were formerly hospitals operated by the U.S. Public Health Service. Public Law 97-35, "Omnibus Budget Reconciliation Act of 1981," subtitle J, "Orderly Closure, Transfer, and Financial Self-Sufficiency of Public Health Service Hospitals and Clinics," terminated appropriations for the hospitals and provided for the transfer or achievement of financial self-sufficiency of each hospital by September 30, 1982. Public Law 97-99, "Military Construction Authorization Act, 1982," authorized the former Public Health Service hospitals to be military treatment facilities eligible to provide medical and dental care to members and former members of the uniformed services and their families. The uniformed services include the Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and the Public Health Service.

Congress originally required DoD to use the USTFs for 3 years (through 1984). Upon each pending expiration of required DoD use, Congress has amended the requirement, which currently extends through December 31, 1996. Because DoD would be the predominant user of the USTFs, DoD became the lead agency for entering into agreements with the nonprofit organizations operating the USTFs.

The table shows the seven nonprofit organizations that operate the 10 USTFs and their geographic locations.

**USTF Organizations and Locations**

| USTF Organization | Location |
|---|---|
| Bayley Seton Hospital | Staten Island, New York |
| Brighton Marine Health Center | Boston, Massachusetts |
| Lutheran Medical Center | Cleveland, Ohio |
| Martin's Point Health Care | Portland, Maine |
| Pacific Medical Center and Clinic | Seattle, Washington |
| Sisters of Charity of The Incarnate Word | Texas* |
| Johns Hopkins Medical Services Corporation | Baltimore, Maryland |

*Includes four USTFs located in four Texas cities: Houston, Galveston, Nassau Bay, and Port Arthur.

During FY 1995, the USTFs will receive about $300 million from DoD and about $29 million from the Departments of Health and Human Services and Transportation to provide health care to enrollees under participation agreements. The USTFs receive from the Government a capitation fee (a flat fee, based on age and gender, geographically adjusted) for each enrollee rather than reimbursement for specific services provided. Appendix C lists the USTFs and authorized funding for each.

**Byrd Amendment Requirements.** The Byrd Amendment, which is codified in United States Code, title 31, section 1352 (31 U.S.C. 1352), prohibits the use of Federal funds for lobbying employees of Federal agencies or members or employees of Congress in connection with the awarding of contracts, making of grants and loans, or entering into cooperative agreements. The Byrd Amendment requires that persons requesting or receiving contracts, grants, loans, and agreements certify that no prohibited payments were or will be made. The certification is required for each proposal for a contract, grant, or cooperative agreement of $100,000 or more; each loan of $150,000 or more; and any extension, continuation, amendment, or modification. The Byrd Amendment also requires the disclosure of lobbying activities that are paid for with private funds and are performed by consultants.

Civil penalties exist for lobbying with appropriated funds and for not disclosing lobbying with private funds. The penalties range from $10,000 to $100,000 for each occurrence.

**Lobbying Restriction in USTF Agreements.** Each USTF operates under a participation agreement between officials of the USTF and DoD, the Department of Health and Human Services, and the Department of Transportation (the Government). The current agreements, which became effective in October 1993, and the preceding 1987 participation agreements, include a provision that prohibits the use of Federal funds for lobbying activities. Paragraph H-2 of the USTF participation agreements, "Prohibition Against the Use of Federal Funds to Pay for Cost of Influencing Legislation," states:

> Funds paid under this Agreement shall not be used to pay the salary or expense of any person, contractor, or agency acting for the Facility to engage in any activity designed to initiate legislation or influence legislation, reports, or appropriations actions pending before Congress.

# Audit Objectives

The objectives of the audit were to determine whether the USTFs complied with restrictions on lobbying activities imposed by the Byrd Amendment and USTF participation agreements. Specific objectives were to determine whether the USTFs properly disclosed lobbying and whether the USTFs used Federal funds for lobbying. We also evaluated applicable management controls. See Appendix A for a discussion of the scope and methodology and the management control program and Appendix B for a summary of prior coverage related to the audit objectives.

# Compliance With the Byrd Amendment and the Restrictions on Lobbying Imposed by Participation Agreements

Until the audit, the USTFs had not submitted to DoD the certifications and disclosures required by the Byrd Amendment regarding their lobbying activities. Also, the USTFs did not include complete information on the lobbying disclosure forms filed. In addition, five of the seven USTFs could not show that private funds were used to pay for all of their lobbying activities. The USTFs had not filed certifications and disclosures of their lobbying because the OASD(HA) did not enforce the Byrd Amendment requirements, the OASD(HA) included a provision in the USTF agreements that did not require the filing of certifications and disclosures, and the USTFs did not believe the Byrd Amendment applied to the USTFs agreements. Also, the Director, Defense Procurement, did not disseminate requirements of the Byrd Amendment to the OASD(HA) for implementation. The USTFs did not file complete lobbying disclosures because they did not follow Office of Management and Budget guidelines. The five USTFs could not show that only private funds were used for lobbying because they had annual operating losses and their accounting systems did not clearly demonstrate the availability of private funds to cover lobbying costs for those years. As a result, DoD reports to Congress required by the Byrd Amendment were not complete or accurate, and five organizations operating USTFs may have used Federal funds for lobbying.

## Byrd Amendment Certification and Disclosure Requirements

The Byrd Amendment (31 U.S.C. 1352[b][2]) requires any person or organization receiving a Federal contract, grant, or cooperative agreement (covered action) to file:

o a certification that the person or organization has not and will not use Federal funds to pay for influencing or attempting to influence the award, extension, continuation, renewal, or modification of a covered action and

o a disclosure of lobbying activities by consultants paid with private funds.

The certification and disclosure are material representations of fact and should be filed by the person or organization upon receipt of a Federal contract, grant,

or cooperative agreement exceeding $100,000. Disclosure forms must also be filed at the end of each calendar quarter in which any event occurs that requires disclosure or materially affects the accuracy of previously filed disclosures.

**Filing of Certifications and Lobbying Disclosures.** Between August 22, 1994, and September 12, 1994, after the announcement of the audit, each of the seven organizations operating USTFs filed the following certification that it had not made any payments for lobbying activities from Federal funds.

> I hereby certify that to the best of my knowledge and belief, that on or after December 23, 1989 no federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the execution of the Participation Agreement and the extension, continuation, renewal, amendment or modification of the Participation Agreement.

The USTFs also submitted lobbying disclosure forms showing that from January 1, 1990, through June 30, 1994, they had paid a total of $1,097,319 to consultants to lobby Government officials in connection with USTF agreements and USTF funding.

The USTFs filed separate disclosures for each calendar year (1990 through 1993) and for the first 6 months of 1994. The disclosures identified lobbying entities, individuals performing services, and amounts of payments. The disclosures also gave brief descriptions of the services performed and lists of the persons contacted. The USTFs filed the certifications and disclosures with the Director, Managed Care Operations, OASD(HA), who was the DoD manager for the USTF Program. The Director, Managed Care Operations, forwarded the disclosures to the Director, Defense Procurement, for reporting to Congress.

**USTF Position on Byrd Amendment Applicability.** The USTFs stated in the transmittal of the certifications and disclosures to the OASD(HA) that they did not agree the certification and disclosure requirements of the Byrd Amendment applied to the USTF agreements. They stated that DoD never requested Byrd Amendment certifications or disclosures as a condition of entering into or maintaining the USTF agreements. They noted that it was the usual and customary practice for Federal agencies to include Byrd Amendment requirements in covered actions when the agency considered compliance necessary, but the requirement had not been included in the USTF participation agreements. The USTFs further stated that they were voluntarily filing the certifications, even though they were uncertain as to the applicability of the Byrd Amendment.

During the audit, legal counsel for one USTF, Bayley Seton Hospital, stated its opinion that the USTF agreements were statutory reimbursement agreements and not contracts or cooperative agreements covered by the Byrd Amendment. The USTF legal counsel pointed out that because the agreements contain the provision at paragraph H-2 prohibiting the use of USTF funds for lobbying, the legal counsel believed the clause was added because DoD procurement lawyers involved in negotiating the agreement determined the Byrd Amendment did not

apply. The provision at paragraph H-2 was also included in the 1987 USTF participation agreements with the Government. In October 25, 1994, and November 11, 1994, letters to the Associate Deputy General Counsel, Inspector General, DoD, and a November 15, 1994, letter to the ASD(HA), the legal counsel for Bayley Seton Hospital requested DoD to make a determination on whether the Byrd Amendment applied to the USTF agreements.

**DoD Decision on Byrd Amendment Applicability.** On April 5, 1995, the Associate Deputy General Counsel (Acquisition and Logistics), DoD, informed by memorandum the Director, Managed Care Operations, OASD(HA), that the USTF agreements were contracts for purposes of applicability of the Byrd Amendment. That opinion was based on the following points.

o Subsection (c) of section 911 of Public Law 97-99, "Military Construction Authorization Act of 1982" (42 U.S.C. 248[c]), requires the USTFs to be reimbursed for medical and dental care provided to members and former members of the uniformed services at rates of reimbursement negotiated and agreed on by the Secretary of Defense, the Secretary of Health and Human Services, and officials of the USTFs.

o The regulations implementing the Byrd Amendment define a Federal contract as an acquisition contract awarded by an agency, including any contract subject to the Federal Acquisition Regulation and any other acquisition contract for real or personal property or services not subject to the Federal Acquisition Regulation.

o The Federal Grant and Cooperative Agreements Act, 31 U.S.C. 6303, provides that an executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the U.S. Government and another recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the U.S. Government.

o Section 716 of Public Law 102-484, "National Defense Authorization Act for FY 1993," provides that "a participation agreement negotiated between a Uniformed Services Treatment Facility and the Secretary of Defense . . . shall not be subject to the Federal Acquisition Regulation issued pursuant to section 25(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 421[c])." If Congress did not consider the agreements to be contracts, legislation exempting the agreement from the Federal Acquisition Regulation would be unnecessary.

On the basis of that legal opinion, the ASD(HA) should clarify the applicability of the Byrd Amendment to the USTFs by amending the USTF participation agreements or by separate letter notification.

**Completeness of Lobbying Disclosures.** Lobbying disclosures filed by the USTFs did not provide detailed descriptions of USTF lobbying activities. Also, disclosures from one USTF excluded several individuals involved in lobbying activities and did not include payments to the excluded individuals for their services. Office of Management and Budget (OMB) instructions for completing the disclosures include the following requirements.

> Enter the full name . . . of the lobbying entity engaged by the reporting activity . . . . [and] the full names of the individual(s) performing services . . . .
>
> Enter the amount of compensation paid or expected to be paid . . . .
>
> Provide a specific and detailed description of the services that the lobbyist has performed or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal officials(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.

Examples of descriptions of lobbying activities reported in the disclosures that were too broad and general follow.

> Individuals researched issues concerning proposed modification of the Uniformed Services Treatment Facilities program, prepared briefing papers, attended meetings, and consulted Members of Congress and staff regarding a managed health care plan.
>
> Facilitated the coordination of USTF activities and served as the USTF Conference Group spokesman. Was chief negotiator for USTF Conference with DoD. Attended various meetings with Members of Congress and their staff[s] and with officials at DoD.

One USTF, Bayley Seton Hospital, also did not disclose two firms and an individual from each firm who performed lobbying activities on its behalf. The firms were KPMG Peat Marwick, which was retained to perform consulting and technical services by all of the USTFs, and Powell, Goldstein, Frazer, and Murphy, which was retained by Bayley Seton Hospital to provide legal services. A consultant from KPMG Peat Marwick and an attorney from Powell, Goldstein, Frazer, and Murphy accompanied a lobbyist who was identified in the disclosures from Bayley Seton Hospital to meetings with employees of Congress to discuss issues on which the USTFs actively lobbied. The attorney with Powell, Goldstein, Frazer, and Murphy stated that he and the KPMG Peat Marwick consultant performed professional and technical services for which their identities did not have to be disclosed under the Byrd Amendment. Although the Byrd Amendment exempts from reporting the payment of reasonable compensation to employees for agency and legislative liaison activities not directly related to a covered Federal action, it does not exempt nonsalary costs. We believe, therefore, that the efforts should have been

reported because their purpose was to influence the continuation of the USTF participation agreements and because direct contact occurred with employees of Congress.

The ASD(HA) should request the USTFs to amend previously filed disclosures to comply with the Byrd Amendment disclosure requirements.

**Implementation of Byrd Amendment.** The ASD(HA) was excluded from distribution of the guidance that implemented the Byrd Amendment within DoD, and that oversight may have contributed to the USTF agreements not including a Byrd Amendment provision and to OASD(HA) not enforcing the Byrd Amendment requirements. Shortly after the effective date of the Byrd Amendment, the Director, Defense Procurement, issued the following memorandums on implementation of the Byrd Amendment within DoD.

o A January 16, 1990, memorandum to DoD contracting activities concisely described the Byrd Amendment restrictions on lobbying activity and provided a preliminary copy of Federal Acquisition Circular 84-55.

o A March 9, 1990, memorandum requested the Service Acquisition Executives and directors of Defense agencies to collect contractor disclosure forms and to forward the forms not later than May 2 and November 2 after the close of each 6-month period.

o A May 8, 1990, memorandum informed the Service Acquisition Executives and directors of the Defense agencies that, until the Federal Acquisition Regulation was modified, a class deviation to the Federal Acquisition Regulation was approved to implement the OMB March 28, 1990, clarifying guidance on the Byrd Amendment.

Senior DoD officials and program officials did not receive the guidance. The limited distribution of implementing guidance to contracting officers was identified as a potential problem area in Inspector General, DoD, Report No. 91-122, "Final Report on the Review of Lobbying Activities," September 25, 1991. The report recommended that the Director, Defense Procurement, prepare a DoD-wide notice for signature by the Secretary of Defense to inform senior officials in the DoD Components of Byrd Amendment restrictions and disclosure requirements. The Director did not implement the recommendation because the review did not identify any noncompliance by contractors with the Byrd Amendment and because of congressional intentions to reform the lobbying laws. The USTF agreements were signed by a senior OASD(HA) official who was not familiar with the Byrd Amendment requirements rather than by a DoD contracting officer. We are not making a repeat recommendation to the Director, Defense Procurement, because except for the USTF agreements, nothing has come to our attention to suggest that DoD has failed to include the Byrd Amendment certification and disclosure requirements in other contractual agreements.

## Funding of Lobbying Activities

Five of the seven USTF organizations could not show that private funds were used to pay for all of their lobbying activities. The five USTFs were Bayley Seton Hospital, Brighton Marine Health Center, Lutheran Medical Center, Pacific Medical Center and Clinic, and Johns Hopkins Medical Services Corporation. Both the Byrd Amendment and paragraph H-2 of the participation agreements prohibit the use of Federal funds for lobbying activities.

The USTFs could not show that private funds were used to pay all lobbying costs because:

o the USTFs reported operating losses during 1 or more years from 1990 through 1994, and

o USTF accounting systems did not segregate unallowable lobbying costs and did not identify profits or losses resulting from USTF agreements or other revenue sources. Instead, the USTF accounting systems accumulated costs by functional cost centers (x-rays, physical examinations, surgery, and so on) and did not directly match actual costs to the USTF agreements or other revenue sources.

Thus, the USTFs could not demonstrate that sufficient private funds were available to cover lobbying costs when there were annual losses. OMB guidance, "Clarifications Regarding Government-Wide Guidance for New Restrictions on Lobbying," dated June 12, 1990, states that:

> To the extent a person can demonstrate that the person has sufficient monies, other than Federal appropriated funds, the Federal Government shall assume that these other monies were spent for any influencing activities unallowable with Federal appropriated funds. This assumption applies equally to persons who do and do not submit to the Federal Government cost or pricing data. Where no cost or pricing data are submitted, the Federal Government shall assume that monies spent are a reduction from profits otherwise available.

USTF officials stated the USTFs had sufficient private funds from other sources to pay for USTF lobbying activities. However, the USTFs considered only gross revenues and excluded matching expenses for the period. The existence of an annual operating loss and the absence of accounting systems that segregate unallowable costs and that identify whether the USTF agreements or other revenue sources were profitable may have resulted in the use of some Federal funds for lobbying activities. Each USTF stated that it was its policy to use only nonappropriated funds for lobbying Federal officials and that lobbying activities were controlled by a limited number of senior officials. However,

policies that prohibited the use of appropriated funds and that established approval and control responsibilities of USTF officials for lobbying were not documented.

Three USTFs (Brighton Marine Hospital, the Sisters of Charity of the Incarnate Word, and Johns Hopkins Medical Services Corporation) incurred costs associated with sending form letters during March 1994 to USTF enrollees encouraging them to contact members of Congress and request action against proposed increases in copayments for medical care received from the USTFs. We believe those costs may have violated the funding prohibition on the use of Federal monies for lobbying contained in paragraph H-2 of the participation agreements.

The ASD(HA) should require the USTFs to show the availability of unrestricted private funds, including profits resulting from USTF participation agreements, to cover lobbying costs when operating losses are incurred in any year.

## Conclusions

**DoD Reporting to Congress.** The Byrd Amendment requires agencies to submit a compilation of disclosure reports semiannually to each body of Congress. The failure of the USTFs to file disclosure reports of their lobbying activities to DoD until August and September 1994 caused prior DoD semiannual reports to Congress to understate the amount of lobbying activities on DoD contracts. As a result, both Congress and the public were denied information on the extent of the efforts of the USTFs to influence the award and continuation of the noncompetitive USTF participation agreements.

**Use of Federal Funds for Lobbying.** The USTFs were aware of prohibitions on the use of Federal funds since their 1987 participation agreements with the Government. Policies, procedures, and accounting system controls should provide reasonable assurance that Federal funds are not inappropriately used.

## Penalties

We are not recommending that DoD assess penalties for potential violations of the Byrd Amendment by the USTFs because OASD(HA) did not inform the USTFs of the Byrd Amendment requirements. The OASD(HA) should initiate action to assess penalties, as appropriate, if the USTFs fail to amend prior

disclosures. The Byrd Amendment states that any person who fails to file or amend a declaration required to be filed or amended shall be subject to a civil penalty of not less than $10,000 or more than $100,000 for each such failure.

## Recommendations, Management Comments, and Audit Response

**Revised Recommendation.** Based on management comments, we revised Recommendation 2. to initiate the imposition of penalties if the Uniformed Services Treatment Facilities do not amend prior disclosures to disclose lobbying activities or do not use appropriated funds in accordance with the Byrd Amendment.

**We recommend that the Assistant Secretary of Defense (Health Affairs):**

**1. Clarify the applicability of the requirements of the Byrd Amendment to the Uniformed Services Treatment Facilities either by modifying paragraph H-2 of the participation agreements or by separate letter notification. The clarification should require the Uniformed Services Treatment Facilities to:**

**a. Amend previously filed disclosures in order to fully disclose the extent of their lobbying activities in accordance with the Byrd Amendment.**

**Assistant Secretary of Defense (Health Affairs) Comments.** The Assistant Secretary of Defense (Health Affairs) concurred and stated that the applicability of the Byrd Amendment would be clarified in a letter notification to the USTFs by September 30, 1995.

**b. Demonstrate the availability of unrestricted private funds, including profits from the participation agreements, to cover lobbying expenses when the Uniformed Services Treatment Facilities incur an operating loss during any operating year.**

**Assistant Secretary of Defense (Health Affairs) Comments.** The Assistant Secretary of Defense (Health Affairs) partially concurred with the recommendation and stated that the USTFs would be informed of their responsibility to demonstrate the availability of unrestricted private funds to cover lobbying expenses in accordance with the Byrd Amendment and OMB guidance. The Assistant Secretary added that OMB implementing guidance does not require organizations to change their accounting systems in order to demonstrate the existence of private funds to cover lobbying expenses.

**2. Initiate action to assess penalties, as appropriate, if the Uniformed Services Treatment Facilities fail to amend prior disclosures and disclose lobbying activities in accordance with the Byrd Amendment or if they use appropriated funds to cover lobbying expenses in violation of the Byrd Amendment.**

**Assistant Secretary of Defense (Health Affairs) Comments.** The Assistant Secretary of Defense (Health Affairs) partially concurred and stated that penalties should also be assessed for appropriated funds violations of the Byrd Amendment. The comments pointed out, however, that the authority to assess penalties for violations of the Byrd Amendment does not reside in the OASD(HA).

**Audit Response.** Based on the management comments, we revised the recommendation to clarify that the OASD(HA) should initiate action to assess penalties for violations by the USTFs of the Byrd Amendment prohibition on use of appropriated funds to lobby Federal officials or Byrd Amendment disclosure requirements. We consider the Assistant Secretary's comments responsive to the revised recommendation, and no additional comments are necessary.

# Part II - Additional Information

# Appendix A. Scope and Methodology

## Scope

To satisfy the audit objectives we:

o reviewed implementation of lobbying requirements in the 1993 participation agreements with the USTFs;

o evaluated actions taken by the USTFs to comply with the lobbying requirements of the Byrd Amendment and the participation agreements;

o reviewed consultant agreements, activity reports, and other information for consultants employed by the USTFs;

o assessed the completeness of the lobbying disclosure forms filed by the USTFs during our audit; and

o reviewed audited financial statements for USTF fiscal years 1990 through 1993, and we reviewed Internal Revenue Service 990 reports filed by the USTFs for tax years ending 1990 through 1993.

## Methodology

We conducted interviews regarding lobbying activities by the USTFs with OASD(HA) and USTF officials and attorneys and consultants retained by the USTFs. We visited two of the seven USTF organizations, Johns Hopkins Medical Services Corporation and Bayley Seton Hospital, and reviewed records related to their lobbying activities. For the remaining five USTF organizations, we conducted telephone interviews and requested the USTFs to provide their policies and procedures for lobbying Government officials and ensuring compliance with paragraph H-2 of the participation agreements. Additionally, for all the USTFs, we requested a description of their accounting systems.

## Audit Period, Standards, and Locations

We performed this program results audit from August 1994 to April 1995 in accordance with the auditing standards issued by the Comptroller General of the United States, as implemented by the Inspector General, DoD. Accordingly,

we included such tests of management controls as were considered necessary. Appendix D lists the officials and organizations visited or contacted during the audit.

## Management Control Program

DoD Directive 5010.38, "Internal Management Control Program," April 14, 1987, requires DoD organizations to implement a comprehensive system of management controls that provides reasonable assurance that programs are operating as intended and to evaluate the adequacy of the controls.

**Scope of Review of Management Control Program.** We reviewed the adequacy of OASD(HA) management controls over the contract management and administration of the participation agreements with the USTFs. Specifically we reviewed OASD(HA) management controls for ensuring the requirements of the Byrd Amendment were implemented in required contracts. We also reviewed the results of any self-evaluation of those management controls.

**Adequacy of Management Controls.** We identified material management control weaknesses as defined by DoD Directive 5010.38. The OASD(HA) did not implement the requirements of the Byrd Amendment in the participation agreements with the USTFs. The Director, Defense Procurement, had not issued guidance to senior and program officials in the OASD(HA) on implementing the requirements of the Byrd Amendment. Recommendations 1. and 2., if implemented, will improve compliance with the requirements of the Byrd Amendment. A copy of the report will be provided to the senior official in charge of management controls for the OASD(HA).

**Adequacy of Management's Self-Evaluation.** The OASD(HA) officials did not identify contract management and administration of the USTF participation agreements as an assessable unit and, therefore, did not identify the material control weakness identified by the audit. The OASD(HA) officials stated they were not aware that the requirements of the Byrd Amendment applied to the USTF participation agreements.

# Appendix B. Summary of Prior Audits and Other Reviews

Since enactment of Public Law 101-121 in 1989, the Office of the Inspector General, DoD, has issued four reports on DoD compliance with the requirements of the Byrd Amendment. The General Accounting Office also reviewed implementation of the Byrd Amendment at selected DoD activities and provided the results of its review in testimony before Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs. A summary of those audit reports and that testimony follows.

## General Accounting Office

GAO/T-GGD-91-70 (OSD Case No. 8605), Testimony before the Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, "Federal Lobbying - Lobbying the Executive Branch," September 25, 1991, covered implementation of the Byrd Amendment by 31 Federal agencies, including DoD. The General Accounting Office reported that required certifications and disclosures were not always made, and disclosure forms that were submitted often lacked information such as payments to lobbyists, names of persons lobbied, and dates of services. The testimony contained no recommendations for DoD.

## Inspector General, DoD

**Report No. 94-027, "DoD Compliance with Lobbying Restrictions Imposed by the Byrd Amendment," December 30, 1993.** The subject report stated that DoD contracting activities did not include the Federal Acquisition Regulation provision and clause implementing the Byrd Amendment in applicable contract solicitations and contracts. In regard to prior audit recommendations, the Director, Defense Procurement, had taken no action to inform senior DoD officials of Byrd Amendment restrictions and disclosure requirements or to require senior DoD officials to report persons lobbying them for contracts and grants and any suspected violations of the Byrd Amendment.

**Report No. 92-MAM-004, "Report on Evaluation of the Implementation of Restrictions on Lobbying Imposed by the Byrd Amendment," January 31, 1992.** The subject report stated that DoD had complied with the Byrd Amendment requirements through December 31, 1991, but OMB clarifying guidance on the Byrd Amendment's applicability and additional steps to ensure contractor compliance were needed. The report summarized the results of Inspector General, DoD, Report No. 91-122 and stated that, on October 2,

1991, the Director, Defense Procurement, issued a memorandum requesting the Military Department Acquisition Executives and the Defense agencies to ensure lobbying disclosure forms were forwarded to the Office of Defense Procurement.

**Report No. 91-122, "Final Report on the Review of Lobbying Activities," September 25, 1991.** The subject report was issued in response to a June 12, 1991, request from OMB. The report stated that:

o contractor compliance with the requirements of the Byrd Amendment could not be conclusively determined because contractor records were not sufficiently detailed, and no controls in DoD ensured that all lobbying activities would be identified;

o in some cases, contractors and grantees submitted disclosure forms because the contractors and grantees were uncertain whether their activities were covered by the Byrd Amendment; and

o DoD contracting offices were obtaining contractor certifications and disclosures required under the Federal Acquisition Regulation subpart 3.8, but the disclosure forms were not always forwarded to the Director, Defense Procurement, for submission to Congress.

The report recommended that OMB issue clarifying guidance and that DoD issue additional guidance, develop training, and improve procedures. The Executive Associate Director, OMB, agreed to issue guidance clarifying the difference between program lobbying and lobbying for contracts and grants in the context of follow-on, sole-source contracts and programs. On November 22, 1991, the Director, Defense Procurement, stated that no additional action would be taken on the audit recommendations because of Senator Carl Levin's intention to revise existing lobbying laws and the OMB intention to issue clarifying guidance. The Assistant Director, Defense Contract Audit Agency, agreed to establish procedures to determine whether contractors disclosed unallowable lobbying activities.

**Unnumbered report, produced by the Office of the Assistant Inspector General for Analysis and Followup, "Department of Defense Implementation of Section 319 of Public Law 101-121, Department of Interior and Related Agencies Appropriations Act for FY 1990," February 5, 1991.** The subject report described actions DoD had taken to comply with the Byrd Amendment provisions. It stated that one disclosure was reported during March 1990 period and six were reported during the September 1990 period. No disclosures were made concerning possible violations of the Byrd Amendment. The report contained no recommendations.

# Appendix C. DoD Funding for Uniformed Services Treatment Facilities

| USTF | Location | Funding ($ millions) FY 1994 | Estimated FY 1995 |
|---|---|---|---|
| Bayley Seton Hospital | Staten Island, New York | $ 26.9 | $ 44.1 |
| Brighton Marine Health Center | Boston, Massachusetts | 33.5 | 36.1 |
| Lutheran Medical Center | Cleveland, Ohio | 14.3 | 12.1 |
| Martin's Point Health Care | Portland, Maine | 38.5 | 36.5 |
| Pacific Medical Center and Clinic | Seattle, Washington | 45.2 | 54.0 |
| Sisters of Charity of The Incarnate Word | Texas* | 66.3 | 68.5 |
| Johns Hopkins Medical Services Corporation | Baltimore, Maryland | 40.3 | 48.7 |
| Total | | **$265.0** | **$300.0** |

*Includes four USTFs located in four cities in Texas: Houston, Galveston, Nassau Bay, and Port Arthur.

# Appendix D. Organizations Visited or Contacted

## Office of the Secretary of Defense

Assistant Secretary of Defense (Health Affairs), Washington, DC
Director, Defense Procurement, Washington, DC
General Counsel, Department of Defense, Washington, DC

## Non-Defense Federal Organizations

Clerk, House of Representatives, Washington, DC
Office of Management and Budget, Washington, DC
Federal Election Commission, Washington, DC
Internal Revenue Service, Washington, DC

## Non-Government Organizations

Johns Hopkins Medical Services Corporation
  Wyman Park Medical Center, Baltimore, MD
Allston, Brighton Aid and Health Group, Inc.
  Brighton Marine Public Health Center, Boston, MA
Sisters of Charity Health Care System
  Bayley Seton Hospital, Staten Island, NY
Pacific Hospital Preservation and Development Authority
  Pacific Medical Center, Seattle, WA
Penobscot Bay Medical Associates
  Martin's Point Health Care Center, Portland, ME
Lutheran Medical Center, Cleveland, OH
SCH Health Care System
  Sisters of Charity of the Incarnate Word, Houston, TX
    St. John Hospital, Nassau Bay, TX
    St. Joseph Hospital, Houston, TX
    St. Mary Hospital, Galveston, TX
    St. Mary Hospital, Port Arthur, TX

# Appendix E. Report Distribution

## Office of the Secretary of Defense

Under Secretary of Defense (Comptroller)
  Deputy Chief Financial Officer
  Deputy Comptroller (Program/Budget)
Assistant Secretary of Defense (Health Affairs)
Director, Defense Procurement
Assistant to the Secretary of Defense (Public Affairs)
Director, Defense Logistics Studies Information Exchange

## Department of the Army

Auditor General, Department of the Army

## Department of the Navy

Assistant Secretary of the Navy (Financial Management and Comptroller)
Auditor General, Department of the Navy

## Department of the Air Force

Assistant Secretary of the Air Force (Financial Management and Comptroller)
Auditor General, Department of the Air Force

## Defense Organizations

Director, Defense Contract Audit Agency
Director, Defense Logistics Agency
Director, National Security Agency
  Inspector General, National Security Agency

## Non-Defense Federal Organizations

Office of Management and Budget
Technical Information Center, National Security and International Affairs Division, General Accounting Office

Chairman and ranking minority member of each of the following congressional committees and subcommittees:

Senate Committee on Appropriations
Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Governmental Affairs
House Committee on Appropriations
House Subcommittee on National Security, Committee on Appropriations
House Committee on Government Reform and Oversight
House Subcommittee on National Security, International Affairs, and Criminal Justice, Committee on Government Reform and Oversight
House Committee on National Security

# Part III - Management Comments

# Assistant Secretary of Defense (Health Affairs) Comments

THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D. C. 20301-1200

HEALTH AFFAIRS

AUG 25 1995

MEMORANDUM FOR DIRECTOR, CONTRACT MANAGEMENT DIRECTORATE
DoD INSPECTOR GENERAL

SUBJECT: Draft Audit Report on Compliance by Uniformed Services Treatment Facilities with Government Lobbying Restrictions

This memorandum is in response to the recommendations for corrective action presented in the Inspector General draft report project No. 4CH-5061.

The Department of Defense, Health Affairs concurs with the recommendation (1) to clarify the applicability of the requirements of the Byrd Amendment to the Uniformed Services Treatment Facility by letter notification. We will provide notification by September 30, 1995. We concur with recommendation (1.a.) and will require the USTFs to begin providing amended previously filed disclosure statements by September 30, 1995.

We partially concur with recommendation (1.b.) to require the USTFs to demonstrate the availability of unrestricted private funds to cover lobbying expenses. As we understand it, OMB guidance does not require that organizations change an existing accounting system or adopt a new one, in order to demonstrate the existence of funds other than appropriated funds. We question whether our office can require it. However we will advise the USTFs that if they can show the existence of funds from unrestricted private sources, we will assume they have demonstrated their ability to provide payment for lobbying activities without violating the Byrd Amendment. If no other source of income can be shown, our office will take appropriate action. Clarification of this issue will be provided the USTFs by September 30, 1995.

The report recommends that the Assistant Secretary of Defense (Health Affairs) assess penalties if the USTFs fail to amend prior disclosures and disclose lobbying activities. We partially concur with this recommendation. The Assistant Secretary of Defense (Health Affairs) will take appropriate action concerning violations in accordance with OMB guidance and the DoD Fraud and Civil Remedies Program. However, it is unclear why the recommendation refers only to assessing penalties for disclosure violations and not for use of appropriated funds violations. Moreover, it is our understanding that the final authority to assess penalties for violations of the Byrd Amendment does not reside in Health Affairs.

Edward D. Martin for

Stephen C. Joseph, M.D., M.P.H.

# Audit Team Members

This report was prepared by the Contract Management Directorate, Office of the Assistant Inspector General for Auditing, DoD.

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