

YEAR-IN-REVIEW

APPROPRIATIONS LAW FORUM 2007

I. CORE CONCEPTS AND TERMINOLOGY

Recording Obligations and Contingent Liabilities

- *B-305484, June 2, 2006: National Mediation Board—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards*

This decision explored the concept of obligations—when to record an obligation and in what amount. Specifically, GAO addressed contingencies as to time and amount.

The National Mediation Board (NMB) requested an advance decision regarding its obligation to pay neutral arbitrators that it appoints to grievance adjustment boards. By law, NMB is required to appoint an arbitrator if a grievance adjustment board cannot resolve a grievance. NMB appoints an arbitrator by issuing a certificate of appointment to hear a specific case or a specified group of related cases and a compensation letter setting out the daily rate of compensation, *per diem*, and travel costs. NMB had recorded an obligation at the beginning of each month when it approved an arbitrator's compensation request.

GAO concluded that the arbitrator's services are nonseverable services; NMB obtains value only when NMB receives the end product—resolution of the grievance. Because the arbitrator's services are nonseverable, NMB must record an obligation for the service at the time it appoints the arbitrator.

At the time of the appointment, of course, neither NMB nor the arbitrator knows how many days it may take the arbitrator to resolve a particular grievance, and NMB may not impose a deadline for resolving a grievance. Nevertheless, NMB is undeniably liable for the arbitrator's pay and related costs as a result of the appointment; therefore, GAO concluded that NMB should record an amount based on its best estimate of costs and adjust the obligation up or down as more information becomes available. Underlying GAO's conclusion is the fact that when NMB appoints an arbitrator, it is the amount of NMB's obligation, not the obligation itself, that is uncertain. In other words, the obligation is contingent as to amount, but the fact of the legal liability is fixed.¹

¹ In the past, NMB had recorded obligations for arbitrators' pay and related costs based on its understanding of two 1986 GAO decisions, B-217475, Dec. 24, 1986, and B-217475, May 5, 1986. To the extent that GAO had indicated that NMB may record obligations monthly, these decisions were overruled.

GAO also concluded that NMB had not yet incurred an obligation for cases pending before a board but for which NMB had not yet appointed an arbitrator, even though NMB might be able to identify when cases were stalemated and it could project the number of cases that eventually would require arbitrators. This was a particular concern for NMB because the law requires NMB to appoint an arbitrator when the grievance cannot be resolved. While NMB might be able to project its liabilities for those cases, these liabilities are contingent as to time and are not recordable as obligations until the contingency materializes, that is, at appointment. This contingency does not ripen into a recordable obligation until NMB appoints an arbitrator to hear that specific case or a specified group of related cases. Sound financial management would dictate, nevertheless, that NMB manage its resources and the timing of its appointments to ensure that adequate budget authority is available at the time of appointment to cover its estimated costs arising from the appointment.

Continuing Resolution—Calculation of Current Rate

- *B-308773, Jan. 11, 2007: United States Capitol Police—Current Rate for Operations Under the 2007 Continuing Resolution*

Ordinarily, continuing resolutions (CR) are of short duration. Questions arising during a CR, therefore, generally are not the subject of many decisions and opinions. This decision advances our understanding of the typical current rate formula.

The United States Capitol Police (USCP) asked for a decision regarding the calculation of the current rate under the continuing resolution in effect in January 2007. Pub. L. No. 109-383, 120 Stat. 2678 (Dec. 9, 2006). At issue was whether \$10 million of unobligated no-year and multiyear balances that USCP made available for fiscal year 2006 operations was part of the “General Expenses” appropriation for purposes of calculating the current rate. USCP has two appropriations available to it: its “General Expenses” appropriation and a separate “Salaries” appropriation. Both are fiscal year appropriations. The \$10 million made available in fiscal year 2006 included \$4,513,671 of no-year funds reprogrammed within USCP’s General Expenses appropriation and \$5,486,329 of no-year funds transferred from USCP’s Salaries appropriation to the General Expenses appropriation.

GAO concluded that USCP should include the \$4.5 million reprogrammed within the General Expenses appropriation in calculating the current rate for the General Expenses appropriation. Reprogramming is the application of funds *within* a lump-sum appropriation for uses other than those contemplated at the time the funds were appropriated. Unless otherwise restricted, agencies may reprogram funds as they wish to adapt to changing fiscal circumstances. Because when Congress appropriated these funds it made them available for General Expenses purposes, the \$4.5 million reprogrammed within USCP’s General Expenses appropriation should be considered part of the General Expenses appropriation for purposes of calculating the current rate.

On the other hand, GAO concluded that USCP should not include the \$5.5 million that it had transferred into General Expenses. A transfer is the shifting of funds *between* appropriations. Agencies may transfer funds only if Congress provides statutory authority to do so. Congress had given USCP the authority to transfer funds from its Salaries appropriation to its General Expenses appropriation. In an earlier decision, GAO had concluded that funds transferred out of an appropriation at an agency's discretion during a fiscal year should be included when calculating the current rate for the transferring appropriation under a continuing resolution the following fiscal year. B-197881, Apr. 8, 1980. Here, GAO determined that funds transferred into an account at an agency's discretion should not be included when calculating the current rate for the receiving account. Any other outcome would be inconsistent with the notion that a previous fiscal year's appropriation, for purposes of calculating the current rate, consists of amounts made available by Congress, as opposed to amounts made available by an agency during the course of a fiscal year.

Impoundment Control Act—Cancellations vs. Proposed Rescissions

- *B-308011, Aug. 4, 2006: Status of Funds Proposed for Cancellation in the President's Fiscal Year 2007 Budget*

Under the Impoundment Control Act, the President may propose a rescission of budget authority and withhold that budget authority from obligation for a period of 45 legislative days pending congressional action on the rescission proposal, but only if he has transmitted a special message to Congress. In his fiscal year 2007 budget submission, the President proposed cancellations of budget authority for 40 programs administered by 13 agencies. Because the President had not submitted a special message under the Impoundment Control Act, GAO examined whether the agencies were improperly withholding the funds proposed for cancellation. Our examination revealed that only one agency had improperly withheld budget authority awaiting congressional action. We noted that, while the President is free to propose cancellations to Congress in the same manner as any other legislative proposal, the Impoundment Control Act is the only avenue through which agencies may properly withhold funds from obligation. We cautioned that agencies should be cognizant of the difference between such proposals and a special message under the Impoundment Control Act. *See also* B-307122, Mar. 2, 2006.

II. STATUTORY CONSTRUCTION

Legislative History Significance

- *Arlington Central School District Board of Education v. Murphy*, 548 U.S. ___, 126 S. Ct. 2445 (2006)

This case provides an interesting example of the weight accorded report language which would alter the plain meaning and effect of the statutory language. The issue was whether a fee-shifting provision of the Individuals with Disabilities Education Act (IDEA) authorizing the award of attorney fees and costs to parents who prevailed in lawsuits under the act extended to costs incurred for experts. The Supreme Court approached the issue by noting that the conditions Congress attaches to the receipt of federal funds by states are contractual in nature and must therefore be expressed “unambiguously” to give states adequate notice of what they are accepting. *Arlington Central*, 126 S. Ct. at 2459. The Supreme Court went on to hold that IDEA did not clearly indicate that expert fees were covered by its fee-shifting provision. On the contrary, the Court concluded that the language of the fee-shifting provision and other IDEA provisions strongly suggested that expert fees were not covered. The Court was influenced by the judicial rule that the term “costs” in fee-shifting provisions is a term of art that generally does not include expert fees. *Id.* The most striking aspect of the Court’s opinion was its rejection of legislative history from the conference report that explicitly stated the intent to include expert costs in IDEA’s fee-shifting provision. The conference report, quoted in the opinion at 126 S. Ct. at 2463, stated: “The conferees intend that the term ‘attorneys’ fees as part of the costs’ includes reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.” Nevertheless, the Court concluded: “Putting the legislative history aside, we see virtually no support for respondents’ position. Under these circumstances, where everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough.” *Id.* Thus, the conference report statement could not make up for the absence of statutory language stating that expert fees are reimbursable.

- *B-307767*, Nov. 13, 2006: *Department of Interior—Royalty-in-Kind Oil and Gas Preferences*

This decision presented a close question of statutory construction and the resolution of two conflicting statutory provisions. In resolution of that conflict, GAO concluded that congressional intent could not be inferred from a floor statement of one lawmaker.

The Department of the Interior asked GAO to determine whether section 342(j) of the Energy Policy Act of 2005, 42 U.S.C. § 15902(j), which permits the Secretary of Interior to “grant a preference” in the sale of oil and gas received as royalty in kind by the United States from mineral leases, allows the Secretary to sell that royalty oil and gas at below fair

market value. Another subsection, section 342(b), clearly states that the Secretary may not sell or dispose of any royalty oil and gas for less than market price. GAO agreed with the Department of the Interior that the phrase “grant a preference” in section 342 does not mean to grant a discount to fair market value where the same section requires sales or transfers to be at not less than market value and there is no indication that Congress intended “preference” to include a discount to fair market value.

Notably, during floor debate on the Act, a senator described section 342(j) as allowing for royalty oil and gas sales at below market costs. Citing to longstanding Supreme Court precedent, GAO opined that, while the senator’s floor statement provides his individual reasons for supporting particular legislation, it did not represent the meaning and purpose of the lawmaking body collectively.

III. AVAILABILITY OF APPROPRIATIONS: PURPOSE

Necessary Expense Rule

- *B-306424, Mar. 24, 2006: Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services*

In this decision, GAO examined what equipment and services were “necessary expenses” for providing space for business conferences. The Presidio Trust’s certifying officer asked whether the Trust’s appropriation was available to pay for audio equipment rental fees and services that the National Academy of Public Administration (NAPA) incurred in its use of the Trust’s facilities for its 2005 annual Board of Directors meeting. The Trust receives appropriations for necessary expenses to fulfill responsibilities under the Trust’s authorizing statute, which includes the authority to lease venue space for events such as NAPA’s Board of Directors meeting. GAO concluded that audio equipment and related services were necessary and incidental components of providing adequate venue space for public use. Thus, the Trust’s appropriations were available for the rental fees incurred in NAPA’s use of the Trust’s facilities for its business meeting.

Personal vs. Government Expenses

- *B-307316, Sept. 7, 2006: Department of the Army—Availability of Funds for Security Clearance Expenses*

In this decision, GAO addressed the intersection of the necessary expense rule and personal expenses when examining whether an agency had established a logical relationship between its appropriation and an employee’s expense.

The United States Army Center for Health Promotion and Preventive Medicine requested a decision on whether its appropriated funds were available to reimburse an Army captain’s costs for renouncing his Turkish citizenship. The Army required the captain to renounce his Turkish citizenship so that he could obtain a security clearance necessary to assume a new position to which the Army

had assigned him. GAO concluded that, on balance, the benefit to the government of paying the renunciation costs outweighed the collateral benefit to the individual. Accordingly, GAO had no objection to the Army reimbursing the captain for such costs.

- *B-306748, July 6, 2006: U.S. Customs and Border Protection—Relocation Expense*

GAO also addressed the intersection of the necessary expense rule and personal expenses when examining whether U.S. Customs and Border Protection (Customs) could use its appropriations to pay for relocation expenses of employees.

As a result of the events of September 11, 2001, Customs instituted a requirement that its employees who are stationed at the border reside within the United States. Customs requested an advance decision on whether it could use its appropriated funds to pay the relocation expenses of employees who would have to relocate their residences to comply with the requirement. Under the necessary expense rule, for an appropriation to be available for a particular expenditure, the expenditure must bear a logical relationship to the purpose of the appropriation sought to be charged. Customs receives a lump-sum appropriation for necessary expenses for, among other things, the “enforcement of laws relating to border security.” Customs explained that it had established the new residency requirement to ensure the integrity of its workforce, maintain employee operational responsiveness and protect its employees. Because the residency requirement enhances border security law enforcement, expenses incurred to implement it, including employees’ expenses of relocating, are reasonably related to the objectives of Customs’s appropriation.

- *B-308044, Jan. 10, 2007: Patent and Trademark Office—High-speed Internet Access in Employees’ Homes*

With the federal government continuing to provide its employees greater flexibility for teleworking, questions arise as to the use of appropriated funds to supply an employee with equipment and resources at an employee’s residence so that the work of the agency can be performed while teleworking. This decision addressed the need for adequate safeguards against personal misuse of office equipment provided using appropriated funds.

The Patent and Trademark Office (PTO) requested an advance decision on whether it may reimburse employees for home high-speed internet access as part of the agency’s telework program. Under Public Law 104-52, federal agencies may use appropriations to install telephone lines and “necessary equipment,” and to pay monthly charges therefor, in the residences of employees authorized to work at home, provided that the agency “certifies that adequate safeguards against private misuse exist, and that the service is necessary for direct support of the agency’s mission.”

GAO agreed with PTO that, like telephone service, internet access is necessary for PTO employees, regardless of worksite. Under PTO's proposal, employees would submit copies of invoices from the internet service provider (ISP) and attest to the appropriate percentage of ISP service used for work-related purposes. PTO would monitor the productivity of participating employees biweekly, quarterly, and annually. GAO found that PTO's proposed reimbursement policy provided adequate safeguards against private misuse. Also, GAO recommended that PTO periodically review ISP reimbursements to ensure that the agency continues to have adequate safeguards against private misuse and is reimbursing employees for home internet service used for official purposes.

- *B-307918, Dec. 20, 2006: NOAA—Reimbursing Mileage for Commuting Expenses for On-Call Emergencies*

In this decision, GAO reinforced the general rule that appropriated funds are not available to pay commuting expenses of employees between their residences and duty stations. Statutory exceptions to this rule are strictly construed when determining whether appropriations are available to pay for commuting expenses.

The National Oceanic and Atmospheric Administration (NOAA) requested an advance decision asking whether appropriated funds are available to reimburse employees for mileage between their homes and offices when performing official services during on-call duty outside normal office hours. Under 31 U.S.C. § 1344(a)(1), employees generally must bear the costs of transportation between their residences and official duty locations. Exceptions may be made when unusual circumstances present a clear and present danger, an emergency exists, or other compelling operational considerations make such transportation essential to the conduct of official business. 31 U.S.C. § 1344(b)(9). Such exceptions may be granted only on a temporary basis. 31 U.S.C. §§ 1344(b)(9), (d). NOAA's on-call employees are scheduled to perform these duties on a continual basis, numerous times per week. The proposal to authorize mileage reimbursement would have continued that arrangement without limit or end date. GAO found this would not qualify as a temporary exception. The fact that emergency conditions may necessitate additional trips or otherwise increase commuting costs does not alter an employee's responsibility to provide for his or her own home-to-work transportation. GAO advised NOAA to seek appropriate changes to the law if it wished to pursue that proposal.

Personal Gifts

- *B-307892, Oct. 11, 2006: Navy—Reenlistment Gifts*

In an effort to bolster reenlistment and recruitment efforts in the armed forces, Congress has authorized the armed forces to use appropriations to pay for small gifts for new recruits and soldiers reenlisting. This decision examined the implementation of this statutory exception to the general rule that appropriations are not available for personal gifts.

A certifying officer of the Navy Information Operations Command requested an advance decision on whether Navy could use appropriated funds to purchase gifts such as pens, mugs, baseball caps, shirts, and duffle bags. The gifts would bear the insignia of the command to which the sailor is reenlisting. Generally, appropriated funds are not available to pay for personal gifts. Under 10 U.S.C. § 2261, however, Congress has authorized the armed forces to procure and award small gifts for the purpose of recognizing and commemorating recruitment and reenlistment. GAO concluded that section 2261 would permit Navy to purchase these items for gifts. This authority expires on December 31, 2007. Implementation of section 2261 is subject to the issuance of regulations which Navy had not yet issued. Thus, GAO advised that Navy may not purchase items to award as gifts under section 2261 until it issues regulations implementing section 2261.

Publicity or Propaganda

- *B-307917, July 6, 2006: Department of Education—No Child Left Behind Newspaper Article Entitled “Parents Want Science Classes That Make the Grade”*

In recent years, GAO has issued a number of decisions and opinions discussing the application of the governmentwide publicity or propaganda prohibition to agencies’ use of appropriations for media-related products such as video news releases and prepackaged news stories, television advertisements, and mass mailings. Much of this recent case law has focused on the use of covert propaganda in violation of the prohibition. This year, GAO reiterated that covert propaganda has always been prohibited under the publicity or propaganda prohibition and that the critical element in determining whether materials constitute covert propaganda is whether the intended audience is informed as to the source of information.

Upon GAO’s request, the Department of Education examined a newspaper article that it distributed to various news outlets as part of the No Child Left Behind program. Although the news article failed to contain an attribution as to source, the department concluded that the news article was not improper at the time the department distributed it. According to the department, such activity did not become illegal until the enactment of section 6076 of Public Law 109-13 on May 11, 2005. Section 6076 stated that no appropriated funds “may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution in the United States unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency.” GAO informed the department that it disagreed with the department’s analysis. The conference report made clear that section 6076 confirmed the analysis of GAO’s line of covert propaganda cases. Consequently, the attribution of source was required at the time the department distributed its newspaper article.

State and Local Taxation

- *B-306666, June 5, 2006: Forest Service—Surface Water Management Fees*

This decision addressed the question of when federal agencies may use appropriations to pay state and local taxes, regulatory charges, user fees and similar assessments. Under the Constitution, the federal government is immune from state and local taxation. The Forest Service requested an advance decision on whether its appropriations were available to pay surface water management (SWM) fees assessed by King County, Washington. King County assesses the fee on developed parcels based on the relative contribution of increased surface and storm water runoff as part of the county's surface water management program under the Clean Water Act, 33 U.S.C. § 1329. Another provision of the Clean Water Act, 33 U.S.C. § 1323(a), requires federal agencies to comply with all state and local requirements respecting the control and abatement of water pollution, including the payment of reasonable service charges.

The Forest Service refused to pay King County's SWM fee, contending that the fee is a tax and that the agency would receive no services from the county in exchange for the fees. GAO agreed with the Forest Service. Like a tax, the county assesses the SWM fee to fund core county government services providing undifferentiated benefits to the entire public. It is not a fee or service charge assessed for a narrowly circumscribed benefit incident to a voluntary act or a service or convenience provided. Furthermore, while the Clean Water Act requires the federal government to pay reasonable service fees imposed in the abatement of water pollution, it does not explicitly waive sovereign immunity from taxation. Thus, the federal government is constitutionally immune from paying King County's SWM fee, and appropriations are not available to pay the fee.

Availability of Two Appropriations for Same Purpose

- *B-307382, Sept. 5, 2006: Department of Homeland Security—Use of Management Directorate Appropriations to Pay Costs of Component Agencies*

In fiscal year 2005, the Department of Homeland Security (DHS) charged the costs of mail operations, parking for official agency vehicles, and executive sedan services incurred by various subcomponent agencies to the DHS's Management Directorate appropriation, rather than to appropriations which the subcomponent agencies themselves received for "management and administration" expenses. GAO concluded that either of those appropriations were available to pay mail operations and executive sedan services. However, having elected to charge one appropriation for these costs, DHS should continue to use that same appropriation to the exclusion of the other appropriation unless DHS, at the beginning of the fiscal year, informs Congress of its intent to change for the next fiscal year. Continued use of an appropriation to the exclusion of another for the same purpose is required to provide for consistency, regularity, and predictability in the execution of appropriations provided by Congress.

DHS, however, improperly charged the costs of employee transit benefit subsidies to both the department's Management Directorate appropriation and to the subcomponent agencies' appropriations for "management and administration" during the same fiscal year. While DHS may choose which appropriation to use, DHS should charge the costs of transit benefit subsidies to one or the other, and adjust its accounts for fiscal year 2005 under the authority of 31 U.S.C. § 1553(a).

IV. AVAILABILITY OF APPROPRIATIONS: AMOUNT

Antideficiency Act Reports

- During calendar year 2006, 12 agencies transmitted 27 Antideficiency Act Reports pursuant to 31 U.S.C. § 1351.
- The amounts involved in the reported violations ranged from \$1000 to approximately \$40 million.

Antideficiency Act—Applicability

- *B-308037, Sept. 14, 2006: Legal Services Corporation—Lease with Friends of Legal Services Corporation*

This year, GAO addressed the application of principles of appropriations law to two corporations that, although they are private, nonprofit corporations, receive annual appropriations. One of these corporations, Legal Services Corporation (LSC), used its appropriations to create a second nonprofit corporation, Friends of the Legal Services Corporation (Friends), in an effort to purchase a building in Georgetown for its headquarters. Specifically, Friends purchased the building, which it mortgaged with the help of a 10-year lease from LSC to occupy the space for an annual fixed rent. The lease contained a termination clause stating that LSC could terminate the lease if it did not receive its annual appropriation.

In this opinion, GAO addressed whether certain transactions, including the 10-year lease, violated the Antideficiency Act. Congress created LSC as a private nonprofit corporation that "shall not be considered a department, agency, or instrumentality of the Federal Government." 42 U.S.C. § 2996d(e)(1). Its officers and employees, except in limited circumstances not relevant here, "shall not be considered officers or employees . . . of the Federal Government." *Id.* The Antideficiency Act, on the other hand, applies to actions of "an officer or employee of the United States." Because, by statute, LSC is not a federal agency and its officers and employees are not officers or employees of the United States, the Antideficiency Act does not apply to its transactions.

GAO further noted that Congress could subject LSC to the Antideficiency Act by amending the LSC Act or by imposing restrictions specifically when it appropriates funds annually to LSC. In the past, Congress had enacted a restriction in an annual appropriations act that subjected a specific appropriation provided to a private entity to the restrictions of the Antideficiency Act. *See* Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, 111 Stat. 1425, 1435 (Oct. 27, 1997) ("an obligation or commitment by [Amtrak] for purchase of capital improvements with funds

appropriated herein which is prohibited by this Act shall be deemed a violation of 31 U.S.C. § 1341”).

Antideficiency Act—Availability of Funds Clauses in Contracts

- *B-305484, June 2, 2006: National Mediation Board—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Board*

As discussed on page 1, GAO concluded that the National Mediation Board (NMB) incurs an obligation when it issues a Certificate of Appointment to a neutral arbitrator. We also examined whether language in the arbitrator’s letter of appointment indicating that compensation was “subject to availability of government funds” would be sufficient to protect NMB from violating the Antideficiency Act. It is well established by federal courts and GAO case law that such “availability of funds” clauses do not save a contract from the Antideficiency Act prohibition against obligations in excess or in advance of appropriations. To avoid violating the Antideficiency Act, an agency must have sufficient budget authority to cover its expected costs at the time it incurs the obligation. Because the arbitrator’s services are nonseverable, NMB incurs an obligation for the full cost of the service at the time it issues the Certificate of Appointment and must have budget authority available at that time to cover those costs.

Miscellaneous Receipts Statute—Applicability

- *B-307317, Sept. 13, 2006: State Justice Institute—Newsletter Advertising Charges*

Like the Legal Services Corporation (LSC) opinion discussed above, the State Justice Institute is a private, nonprofit corporation that receives an annual appropriation. The Institute requested an advance decision as to whether it may retain fees it planned to charge for advertising space in its semiannual newsletter. The request raised concerns regarding the miscellaneous receipts statute, which requires that, in the absence of contrary authority, “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury . . . without deduction or claim.” 31 U.S.C. § 3302(b).

When Congress created the Institute as a private corporation, it specifically stated that, for most purposes, the Institute “shall not be considered a department, agency, or instrumentality of the federal government.” 42 U.S.C. § 10704(c)(1). Moreover, the Institute’s employees and officers “shall not be considered officers or employees of the United States.” 42 U.S.C. § 10704(d)(1). As a result, when the Institute raises revenue in its operations, it does not receive money for the United States government. As a private corporation, the Institute is generally not subject to the same restrictions and controls on its expenditures as government agencies.² It may conduct its business in the same manner as any other private corporation, including retaining fees for use in its regular business practices.

² GAO found this same factor significant in B-308037, addressing the Antideficiency Act’s application to the Legal Services Corporation.

GAO cautioned that the Institute should carefully choose advertising so as to avoid the appearance of endorsement of certain viewpoints or positions over others. Even though the Institute is a private corporation, it possesses some of the traditional indicia of a federal agency, and its public role appears in many ways to be governmental. Thus, the principles supporting the federal policy against commercial advertising should inform the Institute's judgment in its choice of the nature and scope of advertising it will publish in its newsletter.

Augmentation

- *B-307137, July 12, 2006: Department of Energy—December 2004 Agreement with the United States Enrichment Corporation*

In this opinion, GAO questioned an agency's attempt to direct government revenue to a third party instead of depositing that revenue in the Treasury as miscellaneous receipts. In a December 2004 Agreement, the Department of Energy (DOE) transferred uranium to the United States Enrichment Corporation (USEC) and directed USEC to sell the uranium and use the proceeds from those sales to fund the decontamination of uranium owned by DOE, as well as the decontamination of uranium that DOE had previously transferred to USEC.

GAO concluded that DOE's actions violated the miscellaneous receipts statute, 31 U.S.C. § 3302(b). This statute requires agencies to deposit into the general fund of the Treasury all moneys received for use of the United States. It applies to an agency's contractor as well. In directing USEC to receive, retain, and use proceeds from the sale of government-owned uranium to compensate USEC for decontamination expenses it incurred on behalf of the government, DOE created an independent revenue stream not appropriated to it by Congress. This improperly augmented DOE's appropriations.

To resolve its improper use of sales proceeds, GAO recommended that DOE either seek and obtain congressional ratification of its use of the proceeds or adjust its accounts. GAO added that whether DOE's actions also amounted to a violation of the Antideficiency Act would depend on whether DOE obtains congressional ratification of its actions, or has unobligated budget authority sufficient to cover the amounts expended pursuant to the Agreement during the period in question.

- *B-308476, Dec. 20, 2006: Federal Motor Carrier Safety Administration—Retention of Court Ordered Restitution*

In this decision, GAO examined when an agency may retain the proceeds from resolution of a criminal action that the agency instituted against a private entity as part of its regulatory enforcement authority. The Federal Motor Carrier Safety Administration (FMCSA), a regulatory administration charged with issuing and enforcing regulations dealing with commercial trucking and bus operations, requested an advance decision as to whether it could retain restitution awarded

by a district court. Accepting the guilty plea of a trucking company charged with violating regulations and conspiring to falsify documents, a federal district court ordered that the company pay restitution to FMCSA.

Absent specific statutory authority to retain moneys received, the miscellaneous receipts statute requires agencies receiving money for the government to deposit such money in the general fund of the United States Treasury. 31 U.S.C. § 3302(b). FMCSA identified no specific statutory authority that would allow it to retain the restitution awards; therefore, FMCSA should deposit the amount in the Treasury. FMCSA asserted that the court awarded restitution to compensate the agency for investigative costs. Prior GAO decisions recognized a limited exception to the miscellaneous receipts statute for amounts collected that may be characterized as refunds. The refund exception “simply restores to the appropriation amounts that should not have been paid from the appropriation.” The restitution award at issue could not be characterized as a refund.

FMCSA argued that, under B-306860, Feb. 28, 2006, it should be allowed to retain the reimbursement. In that decision, the Office of Federal Housing Enterprise Oversight (OFHEO), in its regulatory capacity, brought administrative charges against Freddie Mac and former executive officers for undue compensation of those officers. Pursuant to a settlement agreement, Freddie Mac agreed to pay the costs associated with formatting certain documents sought in discovery in a manner agreed upon by both parties. GAO found no augmentation because the settlement did not defray an obligation of OFHEO. This was not the case with FMCSA. FMCSA receives an appropriation to pay for costs of investigations such as the one at issue in this case. If FMCSA were permitted to credit the restitution award to its appropriation, that award would defray costs of obligations that would otherwise be borne by FMCSA’s appropriation.

V. AVAILABILITY OF APPROPRIATIONS: TIME

Adjustments to Expired Accounts

- *B-308026, Sept. 24, 2006: National Labor Relations Board—Improper Obligation of Severable Services Contract*

This decision is a significant application of the time statute. The National Labor Relations Board (NLRB) entered into a severable services contract for ongoing support for its Case Activity Tracking System. On September 30, 2005, NLRB exercised a 1-year option under the contract for a performance period entirely within fiscal year 2006, beginning October 1, 2005, and ending on September 30, 2006. The NLRB improperly recorded the obligation for the option against its fiscal year 2005 appropriation instead of its 2006 appropriation. Instead of adjusting its accounts to record the obligation properly, NLRB proposed to modify the contract so that its period of performance would begin in fiscal year 2005, even though at that time the performance period was completed.

The NLRB Inspector General requested our decision on whether this remedy was valid. NLRB argued that it was reforming the contract to reflect what it had actually intended at the time. GAO concluded that even if the law of contracts permitted reformation of completed contracts, fiscal law does not permit NLRB to adjust the performance period to reach fiscal year 2005 appropriations. The option exercised on the last day of the fiscal year was for a *bona fide* need of the next fiscal year and, consistent with the recording and time statutes, obligates fiscal year 2006 funds. Fiscal year 2005 funds had expired and could not be obligated for *bona fide* needs of another fiscal year.

VI. ACCOUNTABLE OFFICER RELIEF

Standard for Relief and Statute of Limitations

- *B-303920, Mar. 21, 2006: Clarence Maddox—Relief of Liability for Improper Payments for Bottled Water*

In this decision, GAO applied the “good faith” standard for certifying officer relief and clarified the statute of limitations as it pertains to settlement of certifying officers’ accounts and granting relief.

GAO denied relief for a certifying officer of a federal court who certified payments for purchases of bottled water for court employees, the payments being improper in the absence of documentation that the available drinking water posed a health risk. The certifying officer maintained that the payments were made in good faith; he claimed to be unaware that the bottled water being purchased was for employees (bottled water for jurors is an allowable expense). GAO found that the payments could not be said to have been made in good faith, because that finding requires that there be no doubt regarding, nor reason to doubt, the propriety of the payments. Here, employee water was paid for out of a different account than juror bottled water, and a reasonable examination of the vouchers should have revealed that the water being purchased was not for jurors.

GAO is authorized to settle accounts of certifying officers and to grant or deny relief within 3 years after the date in which a “substantially complete” account is available for agency audit. Under the agency’s regulations, the certifying officer was required to submit a monthly statement of accountability, including all supporting documents, and upon the receipt of each month’s statement, the account was substantially complete for audit purposes. Hence, the certifying officer was relieved by operation of law for all improper payments made more than 3 years preceding the date of GAO’s decision.