



2022

APPROPRIATIONS LAW FORUM

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

2022 Appropriations Law Forum

Summary of Materials

Page

1

Agenda

4

List of GAO Appropriations Law Decisions

12

Appropriations Law: A Year in Review

47

**Appropriations Law and Personal Expenses in the Time
of COVID-19**

54

Executive Branch Counsel Panelist Biographies

55

Antideficiency Act Determinations

135

Impoundment Control Act Determinations

156

Year in Review: Other Recent GAO Decisions

169

Resources

170

Contributors

Cover image: The United States Capitol
Source: Architect of the Capitol



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

AGENDA

9:00am Opening Remarks

Charlie McKiver, Assistant General Counsel for Appropriations Law
Government Accountability Office

9:05am Appropriations Law: A Year in Review

Shirley A. Jones, Managing Associate General Counsel
Government Accountability Office

9:25am Power of the Purse Act Updates

Edda Emmanuelli Perez, General Counsel
Government Accountability Office

**9:40am Appropriations Law and Personal Expenses in the Time of
COVID-19**

Part I—Recent GAO Decisions

Charlie McKiver, Assistant General Counsel for Appropriations Law
Government Accountability Office

Karly Newcomb, Staff Attorney
Government Accountability Office

**Part II—Executive Branch Counsel Panel on Telework and Other
Expenses in the Post-COVID Hybrid Work Environment**

Julie Matta, Deputy General Counsel
Government Accountability Office

Charlie McKiver, Assistant General Counsel for Appropriations Law
Government Accountability Office

Naomi Taransky, Assistant General Counsel
Office of Management and Budget

James Muetzel, Senior Procurement Counsel
Office of Personnel Management

Claudia Nadig, Deputy Associate General Counsel
General Services Administration

David Leib, Senior Assistant General Counsel
General Services Administration

10:30am Antideficiency Act Determinations

Omari Norman, Assistant General Counsel for Appropriations Law
Government Accountability Office

Holly Firlein, Senior Staff Attorney
Government Accountability Office

Heather Stryder, Staff Attorney
Government Accountability Office

Andrew Howard, Senior Attorney
Government Accountability Office

Karly Newcomb, Staff Attorney
Government Accountability Office

11:00am Break

11:10am Impoundment Control Act Determinations

Shari Brewster, Assistant General Counsel for Appropriations Law
Government Accountability Office

Holly Firlein, Senior Staff Attorney
Government Accountability Office

Kristine Hassinger, Senior Attorney
Government Accountability Office

Andrew Howard, Senior Attorney
Government Accountability Office

11:50am Year-in-Review: Other Recent GAO Decisions

Omar Norman, Assistant General Counsel for Appropriations Law
Government Accountability Office

Paul Blenz, Senior Staff Attorney
Government Accountability Office

Doug Sahmel, Senior Attorney
Government Accountability Office

12:15pm Updates to the Red Book and Budget Glossary

Omar Norman, Assistant General Counsel for Appropriations Law
Government Accountability Office

Aimee Aceto, Senior Attorney
Government Accountability Office

12:25pm Closing Remarks

Charlie McKiver, Assistant General Counsel for Appropriations Law
Government Accountability Office

List of GAO Appropriations Law Decisions
July 2021 to May 2022

1. **U.S. Department of Homeland Security—Availability of Appropriations for Migrant Protection Protocol Hearing Facilities**

B-331419, July 1, 2021

The U.S. Department of Homeland Security (DHS) established facilities along the southwest border so that individuals enrolled in the Migrant Protection Protocols (MPP) could participate in the video teleconference removal proceedings conducted by the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR). DHS used its FY 2019 operations and support appropriation for the U.S. Immigration and Customs Enforcement (ICE) to establish the facilities even though DOJ had appropriations for EOIR facilities. Because DHS established these facilities to achieve the objectives of MPP, DHS's appropriation was available for this purpose.

2. **Office of Navajo and Hopi Indian Relocation—Request for Reconsideration—Compliance with the Miscellaneous Receipts Statute**

B-332596, July 29, 2021

The Office of Navajo and Hopi Indian Relocation (ONHIR) asks us to reconsider our decision concluding that ONHIR violated the miscellaneous receipts statute when it retained money from the sale of cattle without statutory authority to do so. Our standard for reconsideration is a narrow one, and we will reverse or modify a prior decision only if it contains material errors of fact or law. Here, ONHIR failed to demonstrate that the prior decision contained such material errors. Therefore, we find no basis to change our previous decision.

3. **Department of the Army, Fort Carson—Application of Bona Fide Needs Rule to Contract Modification**

B-332430, Sept. 28, 2021

A modification to a firm-fixed-price contract that is within the scope of the original contract may result in an increase to the contract price. Where such a price increase arises from and is enforceable under a provision in the original contract, the agency must obligate the price increase against appropriations available when the contract was originally executed, not against appropriations available when it made the modification. Therefore, a modification to a firm-fixed-price contract to reconnect four buildings to a new water main at Fort Carson, Colorado must be obligated against Operations and Maintenance, Army appropriations for fiscal year 2019, when the contract was executed, rather than against amounts appropriated for fiscal year 2020, when the modification was made.

4. Office of Congressional Workplace Rights—Transfer Authority

B-332003, Oct. 5, 2021

The Congressional Accountability Act (CAA) applied various employment-related laws to agencies across the legislative branch and established a single dedicated appropriation to pay awards and settlements arising from these laws. The CAA also created the Office of Congressional Workplace Rights (OCWR) and vested it with a central role in administering the CAA. The CAA vests OCWR with statutory authority to transfer amounts from this single appropriation to the appropriations of other agencies as necessary to carry out the provisions of the CAA, thereby overcoming the general prohibition on transfers in 31 U.S.C. § 1532.

5. Department of the Interior—Obligation of Amounts for the 2019 Fourth of July Events on the National Mall

B-332322, Oct. 19, 2021

The Department of the Interior (Interior) did not violate the purpose statute when it obligated Federal Lands Recreation Enhancement Act (FLREA) appropriated amounts for event-related expenses associated with the Salute to America portion of the 2019 Fourth of July events. Additionally, Interior did not violate the purpose statute when it obligated amounts from its Centennial Challenge appropriation for the Salute to America fireworks display. Interior's obligations were reasonably and logically related to the purposes identified in FLREA and the Centennial Challenge appropriation.

6. Smithsonian Institution—Application of the Antideficiency Act to Employee Travel during a Lapse in Appropriations

B-333281, Oct. 19, 2021

The Antideficiency Act bars agencies from incurring obligations in advance of appropriations, and prohibits the acceptance of voluntary services, except in certain circumstances. 31 U.S.C. §§ 1341(a), 1342. The Act includes an emergency exception that allows agencies to accept voluntary services in emergencies that imminently threaten the safety of human life or the protection of government property.

During a 2019 lapse in appropriations, the Smithsonian Institution (Smithsonian) incurred an obligation for an employee's salary when the employee travelled to a conference on animal care and nutrition. Smithsonian improperly relied on the Antideficiency Act's emergency exception when it did not record the obligation at the time of the travel. Smithsonian did not clearly link the employee's participation in the conference to an emergency posing imminent harm to its animal collections.

7. Department of the Interior—Activities at Grand Staircase-Escalante National Monument

B-331089, Dec. 14, 2021

Section 408 of the Department of the Interior, Environment, and Related Agencies Appropriations Acts for fiscal years 2017, 2018, and 2019 (section 408), prohibited the U.S. Department of the Interior (Interior) from using its appropriated funds to conduct certain preleasing, leasing, and related activities under the Mineral Leasing Act of 1920 (MLA) within the boundaries of national monuments. While the provision was in effect, the Bureau of Land Management (BLM), an agency within Interior, used appropriated funds to conduct land management planning activities under the Federal Land Policy and Management Act of 1976 (FLPMA) for the Grand Staircase-Escalante National Monument, a national monument in Utah, and the Kanab-Escalante Planning Area. Because the activities that it performed in both areas were required by FLPMA, and not undertaken pursuant to or authorized under the MLA, Interior did not violate section 408 or the Antideficiency Act.

8. Department of Housing and Urban Development—Application of the Antideficiency Act to Agency Implementation of Statutory Deadline on Grant Funds Expenditure

B-332428, Feb. 7, 2022

Section 904(c) of the Disaster Relief Appropriations Act, 2013 imposed a 24-month deadline for grantees in the Department of Housing and Urban Development's (HUD) Community Development Block Grant-Disaster Recovery program to expend grant funds. In a prior decision, we concluded that HUD used a cumulative method of calculation that was not sufficient for HUD to ensure that grantees complied with a 24-month deadline similar to the one in section 904(c). HUD initially assessed grantee compliance with section 904(c) using the same cumulative method of calculation. When HUD's Office of Inspector General brought this to HUD's attention, HUD discontinued use of the cumulative method. An agency violates the Antideficiency Act if it obligates or expends funds in excess of or in advance of any appropriation, apportionment, or allotment. Because HUD made no such obligations or expenditures, its use of the cumulative method of calculation did not result in a violation of the Antideficiency Act.

9. Daniel K. Inouye Asia-Pacific Center for Security Studies—Use of Appropriated Funds to Purchase COVID-19 Self-Test Kits

B-333691, Feb. 8, 2022

The Daniel K. Inouye Asia-Pacific Center for Security Studies (the Center) asks whether its appropriation is available to purchase coronavirus disease 2019 (COVID-19) self-test kits for persons located on its premises. Appropriated funds are available only for the purposes authorized by Congress. 31 U.S.C. § 1301(a). If not otherwise specified in law, an expense is authorized where it bears a reasonable, logical relationship to the purpose of the appropriation to be charged. The Center may use its appropriation to purchase COVID-19 self-test kits where the use of the test kits will allow the Center to carry out engagements in support of its statutory mission.

10. Office of Management and Budget—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing

B-331564.1, Feb. 10, 2022.

For fiscal years 2018 and 2019, Congress appropriated lump-sum amounts for foreign assistance, including for foreign military financing (FMF). In August 2019, the Office of Management and Budget (OMB) issued a series of reapportionments for fifteen foreign assistance accounts, including FMF funds.

Both the appropriations for FMF and their underlying statutory authorizations require the administration to exercise substantial discretion to carry out the program. By law, the Department of State (State) must notify Congress before obligating FMF funds. In the summer of 2019, OMB and State engaged in interagency policy discussions while preparing to notify Congress of State's intent to obligate a portion of the lump-sum FMF appropriation.

The Impoundment Control Act (ICA) prohibits any officer or employee from impounding funds—that is, withholding or delaying enacted budget authority from obligation or expenditure—unless the President transmits a special message to Congress. However, delays in the obligation of funds resulting from programmatic factors are not impoundments and, therefore, do not trigger the ICA's requirement that the President transmit a special message. Based on the information before us, we conclude that OMB's 2019 actions did not violate the ICA because these actions were reasonable exercises of programmatic discretion.

11. Office of Management and Budget—Reconsideration—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing

B-331564.2, Mar. 17, 2022

Our decision in B-331564.1 characterized fiscal year (FY) 2019 appropriations for foreign military financing (FMF) as lump sum amounts, even though a general provision incorporated by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries. We are issuing this reconsideration to assess whether this omission was material to the outcome of the decision. Because the Arms Export Control Act confers substantial discretion to the President to carry out the FMF program, we reaffirm our conclusion in our prior decision. The Office of Management and Budget did not violate the Impoundment Control Act when it conducted interagency discussions that may have delayed the transmission of a congressional notification regarding the agencies intent to obligate FY 2019 FMF funds.

12. U.S. Bureau of Reclamation, Department of the Interior—Amounts Collected From Central Valley Project Water Contractors and the Miscellaneous Receipts Statute

B-329575, Apr. 6, 2022

Under the miscellaneous receipts statute, agencies are required to deposit money received for the government into the general fund of the Treasury, unless otherwise authorized by statute. The U.S. Bureau of Reclamation (USBR), Department of the Interior collected amounts from Central Valley Project water contractors but did not deposit them as miscellaneous receipts in the general fund of the Treasury. USBR did not violate the miscellaneous receipts statute because USBR is authorized by law to retain these amounts.

13. Election Assistance Commission—Use of Grant Funds for Security Services

B-333826, Apr. 27, 2022

The Election Assistance Commission (EAC) asks whether it may permit states to use Help America Vote Act of 2002 (HAVA) grant funds to provide physical security services and social media threat monitoring to state or local election officials. HAVA authorizes the use of grant funds to states for, among other things, “[i]mproving the administration of elections for Federal office.” HAVA and the appropriations at issue do not explicitly authorize, nor do they explicitly prohibit, such expenditures. If not otherwise specified in law, an expense is authorized where it bears a reasonable, logical relationship to the purpose of the appropriation to be charged. Here, a decision to allow use of grant funds for the physical security services and social media threat monitoring would be within EAC’s legitimate range of discretion.

Appropriations Law: A Year in Review



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Election Assistance Commission—Use of Grant Funds for Security Services

File: B-333826

Date: April 27, 2022

DIGEST

The Election Assistance Commission (EAC) asks whether it may permit states to use Help America Vote Act of 2002 (HAVA) grant funds to provide physical security services and social media threat monitoring to state or local election officials. HAVA authorizes the use of grant funds to states for, among other things, “[i]mproving the administration of elections for Federal office.” HAVA and the appropriations at issue do not explicitly authorize, nor do they explicitly prohibit, such expenditures. If not otherwise specified in law, an expense is authorized where it bears a reasonable, logical relationship to the purpose of the appropriation to be charged. Here, a decision to allow use of grant funds for the physical security services and social media threat monitoring would be within EAC’s legitimate range of discretion.

DECISION

On December 1, 2021, the Election Assistance Commission (EAC) requested our decision on whether states may use certain grant funds made available to them under Section 101 of the Help America Vote Act of 2002 (HAVA) to provide “physical security services and social media threat monitoring.”¹ As discussed below, we conclude that EAC has discretion to permit states to use grant funds in this manner.

¹ Letter from Executive Director, EAC, *et al.* to Comptroller General, Dec. 1, 2021, at 1 (Request Letter).

In accordance with our regular practice, we contacted EAC to seek additional factual information and its legal views on this matter.² EAC responded with its explanation of the pertinent facts and legal analysis.³

BACKGROUND

Congress assigned EAC responsibility for administering grants to states to improve the administration of federal elections.⁴ The funds at issue here were appropriated to EAC in fiscal years 2018 and 2020 for activities “to improve the administration of elections for Federal office.... as authorized by” section 101 of HAVA.⁵ In turn, section 101 of HAVA authorizes states to use grant funds for the purpose of “[i]mproving the administration of elections for Federal office.”⁶

In September 2021, the Colorado Department of State asked EAC whether it could use HAVA grant amounts to pay for physical security services and social media threat monitoring.⁷ The Colorado Department of State asserted that election officials cannot effectively perform their duties if they feel their safety is in jeopardy and, furthermore, that additional security protections were necessary to prevent

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 5, 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO to General Counsel, EAC, Feb. 2, 2022.

³ Letter from Interim Executive Director and Acting General Counsel, EAC to Assistant General Counsel for Appropriations Law, GAO, March 1, 2022 (Response Letter).

⁴ Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 101, 102, and 251, 116 Stat. 1666, 1668-72. and 1692-93 (Oct. 29, 2002) *codified at* 52 U.S.C. §§ 20901, 20902, 21001. Although HAVA permanently vests in the Administrator of General Services the authority to administer these grants, Congress in the two relevant annual appropriations acts temporarily vested this authority in EAC. Financial Services and General Government Appropriations Act, 2020, Pub. L. No. 116-93, Div. C, Title V, 133 Stat. 2317, 2461 (Dec. 20, 2019) (“each reference to the ‘Administrator of General Services’ or the ‘Administrator’ in sections 101 and 103 shall be deemed to refer to the ‘Election Assistance Commission’”); Financial Services and General Government Appropriations Act, 2018, Pub. L. No. 115-141, Div. E, Title V, 132 Stat. 348, 562 (Mar. 23, 2018) (“each reference to the ‘Administrator of General Services’ or the ‘Administrator’ in sections 101 and 103 shall be deemed to refer to the ‘Election Assistance Commission’”).

⁵ Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2461; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562; Response Letter at 1.

⁶ 52 U.S.C. § 20901(b)(1).

⁷ Request Letter at 1.

experienced election officials and employees from leaving the profession.⁸ Accordingly, the Colorado Department of State suggested that its use of HAVA grant amounts for the security services and social media threat monitoring would improve the administration of elections for federal office.

According to EAC, there has been an increase in the number of threats made against Federal, state, and local election officials.⁹ EAC currently maintains a detailed website focused on the personal security of election officials.¹⁰ As EAC noted in its request letter to us, the Senate Committee on Rules and Administration in October 2021 heard testimony from state and local election officials about the increase in threats against themselves and their colleagues.¹¹

DISCUSSION

At issue here is whether EAC may permit states to use HAVA grant funds for physical security services and social media threat monitoring on the basis that doing so would “improve” the administration of elections for federal office pursuant to section 101 of HAVA. Section 101 of HAVA does not explicitly authorize, nor does it explicitly prohibit, the use of grant funds to provide physical security services and social media threat monitoring.¹² Similarly, the fiscal year 2018 and 2020 appropriations themselves do not explicitly authorize, nor do they explicitly prohibit the use of grant funds for such purposes.¹³

Under the purpose statute, appropriated funds may only be used for their intended purposes.¹⁴ Each authorized expense need not be stated explicitly in an appropriation. When an appropriation does not specifically enumerate all the items for which it is available, we apply a three-part test, known as the necessary expense rule, to determine whether the appropriation is available for a particular expense. Under this rule, an appropriation is available for a particular purpose if the

⁸ Letter from Colorado Department of State to EAC, Sept. 29, 2021 (Request Letter, Attachment A) (Colorado Letter).

⁹ Request Letter at 1.

¹⁰ EAC, *Election Official Security*, available at <https://www.eac.gov/election-officials/election-official-security> (last visited Mar. 29, 2022).

¹¹ Request Letter at 1; *Emerging Threats to Election Administration, Hearing Before the Senate Comm. On Rules and Admin.*, 117th Cong. (2021), available at <https://www.rules.senate.gov/hearings/emerging-threats-to-election-administration> (last visited Apr. 12, 2022).

¹² 52 U.S.C. § 20901; Request Letter at 2; Response Letter at 2.

¹³ Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2461; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562.

¹⁴ 31 U.S.C. § 1301(a).

obligation or expenditure: (1) bears a reasonable, logical relationship to the purpose of the appropriation to be charged; (2) is not prohibited by law; and (3) is not otherwise provided for. B-331419, July 1, 2021. This discussion focuses on step 1.¹⁵

Neither HAVA nor the appropriations at issue specifically defines “improve” or provides any additional details to specify which actions Congress believed would improve the administration of elections for federal office.¹⁶ We have long held that

[w]here a given expenditure is neither specifically provided for nor prohibited, the question is whether it bears a reasonable relationship to fulfilling an authorized purpose or function of the agency. This, in the first instance, is a matter of agency discretion. When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range.

B-223608, Dec. 19, 1988 (internal citations omitted).

We have previously recognized that, where an agency received appropriations to provide for “enhancement” of certain facilities, determining whether a particular expense actually resulted in an enhancement required the exercise of discretion by the responsible agency. B-332322, Oct. 19, 2021. Determining whether a particular expense provides an “improvement,” similar to determining whether an expense provides an “enhancement,” requires the responsible agency to exercise judgment.

¹⁵ We only address step 1 of the necessary expense analysis because steps 2 and 3 are not at issue. No law explicitly prohibits the use of the funds for these purposes and, in both FY 2018 and FY 2020, EAC only received one appropriation specifically for these grants. See, Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2460; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562.

¹⁶ 52 U.S.C. § 20901; Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2461; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562. The legislative history of these provisions does not detail the precise activities that Congress believed would, or would not, improve the administration of federal elections. See, 165 Cong. Rec. H10,992 (daily ed. Dec. 17, 2019) (explanatory statement regarding fiscal year 2020 appropriation); 164 Cong. Rec. H2,519 (daily ed. Mar. 22, 2018) (explanatory statement regarding fiscal year 2018 appropriation); H.R. Rep. No. 107-730 (2002) (Conf. Rep.).

Congress vested in EAC the authority to administer the HAVA section 101 grants.¹⁷ With this grant of authority, Congress also vested in EAC the authority to determine whether a particular grant expenditure helps “improv[e] the administration of elections for federal office.”¹⁸ Though the bounds of EAC’s discretion are not limitless, the statute’s use of the expansive term “improve” suggests that Congress vested EAC with greater discretion than what Congress sometimes affords when it uses a more specific word. See, e.g., 41 Comp. Gen. 255 (1961) (amounts available for the “replacement” of state roads were not available to make improvements to them).

Our prior decisions provide precedent for EAC’s exercise of discretion here. We have acknowledged that death threats or threats of violence directed at government employees or members of their families can have a significant impact on these employees and the performance of their duties. B-270446, Feb. 11, 1997. We have generally not objected to an agency using appropriated funds to protect an agency official where the agency has a legitimate concern for the safety of the official and where the functioning of the agency may be impaired by the danger to the official. 71 Comp. Gen. 4 (1991). We have also concluded that federal agencies may use appropriated funds to pay the costs of protecting threatened federal officials even when the funds in question were not explicitly appropriated for such security costs. B-251710, July 7, 1993. These prior decisions help illuminate EAC’s discretion even though they relate to threatened federal officials rather than (as here) to state or local officials carrying out responsibilities funded by federal grants.¹⁹ Just as the functioning of a federal program might be impaired by danger to a federal official with responsibility for the program, the functioning of a federally funded state or local program might be impaired by danger to a state or local official with responsibility for that program.²⁰

¹⁷ 52 U.S.C. § 20901; Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2461; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562.

¹⁸ *Id.*

¹⁹ We have held that an agency could provide psychological assessment and referral services to family members of federal employees who received death threats and other threats of violence. Although the family members receiving these services were not federal employees, we agreed that this expense nevertheless benefitted the agency because the stress and anxiety faced by these individuals, if left unaddressed, could negatively impact the accomplishment of the agency’s mission. B-270446.

²⁰ We also note Office of Management and Budget guidance which states that “[n]ecessary and reasonable expenses incurred for protection and security of facilities, personnel, and work products are allowable. Such costs include, but are not limited to, wages and uniforms of personnel engaged in security activities; equipment; barriers; protective (non-military) gear, devices, and equipment; contractual security services; and consultants.” 2 C.F.R. § 200.457; see also,

In light of the information that EAC provided in its letter to us, EAC could reasonably conclude that providing physical security services and social media threat monitoring to election officials would “improve the administration of elections for federal office” and, therefore, that states may use grant funds for these expenses.²¹ Should EAC reach this conclusion, it would be within the legitimate range of discretion that the agency must exercise as it administers HAVA section 101. In reaching its conclusion, EAC may rely on the analysis underlying our prior decisions determining that agencies may use appropriated funds to provide security to threatened federal officials.²²

Should EAC conclude that states may use grant funds for these expenses, EAC would then be responsible for determining the reasonableness of any costs incurred and the proportion of such costs that are properly allocable to a jurisdiction’s HAVA grant funds. EAC would need to make this determination in light of each grantee’s specific circumstances, including any existing security measures.²³

31 U.S.C. § 6307 (authorizing the Director of the Office of Management and Budget to issue “interpretative guidelines” for federal grant agreements).

²¹ Because this conclusion must be reached in light of the specific circumstances, EAC may need to reevaluate should perceived threats to election officials’ safety significantly change in the future.

²² See, e.g., B-251710; B-243866.

²³ EAC also asked “[h]ow to appropriately assess the allocation of the physical security services specifically to the administration of elections for Federal office when officials have multiple duties and responsibilities” Request Letter at 2. In the case of physical security upgrades to a state or local facility that houses election offices, for example, EAC has only allowed the costs of those upgrades specifically related to the portion of the facility housing the election offices to be allocated to a HAVA grant. See, EAC, *HAVA Frequently Asked Questions*, available at <https://www.eac.gov/payments-and-grants/grants-fags> (last visited Apr. 12, 2022). However, the Colorado Department of State proposed allocating the entire cost of physical security services and social media threat monitoring to HAVA grant funds, noting that “[e]lections for federal office are the most visible and virtually all threats to date are related to elections for federal office. Stated another way, the only reason we require these additional services is because of federal elections and this request does not supplant existing state expenses.” Colorado Letter at 2.

Should it deem these costs allowable, EAC must determine the proper method of cost allocation, which could vary depending on various circumstances (such as the extent to which EAC determines these costs are allowable) and which could vary from one grantee to another.

CONCLUSION

HAVA authorizes the use of the grant funds for “[i]mproving the administration of elections for federal office.” Congress vested EAC with authority to administer the grant program. According to EAC, there has been an increase in the number of threats made against Federal, state, and local election officials. In light of this information, EAC could reasonably conclude that grantees could use the funds to provide physical security services and social media threat monitoring to election officials.

A handwritten signature in cursive script that reads "Edda Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: U.S. Bureau of Reclamation, Department of the Interior—Amounts Collected From Central Valley Project Water Contractors and the Miscellaneous Receipts Statute

File: B-329575

Date: April 6, 2022

DIGEST

Under the miscellaneous receipts statute, agencies are required to deposit money received for the government into the general fund of the Treasury, unless otherwise authorized by statute. The U.S. Bureau of Reclamation (USBR), Department of the Interior collected amounts from Central Valley Project water contractors but did not deposit them as miscellaneous receipts in the general fund of the Treasury. USBR did not violate the miscellaneous receipts statute because USBR is authorized by law to retain these amounts.

DECISION

This responds to a request for a decision as to whether the U.S. Bureau of Reclamation (USBR), Department of the Interior (DOI), violated the miscellaneous receipts statute, 31 U.S.C. § 3302, when it retained certain amounts collected from Central Valley Project (CVP) water contractors as opposed to depositing amounts into the Treasury.¹ USBR is authorized by law to retain amounts collected from CVP

¹ Letter from Ranking Member, Committee on Natural Resources, House of Representatives, and Ranking Member, Subcommittee on Water, Power, and Oceans, House of Representatives, and four other members, House of Representatives, Oct. 24, 2017. The request referred to a report issued by DOI's Office of Inspector General (DOI OIG) regarding USBR's use of its appropriations for a project called the Bay Delta Conservation Plan project. See DOI OIG, *The Bureau of Reclamation Was Not Transparent in Its Financial Participation in the Bay Delta Conservation Plan*, Report No. 2016-WR-040 (Sept. 2017) (DOI OIG Report). The request asked if USBR's actions were consistent with the miscellaneous receipts statute. We focused our decision on the application of the miscellaneous receipts

water contractors as prepayments for project operation and maintenance costs. As explained below, we conclude that USBR's retention of these amounts did not violate the miscellaneous receipts statute.

Consistent with our practice for legal decisions, we sent a development letter to DOI, requesting factual information as well as DOI's legal views on this matter. Letter from Assistant General Counsel, Appropriations Law, GAO, to Solicitor (Acting), DOI (Dec. 6, 2017) (Development Letter); GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/gao-06-1064sp>. DOI responded in August 2019 and June 2020.²

BACKGROUND

USBR and CVP

USBR's mission is to manage, develop, and protect water and water-related resources.³ USBR constructs dams and canals, among other things, and is the largest wholesaler of water in the United States.⁴ Congress established the Reclamation Fund as a "special fund"⁵ for USBR to construct and maintain irrigation works, among other things. See 43 U.S.C. § 391. USBR also receives

statute to USBR's retention of amounts collected from CVP water contractors to cover project operation and maintenance costs.

² DOI submitted its response to our Development Letter on August 2, 2019. Letter from Associate Solicitor, Division of Water Resources, DOI, to Assistant General Counsel, Appropriations Law, GAO (DOI Response). However, DOI's response did not provide certain factual information or supporting documentation, nor, in a number of instances, DOI's legal views. We sent a second letter to DOI on June 12, 2020. Letter from Assistant General Counsel, Appropriations Law, GAO, to Solicitor, DOI. DOI submitted its response, with supporting documentation, on June 30, 2020. Letter from Associate Solicitor, Division of Water Resources, DOI, to Assistant General Counsel, Appropriations Law, GAO (DOI Second Response). We contacted USBR by email on December 14, 2020, to clarify certain factual matters. In response to our email, on March 3, 2021, we participated in a teleconference with DOI.

³ USBR, *Reclamation/About Us/Mission/Vision*, available at <https://www.usbr.gov/main/about/mission.html> (last visited Apr. 4, 2022).

⁴ *Id.*

⁵ Special Fund is defined as "a [f]ederal fund account for receipts earmarked for specific purposes and the expenditure of these receipts." Office of Management and Budget Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 1, § 20 (Aug. 2021).

appropriations, such as its appropriation for water and related resources (WRR Appropriation).⁶ The WRR Appropriation is available until expended for activities such as “management, development, and restoration of water and related natural resources and for related activities, including the operation, maintenance, and rehabilitation of reclamation and other facilities, [and] participation in fulfilling related [f]ederal responsibilities.” DOI Response, at 8. The WRR Appropriation states that it shall be derived, to the extent it can be, from the Reclamation Fund.⁷

USBR’s CVP is a network of dams, reservoirs, canals, hydroelectric power plants, and other facilities throughout central California.⁸ The CVP reduces flood risk, supplies water to domestic and industrial users, produces electrical power, and provides water to restore and protect fish and wildlife, among other things.⁹ Under CVP, USBR enters into long-term contracts with users of water such as irrigation districts, and municipal and industrial users, referred to in this decision as water contractors.¹⁰

CVP Operation and Maintenance Costs

CVP’s dams and reservoirs are operated and maintained by USBR. DOI Response, at 4. Water contractors are required by law to pay USBR for operation and maintenance costs¹¹ allocated to them by USBR. 43 U.S.C. § 492. USBR typically pays these costs up front and then bills the water contractors. DOI Second Response, at 7; DOI Response, at 5. The law also permits water contractors to prepay operation and maintenance costs before water delivery. See 43 U.S.C. § 397a. The statute directs that money prepaid to USBR for operation and maintenance is to be deposited into the Reclamation Fund. See *id.* The WRR

⁶ See, e.g., Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. D, title II, 128 Stat. 2130, 2309 (Dec. 16, 2014).

⁷ *Id.*; see also DOI, *Natural Resources Revenue Data, Reclamation Fund*, available at <https://revenuedata.doi.gov/how-revenue-works/reclamation/> (last visited Apr. 4, 2022) (amounts in the Reclamation Fund mostly go to three USBR accounts, one of which is the WRR Appropriation).

⁸ USBR, *California-Great Basin, Central Valley Project*, available at <https://www.usbr.gov/mp/cvp/> (last visited Apr. 4, 2022).

⁹ *Id.*

¹⁰ GAO, *Bureau of Reclamation: Availability of Information on Repayment of Water Project Construction Costs Could Be Better Promoted*, GAO-14-764 (Washington, D.C.: Sept. 08, 2014), at 1–2.

¹¹ DOI defines operation and maintenance costs as “all costs that are not identified as a construction cost [which] would generally comprise the administration, management, coordination, and performance of services . . . needed to ensure that [USBR] facilities provide for the delivery of authorized project purposes.” DOI Response, at 4.

Appropriation directs that prepayments under section 397a are to be credited to the WRR account and are available consistent with the purposes of the account. See, e.g., Pub. L. No. 113-235, 128 Stat. at 2309.

From 2009 to 2015, USBR entered into agreements with certain water contractors under which the contractors prepaid operation and maintenance costs for 1-years' worth of water. DOI OIG Report, at 8; DOI Response, at 7; see DOI Second Response, at 7. During this time, USBR used these prepayments to cover operation and maintenance costs. DOI OIG Report, at 8; DOI Second Response, at 7.

DISCUSSION

At issue here is whether USBR had authority to retain prepayments collected from CVP water contractors for project operation and maintenance costs or should have deposited the prepayments in the Treasury as miscellaneous receipts.

Under the miscellaneous receipts statute, "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). The primary purpose of the miscellaneous receipts statute is to ensure that Congress retains control of the public purse thereby protecting Congress's constitutional power to appropriate public money. B-322531, Mar. 30, 2012.

A statute, however, may authorize an agency to retain amounts received from an outside source and direct that such receipts be deposited in an account other than the general fund of the Treasury. B-322531, at 4. Such authority allows the agency to retain the funds without running afoul of the miscellaneous receipts statute. For example, in a prior decision, we found that the Office of Comptroller of the Currency (OCC) was authorized by statute to lease property, collect payments from lessees, and deposit the funds into any regular government depository or any state or national bank. B-324857, Aug. 6, 2015. Since OCC's statutory authority directed that OCC retain and use funds collected through its leases, such amounts were not required to be deposited into the general fund of the Treasury as miscellaneous receipts. *Id.* By contrast, the Office of Navajo and Hopi Indian Relocation (ONHIR) violated the miscellaneous receipts statute when it failed to deposit money received from the sale of cattle into the Treasury because ONHIR lacked statutory authority to retain the funds. B-329446, Sept. 17, 2020.

Here, similar to OCC's authority to retain funds collected from lessees, USBR is authorized to retain prepayments from water contractors as opposed to depositing these amounts in the Treasury as miscellaneous receipts. See 43 U.S.C. § 397a; Pub. L. No. 113-235, 128 Stat. at 2309. We conclude that USBR did not violate the miscellaneous receipts statute when it retained amounts collected from CVP water contractors because USBR has statutory authority to retain these amounts.

CONCLUSION

The miscellaneous receipts statute requires that amounts received for the government be deposited in the Treasury, unless Congress has provided otherwise. 31 U.S.C. § 3302. USBR's retention of operation and maintenance prepayments from CVP water contractors was consistent with the miscellaneous receipts statute because USBR was not required to deposit these amounts into the Treasury under 43 U.S.C. § 397a and the WRR Appropriation.



Edda Emmanuelli Perez
General Counsel



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Social Security Administration—Legality of Service of Acting Commissioner

File: B-333543

Date: February 1, 2022

DIGEST

The Federal Vacancies Reform Act of 1998 (Vacancies Act), 5 U.S.C. §§ 3345–3349d, is the exclusive means for an acting official to serve in a vacant executive branch position that requires presidential appointment and Senate confirmation unless another statutory provision expressly designates an acting officer or authorizes the President, a court, or the head of an executive department to make a designation. Section 702(b)(4) of the Social Security Act, 42 U.S.C. § 902(b)(4), provides that the President may designate an Acting Commissioner of the Social Security Administration. On July 9, 2021, the President designated an Acting Commissioner of Social Security pursuant to the Social Security Act, not the Vacancies Act. Neither the Vacancies Act’s time limitations on acting service nor the restrictions on performance of the position’s functions and duties apply to the Acting Commissioner.

DECISION

This responds to a congressional request regarding the legality of Dr. Kilolo Kijakazi’s service as Acting Commissioner of Social Security at the Social Security Administration (SSA).¹ As explained below, we conclude that Dr. Kijakazi is lawfully serving as the Acting Commissioner under section 702(b)(4) of the Social Security Act. See 42 U.S.C. § 902(b)(4).² Neither the Vacancies Act’s time limitations on

¹ Letter from Senator Mike Crapo, Representative Kevin Brady, Senator Todd Young, Representative Tom Reed, and Senator Tim Scott to Comptroller General (Aug. 24, 2021).

² The Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (Aug. 14, 1935), is codified as amended in various sections of title 42 of the United States Code.

acting service nor the restrictions on performance of the position's functions and duties apply to Dr. Kijakazi.

In accordance with our regular practice, we contacted SSA to seek factual information and its legal views on this matter.³ SSA responded with its explanation of the pertinent facts and legal analysis.⁴ SSA also provided a copy of the President's designation of Dr. Kijakazi as Acting Commissioner.⁵

BACKGROUND

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of certain vacant positions that require presidential appointment and Senate confirmation. 5 U.S.C. §§ 3345–3349d. The Vacancies Act is the exclusive means for an acting official to serve in a covered position unless another statutory provision expressly designates an officer or employee to temporarily serve in an acting capacity in a specified position or authorizes the President, a court, or the head of an executive department to make such a designation. 5 U.S.C. § 3347.

SSA is an independent agency in the executive branch and is responsible for administering the old-age, survivors, and disability insurance program as well as the supplemental security income program. 42 U.S.C. § 901. The Commissioner of Social Security leads the agency and is a presidentially appointed, Senate-confirmed (PAS) position. 42 U.S.C. § 902(a).

On July 9, 2021, the President removed Andrew Saul, the Commissioner of Social Security,⁶ from office, creating a vacancy in the position.⁷ That same day, the

³ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/GAO-06-1064SP>. Letter from Managing Associate General Counsel for Appropriations Law, GAO, to General Counsel, SSA (Sept. 21, 2021); Email from Senior Attorney, GAO, to General Counsel, SSA, *Subject: Follow up on SSA Development Letter (B-333543)* (Oct. 28, 2021).

⁴ Letter from General Counsel, SSA, to Managing Associate General Counsel for Appropriations Law, GAO (Oct. 21, 2021) (Initial Response Letter); Letter from General Counsel, SSA, to Senior Attorney, GAO (Nov. 10, 2021) (Follow-up Response Letter).

⁵ Presidential Memorandum for Kilolo Kijakazi, Deputy Commissioner for Retirement and Disability Policy, SSA (July 9, 2021) (Presidential Designation).

⁶ Mr. Saul was nominated on April 12, 2018, re-nominated on January 16, 2019, and confirmed by the Senate on June 4, 2019. Initial Response Letter, at 1.

⁷ Initial Response Letter, at 1–2.

President designated Dr. Kilolo Kijakazi, SSA's Deputy Commissioner for Retirement and Disability Policy, as Acting Commissioner pursuant to "the Constitution and the laws of the United States, including section 702(b)(4) of the Social Security Act."⁸ Dr. Kijakazi is the only official that has served as Acting Commissioner since the vacancy began, and no one has been nominated to the position.⁹

DISCUSSION

At issue here is whether Dr. Kijakazi is eligible to serve as Acting Commissioner, and, if so, whether there are any time or other limitations on her acting service.

Dr. Kijakazi's Eligibility

The Vacancies Act is the exclusive means for temporarily authorizing an acting official to perform the functions and duties of most vacant PAS positions in executive agencies unless an exception applies. 5 U.S.C. § 3347(a). In particular, an official may act under a statutory provision other than the Vacancies Act if that provision either expressly "designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity," or expressly "authorizes the President, a court, or the head of an Executive department" to make such a designation. 5 U.S.C. § 3347(a)(1); B-331650, Aug. 14, 2020.

The Commissioner of Social Security is a PAS position subject to the Vacancies Act.¹⁰ However, the President designated Dr. Kijakazi as Acting Commissioner pursuant to section 702(b)(4) of the Social Security Act. Section 702(b)(4) states, in relevant part:

The Deputy Commissioner [of Social Security]¹¹ shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.

42 U.S.C. § 902(b)(4).

Because the provision expressly designates an officer to serve as Acting Commissioner (the Deputy Commissioner of Social Security) and authorizes the

⁸ Initial Response Letter, at 1; Presidential Designation.

⁹ Initial Response Letter, at 2.

¹⁰ See 5 U.S.C. §§ 3345(a), 3347(a); 42 U.S.C. §§ 901(a), 902(a)(1); B-329853, Mar. 6, 2018.

¹¹ The Deputy Commissioner of Social Security, like the Commissioner, is a PAS position. 42 U.S.C. § 902(b)(1).

President to designate another officer as Acting Commissioner, the provision provides authority, independent of the Vacancies Act, to designate an Acting Commissioner. See 5 U.S.C. § 3347(a); S. Rep. No. 105-250, at 15–17 (1998) (expressly identifying section 702(b)(4) as falling within a similarly-worded exception in an earlier version of the bill).

Next, we turn to whether Dr. Kijakazi is authorized to serve under this position-specific authority. Section 702(b)(4) states that the Deputy Commissioner of Social Security becomes the Acting Commissioner when there is a vacancy in the position, unless the President designates another “officer of the Government” to act. See 42 U.S.C. § 902(b)(4). Dr. Kijakazi was not the Deputy Commissioner of Social Security,¹² and so, we consider whether Dr. Kijakazi was “another officer of the Government” who is eligible to act by designation of the President. See *id.*

Generally, to interpret a statute, we begin with the text, giving ordinary meaning to statutory terms unless otherwise defined. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); B-331739, Mar. 18, 2021; B-331312, Mar. 8, 2021. Additionally, we do not construe statutory terms in isolation, but rather, in the context of the whole statute. B-331312, at 5 (citing 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 46:5, at 204 (7th ed. 2009)). When a statute uses an identical word more than once, the settled principle of statutory construction is that the word has the same meaning in the absence of evidence to the contrary. B-331739; 43 Comp. Gen. 252, 254 (B-151007, Sept. 12, 1963) (citing *United States v. Cooper Corp.*, 312 U.S. 600 (1941); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932)).

The Social Security Act does not define “officer.” But the use of the term in other parts of that act sheds light on its meaning in section 702(b)(4). Specifically, section 704 of the act provides that the Commissioner shall appoint officers and employees as necessary to carry out SSA’s mission, and “such officers and employees shall be appointed . . . in accordance with title 5.” 42 U.S.C. § 904(a)(1). Further, section 2104 of title 5 of the United States Code defines “officer,” in pertinent part, as an individual who is required by law to be appointed in the civil service by the head of an agency, is engaged in the performance of federal functions authorized by law, and is subject to the supervision of the agency head. 5 U.S.C. § 2104(a).

As Deputy Commissioner for Retirement and Disability Policy, Dr. Kijakazi was an “officer” as defined by 5 U.S.C. § 2104(a). First, section 704(a) of the Social Security Act directs the head of the agency, the Commissioner, to appoint additional officers, and Dr. Kijakazi was appointed to be Deputy Commissioner for Retirement and Disability Policy by Commissioner Saul.¹³ Second, the Deputy Commissioner

¹² See Initial Response Letter, at 5.

¹³ Follow-up Response Letter, at 2.

for Retirement and Disability Policy performs federal functions under the authority of law. For example, the position description specifies that “[t]he Deputy Commissioner for Retirement and Disability Policy is a key Agency official who . . . is accountable for carrying out and managing major phases of [SSA] programs.”¹⁴ Finally, Dr. Kijakazi was subject to the supervision of, and directly reported to, the head of the agency, the Commissioner, in that position.¹⁵

Since Dr. Kijakazi was an officer for purposes of 5 U.S.C. § 2104(a), we conclude that Dr. Kijakazi was also an “officer of the Government” for purposes of section 702(b)(4) of the Social Security Act. Therefore, Dr. Kijakazi was eligible to become the Acting Commissioner pursuant to the President’s designation on July 9, 2021.¹⁶

Time Limitations on Dr. Kijakazi’s Acting Service

We next consider whether there are any limitations on the time period Dr. Kijakazi may serve as Acting Commissioner.

The Social Security Act does not prescribe any time limitations for an individual serving as Acting Commissioner. See 42 U.S.C. § 902(b)(4). In contrast, the Vacancies Act expressly limits the time period for acting service and sets forth specific time limitations in various situations. See 5 U.S.C. § 3346.¹⁷ We therefore consider whether the Vacancies Act’s time limitations apply to an official serving as Acting Commissioner under section 702(b)(4) of the Social Security Act.

The Vacancies Act’s time limitations in section 3346 apply to “the person serving as an acting officer as described under section 3345.” 5 U.S.C. § 3346(a). Section 3345, in turn, identifies the categories of individuals who may serve as acting

¹⁴ Follow-up Response Letter, at 3; see SSA, *SSA Organizational Manual: Chapter TM – The Office of Retirement and Disability Policy*, available at <https://www.ssa.gov/org/orgDCRDP.htm> (last visited Jan. 31, 2021) (providing a more detailed description of the position’s duties).

¹⁵ Follow-up Response Letter, at 3 (quoting the position description, which states that the Deputy Commissioner for Retirement and Disability Policy “reports directly to the Commissioner of Social Security”); see SSA Organizational Manual: Chapter TM.

¹⁶ See Presidential Designation.

¹⁷ If no nomination has been submitted, the allowable period of acting service is generally 210 days beginning on the date the vacancy occurs. 5 U.S.C. § 3346(a)(1). If a nomination has been submitted, acting service is permitted during the pendency of a first or second nomination and for up to 210 days after the date the first or second nomination is rejected, withdrawn, or returned. 5 U.S.C. § 3346(a)(2), (b).

officials under the Vacancies Act. 5 U.S.C. § 3345. As discussed above, section 3347 provides that sections 3345 and 3346 are generally the exclusive means of temporarily authorizing an acting official to perform the functions and duties of a vacant position, but an acting official may be designated under another statutory provision meeting certain criteria. 5 U.S.C. § 3347(a)(1). Section 3347 thus distinguishes between the Vacancies Act provisions at sections 3345 and 3346 on the one hand and the statutory provisions described in section 3347(a)(1) on the other, characterizing these position-specific authorities as a means of designating an acting official independent of sections 3345 and 3346. *See Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 139 (D.D.C. 2019), *aff'd on other grounds*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). In other words, when an individual is serving as an acting official under one of the statutory provisions described in section 3347(a)(1), they are not serving pursuant to section 3345. Consequently, they are not subject to the time limitations in section 3346.¹⁸

In this case, because Dr. Kijakazi is serving as Acting Commissioner under a position-specific authority in accordance with section 3347, the time limitations in section 3346 do not apply to her acting service. Further, because the Social Security Act does not limit the period an individual may serve as Acting Commissioner, Dr. Kijakazi may serve indefinitely as Acting Commissioner under that authority until the President designates another individual to act or a new Commissioner is confirmed by the Senate. *See Casa de Maryland, Inc.* 486 F. Supp. 3d at 955–56; *Batalla Vidal*, 501 F. Supp. 3d at 130 n.9; *Immigrant Legal Resource Center* 491 F. Supp. 3d at 538; S. Rep. No. 105-250, at 17.

This conclusion differs from the circumstances identified in our 2018 report regarding a previous Acting Commissioner of Social Security. B-329853. In that case, we determined that Nancy A. Berryhill’s acting service violated the Vacancies Act’s time

¹⁸ The courts have similarly interpreted these provisions. *See Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 953–57 (D. Md. 2020); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 129–31 (E.D.N.Y. 2020); *Immigrant Legal Resource Center v. Wolf*, 491 F. Supp. 3d 520, 536–38 (N.D. Cal. 2020); *see also United States v. Guzek*, 527 F.2d 552, 559–60 (8th Cir. 1975) (concluding that the time limitations in the previous vacancies statute did not apply to an Acting Attorney General serving under a position-specific statutory provision). The legislative history of the Vacancies Act also supports this interpretation. S. Rep. No. 105-250, at 17 (noting that many of the statutory provisions that fell within the scope of an earlier draft of section 3347(a) “do not place time restrictions on the length of an acting officer” and opining that the various authorizing committees might revisit whether those provisions should be repealed).

limitation because, unlike Dr. Kijakazi, Ms. Berryhill was serving under the provisions of the Vacancies Act.¹⁹

Other Limitations on Dr. Kijakazi's Acting Service

Finally, we consider whether the Social Security Act or the Vacancies Act places any other limitations on Dr. Kijakazi's acting service or her authority to temporarily perform the functions and duties of the Commissioner.

Aside from section 702(b)(4) of the Social Security Act, we have not identified any other provisions in the Social Security Act governing acting service as Commissioner. In other words, nothing in the Social Security Act expressly limits the authority of a duly designated Acting Commissioner like Dr. Kijakazi to perform the functions and duties of the Commissioner position.

The Vacancies Act includes an enforcement mechanism that restricts the performance of certain functions and duties of a vacant position when no "officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347." 5 U.S.C. § 3348(b). In that situation, "the office shall remain vacant" and "[a]n action taken by any person who is not acting under section 3345, 3346, or 3347 . . . in the performance of any function or duty . . . shall have no force or effect" and "may not be ratified."²⁰ 5 U.S.C. § 3348(b)(1), (d). Here, because we have concluded that Dr. Kijakazi is in fact performing the functions and duties in accordance with section 3347, these restrictions are inapplicable.²¹ Therefore, Dr. Kijakazi's authority to perform the functions and duties of the Commissioner is not restricted.

¹⁹ Although section 702(b)(4) of the Social Security Act uses the word "shall," suggesting that its provisions are mandatory in the event of a vacancy, courts have held that the Vacancies Act remains an alternative means of designating an acting official even when a position-specific authority includes such language. See *Hooks*, 816 F.3d at 555–56; *Guedes*, 356 F. Supp. 3d at 139.

²⁰ When the vacant office is not the head of the agency, section 3348 permits the head of the agency to perform the functions and duties of the position when no one is acting in accordance with sections 3345, 3346, and 3347. 5 U.S.C. § 3348(b)(2), (d)(1). Because the Commissioner is the head of SSA, see 42 U.S.C. § 902(a), these provisions do not apply.

²¹ Sections 3345 to 3347 specify two separate, independent authorities for acting service: (1) sections 3345 and 3346; and (2) position-specific authorities described in section 3347(a)(1). An individual acting pursuant to either one of these authorities is therefore performing the functions and duties of the position "in accordance with sections 3345, 3346, and 3347." See 5 U.S.C. § 3348(b).

CONCLUSION

The Social Security Act provides authority for the President to designate an Acting Commissioner of Social Security. Dr. Kijakazi qualifies to act under this authority. Neither the Social Security Act nor the Vacancies Act restricts or limits Dr. Kijakazi's authority to perform the functions and duties of the Commissioner while serving as Acting Commissioner nor places limitations on the length of her acting service.

A handwritten signature in cursive script that reads "Edda Emmanuelle Perez".

Edda Emmanuelli Perez
General Counsel



441 G St. N.W.
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Decision

Matter of: Centers for Disease Control and Prevention—Applicability of Congressional Review Act to Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs

File: B-333501

Date: December 14, 2021

DIGEST

On February 3, 2021, the Centers for Disease Control and Prevention (CDC) published a document in the Federal Register entitled *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025 (Mask Requirement). Under the CDC's Mask Requirement all persons using public conveyances such as planes, trains, and buses must wear facial coverings while on the conveyance and at transportation hubs such as airports and bus stations. CDC did not submit a CRA report to Congress or the Comptroller General on the Mask Requirement.

The Congressional Review Act (CRA) requires that before a rule can take effect, an agency must submit the rule to both the House of Representatives and the Senate as well as the Comptroller General, and provides procedures for congressional review where Congress may disapprove of rules. We conclude that the Mask Requirement meets the definition of a rule for purposes of CRA and, therefore, is subject to CRA's requirements for submission and congressional review. With this decision, we are not taking a position on the policy of imposing a mask requirement or what steps the agency or Congress may take next; our decision only addresses CDC's compliance with CRA's procedures for congressional review.

DECISION

The Centers for Disease Control and Prevention (CDC), a component of the U.S. Department of Health and Human Services (HHS), issued a document entitled *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025 (Mask Requirement) that was published in the Federal Register on February 3, 2021. Senator Rand Paul, M.D., subsequently requested our legal decision as to whether the Mask Requirement is a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Rand Paul,

M.D., to Comptroller General (Aug. 9, 2021). For the reasons explained below, we conclude that it is.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/gao-06-1064sp>. Accordingly, we reached out to HHS to obtain the agency's legal views. Letter from Managing Associate General Counsel, GAO, to Acting General Counsel, HHS (Aug. 12, 2021). We received HHS's response on September 28, 2021. Letter from Acting General Counsel, HHS, to Managing Associate General Counsel, GAO (Sept. 28, 2021) (Response Letter).

BACKGROUND

CDC Mask Requirement

On January 31, 2020, in response to confirmed cases of Novel Coronavirus Disease 2019 (COVID-19), the Secretary of HHS declared a public health emergency under the Public Health Service Act.¹ The Secretary has renewed that declaration, most recently on October 15, 2021.² Subsequently, the President declared that the COVID-19 outbreak constitutes a national emergency under the National Emergencies Act. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). The national emergency declaration was continued on February 24, 2021. 86 Fed. Reg. 11,599 (Feb. 26, 2021).

On January 29, 2021, CDC issued the Mask Requirement pursuant to its regulatory authorities under the Public Service Health Act with an effective date of February 1, 2021.³ Mask Requirement, at 8025-26. It was published in the Federal Register on February 3, 2021.

¹ HHS, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020), available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last visited Oct. 26, 2021).

² HHS, *Public Health Emergency Declarations*, available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx> (last visited Nov. 2, 2021).

³ Regulations implementing the Public Health Service Act empower CDC to take measures to prevent the introduction or spread of communicable diseases. 42 U.S.C. § 264; 42 C.F.R. §§ 70.2, 71.31, 71.32. Actions CDC can take include inspection, fumigation, disinfection, sanitation, and pest extermination, among others. 42 C.F.R. §§ 70.2, 71.31, 71.32.

The Mask Requirement states that masks help prevent the spread of COVID-19. Mask Requirement at 8028. The stated intent of the Mask Requirement is to preserve human life; maintain a safe and secure operating transportation system; mitigate further introduction, transmission, and spread of COVID-19 into and within the United States; and support response efforts. *Id.* at 8027 (statement of intent).

Under the Mask Requirement, a person must wear a mask while boarding, disembarking, and traveling on any conveyance (such as an aircraft, train, road vehicle, or vessel) into or within the United States. *Id.* at 8026, 8029. A person also must wear a mask while at a transportation hub (such as an airport, bus terminal, port, or subway station) that provides transportation within the United States. *Id.* It also requires conveyance operators to only provide service to masked passengers and to use best efforts to ensure passengers stay masked during the entire trip. *Id.* at 8029.

The Mask Requirement provides several exemptions based on the characteristics of a passenger or the travel scenario. *Id.* at 8027-28. For instance, passengers under the age of two are exempt, as is travel by private conveyance for personal, non-commercial use. *Id.* at 8027, 8029. Other federal agencies are required to take additional steps to enforce the Mask Requirement. *Id.* at 8028, 8030. The Mask Requirement will remain in effect until rescinded by CDC or the public health emergency is ended by the Secretary of HHS. *Id.* at 8026.

Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both Houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. *Id.* Each House of Congress is to provide the report on the rule to the chairman and ranking member of each standing committee with jurisdiction. 5 U.S.C. § 801(a)(1)(C). The CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. *Id.*

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 804(3). CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

CDC did not submit a CRA report to Congress or the Comptroller General on the Mask Requirement. In its response to us, CDC stated the Mask Requirement was not subject to the CRA because it was an emergency action under CDC's regulatory authorities and that any delays could result in serious harms. Response Letter, at 1.

DISCUSSION

The issue here is whether the CDC Mask Requirement is a rule under CRA. Applying the statutory framework of CRA, we first address whether the Mask Requirement meets the definition of a rule under APA. We conclude that it does. Second, we address whether any of the CRA exceptions apply. We conclude they do not. Therefore, we conclude the Mask Requirement is a rule for purposes of CRA.

CDC considers the Mask Requirement to be an order issued under its regulatory authorities implementing the Public Health Service Act. See Response Letter, at 1-2 (“[t]he mask order is an emergency action taken under 42 C.F.R. §§ 70.2, 71.31(b), and 71.32(b) . . . implementing regulations of 42 U.S.C. § 264”). Although an agency's characterization should be considered in deciding whether its action is a rule under the APA definition (and whether, for example, it is subject to notice and comment rulemaking requirements), “[an] agency's own label . . . [is] not dispositive.” *Chamber of Commerce of the U.S. v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980); B-329272, Oct. 19, 2017.

The APA defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” 5 U.S.C. § 551(4). By contrast, the APA defines an order to be “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” 5 U.S.C. § 551(6). As we have noted in our prior decisions, these two definitions make rules and orders mutually exclusive categories. See B-332233, Aug. 13, 2020, at 3.

Here the Mask Requirement meets the APA definition of a rule rather than an order. Regarding the first element of a rule, the Mask Requirement is an agency statement because it is an official document published in the Federal Register by CDC. Mask Requirement at 8025-26. It is of future effect, satisfying the second element, because the order states that it remains in place until rescinded or the public health emergency is terminated. *Id.* at 8026. Third, it implements and prescribes law or policy as it requires all travelers to wear a mask where previously they were not required to do so. *Id.* at 8028-29. Thus, the Mask Requirement falls within the APA's definition of rule.

Conversely, despite its label, the Mask Requirement is not an order for purposes of the APA because it is not the result of an adjudicatory process. See *Coalition for*

Common Sense in Gov't Procurement v. Sec'y for Veterans Affairs, 464 F.3d 1306, 1316-17 (Fed. Cir. 2006). As noted previously, an order is defined as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form.” 5 U.S.C. § 551(6). Thus, an order results from an adjudicatory process. See *Coalition for Common Sense in Gov't Procurement*, 463 F.3d at 1316-17. Here, the Mask Requirement was not the result of an adjudicatory process but a prospective requirement setting process. In its response to us, CDC described its process for drafting the Mask Requirement. “[It] was drafted and cleared by the CDC program (Division of Global Migration and Quarantine), Center (National Center for Emerging and Zoonotic Infectious Diseases), and CDC’s Office of the Director before it was provided to HHS for Departmental review. Following HHS review and clearance, it was provided to OMB.” Response Letter at 2. This is a process used to draft rules, not an adjudicatory proceeding.

In support of its position that the agency action here is an order not a rule, CDC asserted that its long-standing regulations permit it to act quickly to prevent the spread of communicable diseases and any delay in issuance of the Mask Requirement “could result in serious harm.” Response Letter, at 1. CDC further stated that the order was an emergency action and requiring the order to go through notice and comment before taking effect “would exacerbate the substantial harm that the order was intended to mitigate.” *Id.*

While CRA does not provide an emergency exception from its procedural requirements to submit rules for congressional review, CRA and APA address an agency’s need to take emergency action without delay. Agencies can waive the required delay in effective date requirement when an agency for “good cause” finds (and incorporates the finding and a brief statement of reasons in the rule issued) that notice and public procedure are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C §§ 553(b), 808(2). Therefore, an agency can provide for a rule to take effect immediately while still complying with the agency’s statutory obligation to submit the rule to Congress for review.⁴

Having determined the Mask Requirement meets the definition of a rule, we must determine if any of the CRA exceptions apply. We conclude they do not. First, it is not a rule of particular applicability as it applies to all travelers using public conveyances and is not limited to specific parties. Mask Requirement, at 8028-29. Second, it does not deal with agency management or personnel but with travelers and conveyance operators. *Id.* at 8026. Finally, it is not a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties as it imposes new requirements on people who are traveling to wear masks while in transit and at transportation hubs. *Id.* at 8028-

⁴ Over the course of the COVID-19 public health emergency, several agencies have submitted rules for congressional review while waiving the delay in effective date by invoking CRA’s good cause exception. See, e.g., B-333486, Aug. 10, 2021; B-333381, Jul. 9, 2021; B-332918, Feb. 5, 2021.

29. It also requires operators to only provide service to masked passengers. *Id.* Thus, no exception applies.

CONCLUSION

The Mask Requirement is a rule for purposes of CRA because it meets the APA definition of a rule and no CRA exception applies. Accordingly, before it can take effect, the Mask Requirement is subject to the requirement that it be submitted to both Houses of Congress and the Comptroller General for review, which provides Congress a period of 60 days in which it may disapprove the rule using special procedures in accordance with the CRA. While CDC asserted the need to act quickly as its justification for not submitting the Mask Requirement for congressional review, there is not an emergency exception under CRA. An agency may, however, invoke the CRA's good cause exception and provide for a rule to take effect immediately while still complying with the agency's statutory obligation to submit the rule to Congress for review. With this decision, we are not taking a position on the policy of imposing a mask requirement or what steps the agency or Congress may take next; our decision only addresses CDC's compliance with CRA's procedures for congressional review.



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Decision

Matter of: Department of the Interior—Activities at Grand Staircase-Escalante National Monument

File: B-331089

Date: December 14, 2021

DIGEST

Section 408 of the Department of the Interior, Environment, and Related Agencies Appropriations Acts for fiscal years 2017, 2018, and 2019 (section 408), prohibited the U.S. Department of the Interior (Interior) from using its appropriated funds to conduct certain preleasing, leasing, and related activities under the Mineral Leasing Act of 1920 (MLA) within the boundaries of national monuments. While the provision was in effect, the Bureau of Land Management (BLM), an agency within Interior, used appropriated funds to conduct land management planning activities under the Federal Land Policy and Management Act of 1976 (FLPMA) for the Grand Staircase-Escalante National Monument, a national monument in Utah, and the Kanab-Escalante Planning Area. Because the activities that it performed in both areas were required by FLPMA, and not undertaken pursuant to or authorized under the MLA, Interior did not violate section 408 or the Antideficiency Act.

DECISION

In May 2019, the then-Chair of the U.S. House Appropriations Subcommittee on the Interior, Environment, and Related Agencies and the then-Ranking Member of the Senate Appropriations Subcommittee on the Interior, Environment, and Related Agencies requested a decision as to whether the U.S. Department of the Interior (Interior) violated section 408 of the Department of the Interior, Environment, and Related Agencies Appropriations Acts for fiscal years (FYs) 2017, 2018, and 2019 (collectively referred to as “section 408”), when the Bureau of Land Management (BLM), an agency within Interior, used appropriated funds to undertake certain activities at the Grand Staircase-Escalante National

Monument in Utah.¹ Additionally, the requesters asked whether this use of appropriated funds also violated the Antideficiency Act.² As explained below, we conclude that Interior did not violate section 408 when BLM used appropriated funds to undertake land management planning activities as required by the Federal Land Policy and Management Act of 1976 (FLPMA) at the Grand Staircase-Escalante National Monument and the Kanab-Escalante Planning Area. Accordingly, we also conclude that Interior did not violate the Antideficiency Act.

In accordance with our regular practice, we contacted Interior to seek factual information and its legal views on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Solicitor, Interior (Feb. 18, 2020); GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/GAO-06-1064SP>. Interior responded with its explanation of the pertinent facts and legal analysis.³ Letter from Deputy Solicitor for General Law, Interior, to Assistant General Counsel for Appropriations Law, GAO (Mar. 20, 2020) (Response Letter).

¹ This letter was initially sent by Betty McCollum, former Chair, Subcommittee on the Interior, Environment, and Related Agencies, United States House of Representatives, and Tom Udall, former Ranking Member, Subcommittee on the Interior, Environment, and Related Agencies, United States Senate, to the Comptroller General (May 22, 2019) (Request Letter). Ms. McCollum and Mr. Udall are no longer serving in the positions they held when they requested our decision. Chellie Pingree, current Chair, Subcommittee on the Interior, Environment, and Related Agencies, United States House of Representatives; and Jeff Merkley, current Chair, Subcommittee on the Interior, Environment, and Related Agencies, United States Senate; confirmed that their subcommittees remain interested in this decision. Accordingly, this decision identifies Chellie Pingree and Jeff Merkley as the requesters.

² *Id.*

³ In July 2021, we contacted Interior for additional information on this matter. Interior responded with a supplemental legal analysis by letter and email. Letter from Principal Deputy Solicitor, Department of the Interior, to Assistant General Counsel for Appropriations Law, GAO (October 13, 2021) (October Letter); Email from Deputy Solicitor for General Law, Interior, to Assistant General Counsel for Appropriations Law, GAO (October 22, 2021) (Email Response).

BACKGROUND

On September 18, 1996, President Clinton invoked the Antiquities Act of 1906 (16 U.S.C. §§ 431–433 (1996))⁴ and issued a Proclamation to establish the Grand Staircase-Escalante National Monument in the state of Utah. Proclamation No. 6920, 61 Fed. Reg. 50223 (Sept. 24, 1996). This proclamation also directed the Secretary of the U.S. Department of the Interior (Interior) to manage the Grand Staircase-Escalante National Monument through the Bureau of Land Management (BLM). *Id.* at 50225.

In the fiscal year (FY) 2002 Department of the Interior and Related Agencies Appropriations Act, Congress included a provision that limited the activities that could be undertaken within the boundaries of the Grand Staircase-Escalante National Monument and other national monuments. This provision prohibited the use of appropriated funds to conduct any “preleasing, leasing and related activities” under the Mineral Leasing Act (MLA) or the Outer Continental Shelf Lands Act within the boundaries of a national monument as it existed on January 20, 2001, except where such activities are permitted by the presidential proclamation establishing the monument. Pub. L. No. 107-63, § 331, 115 Stat. 414, 471 (Nov. 5, 2001). Congress repeated this provision in section 408 of the FY 2017, 2018, and 2019 Department of the Interior, Environment, and Related Agencies Appropriations Acts. Pub. L. No. 116-6, div. E, title IV, 133 Stat. 13, 259–260 (Feb. 15, 2019); Pub. L. No. 115-141, div. G, title IV, 132 Stat. 348, 688 (Mar. 23, 2018); Pub. L. No. 115-31, div. G, title IV, 131 Stat. 135, 495 (May 5, 2017).

While this provision was in effect, President Trump modified the boundaries of the Grand Staircase-Escalante National Monument to exclude the Kanab-Escalante Planning Area—approximately “861,974 acres of land . . . no longer necessary for the proper care and management of the objects to be protected within the monument . . .” Proclamation No. 9682, 82 Fed. Reg. 58089, 58093 (Dec. 8, 2017); see Response Letter, at 3. President Trump’s proclamation opened this land to entry, location, selection, sale, or other disposition under public land laws; disposition under all laws relating to mineral and geothermal leasing; and location, entry, and patent under the mining laws. 82 Fed. Reg. at 58093. President Trump’s proclamation also required the Secretary of Interior to prepare and maintain a management plan for the units of the Grand Staircase-Escalante National Monument, in consultation with interested entities. *Id.* at 58094. On October 8, 2021, President Biden issued a proclamation to

⁴ In 2014, Congress restated and reenacted the provisions in the Antiquities Act of 1906 as positive law in titles 18 and 54 of the United States Code. Pub. L. No. 113-287, §§ 3, 4(a)(1), 128 Stat. 3094, 3259–61 (Dec. 19, 2014). In particular, 16 U.S.C. §§ 431–432 were restated and reenacted at 54 U.S.C. §§ 320301–320303, and 16 U.S.C. § 433 was restated and reenacted at 18 U.S.C. § 1866(b). *Id.*

“restor[e] the Grand Staircase-Escalante National Monument to its size and boundaries as they existed prior to December 4, 2017.” Proclamation No. 10286, 87 Fed. Reg. 57335 (Oct. 8, 2021).

From FY 2017 through FY 2019, BLM performed certain activities in relation to the Grand Staircase-Escalante National Monument and the Kanab-Escalante Planning Area. Response Letter, at 4. Specifically, BLM prepared resource management plans (RMPs) for each of the three units in the Grand Staircase-Escalante National Monument, and an RMP for the Kanab-Escalante Planning Area. Response Letter, at 4. BLM also analyzed each of these RMPs through a single environmental impact statement (EIS). *Id.* BLM did not perform any activities for these areas that were associated with the facilitation of future development of oil, gas, coal, or other minerals. *Id.*

DISCUSSION

At issue here is whether Interior violated section 408 of the Department of the Interior, Environment, and Related Agencies Appropriations Acts for FY 2017, 2018, and 2019, and the Antideficiency Act, when, during those fiscal years, BLM used appropriated funds to perform activities related to the creation of four resource management plans at the Grand Staircase-Escalante National Monument and the Kanab-Escalante Planning Area. For the reasons outlined below, we conclude that Interior did not violate Section 408 or the Antideficiency Act.

To interpret section 408, we begin with the text, giving ordinary meaning to statutory terms unless otherwise defined. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); B-331739, Mar. 18, 2021; B-329603, Apr. 16, 2018, at 4; B-329199, Sept. 25, 2018, at 23; B-331892, Nov. 19, 2020, at 3. This is because the “starting point in discerning congressional intent is the existing statutory text.” *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); B-331739, Mar. 18, 2021.

Section 408 states that “No funds provided in this Act may be expended to conduct preleasing, leasing and related activities under . . . the Mineral Leasing Act (30 U.S.C. 181 *et seq.*) . . . within the boundaries of a National Monument established pursuant to the Act of June 8, 1906 (16 U.S.C. 431 *et seq.*) as such boundary existed on January 20, 2001, except where such activities are allowed under the Presidential proclamation establishing such monument.”⁵ Pub. L.

⁵ The text of section 408 also contained a reference to the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331 *et seq.*), which governs mineral leasing on the United States’ Outer Continental Shelf. See 43 U.S.C. §§ 1331 *et seq.* That act is not relevant to this decision because neither the Grand Staircase-Escalante National Monument nor the Kanab Escalante Planning Area is situated on any part of the United States’ Outer Continental Shelf.

No. 116-6, div. E, title IV, 133 Stat. 13, 259–260 (Feb. 15, 2019); Pub. L. No. 115-141, div. G, title IV, 132 Stat. 348, 688 (Mar. 23, 2018); Pub. L. No. 115-31, div. G, title IV, 131 Stat. 135, 495 (May 5, 2017).

Here, section 408 prohibited the use of appropriated funds to undertake activities *under* the Mineral Leasing Act, such as holding lease sales and approving geophysical exploration on lands not yet leased. See 30 U.S.C. § 181 *et seq.* The word “under” has numerous definitions and its meaning has to be drawn from its context. See *Kucana v. Holder*, 558 U.S. 233, 245 (2010); *Ardestani v. INS*, 502 U.S. 129, 135 (1991). The most natural reading of the word “under” as it’s used here is that it refers to activities taken “pursuant to” or “authorized under” the MLA.⁶ Therefore, section 408 prohibited the use of appropriated funds to undertake pre-leasing, leasing, and related activities pursuant to or authorized under the MLA.

Interior explained in its original response to us that neither section 408 nor the ADA was violated because BLM did not undertake any actions pursuant to or authorized under the MLA during the fiscal years in question. Response Letter, at 1. Rather, BLM undertook certain activities at the Grand Staircase-Escalante National Monument and the Kanab-Escalante Planning Area that were required by the Federal Land Policy and Management Act of 1976 (FLPMA), the National Environmental Policy Act, and BLM resource management planning regulations. Response Letter, at 2-4. According to Interior, BLM, consistent with its responsibilities under FLPMA,⁷ developed, maintained, and revised land use plans with regard to both areas between FY 2017 and 2019. See Response Letter, at 4. BLM prepared four RMPs for the areas that were analyzed through one environmental impact statement. Response Letter, at 4. The land use planning decisions made in those documents were made in accordance with the procedures in BLM’s planning regulations, FLPMA, the BLM Land Use Planning Handbook, and other resource-specific guidance. BLM, *Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area*, (Aug. 2018), at 1-5.

⁶ See, e.g., *House Legislative Counsel’s Manual on Drafting Style*, HLC 104-1 (Nov. 1995) (advising that “if the result occurs through action required or permitted by the provision, use ‘under’”).

⁷ See, e.g., 43 U.S.C. §§ 1701(a), 1732. FLPMA requires the Secretary of the Interior to “develop, maintain, and when appropriate, revise land use plans. . .” 43 U.S.C. § 1712(a). BLM’s mission is to “sustain the health, diversity, and productivity of public lands for the use and enjoyment of present and future generations.” BLM, *Our Mission*, available at <https://www.blm.gov/about/our-mission> (last visited July 20, 2021). This mission requires the agency to carry out a dual mandate of managing public lands for multiple uses while also conserving natural, historical, and cultural resources. BLM, *What We Manage*, available at <https://www.blm.gov/about/what-we-manage/national> (last visited July 20 2021).

In addition, BLM stated in planning documents for the areas that their actions were limited by section 408 and did not authorize leasing activities. For example, planning documents recognized that Interior was prohibited from “expending appropriated funds on preleasing and leasing activities under the Mineral Leasing Act on lands excluded from G[rand] S[taircase]-E[scalante] N[ational] M[onument] by Presidential Proclamation 9682.” BLM, *Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area Proposed Resource Management Plans and Environmental Impact Statement*, Vol. 1, (Aug. 2019) at 3-106. BLM also issued records of decision (RODs) and approved RMPs for both areas,⁸ and the approved RMP for the Kanab-Escalante Planning Area stated that any mineral exploration and development on such land would be subject to site-specific analysis. BLM, *Record of Decision and Approved Resource Management Plan for the Kanab-Escalante Planning Area* (Feb. 2020) at RODs-13; Response Letter, at 4. Additionally, the RODs for the Kanab Escalante Planning Area stated that the management decisions were focused on planning-level decisions; that it did not change BLM’s responsibility to comply with applicable laws, rules, and regulations; and that it did not authorize any site-specific development or surface disturbance. *RODs and Approved RMP*, at RODs-4–RODs-5. None of the plans, statements, or decisions, for the Kanab-Escalante Planning Area authorized site-specific exploration or leasing activities pursuant to the MLA. Response Letter, at 4.

In its supplemental response to us, Interior noted that an argument exists that some land use planning activities could be “sufficiently connected” to the preleasing and leasing activities authorized by MLA to bring those activities within the purview of section 408, although Interior would not take a position on whether BLM violated section 408. October Letter, at 2-3; Email Response. Interior reached this conclusion, in part, because of legislative history noting that section 408 was “intended to discourage . . . president[s] . . . from modifying any monuments. . . to facilitate mineral exploration or development.” October Letter, at 3. However, there is a “strong presumption that the plain language of the statute expresses congressional intent [, which] is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.” *Ardestani*, 502 U.S. at 135-36. Here, we have found no legislative language to rebut this presumption, and confer the most natural reading to the word “under” as it’s used in section 408. Even if some land use planning activities could be connected to activities authorized by MLA, BLM carried them out pursuant to or as authorized under FLPMA, and thus, the prohibition in section 408 did not reach such activities.

⁸ Although the Kanab-Escalante Planning Area ROD and approved RMPs were finalized in February 2020 (*i.e.* after FY 2019) they are relevant to this decision because BLM was engaged in their preparation in FY 2019, and these documents provide information relevant to the activities that were undertaken by BLM during the FY 2017 through FY 2019 time frame identified in the request letter.

Between FY 2017 and FY 2019, BLM undertook activities at the Grand Staircase-Escalante National Monument and the Kanab-Escalante Planning Area pursuant to FLPMA, the National Environmental Policy Act, and BLM resource management planning regulations, but not pursuant to or authorized under the MLA.⁹ Interior did not violate section 408 because section 408 only prohibited the use of appropriated funds to undertake activities pursuant to or authorized under the MLA.

Further, Interior did not violate the Antideficiency Act. The Antideficiency Act, in pertinent part, prohibits the obligation or expenditure of funds in excess or in advance of an appropriation. 31 U.S.C. § 1341. Where an agency obligates and expends appropriated funds in violation of statutory prohibitions, it also violates the Antideficiency Act, as the agency's appropriations are not available for the prohibited purposes. See B-326944, at 2. Here, Interior did not violate section 408, and so, there is also no violation of the Antideficiency Act.

CONCLUSION

The U.S. Department of the Interior did not violate section 408 of the Department of Interior, Environment, and Related Agencies Appropriations Acts for FYs 2017, 2018, and 2019 or the Antideficiency Act, when the Bureau of Land Management used appropriated funds to carry out land management planning activities for the Grand Staircase-Escalante National Monument.



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⁹ The Supreme Court has also drawn a distinction between planning activities under FLPMA and implementation or use decisions authorized under other statutes. See, e.g., *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69–72 (2004); see also *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733–34 (1998) (drawing a similar distinction, although in the context of opening lands for timber harvesting through a parallel land use planning process that the Forest Service conducts under the National Forest Management Act, not FLPMA).

List of Requesters

The Honorable Chellie Pingree
Chair
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
House of Representatives

The Honorable Jeff Merkley
Chair
Subcommittee on the Interior, Environment, and Related Agencies
Committee on Appropriations
United States Senate

**Appropriations Law and Personal Expenses
in the Time of COVID-19**



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Daniel K. Inouye Asia-Pacific Center for Security Studies—Use of Appropriated Funds to Purchase COVID-19 Self-Test Kits

File: B-333691

Date: February 8, 2022

DIGEST

The Daniel K. Inouye Asia-Pacific Center for Security Studies (the Center) asks whether its appropriation is available to purchase coronavirus disease 2019 (COVID-19) self-test kits for persons located on its premises. Appropriated funds are available only for the purposes authorized by Congress. 31 U.S.C. § 1301(a). If not otherwise specified in law, an expense is authorized where it bears a reasonable, logical relationship to the purpose of the appropriation to be charged. The Center may use its appropriation to purchase COVID-19 self-test kits where the use of the test kits will allow the Center to carry out engagements in support of its statutory mission.

DECISION

This responds to a request for our decision regarding whether the Daniel K. Inouye Asia-Pacific Center for Security Studies (the Center) may use appropriated funds to purchase COVID-19 self-test kits for use by persons located on its premises.¹ We conclude that the Center may use its appropriated funds to purchase COVID-19 self-test kits because their use will allow the Center to safely host courses, workshops, and other engagements in support of its statutory mission.

¹ Letter from Director, Daniel K. Inouye Asia-Pacific Center for Security Studies, to Comptroller General, GAO (Oct. 15, 2021) (Request Letter).

The Center included with its request for a decision relevant factual information and its legal views on this matter.² In accordance with our regular practice, we contacted the Center for additional information.³

BACKGROUND

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency in response to COVID-19.⁴ By March 11, 2020, the World Health Organization (WHO) had designated COVID-19 as a pandemic.⁵ According to the Centers for Disease Control and Prevention (CDC), over 840,000 Americans have died from COVID-19 to date.⁶ To prevent the spread of COVID-19, the CDC, along with other public health agencies, have recommended numerous preventive measures, such as mask wearing, vaccination, testing, and social distancing.⁷ In

² Legal Review Memorandum for Director, Daniel K. Inouye Asia-Pacific Center for Security Studies (Oct. 15, 2021) (Legal Review Memorandum).

³ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; E-mail from Staff Attorney, GAO to Attorney-Adviser, Daniel K. Inouye Asia-Pacific Center for Security Studies (Nov. 2, 2021); E-mail from Attorney-Adviser, Daniel K. Inouye Asia-Pacific Center for Security Studies, to Staff Attorney, GAO (Nov. 2, 2021).

⁴ U.S. Department of Health and Human Services, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020), available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last visited Jan. 21, 2022).

⁵ World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020* (Mar. 11, 2020), available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited Jan. 21, 2022).

⁶ According to the CDC, this number includes all instances where COVID-19 was listed as a cause of death or where COVID-19 was listed as a “probable” or “presumed” cause of death on corresponding death certificates. CDC, *Daily Updates of Totals by Week and State*, available at <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (last visited Jan. 21, 2022).

⁷ See, e.g., CDC, *How to Protect Yourself & Others*, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Jan. 21, 2022); CDC, *Testing for COVID-19*, available at <https://www.cdc.gov/coronavirus/2019-ncov/testing/index.html> (last visited Jan. 21, 2022); WHO, *Advice for the public: Coronavirus disease (COVID-19)* (Oct. 1, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> (last visited Jan. 21, 2022); WHO, *Recommendations for*

addition, on January 20, 2021, the President created the Safer Federal Workforce Task Force to provide the federal government with up-to-date guidance on preventive measures to keep federal employees safe.⁸

The Center is established in 10 U.S.C. § 342 to serve as an international venue for research, communication, training, and exchange of ideas among military and civilian participants. Request Letter. In response to the pandemic, the Center has incorporated the CDC's COVID-19 guidance into its policies and practices. Request Letter. For example, the Center has implemented policies related to vaccinations, mask wearing, social distancing, air filtration, cleaning and disinfecting, and testing. *Id.* Now, the Center's Director seeks a decision regarding whether its appropriated funds are available to purchase self-test kits for use by individuals located on its premises. *Id.*

DISCUSSION

At issue here is whether the Center may use its appropriated funds to purchase COVID-19 self-test kits for use by individuals located on its premises. The Center posits that it can use its funds to purchase COVID-19 self-test kits because the kits are equipment necessary to maintain the health and safety of a federal premises. Thus, the kits are an official expense of the government, rather than a personal expense of employees and visitors.⁹ For the reasons outlined below, we find that the Center may use its appropriated funds to purchase COVID-19 self-test kits.

Under the purpose statute, appropriated funds are available only for the purposes authorized by Congress. 31 U.S.C. § 1301(a). Each authorized expense need not be stated explicitly in an appropriation. Rather, to determine whether an expense would violate the purpose statute, we apply a three-part necessary expense test. An expense is authorized where it (1) bears a reasonable, logical relationship to the purpose of the appropriation to be charged; (2) is not prohibited by law; and (3) is not otherwise provided for. See, e.g., B-330862, Sept. 5, 2019; GAO, *Principles of Federal Appropriations Law*, Ch. 3, § B (4th ed. rev. 2017) GAO-17-797SP (Washington, D.C.: Sept. 2017). At issue here is step 1.¹⁰

national SARS-CoV-2 testing strategies and diagnostic capacities (June 25, 2021), available at <https://apps.who.int/iris/rest/bitstreams/1352897/retrieve> (last visited Jan. 21, 2022).

⁸ Exec. Order No. 13,991, *Protecting the Federal Workforce and Requiring Mask-Wearing*, 86 Fed. Reg. 7045 (Jan. 20, 2021).

⁹ Legal Review Memorandum, at 2.

¹⁰ We only address step 1 of the necessary expense analysis because steps 2 and 3 are not at issue. No law prohibits the use of DOD appropriations to purchase COVID-19 self-test kits, and the Center only has one appropriation available for its expenses so the kits could not otherwise be provided for. See E-mail from Attorney-

The Center seeks to use its appropriation¹¹ to purchase COVID-19 self-test kits for use on premises.¹² This appropriation is available for “expenses, not otherwise provided for, necessary for the operation and maintenance of activities and agencies of the Department of Defense (other than the military departments), as authorized by law.” Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. C, title II, 134 Stat. 1182, 1289 (Dec. 27, 2020). We have long held that where funds are available for a broad purpose, such as “operation and maintenance,” the purpose of the appropriation is informed by the underlying program or organic legislation. See, e.g., B-323365, Aug. 6, 2014. Thus, the Center’s appropriation is available for any expenses necessary to carry out the Center’s statutory responsibilities and we analyze the proposed expense in that framework.

The Center “serves as a forum for bilateral and multilateral research, communication, exchange of ideas, and training involving military and civilian participants.”¹³ To facilitate this mission, the Center hosts courses, workshops, and other engagements that are attended by security practitioners from throughout the Indo-Pacific region.¹⁴ Hosting events during a pandemic requires various safety measures, informed by local and national guidelines, including testing of some individuals, to prevent the spread of the disease.¹⁵ Providing self-test kits to

Adviser, Daniel K. Inouye Asia-Pacific Center for Security Studies, to Staff Attorney, GAO (Nov. 2, 2021).

¹¹ The Center is funded by the annual Department of Defense, Operation and Maintenance, Defense-Wide appropriation. See E-mail from Attorney-Adviser, Daniel K. Inouye Asia-Pacific Center for Security Studies, to Staff Attorney, GAO (Nov. 2, 2021). The Center is currently operating with funds appropriated by section 101 of the Continuing Appropriations Act, 2022, as amended by the Further Extending Government Funding Act. See Pub. L. No. 117-43, div. A, 135 Stat. 344-45 (Sept. 30, 2021); Pub. L. No. 117-70, div. A, 135 Stat. 1499–1500 (Dec. 3, 2021).

¹² Request Letter.

¹³ 10 U.S.C. § 342.

¹⁴ Request Letter.

¹⁵ Regarding event planning, the CDC recommends physical distancing, mask wearing, vaccination and/or testing for unvaccinated individuals as prevention strategies. See CDC, *Event planning FAQs* (Sept. 24, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/event-planners-and-attendees-faq.html> (last visited Jan. 21, 2022). Additionally, the counties of Hawaii each have guidelines for social gatherings and other events within their counties. See, e.g., The City and County of Honolulu, *Safe Access O’ahu* (Nov. 23, 2021), available at <https://www.oneoahu.org/safe-access-oahu> (last visited Jan. 21, 2022) (requiring employees, contractors, and customers of certain businesses to show proof of full vaccination or a recent negative COVID-19 test result).

individuals on the premises will enable the Center to continue the events it was created by Congress to host.

We have previously explained that agencies have a responsibility to provide a safe workplace environment. See, e.g., B-302993, June 25, 2004. More specifically, we have held that when an agency determines that there is a threat to the safety of its employees and premises, appropriations are available to purchase equipment or services that are considered an “appropriate, reasonable, and responsible response to such threat”. See B-301152, May 28, 2003. For example, in response to the threat of terrorist attacks on government facilities, our Office found that GAO could purchase protective hoods for use in the event of an attack involving explosives or chemical or biological weapons. See *id.*

In the midst of a global pandemic, COVID-19 self-test kits are one means of maintaining a safe workplace environment. The spread of COVID-19 remains a threat to individual health and federal workplace functionality, and to minimize its spread, agencies may need to limit entry on their premises to those who do not carry the virus. The use of self-test kits is a reasonable way to identify those infected with COVID-19 before they enter federal premises.

To determine whether the Center’s appropriations are available to purchase COVID-19 self-test kits, we also must consider whether they are personal expenses. We have long held that appropriations are not available for personal expenses, such as employee medical expenses, absent specific statutory authority. B-323449, Aug. 14, 2012; B-253159, Nov. 22, 1993. However, an agency may use appropriated funds for an expense that is ordinarily understood to be personal in nature where such expense primarily benefits the government. B-329479, Dec. 2, 2020. For example, our Office found that the Weather Bureau could purchase X-rays for personnel being assigned to its Alaska office to ensure that employees would not spread tuberculosis to the local population, notwithstanding the collateral benefit for personnel to receive such diagnosis at the government’s expense. B-108693, Apr. 8, 1952.

Here, while employees and non-employees will surely receive the benefit of learning whether they have COVID-19, the primary beneficiary of the test kits is the Center. Given that the use of COVID-19 self-test kits will allow the Center to facilitate courses, workshops, and other engagements in support of its statutory mission and maintain a safe workplace environment, the Center may use its appropriated funds to purchase COVID-19 self-test kits for use by individuals on its premises.

CONCLUSION

The Daniel K. Inouye Asia-Pacific Center for Security Studies may use its appropriated funds to purchase COVID-19 self-test kits where the use of the test kits

will allow the Center to safely carry out engagements in support of its statutory mission.

A handwritten signature in black ink that reads "Edda Emmanuelli Perez". The signature is written in a cursive style with a large, looping initial 'E'.

Edda Emmanuelli Perez
General Counsel

Executive Branch Counsel Panelist Biographies

Naomi Taransky (Office of Management and Budget)

Naomi Taransky serves as an Assistant General Counsel in the Office of Management and Budget. In her time there, she has supported both the management and the budget sides of the agency. For several years, she led OMB's appropriations law practice. More recently, her work has focused on OMB's management side and internal operations. Prior to joining OMB, she worked as a lawyer for the House Committee on the Budget, where she counseled the chairman on parliamentary procedure and legislative drafting and engaged with the authorizing committees, Committee on Rules, and the Congressional Budget Office on pending legislation.

James Muetzel (Office of Personnel Management)

James Muetzel serves as Senior Procurement Counsel in the Office of the General Counsel, U.S. Office of Personnel Management (OPM), where he specializes in both contracting and appropriations law. He holds a B.A. from Cleveland State University (1998), a J.D. from the University of Cincinnati College of Law (2001), and an M.P.A. (2007) and a Ph.D. (2014) from Virginia Tech's Center for Public Administration and Policy. Dr. Muetzel completed the Senior Executive Fellows Program at the Harvard Kennedy School, is a part-time Instructor with the University of Puerto Rico (UPR) School of Law, and is a volunteer with the UPR Resiliency Law Center.

Claudia Nadig (General Services Administration)

Claudia Nadig serves as the Deputy Associate General Counsel of the General Law Division at GSA. In that capacity, she oversees the Fiscal and Administrative Law staff. Prior to joining GSA in 2013, Claudia served as Senior Associate General Counsel in the Office of the Director of National Intelligence working on ethics and administrative law matters from 2006-2013. Claudia was also employed as General Counsel for the National Endowment for the Arts from 2003-2006 and Chief Counsel in the Economic Development Administration at the U.S. Department of Commerce. Prior to joining the federal government, she worked for 15 years for the State of Texas in the Office of the Governor, the Texas Workers' Compensation Commission, and the Texas Senate. She holds a B.A. from Smith College, a J.D. from the University of Texas School of Law, and an M.B.A. from the University of Texas Graduate School of Business.

David Leib (General Services Administration)

Dave is a Senior Assistant General Counsel in the Real Property Division of the U.S. General Services Administration's Office of the General Counsel. Dave has worked in the Office of the General Counsel since 2006. Dave provides fiscal law advice to the Public Buildings Service. Prior to working at GSA, Dave was an associate in the Government Contracts department at Blank Rome LLP in Washington, DC and a law clerk to the Honorable Marian Blank Horn at the United States Court of Federal Claims. He received his J.D. from the University of Maryland, where he was a member of the Maryland Law Review, and a B.A. from Miami University in Oxford, Ohio. He is admitted to practice in Maryland and the District of Columbia.

Antideficiency Act Determinations



441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Smithsonian Institution—Application of the Antideficiency Act to Employee Travel during a Lapse in Appropriations

File: B-333281

Date: October 19, 2021

DIGEST

The Antideficiency Act bars agencies from incurring obligations in advance of appropriations, and prohibits the acceptance of voluntary services, except in certain circumstances. 31 U.S.C. §§ 1341(a), 1342. The Act includes an emergency exception that allows agencies to accept voluntary services in emergencies that imminently threaten the safety of human life or the protection of government property.

During a 2019 lapse in appropriations, the Smithsonian Institution (Smithsonian) incurred an obligation for an employee's salary when the employee travelled to a conference on animal care and nutrition. Smithsonian improperly relied on the Antideficiency Act's emergency exception when it did not record the obligation at the time of the travel. Smithsonian did not clearly link the employee's participation in the conference to an emergency posing imminent harm to its animal collections.

DECISION

This responds to a request for our decision regarding whether the Smithsonian Institution (Smithsonian) violated the Antideficiency Act when a federal employee traveled to a conference about animal care and nutrition during a lapse in appropriations.¹

As discussed below, we conclude that Smithsonian improperly relied on the Antideficiency Act's emergency exception when it incurred an obligation for an

¹ Letter from Inspector General, Smithsonian, to Comptroller General (May 3, 2021) (Request Letter).

employee's salary and did not record the obligation against funds available at that time. Smithsonian has not shown that there was an emergency necessitating the obligation and has not explained how the employee's participation in the conference avoided imminent harm to human life or property. Smithsonian had sufficient budget authority available when it incurred the obligation but did not record its obligation against the available funds. Therefore, we conclude Smithsonian should adjust its accounts to obligate funds that were available at the time Smithsonian incurred the obligation. If Smithsonian has insufficient budget authority to make the adjustment, it must report an Antideficiency Act violation. 31 U.S.C. § 1351.

In accordance with our regular practice, we contacted Smithsonian to seek factual information and its legal views on this matter.² Smithsonian provided a response.³

BACKGROUND

Smithsonian generally receives a lump-sum appropriation for salaries and expenses, available for two fiscal years.⁴ On September 28, 2018, the President signed a continuing resolution appropriating amounts for Smithsonian's operations through December 7, 2018.⁵ After an extension enacted on December 7, 2018, the continuing resolution expired at midnight on December 21, 2018.⁶

From December 22, 2018 until January 2, 2019, Smithsonian continued operating by obligating available balances from its Salaries and Expenses appropriation enacted in March of 2018.⁷ These funds were available for obligations incurred during fiscal years (FY) 2018 and 2019.⁸ On January 2, 2019, Smithsonian shut down the majority of its operations, even though a small amount from its FY 2018 and 2019

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, Smithsonian (June 1, 2021).

³ Letter from Associate General Counsel, Smithsonian, to Assistant General Counsel for Appropriations Law, GAO (June 24, 2021) (Response Letter).

⁴ See, e.g., Department of the Interior, Environment, and Related Agencies Appropriations Act, 2018, Pub. L. No. 115-141, div. G, title III, 132 Stat. 635, 682 (Mar. 23, 2018).

⁵ Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. C, §§ 101(6), 105, 132 Stat. 3123, 3124 (Sept. 28, 2018).

⁶ Pub. L. No. 115-298, 132 Stat. 4382, 4382 (Dec. 7, 2018).

⁷ Response Letter, at 2.

⁸ Pub. L. No. 115-141, div. G, title III, 132 Stat. at 682.

Salaries and Expenses appropriation remained available.⁹ Smithsonian “furloughed non-excepted federal employees and through the remainder of the partial government shutdown did not incur obligations with federal funds unless it determined that an exception to the Antideficiency Act applied.”¹⁰

From January 15, 2019, through January 20, 2019, a senior nutritionist at the Smithsonian National Zoological Park (Zoo) attended a conference in the United Kingdom on animal care and nutrition.¹¹ On January 19, 2019, Smithsonian incurred an obligation for the employee’s salary of \$2,736.17, but did not record the obligation against available budget authority because Smithsonian determined the Antideficiency Act’s emergency exception applied.¹² On January 25, 2019, Congress and the President enacted a continuing resolution appropriating amounts for Smithsonian.¹³ On January 30, 2019, Smithsonian recorded the obligation for the employee’s salary against funds appropriated by the continuing resolution.¹⁴

Smithsonian also incurred an obligation for \$1,987.23 for the employee’s travel expenses, charged to non-appropriated trust funds.¹⁵ Smithsonian’s trust funds include amounts received from private sources, including its endowments, and revenues from Smithsonian Enterprises’ operations.¹⁶ Smithsonian had sufficient

⁹ Response Letter, at 1–2. Smithsonian stated that the remaining amount was “not enough budget authority to continue full operations without a reprogramming of funds.” *Id.* at 2.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 1, 3; Request Letter, at 2.

¹² Response Letter, at 1, 3. An agency incurs an obligation for an employee’s salary when the salary is earned—that is, when the services are performed—generally on a pay period basis. B-287619, July 5, 2001. Here, the employee attended the conference during a pay period which ended January 19, 2019. Response Letter, at 1. January 19 and 20 were weekend days for which the employee was not paid. *Id.*

¹³ Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 101, 133 Stat. 10, 10 (Jan. 25, 2019).

¹⁴ Response Letter, at 1; see Pub. L. No. 115-245, div. C, § 138, *as added by* Pub. L. No. 116-5, § 101, 133 Stat. at 10 (providing that obligations previously incurred “in anticipation of the appropriations made . . . by this Act for the purposes of maintaining the essential level of activity to protect life and property . . . are hereby ratified and approved if otherwise in accord with the provisions of this Act”).

¹⁵ Response Letter, at 1.

¹⁶ Smithsonian, *The Smithsonian Institution Fact Sheet* (Apr. 7, 2020), available at <https://www.si.edu/newsdesk/factsheets/smithsonian-institution-fact-sheet>.

trust amounts to cover the travel expenses and recorded the obligation against those amounts.¹⁷ As such, the remainder of this decision concerns only the obligation for the employee's salary.

DISCUSSION

At issue here is whether Smithsonian violated the Antideficiency Act when it incurred an obligation for the employee's salary during a lapse in appropriations.

The Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation unless otherwise authorized by law. 31 U.S.C. § 1341. The Act further prohibits agencies from accepting voluntary services for the United States, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342. During a lapse in appropriations, the Antideficiency Act generally bars an agency from incurring obligations and the agency must commence an orderly shutdown of affected functions unless it has available budget authority or where an exception to the Antideficiency Act allows the agency to continue operating. B-331132, Dec. 19, 2019.

Here, Smithsonian had sufficient budget authority available for the employee's salary in its FY 2018 and 2019 Salaries and Expenses account.¹⁸ However, when it incurred the obligation on January 19, 2019, Smithsonian did not record the obligation against the available funds.¹⁹ Instead, on January 30, 2019, Smithsonian recorded the obligation for the employee's salary against funds Congress appropriated on January 25, 2019.²⁰ Because Smithsonian incurred an obligation for the employee's salary in advance of the appropriation it charged, we must determine whether an exception to the Antideficiency Act applied.

One key exception is provided explicitly in the text of the Antideficiency Act itself. The Act permits agencies to accept voluntary services "for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 1990, Congress amended this section to add: "As used in this section, the term 'emergencies involving the safety of human life or the protection of property' *does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.*" Budget Enforcement Act of 1990, Pub. L. No. 101-508, title XIII, § 13213(b),

¹⁷ Response Letter, at 2.

¹⁸ *Id.*

¹⁹ *Id.* at 3.

²⁰ *Id.* at 1, 3

104 Stat. 1388-573, 1388-621 (Nov. 5, 1990), *codified at* 31 U.S.C. § 1342 (emphasis added).

Activities that protect property, where suspension of the activity would imminently threaten property, fall within Congress's explicit authorization in the Antideficiency Act, and obligations for those activities may continue during a lapse in appropriations. See, e.g., B-331092, June 29, 2020 (taking time-sensitive actions to protect security interests was authorized under the Antideficiency Act's exception for emergencies involving the protection of property); 3 Comp. Gen. 979 (1924) (local firefighters fighting a fire on federal property, where the fire would have almost certainly destroyed most of the property had they not responded, was authorized under the Antideficiency Act's emergency exception). However, agencies must take only those limited actions necessary to avoid imminent threat to property to minimize obligations incurred. B-331092, June 29, 2020.

The first question is whether the Zoo's animal collections constitute property within the meaning of the Antideficiency Act. We conclude that they do. Under the Act, "the property must be either government-owned property or property for which the government has a responsibility." B-331093, Oct. 22 2019, at 6; 9 Comp. Dec. 182, 185 (1902). Here, the Zoo's animal collections are property of the United States, and Smithsonian is charged with their care. See 20 U.S.C. § 81.

The next question is whether the obligation for the employee's salary was necessary to avoid imminent harm to the Zoo's animal collections. The Antideficiency Act provides that an emergency involving the protection of property does not include functions that, if suspended, would not imminently threaten the protection of property. 31 U.S.C. § 1342. Because the Act is central to Congress's constitutional power of the purse, we interpret exceptions narrowly and in a manner to protect congressional prerogative, applying a case-by-case analysis. B-331093, Oct. 22, 2019.

Agencies must establish a clear link between the relevant activity and the imminent harm the activity would prevent. For example, we concluded that the Farm Service Agency (FSA) could file time-sensitive continuances to protect security interests, which would otherwise have been "immediately damaged." B-331092, June 29, 2020, at 6. On the other hand, the emergency exception does not authorize activities undertaken to overcome mere inconvenience or to avoid a potential future emergency. See 10 Comp. Gen. 248 (1930) (denying a claim for expenses incurred while voluntarily towing an aircraft where the aircraft had landed intact and the pilot was in no immediate danger). In addition, employees recalled to perform excepted functions may intermittently perform limited non-excepted functions where the excepted activity requires the employee to remain at work, so long as the excepted activity takes priority. B-330775.1, Oct. 1, 2020 (Department of the Interior employees could perform limited non-excepted functions while remaining ready to perform excepted duties); see *also* B-331092, June 29, 2020 (FSA employees could perform non-excepted work during intervals of time where the employees had to

remain at work ready to perform, but were not actively performing, nor were they expected to perform, the excepted functions).

Here, Smithsonian has not clearly linked the employee's participation in the conference to an emergency posing imminent harm to the Zoo's animal collections. In its response to us, Smithsonian explained that the employee presented a paper and "shared his experience in developing novel milk formulas for infant animals."²¹ According to Smithsonian, the employee also gained "unique, valuable, and up-to-date information about animal nutrition . . . a matter directly related to his responsibilities and his ability to provide care for, and protect the life and safety of, the animals at the Zoo."²² This description, without more, is insufficient to establish the existence of an emergency, or to connect the employee's participation in the conference with imminent harm to the Zoo's animal collections.

Smithsonian argues that if zookeepers who feed and care for living collections are "excepted employees" under the emergency' exception, then a senior Zoo nutritionist participating in a conference related to animal nutrition is also engaging in an excepted activity.²³ We disagree with Smithsonian's conclusion. The Antideficiency Act does not categorize employees as "excepted" or "non-excepted," and an employee's job description is generally insufficient to determine whether the emergency exception applies to a particular activity. Rather, we must analyze the activity itself to determine whether it may continue during a lapse in appropriation. Here, Smithsonian has not identified a relevant emergency or demonstrated how the employee's participation in the conference avoided imminent harm to human life or property. Nor has Smithsonian demonstrated that the employee's participation in the conference was incidental to other excepted functions. Therefore, based on the information before us, we conclude that Smithsonian improperly relied on the emergency exception in accepting the employee's voluntary services and incurring an obligation for his salary without recording the obligation against available funds.

CONCLUSION

The Antideficiency Act provides that agencies may accept voluntary services—and incur resultant obligations—only in emergencies involving the safety of human life or protection of property. Smithsonian's reliance on the emergency exception was improper because Smithsonian has not demonstrated that the employee's participation in a conference on animal care and nutrition was necessary to avoid imminent harm to human life or property. Therefore, Smithsonian should de-obligate the FY 2019 and 2020 funds it obligated on January 30, 2019, as it recorded the obligation against this appropriation due to its improper reliance on the emergency exception. Smithsonian should adjust its accounts to record the obligation against

²¹ Response Letter, at 3.

²² *Id.*

²³ *Id.* at 3–4.

balances that remained available at the time it incurred the obligation. If Smithsonian has insufficient budget authority available to make the adjustment, it must report an Antideficiency Act violation. 31 U.S.C. § 1351.

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Edda Emmanuelli Perez
General Counsel



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Department of Housing and Urban Development—Application of the Antideficiency Act to Agency Implementation of Statutory Deadline on Grant Funds Expenditure

File: B-332428

Date: February 7, 2022

DIGEST

Section 904(c) of the Disaster Relief Appropriations Act, 2013 imposed a 24-month deadline for grantees in the Department of Housing and Urban Development's (HUD) Community Development Block Grant-Disaster Recovery program to expend grant funds. In a prior decision, we concluded that HUD used a cumulative method of calculation that was not sufficient for HUD to ensure that grantees complied with a 24-month deadline similar to the one in section 904(c). HUD initially assessed grantee compliance with section 904(c) using the same cumulative method of calculation. When HUD's Office of Inspector General brought this to HUD's attention, HUD discontinued use of the cumulative method. An agency violates the Antideficiency Act if it obligates or expends funds in excess of or in advance of any appropriation, apportionment, or allotment. Because HUD made no such obligations or expenditures, its use of the cumulative method of calculation did not result in a violation of the Antideficiency Act.

DECISION

On August 11, 2020, the Department of Housing and Urban Development (HUD), Office of Inspector General (OIG) requested a decision on whether HUD violated the Antideficiency Act when it used a cumulative method of calculation to determine grantee compliance with section 904(c) of the Disaster Relief Appropriations Act, 2013.¹ As discussed below, we conclude that HUD's use of the cumulative method of calculation did not result in a violation of the Antideficiency Act.

¹ Letter from Acting Counsel to the Inspector General, HUD, to General Counsel, GAO (Request Letter).

In accordance with our regular practice, we contacted HUD and HUD OIG to seek factual information and their legal views on this matter.² Both HUD and HUD OIG responded with their explanations of the pertinent facts and legal analysis.³

BACKGROUND

Congress passed the Disaster Relief Appropriations Act, 2013 in response to Hurricane Sandy and other disasters.⁴ The Act included a supplemental appropriation for HUD's Community Development Block Grant, Disaster Recovery (CDBG-DR) program to provide grants to state and local governments for disaster recovery-related purposes.⁵

Section 904(c) of the Act required that the grant funds "be expended by the grantees within the 24-month period following the agency's obligation of funds for the grant."⁶ It also required HUD to "include a term in the grant that requires the grantee to return to the agency any funds not expended within the 24-month period."⁷ This requirement is substantially similar to the 24-month recapture requirement we addressed in a prior decision.⁸ See B-322077, July 17, 2013. To track compliance with section 904(c), HUD used the same "cumulative method of calculation" described in detail in that decision.⁹ However, in that decision, we determined that

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 5, 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to Director, Appropriations Law Staff, HUD (Feb. 9, 2021); Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting Counsel to the Inspector General, HUD (Feb. 9, 2021).

³ Letter from Director, Appropriations Law Staff, HUD, to Assistant General Counsel for Appropriations Law, GAO (Apr. 9, 2021) (HUD Response); Letter from Counsel to the Inspector General, HUD, to Assistant General Counsel for Appropriations Law, GAO (Mar. 24, 2021) (OIG Response).

⁴ Pub. L. No. 113-2, div. A, 127 Stat. at 4 (Jan. 29, 2013).

⁵ *Id.*, 127 Stat. at 36; Request Letter at 1.

⁶ Pub. L. No. 113-2, div. A, § 904(c).

⁷ *Id.*

⁸ Compare Pub. L. No. 113-2, div. A, § 904(c), with Pub. L. No. 101-625, § 218(g), 104 Stat. 4079, 4110 (Nov. 28, 1990), codified as amended at 42 U.S.C. § 12748(g).

⁹ HUD Response at 1; Request Letter at 5. Rather than a single lump sum, HUD provided funds to grant recipients in increments which it referred to as "rounds." This resulted in multiple obligations for the same grantee on different dates. According to HUD, "The cumulative method measured grantee compliance with the 24-month expenditure requirement by total, cumulative expenditures against total

this cumulative method resulted in HUD “failing to recapture and reallocate uncommitted grant funds” after 24 months as required by the statute. B-322077.

According to HUD OIG, HUD began using the cumulative method to track these funds in February 2017. However, “Once [OIG] notified [HUD’s Office of the Chief Financial Officer (OCFO)] of the improper methodology, OCFO required [the program] to discontinue the cumulative method.”¹⁰ OIG also stated that use of the cumulative method had potentially resulted in violations of the Antideficiency Act.¹¹ HUD and its grantees then took a series of corrective actions similar to those outlined in B-322077.¹²

OCFO also completed an investigation into the potential Antideficiency Act violations that OIG referred.¹³ This investigation found no evidence that use of the cumulative method or the steps taken to discontinue its use resulted in any Antideficiency Act violations.¹⁴

DISCUSSION

HUD states that its use of the cumulative method to assess compliance with section 904(c) was “improper.”¹⁵ At issue here is whether use of the cumulative method resulted in a violation of the Antideficiency Act.

The Antideficiency Act prohibits agencies from obligating or expending funds in excess of amounts available under an appropriation, apportionment, or allotment. It also prohibits obligating or expending funds in advance of an appropriation, apportionment, or allotment. 31 U.S.C. §§ 1341(a)(1), 1517(a). In response to OIG’s referral, OCFO conducted an investigation. Following that investigation, OCFO acknowledged that, while use of the cumulative method was inconsistent with our conclusions in B-322077, no Antideficiency Act violation had resulted from use of

cumulative obligations to date, and not by measuring expenditures attributable to specific rounds.” Memorandum from Director, Office of Appropriations Law Staff, HUD, to Chief Financial Officer, HUD (May 29, 2019) (OCFO Memo), at 2-3.

¹⁰ HUD OIG, *Office of Community Planning and Development, Washington, DC, Compliance With the Disaster Relief Appropriations Act, 2013 Grantee Expenditure Requirement*, 2019-FW-0001 (May 17, 2019), at 12.

¹¹ *Id.* at 30.

¹² HUD Response at 2.

¹³ *Id.* at 2.

¹⁴ OCFO Memo at 14.

¹⁵ HUD Response at 1.

the cumulative method or the steps taken to discontinue its use.¹⁶ Specifically, OCFO found no instances in which the agency obligated or expended funds in excess of, or in advance of, any appropriation, apportionment, or allotment.¹⁷ Similarly, OIG identified no such instances.¹⁸

HUD explained that the CDBG-DR grants were obligated at the time HUD awarded a grant to a grantee and that HUD recorded and tracked these obligations in HUD's financial system.¹⁹ Grantees entered data into HUD's separate Disaster Recovery Grants Reporting (DRGR) system to draw funds from their previously awarded grants. HUD stated that the grantees had no access to HUD's financial system. HUD also stated that the DRGR system did not permit any grantee to draw more than the total obligation amount recorded for that grantee or to draw funds in advance of an obligation to it.²⁰ Thus, HUD's funds control system prevented the use of the cumulative method from leading to any violations of the Antideficiency Act.

OIG also asks whether use of the cumulative method of calculation, "in and of itself," might constitute an Antideficiency Act violation that HUD must report.²¹ Use of the cumulative method, on its own, does not violate the Antideficiency Act. HUD's use of the cumulative method to assess compliance with section 904(c) did not obligate or expend government funds.²² The Antideficiency Act contains specific prohibitions. See 31 U.S.C. §§ 1341(a), 1517. It requires agencies to report violations of these specific prohibitions to the President and Congress. *Id.* §§ 1351, 1517(b). The Antideficiency Act does not require agencies to report violations of other laws nor does it require agencies to report improper financial management practices that do not result in violations of the Antideficiency Act.²³

¹⁶ HUD Response at 2; OCFO Memo at 1.

¹⁷ HUD Response at 4.

¹⁸ OIG Response at 6.

¹⁹ HUD Response at 2, 4.

²⁰ *Id.*, at 2-4.

²¹ Request Letter at 1.

²² HUD Response at 2, 4; see generally B-322077.

²³ HUD OIG also questions whether the reasoning of B-322077 and another of our prior decisions, B-272191, Nov. 4, 1997, should apply to the appropriations made in the Disaster Relief Appropriations Act, 2013, given that this was a supplemental appropriation and the appropriations addressed in those prior decisions were annual appropriations. Request Letter at 7. We have generally interpreted provisions in supplemental appropriation acts consistently with similar provisions in prior annual appropriation acts. Nothing in either decision suggests that their analysis was in any way dependent on the annual nature of the appropriations at issue in those cases.

CONCLUSION

HUD states that its use of the cumulative method of calculation to assess grantee compliance with section 904(c) was “improper” and has ceased use of the cumulative method for that purpose. However, an agency violates the Antideficiency Act if it obligates or expends funds in excess of or in advance of any appropriation, apportionment, or allotment. HUD OIG did not identify any evidence that use of the cumulative method, or the steps taken to discontinue it, resulted in HUD making any obligations or expenditures that violated the Antideficiency Act. Furthermore HUD, after undertaking an investigation, found no such obligations or expenditures. Accordingly, HUD’s use of the cumulative method did not result in a violation of the Antideficiency Act.



Edda Emmanuelli Perez
General Counsel

See *generally* B-322077; B-272191. Nothing in the Disaster Relief Appropriations Act, 2013 suggests that the supplemental appropriations made therein are not subject to the Antideficiency Act or that section 904(c) should not be interpreted in a manner consistent with similar provisions in prior acts. See *generally* Pub. L. No. 113-2, div. A, 127 Stat. at 4.



441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Department of Defense—Amount Limitations on the Lift and Sustain Program

File: B-332393

Date: May 5, 2021

DIGEST

The Department of Defense (DOD) operates the Lift and Sustain program to reimburse international allies for assistance in military operations. The program is funded through a lump sum appropriation for Operation and Maintenance, Defense-wide. In the conference report accompanying DOD's Fiscal Year 2019 appropriation, the conferees designated \$120 million to the program.

Based on the \$120 million designation, DOD prematurely reported to Congress a potential violation of the Antideficiency Act stemming from a potential cost overrun while operating the program. After review, we conclude the \$120 million designation was not binding on DOD. Moreover, DOD also subsequently determined it did not obligate more than \$120 million for the program. Accordingly, DOD did not violate the Antideficiency Act.

DECISION

This responds to a congressional request for our decision regarding the Department of Defense's (DOD) use of Fiscal Year 2019 (FY19) appropriations to operate its Lift and Sustain (L&S) program and whether DOD violated the Antideficiency Act (ADA). Letter from Chairman and Ranking Member, House Committee on Appropriations, Defense Subcommittee to Comptroller General (July 14, 2020) (Request Letter).¹ DOD prematurely reported a potential ADA violation to its congressional appropriations and oversight committees stemming from its obligations for the program. As a result, we were asked to evaluate whether DOD had actually violated the ADA. As described below, we conclude DOD's operation of the L&S program in FY19 did not violate the ADA.

¹ The chair of the House Committee on Appropriations, Defense Subcommittee changed in January 2021 with the organization of the 117th Congress.

In the conference report accompanying DOD's FY19 appropriation, the conferees included a table in which they designated \$120 million for the L&S program. DOD initially reported a potential violation of the ADA based on the premise that its obligations for the program exceeded this amount. However, as discussed below, this designation did not create a legally binding limitation on the amount available for the L&S program such that obligating in excess of \$120 million for L&S activities would trigger an ADA violation. Notwithstanding, DOD also confirmed it did not actually exceed the \$120 million designation as it had initially reported.

In accordance with our regular practice, we contacted DOD to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to General Counsel, DOD, (Sept. 17, 2020). We received DOD's response on October 22, 2020. Letter from Deputy General Counsel (Fiscal), DOD, to Assistant General Counsel, GAO, (Oct. 22, 2020) (Response Letter).

BACKGROUND

The L&S program is used to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military stability operations in specified countries or for specified operations. Response Letter, at 1. The program was first authorized in 2004 by the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004. Response Letter, at 1; See Pub. L. No. 108-106, § 1106, 117 Stat. 1209, 1214 (Nov. 6, 2003). There is no specific appropriation for the L&S program; however, DOD funds the program out of its Operation and Maintenance, Defense-wide appropriation, which is available, in part, to reimburse key cooperating nations for logistical, military, and other support. Response Letter, at 1; see also Pub. L. No. 115-245, div. A, titles I, IX, 132 Stat. at 2985, 3034.

For FY19, DOD requested \$150 million to fund the L&S program, however, in the conference report, the conferees designated \$120 million for the program instead. H.R. Rep. No. 115-952, at 473 (2018). This designation only appeared in the conference report. Response Letter, at 2. In particular, the conferees included tables throughout the conference report entitled "Explanation of Project Level Adjustments," which specified amounts for various DOD programs, including the L&S program.

In a quarterly report to Congress, DOD stated it "suspected [a] \$29.1 million over-obligation of FY 2019 Lift and Sustain" program appropriations and, thus, may have violated the ADA. DOD, *Quarterly Report to Congress on the Use of Lift & Sustain Authority: Fourth Quarter of Fiscal Year 2019* (2019). DOD based this preliminary determination on the \$120 million designation in the conference report. *Id.*

DISCUSSION

The ADA prohibits the obligation or expenditure of funds in excess or in advance of an appropriation. 31 U.S.C. § 1341. Congress often appropriates amounts to agencies in lump sums, as it did here with DOD's Operation and Maintenance, Defense-wide appropriation. This allows the agency flexibility to execute its appropriation in a manner that accommodates shifting circumstances and needs, provided that the resulting obligations remain consistent with the terms of the lump-sum appropriation and any other applicable law. See B-329964, Oct. 8, 2020. Conversely, where Congress intends to limit agency discretion, it may insert a line item within a lump-sum appropriation, specifying a minimum or maximum amount for a particular program or activity. Cf. B-331888, June 11, 2020. If agency obligations exceed a line item that is determined to have set forth the maximum amount available for a particular purpose, the agency violates the ADA. Cf. B-326941, Dec. 10, 2015 (lump-sum appropriation available to supplement line-item appropriation found to constitute a minimum).

We first analyze whether DOD's L&S program funding was subject to a line-item limitation. We then analyze whether a violation of the ADA occurred based on L&S program obligations.

Funding Limitations on the L&S Program

Generally, "indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975). However, such expectations can be made legally binding if incorporated by reference into the text of the statute. B-316010, Feb. 25, 2008. If the legislative history is not incorporated by reference into the statute, the agency may still choose to comply with the directive, but is not legally required to. B-323699, Dec. 5, 2012.

In the conference report accompanying DOD's FY19 appropriation act, the conferees designated \$120 million for the L&S program. H.R. Rep. No. 115-952, at 473. No mention of the L&S program or the \$120 million designation was made in the Act itself. See Pub. L. No. 115-245, div. A, title II, title IX, 132 Stat. at 2985, 3034, 3043. Because the designation was in the conference report, it is only legally binding to the extent incorporated by reference into the Act. Here, as the conferees' designation for the L&S program is not included or otherwise referenced in DOD's FY19 appropriations act, it was not incorporated into the Act and remains nonbinding. See Pub. L. No. 115-245, div. A, title II, title IX, 132 Stat. at 2985, 3034, 3043.

There are amount designations included in the conference report that Congress did choose to incorporate into the Act. Specifically, section 8006 of the Act incorporates funding designations for programs, projects, and activities contained in the tables titled "Explanation of Project Level Adjustments" where the amounts appropriated for the designated projects exceed the amounts requested for those projects. Pub. L.

No. 115-245, § 8006, 132 Stat. at 2999. For example, DOD only requested \$72,990,000 for operational test and analysis activities without mentioning an advanced satellite navigation receiver specifically. See H.R. Rep. No. 115-952, at 443. However the conferees designated an additional \$10,000,000 to operational test and analysis activities in the conference report above the initial request for such a receiver. *Id.* Notably, Congress only made the conference amounts that were greater than the amounts requested by the agency legally binding. By limiting the legally binding nature of the incorporation to this narrow subset of the tables, as a legal matter, Congress indicated all other funding amounts specified in the table that did not exceed the amount requested by the agency were to be nonbinding.

Here, the amount specified for the L&S program does not fit the criteria for incorporation by reference under section 8006. DOD originally requested \$150 million for the program, however, the conferees designated \$120 million to the L&S program in the conference report. Because the table *reduced* L&S funding below the budget request and did not provide *more* than requested, the funding designation for the L&S program was nonbinding. While DOD could have chosen to comply with the designation in the legislative history, it was not legally required to do so.

Application of the ADA

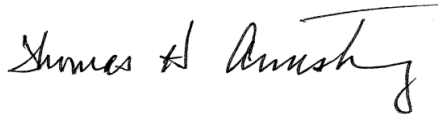
The ADA prohibits obligations or expenditures exceeding appropriations limits, whether that limitation is derived from a specific line item or the overall appropriation. See 31 U.S.C. § 1341. Importantly, as discussed previously, because the amount specified in the conference report for the L&S program was not legally binding, and thus not representative of the amount available for L&S activities, an ADA violation could not result based solely on exceeding it.

However, even if the \$120 million designation were binding, an ADA violation still would not have occurred based on the information provided to us by DOD. When DOD initially reported its potential ADA violation, DOD informed Congress it would conduct an investigation into the matter. DOD, *Quarterly Report to Congress on the Use of Lift & Sustain Authority: Fourth Quarter of Fiscal Year 2019* (2019). As a result of the investigation, DOD found that the initial calculations that led to its determination that it exceeded the \$120 million designation were based on multiplying the total number of eligible coalition personnel in country at a certain point in time during each quarter by the rate for full support under the Logistics Civil Augmentation Program contract. Response Letter, at 4. However, not all eligible coalition personnel in country receive support and, of those that do, not all receive full support. *Id.* When calculated based on the actual amounts, the obligations and expenditures fell within \$120 million. *Id.* Further, DOD also confirmed that it did not exceed the overall Operation and Maintenance appropriation due to L&S program obligations, meaning no ADA violation related to L&S program obligations occurred. See Response Letter, at 2.

SUMMARY

For FY19, DOD requested \$150 million for the L&S program, but the conferees designated \$120 million for the program in the conference report. While Congress incorporated some of the amounts included in the Explanation of Project Level Adjustment tables into DOD's appropriations act, it did not incorporate the conferees' designation for the L&S program. This means the designation remained nonbinding on DOD.

DOD prematurely reported a potential ADA violation regarding the L&S program based on the \$120 million designation before completing its investigation into the matter. As discussed above, the \$120 million designation was not binding on DOD, and after DOD reviewed the program's obligations and expenditures, it concluded the program's expenses did not exceed \$120 million. We conclude there is no ADA violation.



Thomas H. Armstrong
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

B-333630

April 21, 2022

The Honorable Kamala Harris
President of the Senate

The Honorable Nancy Pelosi
Speaker of the House of Representatives

Subject: *Fiscal Year 2021 Antideficiency Act Reports Compilation*

Agencies that violate the Antideficiency Act must report the violation to the President and Congress and transmit a copy of the report to the Comptroller General at the same time. 31 U.S.C. §§ 1351, 1517(b). The report must contain all relevant facts and a statement of actions taken.

Since fiscal year 2005, GAO, in its role as repository for the Antideficiency Act reports that agencies submit, has produced and publicly released an annual compilation of summaries of the reports. We base the summaries on unaudited information we extract from the agency reports. Each summary includes a brief description of the violation, as reported by the agency, and of remedial actions agencies report that they have taken. We also include copies of the agencies' transmittal letters. We post the summaries and the agency transmittal letters on our public website. In some cases, the agencies also send us additional materials with their transmittal letters. We make these additional materials available to Members and their staffs upon request.

Please find enclosed the compilation of summaries of the 17 Antideficiency Act violation reports and agency transmittal letters submitted to GAO in fiscal year 2021. The Department of Homeland Security submitted six reports and the Department of Defense submitted three reports. The Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Department of Agriculture, the Department of Housing and Urban Development, the Department of Veterans Affairs, the General Services Administration, the National Archives and Records Administration, and the Pension Benefit Guaranty Corporation each submitted one report.

While GAO has not opined on the agency reports or the remedial actions taken, we do note that many of the reported violations resulted from similar agency actions. For example, six of the reported violations occurred during a lapse in appropriations, with four resulting from agencies incurring obligations without available budget authority for activities that were not excepted by the Antideficiency Act and two resulting from

agencies accepting voluntary services that were not excepted by the act. Three of the reported violations resulted from obligating or expending funds in violation of statutory spending restrictions.

If you have any questions, please contact Shirley A. Jones, Managing Associate General Counsel, at (202) 512-8156, or Charlie McKiver, Assistant General Counsel for Appropriations Law, at (202) 512-5992.

A handwritten signature in cursive script that reads "Edda Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel

Enclosure

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-01

Agency No.: None Reported **Date Reported to GAO:** October 7, 2020

Agency: Consumer Product Safety Commission (CPSC) **Date(s) of Violation(s):** Fiscal Year 2019

Account(s): Salaries and Expenses **Amount Reported:** \$79.70

Description: CPSC reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1342, when it accepted voluntary services when a furloughed employee worked during the partial government shutdown that occurred between December 2018 and January 2019.

According to CPSC, an employee assigned to the Division of Chemistry in the Directorate of Laboratory Services was furloughed on December 26, 2018, due to a lapse in appropriations. CPSC reported that its furlough notice, which the employee signed, instructed the employee not to work on official business, even as an unpaid volunteer. While furloughed, the employee accessed his official CPSC e-mail and sent a total of six emails from his official e-mail.

Remedial Action Taken: To prevent a recurrence of this type of violation, CPSC reported that it will continue to emphasize that employees who work while furloughed are subject to the penalties of the ADA. According to CPSC, the responsible employee received a three-day suspension and was required to receive trainings on the ADA and its application to government furloughs. CPSC reported that the responsible employee did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports; E-mail from Acting Chief Financial Officer, CPSC to Staff Attorney, GAO (Dec. 15, 2021).

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-02

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| Agency No.: None Reported | Date Reported to GAO: October 7, 2020 |
| Agency: Department of Agriculture (USDA) | Date(s) of Violation(s): Fiscal Year 2019 |
| Account(s): Agricultural Research Service Salaries and Expenses | Amount Reported: \$11.03 |

Description: USDA reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1342, when it accepted voluntary services when a furloughed employee worked during the partial government shutdown that occurred between December 2018 and January 2019.

According to USDA, a Contracting Specialist in the Agricultural Research Service (ARS) uploaded a document into the Integrated Acquisition System on December 31, 2018, while furloughed. According to USDA, ARS accepted the voluntary services in violation of the ADA, 31 U.S.C. § 1342.

Remedial Action Taken: To prevent a recurrence of this type of violation, USDA reported that ARS had a process to disseminate information to employees regarding emergency and shutdown furlough procedures, furlough notices, and ethics during a lapse in appropriations. According to USDA, the responsible employee has been advised of the prohibition against working while furloughed. ARS has determined that the responsible employee did not did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-03

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| Agency No.: None Reported | Date Reported to GAO: November 5, 2020 |
| Agency: Department of Veterans Affairs (VA) | Date(s) of Violation(s): Fiscal Years (FYs) 2017 and 2018 |
| Account(s): Medical Services; Medical Community Care ¹ | Amount Reported: \$1,091,078,347 |

Description: VA reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), when it obligated funds from the wrong appropriations account for State Veterans Homes in FYs 2017 and 2018, and did not have sufficient funds in the correct appropriations account to cover the obligations.

VA reported that it charged obligations for State Veterans Homes for FYs 2017, 2018, and 2019 to its Medical Community Care account. For each of those FYs, the Medical Services appropriation contained specific language for State Veterans Homes. VA's Office of General Counsel advised VA that it was required to charge the obligations to the Medical Services account to comply with the purpose statute. However, VA reported that insufficient funds remained in the Medical Services account to charge the obligations for FYs 2017 and 2018, and it therefore violated the ADA for those FYs.

Remedial Action Taken: To prevent a recurrence of this type of violation, VA reported that the President's FY 2021 budget requested a provision that would allow erroneously obligated and expended funds to be charged to the Medical Community Care Account. Congress included a similar provision in the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act. According to VA, it reviewed the language in its Medical Services appropriations to ensure that no oversights remained. VA reported that the Veterans Health Administration (VHA) is improving congressional justification materials to clarify how programs should be funded in the future. According to VA, the employee responsible for the violation was the VHA Chief Financial Officer, who did not knowingly or willfully violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports; E-mail from Senior Level Attorney, VA to Staff Attorney, GAO (Oct. 5, 2021).

¹ Throughout this report, where an agency reports that it violated the ADA by obligating or expending funds from an incorrect account, we identified both the account initially charged, and the account that was supposed to be charged, according to the agency.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-04

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| Agency No.: None Reported | Date Reported to GAO: January 14, 2021 |
| Agency: Department of Housing and Urban Development (HUD) | Date(s) of Violation(s): Fiscal Years (FYs) 2009, 2010, 2012, 2014, 2017, and 2018 |
| Account(s): Executive Offices, Management and Administration; Administrative Support Offices, Management and Administration; Community Planning and Development, Program Office Salaries and Expenses; and Fair Housing and Equal Opportunity, Program Office Salaries and Expenses | Amount Reported: \$158,850.74 |

Description: HUD reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), in FYs 2009, 2010, 2012, 2014, 2017, and 2018, when it incurred obligations and expended funds without providing advance congressional notification in violation of a statutory prohibition.

According to HUD, on a number of occasions, HUD staff made obligations and expenditures for offices and other spaces assigned to presidentially appointed officials that were covered by then-applicable advance congressional notification requirements. HUD reported that advance notification was not given to Congress before making such obligations and expenditures. HUD noted that the failures to notify Congress occurred due to a lack of written procedures regarding the statutory notification requirements.

According to HUD, the HUD Office of Inspector General conducted an investigation and issued a report with respect to office furniture purchased for the Secretary's dining room that found no evidence of misconduct and made no recommendations because of remedial actions proposed by HUD and HUD's intent to report an ADA violation.² Additionally, HUD reported that the purchase contract for the Secretary's dining room furniture was canceled.

² GAO issued a decision regarding HUD's obligation of appropriated funds in this manner. B-329955, May 16, 2019.

Remedial Action Taken: To prevent a recurrence of this type of violation, HUD reported that it has instituted a mandatory review process under which various offices must review and pre-approve all proposed purchases that may fall within the government-wide limitation to furnish, redecorate, or make improvements for the offices of presidentially appointed officials. Additionally, HUD reported that the Office of Administration is developing a standard operating procedure to formally document this review process. HUD reported that this error was systemic in nature and therefore, no responsible employees were identified. According to HUD, there was no knowing or willful intent to violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-05

Agency No.: Navy, 19-01/02

Date Reported to GAO: January 19, 2021

Agency: Department of the Navy (Navy)

Date(s) of Violation(s): Fiscal Years 2009-2013

Account(s): Operation and Maintenance, Marine Corps (OMMC), Other Procurement, Marine Corps (PMC), funds transferred from the Joint Improvised Explosive Devise Defeat Organization funds

Amount Reported: \$70,133,853.19

Description: Navy, through the Department of Defense, reported that it violated the Antideficiency Act (ADA), 31 U.S.C. §§ 1341(a), 1517(a), when it obligated and expended funds from the incorrect appropriation for the construction of ground training systems located on Military Operations on Urban Terrain (MOUT) sites, and did not have any funds in the correct appropriations accounts to charge the obligations and expenditures. Navy also reported it violated the ADA when it improperly obligated and expended OMMC and PMC funds for the construction of MOUT training facilities for which Congress has not provided an authorization or appropriation. Finally, Navy reported it violated the ADA when it incorrectly used an appropriation to purchase movable equipment associated with the construction projects.

Remedial Action Taken: To prevent a recurrence of this type of violation, Navy reported that it updated policies regarding relocatable buildings, training systems, and site work and performed contracts compliance review. Navy clarified that the Marine Corps Systems Command (MCSC) is not authorized to write contracts for construction-like work or work subject to the Davis-Bacon Act of 1931. According to Navy, MCSC took corrective actions related to program management, contracting, engineering, and financial management. Navy reported that two former MCSC Commanding Officers were responsible for the violations, and that both individuals are now retired. According to Navy, there was no willful or knowing intent to violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-06

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| Agency No.: None Reported | Date Reported to GAO: February 4, 2021 |
| Agency: Pension Benefit Guaranty Corporation (PBGC) | Date(s) of Violation(s): Fiscal Years (FYs) 2004 and 2005 |
| Account(s): Pension Benefit Guaranty Corporation Fund | Amount Reported: \$319,501,649 |

Description: PBGC reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), when it entered into two multiyear leases in FYs 2004 and 2005, and did not have sufficient funds in those FYs to cover its total liability for the leases.

PBGC reported that on August 9, 2004, it entered into a multiyear lease for rentable space for a term of approximately 14 years and 4 months. Additionally, on September 30, 2005, PBGC reported that it entered into a multiyear lease for rentable space for a term of approximately 13 years and 3 months. According to PBGC, upon executing the leases, PBGC did not record an obligation equal to its total liability but instead funded these multiyear leases incrementally. PBGC reported that it attempted to make account adjustments to comply with the ADA, but did not have sufficient funds in FYs 2004 and 2005 to fund the total liabilities for the space.

Remedial Action Taken: To prevent a recurrence of this type of violation, PBGC states that it took actions to bring its leasing program into compliance with the recording statute, 31 U.S.C. § 1501(a)(1), and the ADA. PBGC reported that it renegotiated new, short term, annual leases in place of the previous multiyear leases. According to PBGC, it also revised its directive governing its system of administrative control of funds and has submitted this for OMB approval. PBGC determined that there was no knowing or willful intent to violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-07

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| Agency No.: DCMA 20-01 | Date Reported to GAO: February 19, 2021 |
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| Agency: Defense Contract Management Agency (DCMA) | Date(s) of Violation(s): Fiscal Years 2015 and 2016 |
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| Account(s): Operation and Maintenance (O&M), Defense-Wide; Research, Development, Test and Evaluation (RDT&E) | Amount Reported: \$1,248,155.63 |
|--|--|

Description: DCMA, through the Department of Defense, reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1517(a), when it corrected its errant obligations and expenditures for the development of the Earned Value Analysis System (EVAS), and exceeded the amount of funds available through the formal subdivision of funds for the EVAS.

DCMA reported that it used appropriations from its O&M account to fund the development of the EVAS. According to DCMA, because of the significant software development, testing and evaluation requirements defined in the EVAS performance work statements, DCMA should have used its RDT&E account instead of its O&M account to fund the project. DCMA reported that the violation occurred due to lack of oversight over information technology finance and budget, and lack of communication among various groups.

Remedial Action Taken: To prevent a recurrence of this type of violation, DCMA conducted a comprehensive realignment of the duties and responsibilities associated with budget formulation and execution processes. According to DCMA, it issued a revised policy to facilitate agency leadership review of key procedures. DCMA reported that it has centralized the fund execution process and moved this responsibility to the Headquarters Finance and Business Operations/ Comptroller Directorate. DCMA identified the Chief Information Officer (CIO) as responsible for the violation. DCMA reported that the individual who served as CIO is no longer a government employee and discipline was not pursued. DCMA determined that the responsible individual did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-08

Agency No.: Navy, 19-03 **Date Reported to GAO:** March 17, 2021

Agency: Department of the Navy (Navy) **Date(s) of Violation(s):** Fiscal Years (FYs)
2013-2018

Account(s): Operation and Maintenance, Navy (O&MN); Shipbuilding and Conversion, Navy (SCN) **Amount Reported:** \$25,966,667.79

Description: Navy, through the Department of Defense, reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), when it improperly obligated and expended funds from the incorrect appropriations account to convert a large covered lighter barge into a Berthing and Messing barge and did not have sufficient funds in the correct appropriations account to cover the obligations and expenditures.

According to Navy, the Naval Sea Systems Command, Southwest Regional Maintenance Center (SWRMC) improperly obligated and expended O&MN funds to convert a large covered lighter barge into a Berthing and Messing barge. Navy determined that this occurred due to the program manager improperly characterizing the conversion as modernization through maintenance and repair work. Navy also reported that the non-severable work was improperly split over the course of several years as O&MN funds became available. Navy reported that conversion of service craft such as barges is funded from a specific annual appropriation for ship conversion, and as such, SCN funds should have been used. According to Navy, after recognizing the error, it did not have FY 2013 SCN funds available to cure the violations.

Remedial Action Taken: To prevent a recurrence of this type of violation, SWRMC has instituted organizational and process changes to strengthen the programmatic, contracting, and funding review associated with ship modernization. Additionally, Navy reported that the Director, Fleet Maintenance for the Commander, U.S. Pacific Fleet (COMPACFLT) established a detailed review process of barge work. Lastly, Navy reported that COMPACFLT will implement a formal qualification and continuing training program for fleet maintenance program managers. According to Navy, the program manager was responsible for the violation. COMPACFLT issued the program manager a letter of caution. Navy determined that the responsible individual did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-09

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| Agency No.: None Reported | Date Reported to GAO: May 6, 2021 |
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| Agency: National Archives and Records Administration (NARA) | Date(s) of Violation(s): Fiscal Year (FY) 2019 |
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| Account(s): Operating Expenses (OE) | Amount Reported: None Reported |
|--|---------------------------------------|

Description: GAO, following a congressional request, determined that NARA violated the Antideficiency Act (ADA), 31 U.S.C. §§ 1341(a), 1342, when it incurred obligations during a lapse of appropriations between December 22, 2018, and January 25, 2019. B-331091, July 16, 2020. GAO concluded that NARA’s activities in connection with the publication of three temporary rules for the National Oceanic and Atmospheric Administration, a final rule for the Department of Labor, and a notice for the Centers for Disease Control and Prevention violated the ADA because NARA lacked available budget authority and no exception to the ADA that would otherwise authorize its obligations applied. *Id.* See 31 U.S.C. §§ 1341(a), 1342.

NARA’s report expressed disagreement with GAO’s determination. It asserted that NARA did not violate the ADA because NARA believes the activities were authorized by the necessary implication exception to the ADA.

Remedial Action Taken: NARA did not identify remedial actions taken.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-10

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|--|---|
| Agency No.: None Reported | Date Reported to GAO: May 27, 2021 |
| Agency: General Services Administration (GSA) | Date(s) of Violation(s): Fiscal Year (FY) 2017 |
| Account(s): Acquisition Services Fund (ASF) | Amount Reported: \$690,000,000 |

Description: GSA reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1517(a), when it obligated funds in the ASF in excess of its apportionment.³

According to GSA, the majority of ASF obligations are related to “flow-through” activity, which consists of customer orders for which GSA has entered into reimbursable agreements with agencies to procure goods and services for those agencies. In FY 2017, GSA exceeded the amount apportioned for ASF flow-through obligations by \$689.4 million, and exceeded the amount apportioned for the entire ASF by \$251.5 million. According to GSA, these violations occurred due to higher than anticipated agency customer orders and lack of internal controls to prevent GSA from incurring obligations for vendor orders in excess of the amount apportioned for ASF flow-through obligations.

Remedial Action Taken: To prevent a recurrence of this type of violation, GSA instituted a Corrective Action Plan (CAP), which contains more stringent measures for regular monitoring and forecasting. Specifically, GSA noted that the CAP requires increased scrutiny of ASF flow-through obligations by establishing monthly monitoring controls over apportionment levels and reviews of report documentation to ensure alignment between budgetary and proprietary forecasts. Additionally, under the CAP, GSA will develop and implement a monitoring process to determine whether it needs to request a reapportionment late in the year to deal with unexpected changes in activity. According to GSA, it also will consider developing automatic preventative system controls.

³ While GSA initially reported that it violated 31 U.S.C. § 1341, GSA later stated that the reported violation occurred because the agency obligated funds in excess of an apportionment, which is a violation of 31 U.S.C. § 1517(a). E-mail from Deputy Budget Director, GSA to Staff Attorney, GAO (Jan. 13, 2022).

Source: Unaudited information GAO extracted from agency Antideficiency Act reports; E-mail from Deputy Budget Director, GSA to Staff Attorney, GAO (Jan. 13, 2022).

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-11

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| Agency No.: None Reported | Date Reported to GAO: June 11, 2021 |
| Agency: Department of Homeland Security (DHS) | Date(s) of Violation(s): Fiscal Years (FYs) 2010-2016 |
| Account(s): None Reported | Amount Reported: \$361,164,112.23 |

Description: DHS reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), when it incurred obligations without providing advance congressional notification, in violation of a statutory prohibition.

According to DHS, it identified 42 contract violations that occurred between FYs 2013 and 2016. Additionally, DHS reported that it identified 104 Other Transaction Authority (OTA) agreement violations that occurred within the Transportation Security Administration (TSA) between FYs 2010 and 2015. According to DHS, these violations occurred because DHS did not provide congressional notification in advance of entering into contracts and OTAs as required by DHS's FYs 2010-2016 appropriations acts. DHS reported that the violations occurred due to a misunderstanding of the notification requirements, inattention to detail, and inadequate quality review.

Remedial Action Taken: To prevent a recurrence of this type of violation, DHS revised the Homeland Security Acquisition Manual to clarify the process for providing Congressional notifications. DHS reported that additional tools were developed to assist contracting officers in determining when Congressional notification is required and to help monitor Congressional notification compliance, including training. According to DHS, TSA updated its OTA policy and checklist to enhance compliance and mandated an OTA refresher training for contracting officers. DHS determined that the Chief Procurement Officer was responsible for the contract violations, and that a TSA contracting officer was responsible for the OTA violations. DHS reported that the TSA contracting officer's warrant was suspended on July 8, 2015, and the employee voluntarily separated from TSA in October 2015. No disciplinary actions against the responsible employees were taken. DHS has determined that the responsible individuals did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-12

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| Agency No.: None Reported | Date Reported to GAO: June 11, 2021 |
| Agency: Department of Homeland Security (DHS) | Date(s) of Violation(s): Fiscal Years (FYs) 2010; 2016-2019 |
| Account(s): Working Capital Fund, Departmental Management | Amount Reported: None Reported |

Description: DHS reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), when it exceeded its available account balance.

DHS reported that the violation was discovered when DHS's Financial Management Division conducted a policy review. During this review, DHS states it discovered that its Working Capital Fund had exceeded its available fund balance with Treasury in July 2010 and from March 2016 through August 2019. DHS reported that this violation occurred because DHS's processes and procedures were predicated on a misinterpretation of the law, which was the assumption that an ADA violation did not occur if the accounts receivable offset the negative cash balance.

Remedial Action Taken: To prevent a recurrence of this type of violation, DHS submitted legislative language to Congress for consideration that would allow anticipated reimbursements to offset negative cash balances. The proposed language was enacted in the 2020 Consolidated Appropriations Act. The FY 2021 enacted appropriations did not provide for continued usage of DHS's Working Capital Fund, and instead appropriated funds directly to the servicing Management Directorate offices. DHS identified the former Financial Operations Director as the responsible party. The responsible party has retired from federal service. According to DHS, the responsible party did not knowingly or willfully violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-13

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| Agency No.: None Reported | Date Reported to GAO: June 11, 2021 |
| Agency: Department of Homeland Security (DHS) | Date(s) of Violation(s): Fiscal Years (FYs) 2013, 2014, 2015 and 2016 |
| Account(s): Immigration and Customs Enforcement (ICE), Salary and Expenses | Amount Reported: \$90,736.87 |

Description: DHS reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), when it incurred obligations without providing advance congressional notification, in violation of a statutory prohibition.

DHS reported that ICE obligated more than \$5,000 to furnish the Director's suite without providing advance Congressional notification, as required by statute, between FYs 2013 and 2016. According to DHS, this resulted in ICE obligating funds that were not legally available. The violation was discovered by ICE in 2016, when a professional staff member on the Senate Committee on Appropriations Subcommittee on Homeland Security requested an inventory of the materials and contract work used in the Director's suite renovation. DHS reported that the violation occurred due to a lack of awareness of the restriction by the responsible employee.

Remedial Action Taken: To prevent a recurrence of this type of violation, ICE is ensuring appointment of certifying officials, as well as improving internal controls with regard to restrictions in appropriations language and the Congressional notification process. DHS also reported that funds certifiers are required to review relevant transactions, and that ICE implemented a process to appoint certifying officials in a manner that ensures that certifying officials understand the roles assigned to them. DHS reported that certifying officials will receive additional guidance in their Budget Formulation Handbook regarding current appropriations language and applicable restrictions. According to DHS, an employee serving as the project manager and funds certifier was responsible for the violation. No disciplinary actions against the responsible employee were taken. DHS determined that the responsible employee did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-14

Agency No.: None Reported **Date Reported to GAO:** June 11, 2021

Agency: Department of Homeland Security (DHS) **Date(s) of Violation(s):** Fiscal Year (FY) 2019

Account(s): Citizenship and Assimilation Grant Program **Amount Reported:** \$9,947,152

Description: DHS reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1517(a), when it incurred obligations in excess of its apportionment.

According to DHS, grants were awarded and obligated by the USCIS prior to receiving an apportionment for the Federal Assistance account in FY 2019. DHS reported that USCIS requested an apportionment upon determination that there was not an apportionment covering the grants, but the request was submitted too late to be processed by the end of the fiscal year. As a result, DHS reported that grants were awarded without an approved apportionment in place. DHS determined that the violation occurred due to turnover in key personnel responsible for the apportionment process and failure in internal controls.

Remedial Action Taken: To prevent a recurrence of this type of violation, DHS reported that it improved standard operating procedures and internal controls, and implemented training for key personnel in the apportionment process. According to DHS, USCIS implemented steps to validate an apportionment before approving funding and added monthly reconciliations. DHS determined that the Acting Chief of the Budget and Planning Division in USCIS was the responsible individual. No disciplinary action against the responsible employee was taken. DHS determined that the responsible party did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-15

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| Agency No.: None Reported | Date Reported to GAO: June 11, 2021 |
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| Agency: Department of Homeland Security (DHS) | Date(s) of Violation(s): Fiscal Year (FY) 2018 |
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|---|--------------------------------------|
| Account(s): Operations and Support, United States Coast Guard (USCG) | Amount Reported: \$177,608.41 |
|---|--------------------------------------|

Description: DHS reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), when DHS obligated funds for contract modifications during a lapse in appropriations.

According to DHS, a contracting officer, an excepted employee, awarded five contract modifications without available appropriations during a lapse in appropriations. The violations were discovered by the contracting officer's supervisor during a system review. DHS determined that these violations occurred due to a lapse in judgment by the contracting officer. Upon notification of the violations, the contracting officer immediately cancelled the contract modifications. The modifications were cancelled prior to any contract performance, such that USCG was not liable for any modification costs.

Remedial Action Taken: To prevent a recurrence of this type of violation, USCG has released notifications on acquisition guidance when a lapse in appropriations occurs, directing contracting officers and contracting specialists to adhere to applicable restrictions. DHS reported that the responsible employee was the contracting officer. No disciplinary action against the responsible employee was taken. The contracting officer was required to attend additional acquisition training and a Principles of Federal Appropriations Law course. DHS determined that the responsible party did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-16

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| Agency No.: None Reported | Date Reported to GAO: June 11, 2021 |
| Agency: Department of Homeland Security (DHS) | Date(s) of Violation(s): Fiscal Years (FY) 1974-2019 |
| Account(s): Operations and Support, United States Coast Guard (USCG) | Amount Reported: None Reported |

Description: DHS reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341(a), when it entered into lease agreements with uncapped liabilities.

According to DHS, between FYs 1974 and 2019, it had leases with escalation and/or indemnification clauses without limitations. DHS reported that these leases created a potentially unlimited liability on behalf of the federal government. DHS reported that these violations were discovered after it began reviewing leases for potential ADA violations in response to GAO's conclusions in B-328450, Mar. 6, 2018. DHS determined that the violation occurred due to lack of guidance regarding uncapped liabilities in lease agreements.

Remedial Action Taken: To prevent a recurrence of this type of violation, DHS updated policy and procedures to include information regarding uncapped liabilities and developed training for warranted real property contracting specialists. Additionally, according to DHS, it renegotiated terms for the leases at issue. DHS determined that the Assistant Commandant for Engineering was responsible for the violations. No disciplinary actions for this matter were taken. DHS determined that the responsible party did not willfully or knowingly violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.

Antideficiency Act Reports – Fiscal Year 2021

GAO No.: GAO-ADA-21-17

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| Agency No.: None Reported | Date Reported to GAO: September 30, 2021 |
| Agency: Commodity Futures Trading Commission (CFTC) | Date(s) of Violation(s): Fiscal Years (FYs) 1995-2015, 2014-2017 |
| Account(s): Expenses | Amount Reported: \$88,314.06 |

Description: CFTC reported that it violated the Antideficiency Act (ADA), 31 U.S.C. § 1341, during FYs 1995-2015, when it entered into leasing contracts with open-ended liabilities. Additionally, CFTC reported that it violated the ADA, 31 U.S.C. § 1341, when it paid senior political officials above limits based on their political appointee employment status with CFTC.

According to CFTC, it entered into contracts to lease real property for office space in four locations. On March 6, 2018, GAO issued B-328450, finding that CFTC had agreed to uncontrolled and unlimited liabilities with definite appropriations in these leasing contracts in violation of the ADA. In addition, CFTC reported that it improperly paid five political appointees at rates inconsistent with a pay freeze set forth in the Consolidated Appropriations Acts for FYs 2014-2017. CFTC reports that it violated the ADA because it did not have the authority to increase the pay for these individuals due to the government-wide provisions prohibiting pay rate increases for certain senior level political officials in each applicable appropriations act.

Remedial Action Taken: To prevent a recurrence of these types of violations, CFTC reported that it has implemented controls to ensure proper legal and financial oversight of future contracts. Additionally, CFTC signed a memorandum of understanding with the General Services Administration to procure future leases on behalf of CFTC. In regard to overpayment, CFTC reported that it created controls to ensure that political employee position types are separated from other positions in the human resources and payroll systems. Additionally, each of the employees who were overpaid signed requests to waive the debt and CFTC reports that its Chairman approved the waivers. CFTC determined that the violations occurred as result of systemic weaknesses, and that there was no willful or knowing intent to violate the ADA.

Source: Unaudited information GAO extracted from agency Antideficiency Act reports.



THE CHAIRMAN

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

October 7, 2020

Gene L. Dodaro
Comptroller General of the United States
U.S. General Accounting Office
Room 7165
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Dodaro:

This letter is to report a violation of the Antideficiency Act, as required by 31 U.S.C. 1351.

A violation of 31 U.S.C. 1342 occurred in the 2019 Salaries and Expenses, Consumer Product Safety Commission Treasury account (061-2019-2019-0100-000) when an employee, while in a furlough status, worked during the partial government shutdown that occurred December 2018 through January 2019. This resulted in the government's receipt of voluntary services. A furloughed employee was responsible for the violation.

An employee who is a Chemist assigned to the Division of Chemistry in the Directorate of Laboratory Sciences was furloughed on December 26, 2018, as part of an orderly shutdown from a lapse in appropriations. The furlough notice, which the employee signed, instructed the employee not to work on official business at all, even as an unpaid volunteer. Nonetheless, the employee accessed his official CPSC email account on five separate occasions, December 28, 2018; and January 3, 5, 7, and 24, 2019, sending a total of six emails from his CPSC email address. The employee acknowledged receiving and signing the furlough notice instructing him not to work during the furlough. Such actions by the employee resulted in a violation of the voluntary services prohibition of the Antideficiency Act.

The agency carefully followed all applicable laws and guidance regarding shutdown furloughs, and the employee acknowledges receiving the notice not to conduct work. Going forward, the agency's shutdown plan and communications will continue to emphasize that employees who work in violation of the voluntary services prohibition in 31 U.S.C. 1342 are subject to the penalties in the Antideficiency Act.

CPSC received an unqualified audit opinion on our financial statement audit for fiscal year 2018. In 2014, the Office of Management and Budget reviewed and approved the CPSC's Administrative Control of Funds in accordance with OMB Circular A-11, Section 150, Administrative Control of Funds.

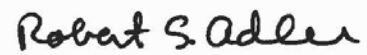
The responsible employee received a three-day suspension and was required to receive training on the Antideficiency Act and its application to government furloughs. Agency management

Page 2

determined that the employee had no knowing and willful intent to violate the Antideficiency Act.

Identical reports also are being submitted to the President of the Senate and the Speaker of the House of Representatives.

Sincerely,

A handwritten signature in black ink that reads "Robert S. Adler". The signature is written in a cursive style with a clear, legible font.

Robert Adler
Acting Chairman



United States Department of Agriculture

Office of the Secretary
Washington, D.C. 20250

October 7, 2020

The Honorable Gene L. Dodaro
Comptroller General of the United States
United States Government Accountability Office
441 G Street, NW.
Washington, D.C. 20548

Dear Comptroller Dodaro:

This letter is to report a violation of the Antideficiency Act (ADA), as required by Title 31 U.S. Code § 1351.

A violation of Title 31 U.S. Code § 1342 occurred in account 012–2019–2019–1400–000, totaling \$11.03 from the Salaries and Expense account for fiscal year 2019. A violation of Title 31 U.S. Code § 1342 occurred at the Agricultural Research Service (ARS). The ADA violation occurred on December 31, 2018, when Mr. James Porter, Contracting Specialist, uploaded a corrective action memorandum that was requested by the Acquisition and Property Division into the Integrated Acquisition System (IAS) during the furlough period in fiscal year 2019. The furlough period began December 22, 2018 and ended January 25, 2019.

Mr. Porter was previously counseled by his supervisor on the importance of contract clause uploading. An email was sent on December 21, 2018, indicating that Mr. Porter must upload a corrective action memorandum to a contract folder by January 1, 2019. Mr. Porter was in the process of reviewing contracts and preparing shutdown notices on December 21, 2018. Mr. Porter uploaded the requested correction action memorandum into the IAS on December 31, 2018, because of the contents of the email sent on December 21, 2018. The employee's salary and benefits for the time spent uploading the document was \$11.03. The service benefited ARS, and ARS accepted the voluntary service in violation of Title 31 U.S. Code § 1342.

To prevent a reoccurrence of this type of violation, ARS has a process of disseminating information to employees with regards to frequently asked questions on emergency/shutdown furlough procedures; furlough notices; and the Ethics Q&A – During a Lapse in Appropriations.

The adequacy of the system of administrative control of funds has been approved by the Office of Management and Budget.

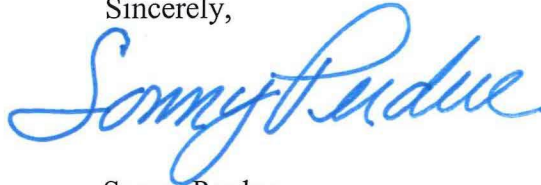
Mr. Porter has been counseled regarding the prohibition against working as a furloughed employee during a furlough period.

ARS has determined that the responsible party had no knowing and willful intent to violate the ADA.

The Honorable Gene L. Dodaro
Page 2

Identical reports are being submitted to the President, the President of the Senate, and the Speaker of the House of Representatives. The Director of the Office of Management and Budget has also been informed of the ADA violation.

Sincerely,

A handwritten signature in blue ink that reads "Sonny Perdue". The signature is written in a cursive, flowing style.

Sonny Perdue
Secretary



**THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON**

November 5, 2020

The Honorable Gene Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Dodaro:

This letter is to report a violation of the Antideficiency Act, as required by section 1351 of title 31, United States Code (U.S.C.), pursuant to 31 U.S.C section 1341(a). The violation occurred in the Department of Veterans Affairs (VA) Medical Services account (36-0160) in the amount of \$703,735,515 for fiscal year (FY) 2017, and \$387,342,832 for FY 2018, for obligations related to care of Veterans at State Veterans Homes.

Prior to FY 2017, VA requested funding for State Veterans Homes in the Medical Services appropriation account. In FY 2017, the President's Budget proposed the creation of a new appropriation account (i.e., Medical Community Care) and requested funding for State Veterans Homes in the new account. VA charged expenses for this program in the Medical Community Care account in FY 2017, FY 2018 and FY 2019. However, in each of these fiscal years, the Medical Services appropriation retained specific language for State Veterans Homes. If a specific appropriation exists for a particular item (in this case, State Veterans Homes), then that appropriation must be used and it is improper to charge the more general appropriation.

VA's Office of General Counsel advised the Veterans Health Administration (VHA) to reverse the obligations recorded in the Medical Community Care account and record them in the Medical Services account to comply with the Purpose Statute, 31 U.S.C. § 1301(a), and the appropriations acts for the periods in question. Insufficient funds remain in the Medical Services account to properly record the State Veterans Homes obligations in FY 2017 and FY 2018.

Correcting this error would create significant administrative and operational burden and negatively impact Veterans' care by reducing current and prior-year funding available in the Medical Services account. The FY 2021 President's Budget includes a provision that will allow the erroneously obligated funds to remain in Medical Community Care for Veteran care (see FY 2021 Appendix, page 1089, section 229):

SEC. 229. Obligations and expenditures applicable to the "Medical Services" account in fiscal years 2017 through 2019 for aid to State homes (as authorized by section 1741 of title 38, United States Code) shall remain in the "Medical Community Care" account for such fiscal years (Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2020).

Page 2.

The Honorable Gene Dodaro

VA respectfully requests that Congress include this provision in the FY 2021 appropriation for VA. Following the identification of this deficiency, VA undertook a close review of the statutory language in the Medical Services appropriation to ensure that no additional unintentional oversights remained following the separation of the Medical Community Care appropriation from this appropriation. In addition, VHA is improving the Congressional Justification materials for the two appropriation accounts to make explicit how programs are budgeted and should be funded going forward.

VA received an unmodified (“clean”) audit opinion on the Department’s consolidated financial statements in FY 2017 and FY 2018. VA has determined that the responsible parties had no knowing nor willful intent to violate the Antideficiency Act.

Identical letters are being submitted to the President, the President of the Senate, and the Speaker of the House.

Sincerely,

A handwritten signature in blue ink that reads "Robert L. Wilkie". The signature is written in a cursive style with a large initial "R" and "W".

Robert L. Wilkie



CHIEF FINANCIAL OFFICER

January 14, 2020

The Honorable Gene L. Dodaro
Comptroller General of the United States
441 G St. NW
Washington, DC 20548

Dear Comptroller General:

This letter is to report a violation of the Antideficiency Act (ADA), as required by 31 U.S.C. 1351.¹

A violation of 31 U.S.C. 1341(a) occurred in the Department of Housing and Urban Development's salaries and expenses (S&E) accounts Executive Offices (86-14-0332), Administrative Support Offices (86-09-0335, 86-10-0335, 86-12-0335, 86-14-0335, 86-18-0335), and Program Offices (86-17-0340, 86-18-0338) in the total amount of \$158,850.74. The violations occurred during fiscal years 2009, 2010, 2012, 2014, 2017, and 2018. The Department has determined that these violations occurred due to systemic failures, and, as a result, no responsible officials have been identified.

On a number of occasions during the fiscal years identified above, staff obligated and expended funds for the offices, office suites, conference rooms, or other spaces assigned to certain presidentially appointed officials that were covered by then-applicable advance Congressional notification requirements.² No official or employee provided the required advance notification before making such obligations and expenditures. The failures to notify occurred due to a lack of written policies and procedures with regard to the notification requirement in question.

The HUD Office of Inspector General conducted an investigation and issued a report with respect to the purchase of furniture for the Secretary's dining room that found no evidence of misconduct and made no recommendations to the Department because of the efforts described below and confirmation of HUD's intent to report an ADA violation.³ The report also noted that the purchase contract was cancelled and no cancellation fees were assessed.

¹ This letter is signed by HUD's Chief Financial Officer pursuant to the Department of Housing and Urban Development's Fiscal Year 2003 Appropriations Act (Salaries and Expenses (S&E) Account; Public Law 108-7).

² This provision can be found at section 710 of the Financial Services and General Government Appropriations Act, 2018, Pub. L. 115-141, div. E, title VII (March 23, 2018). Identical or nearly identical notification provisions were enacted in the annual government-wide General Provisions in each of the fiscal years covered within this report.

³ HUD OIG, *Investigation into Alleged Violation of Federal Appropriations Law by the Office of the Secretary*, Report Number: 2018SI006075I (Washington, D.C.: Sept. 2019).

The Government Accountability Office likewise conducted a review of this subject matter and issued a decision concurring with HUD's determination that a violation of the Antideficiency Act should be reported.⁴

The Department completed a comprehensive revision of its *Administrative Control of Funds Policies and Procedures Handbook* (Handbook) in 2017, in an effort to strategically improve the Department's documentation of key funds control policies and internal controls and address prior funds control weaknesses as well as Office of the Inspector General audit findings. This Handbook was reviewed and approved by the Office of Management and Budget (OMB). At the same time, in consultation with OMB, the Department split out and developed and implemented a separate policies and procedures document for S&E funding.

To prevent this issue from recurring, the Department has instituted a mandatory review process under which its Office of Administration and Office of the Chief Financial Officer must review and pre-approve all proposed purchases that may fall within the jurisdiction of the government-wide limitation to furnish, redecorate, purchase furniture for, or make improvements for the office suites of presidentially appointed officials. The Office of Administration is developing a standard operating procedure to further and more formally document this mandatory review and approval process for use of S&E funding for these covered purchases.

The Department has determined, due to the lack of sufficient written policies and procedures, that this error was systemic in nature and there was no knowing and willful intent to violate the Antideficiency Act.

Identical reports are being sent to the President (through the Director of the Office of Management and Budget), the Speaker of the House of Representatives, and the President of the Senate.

Sincerely,

A handwritten signature in blue ink, appearing to read 'I. Dennis', is centered below the text 'Sincerely,'.

Irving L. Dennis, Chief Financial Officer
Department of Housing and Urban Development

⁴ *U.S. Department of Housing and Urban Development—Compliance with Statutory Notification Requirement and the Antideficiency Act*, B-329955, May 16, 2019.



OFFICE OF THE UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

COMPTROLLER

JAN 19 2021

The Honorable Gene Dodaro
Comptroller General of the United States
Washington, DC 20548

Dear Mr. Dodaro:

This letter reports violations of the Antideficiency Act (ADA), contained in Navy case numbers 19-01/02 (enclosed), as required by 31 U.S.C. § 1351. The violations involved fiscal years (FY) 2009 through 2013 Operations and Maintenance, Marine Corps (OMMC), Other Procurement, Marine Corps (PMC), and similar funds transferred from the Joint Improvised Explosive Device Defeat Organization funds. The violations totaled \$70,133,853.19 and occurred at eight different military installations. As the command responsible for funding the construction of Military Operations on Urban Terrain (MOUT) sites, the Marine Corps Systems Command (MCSC) failure to provide proper oversight allowed the Program Manager for Training Systems (PM TRASYS) to improperly obligate and expend OMMC and PMC funds for the acquisition of MOUT ground training systems designed to represent different types of cities and villages found primarily in the United States Central Command Area of Responsibility. Performing military construction at these MOUT sites required, in general, either Specified Military Construction (MILCON), Unspecified Minor Military Construction (UMMC), or Operation and Maintenance (O&M) funds. In sum, no MILCON and UMMC funds were available then and currently for projects that were required to be funded by these funds, and O&M funds are not currently available for other minor construction projects. Instead, the MILCON and UMMC military construction projects were impermissibly funded with OMMC and PMC, and two minor construction projects were funded with PMC. Under these circumstances violations of the ADA occurred. Additional violations include incorrect use of OMMC funds for movable equipment associated with the construction projects. Consequently, the MCSC incurred uncorrectable violations of title 31 U.S.C. § 1341(a)(1)(A).¹ and 31 U.S.C. § 1517(a).

The MCSC awarded an Indefinite Delivery Indefinite Quantity contract with multiple delivery orders (DOs) to construct a series of urban terrain environments designed to provide

¹ Although the circumstances described herein constitute violations of 10 U.S.C. § 2802 and 10 U.S.C. § 2805(a)(1) and (c), the Department of Justice (DOJ) Office of Legal Counsel (OLC) has concluded that “a violation of a statutory restriction on spending does not violate the ADA where the restriction is not ‘in an appropriation.’” See also: DOJ OLC opinion, “Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences,” April 5, 2007 (http://www.justice.gov/sites/default/files/olc/opinions/2007/04/31/epa-light-refreshments13_0.pdf); and DOJ OLC letter, “Re: Whether the Federal Aviation Administration’s Finalizing and Implementing of Slot Auction Regulations Would Violate the Anti-Deficiency Act,” October 7, 2008. However, given the Government Accountability Office’s views to the contrary, consistent with section 145.8 of the Office of Management and Budget Circular A-11, Department of Defense is submitting this report in its entirety to the President, the Congress, and the Comptroller General of the United States.



enhanced combat training on MOUT. Seventeen of the 34 DOs awarded under this contract have been identified as violations of the ADA. The MCSC established the PM TRASYS in order to accomplish its mission related to Training Systems and Equipment. The PM TRASYS developed an acquisition strategy that incorrectly classified these MOUT training systems as equipment (personal property), and not as buildings, facilities, structures or improvements to land (real property). The MOUT structures, whether they constituted moveable or real property, required site preparation for placement. This included ground leveling, concrete pads, gravel paving, concrete paved footers for stability, and new electrical utilities and street lighting. The site preparation work constituted military construction as it improved the land. Based on the cost of the buildings that were real property and the site preparation, certain construction funds were required to pay these costs.

The MCSC constructed approximately 17 MOUT facilities at various installations. Ten projects had cost over \$2 million each and were funded with OMMC and PMC funds, or a combination of both. As each project exceeded \$2 million, it became a major MILCON project and could not be funded with OMMC or PMC funds. Under the provisions of Title 10, military departments can only carry out major MILCON projects that are specifically authorized by Congress (10 U.S.C. § 2802). Once this occurs, the project must be funded from an appropriation available to pay for the cost of the project. In general, MILCON appropriations are made available for specified major MILCON projects authorized by current law, specifically those projects approved by Congress in the authorization acts for the same year as the appropriations acts. These ten construction projects were not authorized by Congress and funds were not appropriated. Therefore, obligations incurred for these projects were not authorized and no MILCON funds were available then and currently for account corrective action. The ADA was violated as obligations were made in excess of appropriations.

In addition, there were five minor military construction projects that should have been funded with UMMC Funds. Each one exceeded the maximum limit of \$750 thousand below which permitted the use of OMMC funds, but did not exceed the specified MILCON threshold of \$2 million (10 U.S.C. 2805(a)(1)). Unlike major MILCON projects, these minor projects did not require authorization by Congress. As the amount of UMMC funds that are appropriated is limited, the USMC allotted insufficient funds to UMMC accounts to cover the costs of these projects. The USMC could not find sufficient funds from UMMC accounts to make appropriate account corrections. Accordingly, violations of 31 U.S.C. § 1517 resulted in ADA violations.

One construction project costing under \$750 thousand was conjunctively funded with OMMC and PMC funds. 10 U.S.C. § 2805(c) provides statutory authority to carry out minor military construction projects not otherwise authorized by law. At the time of these violations the DoD could spend up to \$750 thousand from OMMC appropriations to carry out these projects. PMC funds could not be used for minor construction projects, and therefore the project should have been entirely funded with OMMC. In another construction project under

\$750 thousand, PMC funds were used exclusively to pay for the construction costs when they should have been funded with OMMC. There are no sufficient OMMC funds that could have been used to make account correction.

Three projects used containers to build the MOUT structures, as personnel property, and were properly funded with PMC funds. However, additional items were acquired that were integral to the items already purchased with PMC funds, but instead they were funded with OMMC. These items should have been also funded with PMC funds. As PMC funds were not available to make account corrections, violations of 31 U.S.C. § 1517 resulted in ADA violations.

Two former MCSC Commanding Officers (CO) were found responsible for causing the ADA violations. The two named responsible officials have retired from the United States Marine Corps. The Department of the Navy (DON), after reviewing the specific facts and circumstances of these ADA violations and because the actions occurred more than ten years ago, decided not to pursue discipline for either responsible official. The report concludes that there was not willful or knowing intent on the part of the responsible individuals to violate the ADA.

To prevent a recurrence of this type of violation, the DON has updated and clarified policy surrounding relocatable buildings, training systems, and site work; performed contracts compliance review; and clarified that MCSC is not authorized to write contracts for construction-like work or work subject to the Davis-Bacon Act of 1931. MCSC also implemented a series of program management, contracting, engineering, and financial management corrective actions related to projects that may have a potential for any type of construction.

Identical reports are also being submitted to the President (through the Director of the Office of Management and Budget), President of the Senate, and Speaker of the House of Representatives.

Sincerely,



Thomas W. Harker
Performing the Duties of the Under Secretary of
Defense (Comptroller)/Chief Financial Officer

Enclosure:
As stated



GAO-ADA-21-06

Pension Benefit Guaranty Corporation

1200 K Street, N.W., Washington, D.C. 20005-4026

Office of the Director

February 4, 2021

The Honorable Gene L. Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street, NW
Washington DC 20548

Dear Mr. Dodaro:

This letter is to report violations of the Antideficiency Act (ADA) that occurred in 2004 and 2005, as required by 31 U.S.C. 1351.

Violations of 31 U.S.C. 1341(a) occurred in account 16-4204 /X, the Pension Benefit Guaranty Corporation Fund, in the amount of \$319,501,649.00. The first violation occurred on August 9, 2004, when the Pension Benefit Guaranty Corporation (PBGC or Corporation) entered into a multiyear real property lease for headquarters space at 1200 K Street, NW, Washington DC 20005. The second violation occurred on September 30, 2005, when the Pension Benefit Guaranty Corporation entered into a multiyear property lease for headquarters space at 1275 K Street, NW, Washington DC 20005.

On August 9, 2004, PBGC entered into a multiyear lease for 385,247 ANSI/BOMA rentable square feet of space at 1200 K Street for a term of approximately fourteen years and four months. On September 30, 2005, PBGC entered into a multiyear lease for 51,024 ANSI/BOMA rentable square feet¹ of space at 1275 K Street for a term of approximately thirteen years and three months. Upon executing these multiyear leases, PBGC did not record an obligation equal to its total liability for the leases in accordance with 31 U.S.C. 1501(a)(1). Instead, the Corporation funded these multiyear leases on an annual basis. The Corporation attempted to make account adjustments to comply with 31 U.S.C. 1501(a)(1) but did not have sufficient funds in fiscal years 2004 and 2005 to fund the total liability for the two leases, which resulted in two violations of 31 U.S.C. 1341(a).

The Corporation has taken actions to bring its leasing program into compliance with 31 U.S.C. 1501(a)(1) and to prevent additional violations of 31 U.S.C. 1341(a). In 2015, the Corporation asked the General Services Administration to procure and award a new headquarters lease on behalf of the agency. GSA awarded the Corporation's new headquarters lease in December of 2017. The Corporation also renegotiated new, short term, annual leases for its headquarters

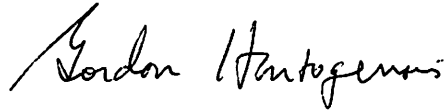
¹ PBGC increased its square footage at 1275 K Street to 69,991 during its final ten-year term.

locations at 1200 K Street and 1275 K Street. The Corporation also revised its directive governing its system of administrative control of funds and has submitted the directive for OMB review and approval.

The Corporation will not impose administrative discipline or further action with respect to the Contracting Officers responsible for these violations. The Corporation has determined that the responsible parties had no knowing and willful intent to violate the Antideficiency Act.

An identical report has been submitted to the President of the United States via the Office of Management and Budget, and identical reports are also being submitted to the President of the Senate and the Speaker of the House of Representatives.

Respectfully,

A handwritten signature in cursive script that reads "Gordon Hartogenesis". The signature is written in black ink and is positioned above the printed name and title.

Gordon Hartogenesis
Director



OFFICE OF THE UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

COMPTROLLER

The Honorable Gene Dodaro
Comptroller General of the United States
Washington, DC 20548

FEB 19 2021

Dear Mr. Dodaro:

This letter reports a violation of the Antideficiency Act (ADA), contained in Defense Contract Management Agency (DCMA) case number 20-01 (enclosed), as required by 31 U.S.C. § 1517(b). The violation involved fiscal year (FY) 2015 Operation and Maintenance (O&M), funds. The violation totaled \$1,248,155.63 and occurred at the DCMA Headquarters, Fort Lee, Virginia. The DCMA improperly obligated and expended O&M funds to develop the Earned Value Analysis System (EVAS) as a replacement for the manual process of DCMA's earned value management tasks. Given the significant development, integration, and testing, DCMA's use of O&M funding was improper and Research, Development, Test and Evaluation (RDT&E) funds should have been used. The cost of the development work on the EVAS exceeded the amount of FY 2015 RDT&E funds that were made available to DCMA in a formal subdivision of funds. Exceeding such amount resulted in an uncorrectable ADA violation of 31 U.S.C. § 1517.

The DCMA improperly used O&M funds for the EVAS effort, violating the Purpose Statute. Use of O&M funds for EVAS was inappropriate due to the significant software development, testing, and evaluation requirements that were defined in the Performance Work Statement. The Chief Information Officer (CIO) controlled all program dollars, funds, and reporting during EVAS budget formulation and execution. The CIO programmed and managed funds to ensure they were available when needed, and there was no visibility outside of the CIO's office. Consequently, the lack of oversight over Information Technology (IT) finance and budget; lack of communication and coordination between finance, IT, and contracting; and non-recognition of the appropriate funds for EVAS development led to an ADA violation.

The CIO was found responsible for causing the ADA violation. The CIO is no longer a U.S. Government employee and discipline was not pursued. The violation contained no willful or knowing intent on the part of the responsible individual to violate the ADA.

To prevent a recurrence of this type of violation, the DCMA conducted a comprehensive realignment of duties and responsibilities of the budget formulation and execution processes that are used across the agency. DCMA also issued a revised policy to affirm that the agency leadership has validated, prioritized, and resourced requirements that were vetted and monitored through the appropriate corporate governance process and appropriately programmed through the Program Budget Review procedure. The new policy has also centralized the funds execution process and moved the responsibility to the Headquarters Finance and Business Operations/Comptroller Directorate.



Identical reports are being submitted to the President (through the Director of the Office of Management and Budget), President of the Senate, and Speaker of the House of Representatives.

Sincerely,

A handwritten signature in blue ink that reads "D. A. Glenn". The signature is written in a cursive style with a large, stylized "G".

Douglas A. Glenn
Performing the Duties of the Under Secretary of
Defense (Comptroller)/Chief Financial Officer

Enclosure:
As stated



OFFICE OF THE UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

COMPTROLLER

The Honorable Gene Dodaro
Comptroller General of the United States
Washington, DC 20548

MAR 17 2021

Dear Mr. Dodaro:

This letter reports violations of the Antideficiency Act (ADA), contained in Navy case number 19-03 (enclosed), as required by 31 U.S.C. § 1351. The violations involved fiscal years (FYs) 2013 through 2018 Operation and Maintenance, Navy (O&MN), funds. The violations totaled \$25,966,667.79 and occurred at the Naval Sea Systems Command, Southwest Regional Maintenance Center (SWRMC), San Diego, California. The SWRMC improperly obligated and expended O&MN funds to convert a large covered lighter barge into a Berthing and Messing barge. The specific Shipbuilding and Conversion, Navy (SCN) funds were required for the conversion. As O&MN funds were used for the barge conversion work in lieu of SCN funds, the Purpose Statute (31 U.S.C. § 1301) was violated for each obligation made during that time period. The Navy did not have SCN funds available to cure the violations. As a result, the Navy violated the ADA (31 U.S.C. § 1341(a)(1)(A)) multiple times.

The Special Programs–Berthing and Messing Program Manager (PM) improperly characterized the conversion of the large covered lighter barge as modernization through maintenance and repair work, and used O&MN funds to finance the work. In addition, the work was improperly split and proceeded over the course several years when excess O&MN funds became available.

Ship conversion is funded from annual procurement appropriations under the heading “SCN.” The appropriation states the funds are for expenses necessary for the construction, acquisition, and conversion of vessels as authorized by law. While the appropriation names specific ships for construction, it also makes SCN funds available for conversion of service craft. The Navy considers barges to be service craft. As the contracted conversion work began in FY 2013, and the work was non-severable, FY 2013 SCN funds should have been used to fund the effort. However, no SCN funds for service craft were appropriated in FY 2013.

The PM was found responsible for causing the ADA violations. The Director, Fleet Maintenance for the Commander, U.S. Pacific Fleet (COMPACFLT) issued the PM a Letter of Caution. The violations contained no willful or knowing intent on the part of the responsible individual to violate the ADA.



To prevent a recurrence of this type of violation, the SWRMC has instituted organizational alignment and process changes to strengthen the programmatic, contracting and funding review associated with ship modernization requirements. The COMPACFLT has established a process for review of barge work across all stakeholders and required staff. The staff effort will involve Fleet Counsel, Fleet Comptroller, and the barge experts in the Naval Sea Systems Command. In addition, COMPACFLT will implement a formal qualification and continuing training program for all fleet maintenance program managers.

Identical reports are being submitted to the President (through the Director of the Office of Management and Budget), President of the Senate, and Speaker of the House of Representatives.

Sincerely,

A handwritten signature in black ink that reads "D. A. Glenn". The signature is written in a cursive style with a large initial "D" and "G".

Douglas A. Glenn
Performing the Duties of the Under Secretary of
Defense (Comptroller)/Chief Financial Officer

Enclosure:
As stated



GAO-ADA-21-09

May 6, 2021

Honorable Gene L. Dodaro
Comptroller General
Government Accountability Office
Washington, DC 20548

Re: B-331091, *National Archives and Records Administration-Publication of Federal Register during the Fiscal Year 2019 Lapse in Appropriations* (July 16, 2020)

Dear Mr. Dodaro:

I am providing this report to explain the National Archives and Records Administration's (NARA) position regarding the above-captioned opinion issued by the Government Accountability Office (GAO) on July 16, 2020.

The opinion found that NARA committed several Antideficiency Act (ADA) violations during Fiscal Year 2019. For the reasons set forth in the enclosed letter to Tom Armstrong, GAO's General Counsel, dated January 19, 2021, NARA disagrees that any ADA violations occurred.

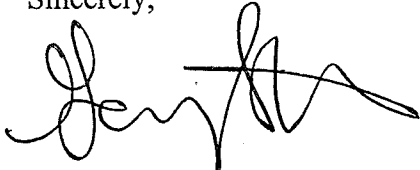
GAO concluded that NARA violated the Antideficiency Act when the Office of the Federal Register (OFR), a component of NARA, incurred obligations in the absence of appropriations during the partial Government shutdown that occurred between December 22, 2018, and January 25, 2019. GAO found ADA violations arising from OFR's publication of three temporary rules for the National Oceanic and Atmospheric Administration; a final rule for the Department of Labor; and OFR's processing and scheduling of a notice for the Centers for Disease Control and Prevention. GAO's conclusion rested on the premise that no legal exception to the ADA permitted NARA to incur such obligations.

It is NARA's view that the OFR activities of concern to GAO during the 2019 partial shutdown did not violate the ADA because the activities were authorized by the necessary implication exception. The Department of Justice's (DOJ) Office of Legal Counsel (OLC) articulated this exception to the ADA in opinions issued in 1981 and 1995. 43 U.S. Op. Atty. Gen. 293 (Jan. 16, 1981); Opinion of the Office of Legal Counsel, Department of Justice, *Government Operations in the Event of a Lapse in Appropriations*, 1995 WL 17216091 (Aug. 16, 1995); *Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations*, 19 Op. O.L.C. 337 (Dec. 13, 1995). The opinions address the specific scenario of a partial Government shutdown and the enclosed letter provides more detail regarding our conclusions.

NARA initially decided not to file this report, as the enclosed letter states. However, GAO encourages agencies to submit reports even when an agency and GAO disagree. We are submitting this letter in support of our joint commitment to government transparency and accountability to the President, Congress, and the American people.

NARA is also submitting copies of this report to the President of the Senate, the Speaker of the House of Representatives, and the Acting Director of the Office of Management and Budget.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary M. Stern". The signature is fluid and cursive, with a prominent horizontal stroke across the middle.

GARY M. STERN
General Counsel

Enclosure



GAO-ADA-21-10

The Administrator

May 27, 2021

The Honorable Gene Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Dodaro:

Please see attached U.S. General Services Administration Anti-Deficiency Act report from August 2019.

If you have any questions and concerns, please contact me or Ms. Gianelle E. Rivera, Associate Administrator, Office of Congressional and Intergovernmental Affairs, at (202) 501-0563.

Sincerely,

A handwritten signature in blue ink, appearing to read "KK".

Katy Kale
Acting Administrator

Enclosure



Report of Violation of Administrative Funds Control Procedures and Antideficiency Act Violation

The U.S. General Services Administration's (GSA) Office of the Chief Financial Officer (OCFO) is submitting this report of a violation of the Antideficiency Act and of GSA's Administrative Funds Control procedures in accordance with GSA Directive 4200.2B ADM, "GSA System for the Administrative Control of Funds."

The Office of Management and Budget (OMB), through a process termed "apportionment," places limitations on, among other things, the overall level of customer orders placed with GSA's Acquisition Services Fund (ASF). In fiscal year (FY) 2017, GSA accepted customer orders that exceeded the limitation by \$690 million. Although GSA customers properly funded the orders, the overage violated GSA's Directive 4200.2B ADM and the Antideficiency Act (ADA).¹ This report sets forth the circumstances surrounding this violation.

Overview

The ASF was established in 2007² to procure goods and services on behalf of GSA's programs and customer agencies, with the goal of leveraging the Federal Government's economies of scale and of streamlining and centralizing the procurement process. To this end, the majority of ASF obligations are related to "flow-through" activity, which consists of customer orders for which GSA has entered into reimbursable agreements with agencies to procure goods and services for those agencies.

For these "flow-through" obligations, agencies obligate their own funds and place orders with GSA. Those agency obligations to GSA must fit within each customer agency's own appropriations and apportionments before those orders are placed with GSA. GSA then accepts the order and the customer agency's funding, enabling the customer agency to enter into contracts with outside vendors to fulfill those orders.

In FY 2017, GSA recorded ASF obligations of \$13,626,210,788, including obligations related to "flow-through" activity in the amount of \$12,366,036,970. These amounts exceeded the total ASF apportioned budget authority of \$13,374,733,572 and the "flow-through" apportioned budget authority of \$11,676,650,072.

¹ 31 U.S.C. § 1341

² 40 U.S.C. § 321

The FY 2017 results are summarized below.

| | Pegasys Financial System | | |
|------------------------------|--------------------------|----------------|--------------|
| | Apportioned | Actual | Variance |
| Category A (ASF Overhead) | 1,565,000,000 | 1,143,422,950 | 421,577,050 |
| Category B (ASF Flow-Thru) | 11,676,650,072 | 12,366,036,970 | -689,386,898 |
| Category B (IAE Obligations) | 133,083,500 | 116,750,868 | 16,332,632 |
| Total ASF | 13,374,733,572 | 13,626,210,788 | -251,477,216 |

GSA processed more than \$2.3 billion in flow-through obligations in September of FY 2017, which is \$550 million more than was recorded in September of FY 2016. This was higher than the anticipated customer orders. The ASF apportionment, however, did not account for this growth potential, and therefore the ASF flow-through apportionment limitation was exceeded by \$689.4 million. The overall ASF apportionment limitation was exceeded by \$251.5 million. Although the ASF had sufficient funds, exceeding the apportionment limitation violated GSA's Administrative Funds Controls Procedures and the ADA.

1. All pertinent facts of the violation, including the cause and a statement by the responsible officer(s) or associate(s) concerning any extenuating circumstances:

A. What controls were in place under GSA's system of internal controls to prevent the violation?

GSA's information technology systems did not have sufficient internal controls in place to prevent the violation. Pegasys, GSA's financial management system, does have controls to prevent the interface—i.e., the recording—of obligations in excess of OMB apportioned authority in certain circumstances. However, GSA's acquisitions systems do not have controls to prevent GSA from accepting customer orders and placing orders with vendors in excess of the OMB-apportioned reimbursable obligation authority in Pegasys. Therefore, by the time, GSA's Federal Acquisition Service's (FAS) acquisitions systems were attempting to interface those obligations with Pegasys, the total GSA reimbursable obligations (i.e., the sum of all reimbursable obligations recorded to date in Pegasys plus the end-of-year customer orders in the FAS acquisitions feeder systems) had already exceeded the OMB obligation limitation.

In other words, the obligation limitation had already been violated, and, at year-end, it was a matter of recording those valid reimbursable obligations in Pegasys to accurately report the obligations incurred in the ASF. Compounding this was the fact that customer orders came from multiple FAS systems and lines of business. Some acquisitions

system obligations did not interface with Pegasys until the end of the month, giving financial managers minimal time to accommodate the obligations within limitations.³

In terms of GSA internal control processes, ADM 4200.2B (section 6.c) states:

Reimbursable work is constantly monitored to make sure that obligations and expenditures do not exceed the lesser of amounts allowed or available resources. Allowees immediately inform the allottee of changes in anticipated reimbursements or other receipts. Allowances are adjusted and, if necessary, the GSA CFO requests reapportionment from OMB.

GSA's OCFO, however, did not consistently monitor reimbursable work. Nor did the Acting Budget Director have a regimented review of the ASF that compared anticipated customer orders and actual obligations against apportionment limitation. Under the direction of the Acting Budget Director, Andrea Fisher-Colwill, two Office of Budget Division Directors—Craig Hull, Director of the Budget Control, Oversight, and Formulation Division; and Andrew Roach, Director of the FAS Budget Division—were most directly culpable for the lack of these reviews and therefore the ultimate violation.

Craig Hull's division was responsible for the apportionment process and for monitoring the execution of GSA's budget versus the apportionment limitation. Andrew Roach's division was responsible for understanding FAS financial projections and the need to update apportionments based on the projections. These two divisions should have worked together to make customer order projections, monitor balances, and determine if GSA was in danger of exceeding the apportionment limitation. If the divisions had done so, GSA could have requested a new apportionment to accommodate the expected obligations.

B. When were GSA personnel alerted to the problem and who received the alert?

The U.S. Department of Agriculture (USDA), GSA's financial shared service provider, informed Craig Hull at 3:24 p.m. on September 30, 2017, that USDA was unable to post obligations due to a Pegasys "spending error." Craig Hull correctly replied that he would not expect such an error "unless we've exceeded the amount apportioned." While USDA and GSA personnel were exchanging emails, no one took affirmative action or escalated the matter to the GSA Budget Director or higher. At that point, nothing could have been done to limit ASF obligations because the obligations were due to valid customer orders. Still, if the matter had been escalated, GSA officials may have requested from OMB revised apportioned obligational authority to accommodate the valid ASF obligations.

³ Requisitioning, Ordering, and Documentation System and Order Management Services, which interface through FEDPAY, recorded nearly \$850 million of transactions on or after September 30, 2017, as their valid obligations were processed through October 2, 2017.

C. What actions GSA could have taken after receiving the alert to prevent the violation? What actions did GSA take and the reason those actions were taken?

When GSA personnel received the alert, they could not have affected the obligations interfacing with Pegasys since those obligations were already valid customer orders. At that point, it was simply a matter of recording the obligations in Pegasys. However, if the potential violation had been escalated to GSA Budget and OCFO leadership before midnight on September 30, 2017, OMB may have given GSA permission, possibly even oral permission, to exceed the apportionment limitation and record the revised limitation in Pegasys in the following days. This does not imply that revising the apportionment in a small-time window on the last day of the fiscal year would have been routine.

However, OMB Circular A-11, which governs the apportionment process, states that:

“OMB may also choose to indicate its approval of an apportionment in other ways {i.e. *other than the traditional ‘Max Data Entry’ system*}, including by letter, telephone, hard copy, or other method that is appropriate to the particular circumstance.”

Ultimately, GSA personnel took no action, other than exchanging emails and discussing the possibility of shifting funds to cover the overage. The following is a summary of the September 30, 2017, emails pertinent to the violation:

- At 3:24 p.m., USDA informed Craig Hull of its inability to post obligations due to a Pegasys “spending error.” Craig Hull correctly replied that he would not expect such an error to occur “unless we’ve exceeded the amount apportioned.” (This was, in fact, the case.)
- At 5:01 p.m., USDA emailed Bob Smalskas of GSA’s Office of Financial Management (OFM), copying other OFM officials and Vivi Tran-Chu, head of the OCFO’s Data Delivery and Management Division. In its email, USDA stated that \$90 million of Visual Invoice Tracking and Payment obligations were not processed and that USDA needed “someone in Budget to address the budget issue in order for us to process the documents.” USDA also stated that it was awaiting guidance from Craig Hull and Sunny Kwa, a GSA employee who works for Craig Hull.
- At 7:59 p.m., Michelle Norman, an employee at GSA’s Kansas City, Missouri, Finance office, added others to the chain including Andrew Roach and Brian Block from FAS Budget Division (BBF). Brian Block responded by asking Craig Hull if funds could be shifted. Craig Hull did not respond.
- At 11:25 p.m., in a follow-up to the USDA 5:01 p.m. email, Vivi Tran-Chu emailed Craig Hull, Andrew Roach, and others, stating “help us resolve the budget issue for AAS.”

- At 11:40 p.m., Brian Block responded that, if there is availability to shift between ASF fund codes, Craig Hull or Sunny Kwa would have to make those changes based on Pegasys user roles.

On October 2, 2017, USDA employee, Thane Douglas, a Supervisory Accountant, wrote to Craig Hull, Andrew Roach, Vivi Tran-Chu, and others about the need to lift controls to process \$179 million in valid obligations. The obligations had not been processed into Pegasys on September 30, 2017, since the ASF had obligations that exceeded the apportionment limitation. Evan Farley, GSA's Deputy CFO, gave permission to proceed and record the valid obligations on October 2, 2017.

D. Whether anyone ignored or interfered with existing internal controls?

There is no evidence that any GSA personnel willfully ignored or interfered with existing controls.

2. The name and position of the associate(s) responsible for the violation:

- Craig Hull, Division Director, GSA OCFO, Office of Budget, Budget Control, Oversight, and Formulation Division
- Andrew Roach, Division Director, GSA OCFO, Office of Budget, FAS Budget Division
- Andrea Fisher-Colwill, Acting Budget Director, GSA OCFO, was the supervisor of both Craig Hull and Andrew Roach

3. Administrative discipline taken or proposed:

Both Office of Budget Division Directors—Craig Hull and Andrew Roach—were counseled and received lowered FY 2017 performance evaluations than they would have received had the violation not occurred. GSA found no evidence showing that either Director intentionally committed the violation.

4. Actions to safeguard against or prevent recurrence of the same type of violation:

GSA OCFO instituted a Corrective Action Plan (CAP) in response to the violation and the Notification of Finding and Recommendation (NFR) issued by GSA's financial auditor, KPMG. The CAP contains more stringent measures for regular monitoring and forecasting of end-of-year ASF activity, along with a review of acquisition system interfaces and GSA's financial management system.

Specifically the CAP requires GSA OCFO to:

1. Increase the level of scrutiny applied to ASF reimbursable/flow-through obligations by establishing or refining monthly monitoring controls over apportionment levels and reviewing the Report on Budget Execution and Budgetary Resources (SF-133) and revenue/business volume forecasts to ensure alignment between budgetary and proprietary forecasts.
2. Develop and implement a year-end forecasting control to be instituted in the fourth quarter of the fiscal year. This would give OCFO insight into whether the current apportionment is sufficient given business volume projections or if OCFO needs to submit a revised apportionment.
3. Develop and implement a monitoring process to reapportion late in the year to deal with unexpected changes in activity. Establish and implement controls to properly monitor the completion of the apportionment.
4. Explore the feasibility and practicality of developing and implementing automated preventive system controls in FAS ordering systems to alert users of activity increases and to prevent acceptance of orders in excess of apportioned funding levels. This will entail an OCFO/GSA IT/FAS team to explore the viability of implementing system level controls for FAS ordering systems.

These measures were implemented in FY 2018.

OMB has reviewed a letter for the Administrator's signature notifying the President and others of GSA's violation of the ADA.



Homeland Security

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

This letter is to report violations of the Antideficiency Act (ADA), as required by 31 U.S.C. § 1351 (2004). The letter separates the violations into two sections grouped into two categories: Contracts and Other Transaction Authority agreements (OTAs).

Category 1 identifies 42 violations of 31 U.S.C. § 1341 that occurred on contracts awarded between fiscal years 2013 and 2016 throughout the Department of Homeland Security (DHS) totaling \$251,491,088.91. The DHS Chief Procurement Officer (CPO) was responsible for the contract violations. Category 2 identifies 104 OTAs awarded between fiscal years 2010 and fiscal year 2015 at the Transportation Security Administration (TSA) totaling \$109,673,023.32. A Contracting Officer at TSA was responsible for the OTA agreement violations.

In September 2017, the Department's Office of the Chief Financial Officer completed an investigation on this matter. The investigation found the Department violated 31 U.S.C. § 1341(a) when it obligated more than was legally available in the appropriation. This violation occurred because the Department did not provide the Congressional notification required by general provisions of the Department's appropriations acts in fiscal years 2010 through 2016.

The contracting violations were discovered on August 11, 2016, when the CPO took the initiative to conduct an internal review and validation of the compliance, timeliness, and accuracy of the Congressional notifications issued by DHS Contracting Officers. The violations occurred due to misunderstanding of the notification requirements, inattention to detail, and inadequate quality review. The CPO has revised the Homeland Security Acquisition Manual to clarify the process for reporting Congressional notification. Additional decision tools were developed to assist Contracting Officers in determining when Congressional notification is required and to help Components monitor Congressional notification compliance. The Heads of Contracting Activities will be held accountable for compliance. Training has been provided to Contracting Officers on Congressional notification requirements and policy changes. These measures have strengthened awareness of the notification requirements and ensures this type of violation does not occur again within the Department.

The Honorable Gene L. Dodaro

Page 2

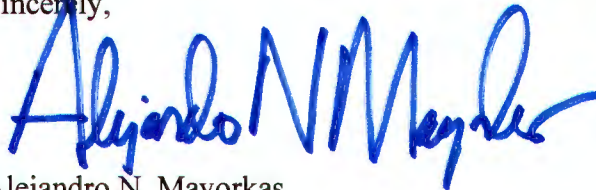
A Contract Compliance Review at TSA of sample OTAs on June 18, 2015, identified OTAs awarded without evidence of the required Congressional notification. A subsequent full review of OTAs was completed in January 2016 that identified the reported violations. The violations occurred because the Contracting Officer did not follow the policies and procedures implemented to ensure that Congressional notifications were provided as required. The Contracting Officer's warrant was suspended on July 8, 2015, and the employee voluntarily separated from TSA in October 2015. TSA updated its OTA policy and checklist to enhance compliance, mandated OTA refresher training for Contracting Officers, and developed a reporting tool for assisting Contracting Officers in determining when Congressional notification is required.

Due to the nature of these violations, no disciplinary action against the employees involved in this matter was taken. The Department has determined that the responsible parties had no knowing and willful intent to violate the ADA.

The Department's system of administrative control of funds was approved by the Office of Management and Budget (OMB) on January 20, 2010. The policy was revised in Fiscal Year 2020 to provide clarification based on the Consolidated Appropriations Act, 2020, and is being routed for OMB approval prior to publishing.

An identical copy of this letter is being sent to the President, the President of the Senate, and the Speaker of the House of Representatives. A similar letter is also being provided to the Director of OMB.

Sincerely,



Alejandro N. Mayorkas
Secretary

Enclosure



Homeland Security

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

This letter is to report violations of the Antideficiency Act (ADA), as required by 31 U.S.C. 1351.

The ADA violations involving a negative cash balance with Treasury occurred in Treasury Appropriation Fund Symbol 070 X 4640. The violation happened in connection with the Department's Working Capital Fund in July 2010, and from March 2016 through August 2019. The Department determined that the former Financial Operations Director was responsible for the violation.

In September 2019, the Department's Office of the Chief Financial Officer completed an investigation into whether the Department violated 31 U.S.C. 1341(a) when the amount expended in the Department's Working Capital Fund exceeded the available fund balance with Treasury.

The violation was discovered in September 2018 when the Department's Financial Management Division (FMD) conducted a policy review. During the review, FMD discovered that the Department's Working Capital Fund was operating under a negative cash balance with Treasury. The Department's Working Capital Fund process and procedures were established under the assumption that an ADA did not exist if the accounts receivable collections offset the negative cash balance. Such action resulted in a violation of 31 U.S.C. 1341(a), which prohibits the Federal government exceeding available fund balances with Treasury whether apportioned or not. The Department determined the violation occurred due to a misinterpretation of the law.

To mitigate the violation for Fiscal Year (FY) 2020, the Department submitted legislative language to Congress for consideration that would allow anticipated reimbursements to offset negative balances. The proposed language was enacted in the Consolidated Appropriations Act, 2020, authorizing funds from the working capital fund to be obligated and expended in anticipation of reimbursements. The FY 2021 Enacted

The Honorable Gene L. Dodaro

Page 2

appropriations does not provide for continuing usage of the Department's Working Capital Fund and appropriates funds directly to the servicing Management Directorate offices.

No disciplinary action for this matter was taken. The responsible party is retired from Federal Service. The Department determined that the responsible party had no knowing or willful intent to violate the ADA.

The Department's system of administrative control of funds was approved by the Office of Management and Budget (OMB) on January 20, 2010.

An identical copy of this letter is being sent to the President, President of the Senate, and the Speaker of the House of Representatives.

Sincerely,



Alejandro N. Mayorkas
Secretary

Enclosure

GAO-ADA-21-13

*Secretary*U.S. Department of Homeland Security
Washington, DC 20528**Homeland
Security**

March 16, 2021

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

This letter is to report a violation of the Antideficiency Act (ADA) as required by 31 U.S.C. § 1351 (2004) by the Department of Homeland Security (DHS) U.S. Immigration and Customs Enforcement (ICE).

The ADA violation occurred in the ICE Annual Salary and Expenses Treasury Appropriation Fund Symbol 070 0540 for the amount of \$90,736.87 when ICE obligated more than \$5,000 to furnish the Director's suite without providing advance Congressional notification, as required. This error led to ICE obligating funds in excess of the amount available during Fiscal Years 2013, 2014, 2015, and 2016. ICE obligated funds that were not legally available because ICE did not satisfy the Congressional notification requirement. The employee serving as the project manager and funds certifier was responsible for the violation.

In March 2017, the Department's Office of the Chief Financial Officer completed an investigation on this matter. The Office found that the Department violated 31 U.S.C. § 1341(a) when it obligated more than was legally available in the appropriation, because ICE did not notify Congress.

The violation was discovered by ICE on April 13, 2016, when a professional staff member on the Senate Committee on Appropriations Subcommittee on Homeland Security requested an inventory of the materials and contract work used in the Director's suite renovation. Upon gathering the requested documentation, it was discovered that ICE obligated in excess of the \$5,000 cap without providing Congressional notification. The violation occurred due to lack of awareness of the restriction by the responsible employee. A government-wide provision applicable to the Department's appropriated funds during this time made no funds in excess of \$5,000 available for the purpose of furnishing, redecorating, or improving the office of an employee appointed by the President during the employee's term of office without first notifying the Committees on Appropriations of the Senate and the House of Representatives.

ICE has taken corrective action to prevent future violations by ensuring appointment of certifying officials, as well as improving internal controls with regards to restrictions in appropriation language and the Congressional notification process. Funds certifiers are required to review the transactions and ensure the obligation represents a valid use of the appropriation prior to approval in accordance with the DHS Financial Management Policy Manual (FMPM). ICE implemented a process to appoint certifying officials in writing in accordance with the FMPM. This process ensures certifying officials understand the roles and responsibilities assigned to them. The ICE budget office reviews current appropriation language and documents the requirements and restrictions applicable to the Component. This guidance is provided to certifying officials and will be included annually as an appendix to the Budget Formulation Handbook. This handbook will assist certifying officials with fulfilling their responsibilities. These measures help strengthen awareness to ensure this type of violation does not occur again.

Due to the nature of this violation, no disciplinary action against the employee involved in this matter was taken. The Department has determined that the responsible party did not have a knowing and willful intent to violate the ADA.

The Department's system of administrative control of funds was approved by the Office of Management and Budget (OMB) on January 20, 2010. The policy was revised in Fiscal Year 2020 to provide clarification based on the Consolidated Appropriations Act, 2020, and is being routed for OMB approval prior to publishing.

An identical copy of this letter is being sent to the President, the President of the Senate, and the Speaker of the House of Representatives. A similar letter is also being provided to the Director of OMB.

Sincerely,



Alejandro N. Mayorkas
Secretary

GAO-ADA-21-14

*Secretary*U.S. Department of Homeland Security
Washington, DC 20528**Homeland
Security**

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

This letter is to report a violation of the Antideficiency Act (ADA), as required by 31 U.S.C. 1517(b) at the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS).

The ADA violation involving the Citizenship and Assimilation Grant program occurred in Treasury Appropriation Fund Symbol 070 19 0408. The violation happened on September 26, 2019, when grants in the amount of \$9,947,152 were awarded and obligated prior to receiving an apportionment for the Federal Assistance account in Fiscal Year 2019. The Acting Chief of the Budget and Planning Division of USCIS was responsible for the violation.

In June 2020, the Department's Office of the Chief Financial Officer completed an investigation on this matter. The Office found that the Department violated 31 U.S.C. 1517(a) when it made obligations in excess of its apportionment.

In September 2019, USCIS discovered there was not an approved apportionment for the Federal Assistance account. USCIS requested an apportionment upon determination that there was not an apportionment, but the request was submitted too late to be processed by the end of the fiscal year. Such action resulted in a violation of 31 U.S.C. 1517(a) because grants were awarded in September without an approved apportionment.

The Department determined the violation occurred due to turnover in key personnel responsible for the apportionment process and failure in the internal controls. The Department has taken corrective actions to prevent future violations by improving standard operating procedures and internal controls and implementing training for key personnel on the apportionment process. Specifically, USCIS implemented steps to validate the apportionment before approving funding in the financial system and added monthly reconciliations.

Due to the nature of this violation, no disciplinary action against the employee involved in this matter was taken. The Department has determined that the responsible party had no knowing and willful intent to violate the ADA.

The Honorable Gene L. Dodaro

Page 2

The Department's system of administrative control of funds was approved by the Office of Management and Budget (OMB) on January 20, 2010. The policy was revised in Fiscal Year 2020 and is being routed for OMB approval prior to publishing.

An identical copy of this letter is being sent to the President, President of the Senate, and the Speaker of the House of Representatives.

Sincerely,

A handwritten signature in blue ink that reads "Alejandro N. Mayorkas". The signature is fluid and cursive, with the first name being the most prominent.

Alejandro N. Mayorkas
Secretary

Enclosure



Homeland Security

March 16, 2021

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

This letter is to report violations of the Antideficiency Act (ADA), as required by 31 U.S.C. § 1351 (2004), by the United States Coast Guard (USCG).

The ADA violations occurred in Treasury Appropriation Fund Symbol 070 18 0610 in the amount of \$177,608.41. The violations occurred on January 21, 2018, in connection with the USCG Operating Expenses.

In October 2018, the Department's Office of the Chief Financial Officer completed an investigation on this matter. The investigation found the Department violated 31 U.S.C. § 1341(a) when it obligated more than was legally available in the appropriation. These violations occurred because the Department obligated funds on five contract modifications during a lapse in appropriations.

The violations were discovered on January 22, 2018, when the contracting officer's supervisor conducted a system review. The supervisor identified five modifications that were awarded by an excepted employee during the lapse in appropriation. The Department determined that these violations occurred due to a lapse in judgement by the contracting officer.

USCG immediately instituted remedial actions and new controls to address the violations. Specifically, the contracting officer immediately cancelled the contract modifications upon notification of the violations. The modifications were cancelled prior to any contract performance so USCG was not liable for any modification costs. USCG has taken action to release notifications on acquisition guidance when a lapse in appropriation occurs, directing contracting officers and contracting specialists to immediately adhere to the applicable guidance in notifications. This action will strengthen awareness of the requirements and ensure this type of violation does not occur again within the Department.

The Honorable Gene L. Dodaro

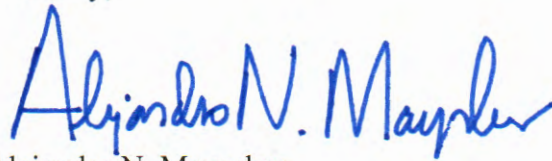
Page 2

The Department's system of administrative control of funds was approved by OMB on January 20, 2010.

No disciplinary action against the employee involved in this matter was taken. The contracting officer was required to attend additional acquisition training as well as a Principles of Federal Appropriations Law course. The Department determined that the responsible party had no knowing and willful intent to violate the ADA.

An identical copy of this letter is being sent to the President of the Senate, the Speaker of the House of Representatives, and the Comptroller General. A similar letter is also being provided to the Director of OMB.

Sincerely,



Alejandro N. Mayorkas
Secretary



Homeland Security

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

This letter is to report violations of the Antideficiency Act (ADA), as required by 31 U.S.C. 1351.

The ADA violations involving uncapped liabilities on lease agreements occurred in Treasury Appropriation Fund Symbol 070 X 0610. The violations happened in connection with the United States Coast Guard leases starting in Fiscal Year 1974 and continuing through Fiscal Year 2019. The Department determined that the Assistant Commandant for Engineering was responsible for the violations.

In December 2019, the Department's Office of the Chief Financial Officer completed an investigation into whether the Department violated 31 U.S.C. 1341(a) when the United States Coast Guard entered into lease agreements with uncapped liabilities.

The violations were discovered in March 2018 when the Department Chief Readiness Support Officer required Components to review leases for potential ADA violations in response to Government Accountability Office opinion, B-328450, Commodity Future Trading Commission - Liabilities Outside of the Government's Control. During the review, the Department discovered leases that contained language concerning (1) escalation clauses for taxes or operating costs without an upper limit and/or (2) indemnification clauses where the Government promises to reimburse the Lessor in the case of a covered low limit without a fixed upper limit. Such action resulted in a violation of 31 U.S.C. 1341(a) because seven leases included a provision or provisions that created an uncontrollable and potentially unlimited liability on behalf of the Federal Government.

The Department determined the violations occurred due to lack of knowledge and guidance regarding uncapped liabilities on lease agreements. The Department renegotiated terms for leases identified with uncapped liabilities. Furthermore, the Department updated policy and procedures to include information on uncapped liabilities as well as developed training for warranted real property contracting specialists.

The Honorable Gene L. Dodaro

Page 2

No disciplinary action for this matter was taken. The Department determined that the responsible party had no knowing or willful intent to violate the ADA.

The Department's system of administrative control of funds was approved by the Office of Management and Budget (OMB) on January 20, 2010. The policy was revised in Fiscal Year 2020 and the revised policy is being routed for OMB approval prior to publishing.

An identical copy of this letter is being sent to the President, President of the Senate, and the Speaker of the House of Representatives.

Sincerely,

A handwritten signature in blue ink that reads "Alejandro N. Mayorkas". The signature is written in a cursive, flowing style.

Alejandro N. Mayorkas
Secretary



U.S. Commodity Futures Trading Commission
Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581

Rostin Behnam
Acting Chairman

(202) 418-5575
CFTCChairman@CFTC.gov

September 30, 2021

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
Washington, D. C. 20510

Dear Comptroller General Dodaro,

The purpose of this letter is to officially report two violations of the Antideficiency Act (“ADA”), as required by section 1351 of Title 31, United States Code. The first violation pertains to lease contracts that contain liabilities outside of the government’s control that were entered into by the U.S. Commodity Futures Trading Commission (the “CFTC” or “Commission”) from fiscal years (“FY”) 1995 to 2015. The second violation pertains to the overpayment of certain senior political officials from FY 2014 to 2017. The Commission has instituted new internal controls to prevent a reoccurrence of both of these types of violations.

Lease Contract Liabilities

A violation of 31 U.S.C. § 1341(a) occurred in account 339 1400, Expenses, Commodity Futures Trading Commission, from FY 1995 through FY 2015 in an undeterminable amount. The violations resulted from the CFTC entering into contracts to lease real property for office space in Washington, District of Columbia; New York, New York; Chicago, Illinois; and Kansas City, Missouri, containing provisions that constituted open-ended liabilities in violation of the ADA.

On March 6, 2018, the United States Government Accountability Office (“GAO”) issued Comptroller General Decision B-328450, Commodity Futures Trading Commission – Liabilities Outside of the Government’s Control (“Decision”). This Decision concluded that the Commission’s lease agreements for its four locations contained provisions in which the CFTC agreed to liabilities which it did not control. The GAO further explained that:

“an agency violates the Antideficiency Act when it enters into an uncontrolled liability that has no fixed limit that the government may ascertain when it agrees

to assume the liability, unless the agency has specific statutory authority that permits it to do so.”

The leases and related documents covered in the GAO opinion span a period of over 20 years, which significantly limited the CFTC’s ability to recreate a complete historical record of its budgetary and accounting records related to its real property leases. The CFTC carefully reviewed all available historical agency records, both paper and electronic, in an effort to identify all instances where the CFTC agreed to uncontrolled liabilities.

The review included an in-depth analysis of the four leases, totaling approximately 1,300 pages, and approximately 300 personnel hours. As a result, the investigation identified 103 instances where the CFTC did, in fact, agree to assume uncontrolled liabilities that were unlimited as to the amount.

After reviewing the GAO’s opinions related to the CFTC’s leases, the Commission took steps to ensure that future contracts entered into by the CFTC contain no legal liabilities where the total amount is outside of the CFTC’s control and that it records an obligation for the total potential amount. The Commission has implemented new internal controls to ensure proper legal and financial oversight of all future contracts, including leases. In addition, in 2016, the Commission signed a memorandum of understanding with the U.S. General Services Administration (“GSA”) to procure all future space needs of the CFTC.

The Commission has determined that the lease agreements were executed with no willful or knowing intent to violate the ADA and no specific individual is solely responsible for the actions. As noted above, the CFTC has instituted new internal controls and agreements with the GSA to prevent a reoccurrence of this type of violation.

Overpayment of Certain Senior Political Officials

A violation of 31 U.S.C. § 1341(a) occurred in account 339 1400, Expenses, Commodity Futures Trading Commission, from FY 2014 to 2017 in the total amount of \$88,314.06. The violations were a result of overcompensation paid to certain senior political officials that should have been limited based on their political appointee employment status with the Commission.

In January 2017, the Commission reviewed the Office of Personnel Management (“OPM”) Compensation Policy Memorandum (“CPM”) 2017-02 for impacts to its employees. CPM 2017-02 included guidance for agency use in reviewing the pay rates and pay limitations for certain senior political officials as a result of a government-wide pay rate increase freeze applicable to these officials. Specifically, the guidance explained that the pay freeze set forth in the Consolidated Appropriations Act, 2016, Division E, Section 738, continued to apply to certain senior political appointees under the continuing resolution, Further Continuing and Security Assistance Appropriations Act, 2017, had restricted the pay for political appointees “at or above level IV of the Executive Schedule . . . notwithstanding any other provision of law . . .” unless such appointees are “in another pay system whose position would be classified at GS-15 or below . . .” During review of the CPM 2017-02 guidance, the CFTC determined it was a continuation of prior guidance regarding pay freezes that applied to certain current and new

political appointees (*i.e.*, those paid at or above the EX-IV level) since FY 2014. The CFTC discovered that some of its political appointees were receiving compensation above the EX-IV level and had received pay increases along with all other CFTC employees in the years in which the pay freeze was effective at FY 2013 levels (FY 2014-2017). The improper increases included the annual cost of living and merit pay increases granted to Commission employees during this period of time.

Based on a review of the compensation records conducted by the CFTC, it was determined that four employees were receiving compensation above the EX-IV pay level and one employee that received compensation exceeding the statutory limitation of the pay freeze was no longer employed at the Commission. The amount of overpayments to the five individuals totaled \$88,314.06 and each employee submitted a signed waiver request to the Commission to waive the debt. The waivers were subsequently approved by the Chairman in 2018.

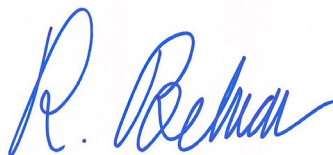
The Commission did not have the authority to increase the pay for these individuals given the government-wide provisions prohibiting pay rate increases for certain senior level political officials contained in each applicable fiscal year's appropriation act. Therefore, the funds were not legally available for the purpose. The ADA was violated at the time the payments were made because the authorization of the original salary overpayments from the single annual appropriation violated the ADA.

The CFTC has coordinated corrective actions to ensure that a political employee's position type is clear and separate from other Commission positions in the human resources and payroll system to preclude future overpayments of this nature. Also, due to the repetitive occurrence of pay adjustments with statutory limitations, the Commission is improving the internal controls over its pay-setting processes among the Human Resources Branch, the Finance Management Branch, and the Legal Division. These organizations will review appropriations language annually to ensure that the CFTC is aware of limiting language and executing appropriately.

The Commission has determined that the overpayment activity occurred with no willful or knowing intent to violate the ADA, and no specific individual is solely responsible for the actions. As noted above, CFTC has instituted systemic changes and new internal controls intended to prevent a reoccurrence of this type of violation.

Identical reports will be submitted to the President.

Most respectfully,



Impoundment Control Act Determinations



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Office of Management and Budget—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing

File: B-331564.1

Date: February 10, 2022

DIGEST

For fiscal years 2018 and 2019, Congress appropriated lump-sum amounts for foreign assistance, including for foreign military financing (FMF). In August 2019, the Office of Management and Budget (OMB) issued a series of reapportionments for fifteen foreign assistance accounts, including FMF funds.

Both the appropriations for FMF and their underlying statutory authorizations require the administration to exercise substantial discretion to carry out the program. By law, the Department of State (State) must notify Congress before obligating FMF funds. In the summer of 2019, OMB and State engaged in interagency policy discussions while preparing to notify Congress of State’s intent to obligate a portion of the lump-sum FMF appropriation.

The Impoundment Control Act (ICA) prohibits any officer or employee from impounding funds—that is, withholding or delaying enacted budget authority from obligation or expenditure—unless the President transmits a special message to Congress. However, delays in the obligation of funds resulting from programmatic factors are not impoundments and, therefore, do not trigger the ICA’s requirement that the President transmit a special message. Based on the information before us, we conclude that OMB’s 2019 actions did not violate the ICA because these actions were reasonable exercises of programmatic discretion.

DECISION

Pursuant to our role under the Impoundment Control Act (ICA), we are issuing this decision regarding 2019 reapportionments of foreign assistance funds by the Office of Management and Budget (OMB) and policy discussions prior to congressional notification for Foreign Military Financing (FMF) funds. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, title X, § 1015, 88 Stat. 297,

336 (July 12, 1974), *codified at* 2 U.S.C. § 686. GAO must report to Congress when the President impounds funds without first transmitting a special message. *Id.* In carrying out this responsibility, GAO investigates potential impoundments by reviewing publicly available documents and requesting information from relevant agencies. It is our general practice to issue decisions on such matters where we find a violation of the ICA or where such a decision would advance congressional oversight.

In this decision, we are examining whether 2019 apportionment letters and consideration of congressional notification for Foreign Military Financing (FMF) funds violated the Impoundment Control Act.¹ In accordance with our regular practice, we contacted OMB, the Department of State (State), and the United States Agency for International Development (USAID) to seek additional factual information and their legal views on these matters.² We have received information from all three agencies.³

¹ In 2019, we issued a decision regarding OMB's withholding of security assistance for Ukraine. See B-331564, Jan. 16, 2020. We concluded that OMB had withheld funds appropriated specifically for the Ukraine Security Assistance Initiative (USAI) in violation of the ICA. In that decision, we noted that we continued to investigate whether OMB impounded additional foreign assistance funds, including funds State had designated for Ukraine.

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP; Letter from General Counsel, GAO, to General Counsel, OMB (Feb. 14, 2020); Letter from General Counsel, GAO, to Acting Legal Advisor, State (Feb. 14, 2020); Letter from General Counsel, GAO, to General Counsel, USAID (Feb. 14, 2020); Email from Staff Attorney, GAO, to Attorney-Advisor, State (Dec. 18, 2019); Letter from General Counsel, GAO, to Acting Director and General Counsel, OMB (Nov. 25, 2019); Letter from General Counsel, GAO, to Secretary of State and Acting Legal Adviser, State (Nov. 25, 2019); Letter from Managing Associate General Counsel, GAO, to Acting Legal Adviser, State (Oct. 7, 2019); Letter from Managing Associate General Counsel, GAO, to General Counsel, USAID (Oct. 7, 2019); Letter from Managing Associate General Counsel, GAO, to Acting Legal Adviser, State (Sept. 17, 2019); Letter from Managing Associate General Counsel, GAO, to General Counsel, USAID (Sept. 17, 2019); Letter from Managing Associate General Counsel, GAO, to Acting Legal Adviser, State (Aug. 23, 2019); Letter from Managing Associate General Counsel, GAO, to General Counsel, USAID (Aug. 23, 2019); *see also* Letter from Managing Associate General Counsel, GAO, to Deputy General Counsel, OMB (Aug. 23, 2019) (asking that OMB instruct State and USAID to respond to GAO directly).

³ Letter from USAID to General Counsel, GAO (Apr. 13, 2021); Letter from General Counsel, OMB, to General Counsel, GAO (Jan. 19, 2021) (OMB 2021 Response); Email from GAO Liaison, State, to Senior Staff Attorney, GAO (Jan. 19, 2021) (State

As explained below, we conclude that OMB did not violate the ICA by issuing these 2019 apportionment letters or by considering the congressional notification. The three apportionment letters were valid exercises of OMB's authority to apportion, and we see no evidence to suggest that OMB abused that power in contravention of the ICA. In addition, the congressional notification was prepared and transmitted in accordance with established practice, and the information before us shows that any delays in its transmission were the result of programmatic factors.

BACKGROUND

For fiscal years 2018 and 2019, Congress appropriated lump-sum amounts for foreign assistance, including FMF.⁴ For fiscal year 2019, Congress appropriated approximately \$5.9 billion for FMF.⁵ Congress also appropriated an additional \$460 million in Overseas Contingency Operations (OCO) funds for FMF for fiscal years 2018 and 2019.⁶

Apportionment Letters

Congress appropriates funds for one or more fiscal years, and the Antideficiency Act requires the apportionment of most appropriations. See 31 U.S.C. § 1512(a). An apportionment divides amounts available for obligation by specific time periods

2021 Response); Email from GAO Liaison, State, to Assistant General Counsel for Appropriations Law, GAO (Jan. 9, 2020) (State 2020 Response); Email from GAO Liaison, State, to Assistant General Counsel for Appropriations Law, GAO (Dec. 12, 2019); Letter from General Counsel, OMB to General Counsel, GAO (Dec. 11, 2019) (OMB 2019 Response); Email from GAO Liaison, State, to Senior Staff Attorney, GAO (Nov. 20, 2019) (State November 2019 Response); Email from Acting GAO Liaison, USAID, to Senior Staff Attorney, GAO (Nov. 6, 2019); Email from GAO Liaison, State, to Assistant General Counsel for Appropriations Law, GAO (Sept. 25, 2019); Email from GAO Liaison, State, to Assistant General Counsel for Appropriations Law, GAO (Aug. 30, 2019) (State August 2019 Response); Email from Acting GAO Liaison, USAID, to Assistant General Counsel for Appropriations Law, GAO (Aug. 30, 2019).

⁴ See, e.g., Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. F, title IV, 133 Stat. 13, 288 (Feb. 15, 2019); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. K, title IV, 132 Stat. 348, 854 (Mar. 23, 2018).

⁵ Pub. L. No. 116-6, 133 Stat. at 288.

⁶ Pub. L. No. 115-141, 132 Stat. at 970.

(usually quarters), activities, projects, objects, or a combination thereof.⁷ The amounts so apportioned limit the amount of obligations that may be incurred.⁸

The apportionment process helps prevent agencies from obligating their appropriations in a manner that would prematurely deplete them.⁹ Such a premature depletion can leave Congress with little choice but to make a deficiency or supplemental appropriation to permit agency operations to continue. These “coercive deficiencies” usurp Congress’s constitutional power of the purse.¹⁰ In addition, apportionment is intended to help achieve the most effective and economical use of the amounts made available for obligation.¹¹

Congress vested the President with authority to apportion executive branch appropriations, and the President has delegated that authority to OMB. 31 U.S.C. § 1513; Exec. Order No. 6166, § 16 (June 10, 1933) *at* 5 U.S.C. § 901 note. The process of apportionment is not static, as OMB has explicit authority to reapportion. 31 U.S.C. § 1512(a).

On August 3, 2019, OMB reapportioned funds in 15 accounts that spanned a variety of activities in State and USAID, including for FMF.¹² The reapportionment made

⁷ 31 U.S.C. § 1512(b); GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 12.

⁸ GAO-05-734SP, at 12.

⁹ *See id.* at 13.

¹⁰ *See* 59 Comp. Gen. 369 (1980).

¹¹ GAO-05-734SP, at 13.

¹² Letter from Associate Director for National Security Programs, OMB, to Deputy Secretary, State, and Deputy Administrator, USAID (effective Aug. 3, 2019) (Aug. 3 Letter). The 15 accounts identified in the reapportionment are: fiscal year (FY) 2019 Contributions to International Organizations (State); FY 2018/19 Contributions for International Peacekeeping Activities (State); FY 2019 Contributions for International Peacekeeping Activities (State); FY 2018/19 International Narcotics Control and Law Enforcement (State); FY 2018/19 Development Assistance (USAID); FY 2018/19 Development Assistance (State); FY 2018/19 Assistance for Europe, Eurasia and Central Asia (USAID); FY 2018/19 Assistance for Europe, Eurasia and Central Asia (State); FY 2018/19 Peacekeeping Operations (State); FY 2019 Peacekeeping Operations (State); FY 2018/19 Economic Support Fund (USAID); FY 2018/19 Economic Support Fund (State); FY 2018/19 Foreign Military Financing Program (State); FY 2019 International Organizations and Programs (State); FY 2018/19 Global Health (USAID).

the funds unavailable for obligation until 3 days after OMB received an accounting of the unobligated balances.¹³

Subsequently, on August 9, 2019, OMB issued another reapportionment, instructing that the remaining balances be “obligated at a daily rate calculated to obligate remaining funds by September 30th.”¹⁴ The letter also provided that State and USAID could request a reapportionment for programmatic reasons.¹⁵ State and USAID requested an exemption from the daily rate for USAID’s Global Health account, which OMB granted.¹⁶ State also requested that OMB modify the daily rate to ease execution.¹⁷ On August 29, 2019, OMB issued a third apportionment letter, apportioning remaining balances in the relevant accounts at a weekly rate, starting on September 1, 2019.¹⁸ The weekly rate apportioned a quarter of the then-remaining balance on each of the Sundays between September 1, 2019, and September 22, 2019.¹⁹ State subsequently requested that OMB remove the weekly rate from the apportionment, but OMB did not do so.²⁰

The daily and weekly rates were not typical apportionments for these foreign assistance accounts.²¹ OMB usually apportions State and USAID full-year foreign assistance appropriations by account or program after receiving requests for apportionment from State and USAID.²² Because the August 2019 letters differed from established practice by apportioning funds by time period, State and USAID had to implement additional financial controls.²³

¹³ August 3 Letter.

¹⁴ Letter from Associate Director for National Security Programs, OMB, to Deputy Secretary, State, and Deputy Administrator, USAID (Aug. 9, 2019) (Aug. 9 Letter).

¹⁵ *Id.*

¹⁶ State 2021 Response, at 3.

¹⁷ *Id.*

¹⁸ Letter from Associate Director for National Security Programs, OMB, to Deputy Secretary, State, and Deputy Administrator, USAID (Aug. 29, 2019) (Aug. 29 Letter). USAID’s Global Health appropriation was excluded from this apportionment. *Id.*

¹⁹ *Id.*

²⁰ State 2021 Response, at 3.

²¹ State 2021 Response, at 3.

²² *Id.* at 2.

²³ *Id.* at 1.

Congressional Notification for FMF Funds

The FMF program is authorized by the Arms Export Control Act, in order to “facilitate the common defense” through sales of military equipment to friendly countries. 22 U.S.C. § 2751. The President has substantial discretion in obligating FMF funds and must exercise considerable judgement in carrying out FMF sales. See, e.g. 22 U.S.C. §§ 2752(b), 2763(a), 2778(a)(1). Before State can obligate FMF funds, State must notify Congress. 22 U.S.C. § 5476. OMB instructs agencies to submit such congressional notifications to OMB for approval at least 5 working days before transmitting the notifications to Congress.²⁴

On June 21, 2019, State transmitted a congressional notification to OMB for review.²⁵ Although there was no legal requirement that State obligate any FMF funds to provide assistance to Ukraine, the notification included \$115 million in FY 2019 FMF funds that State planned to obligate for such assistance.²⁶ OMB, State, and “other interagency partners” then conducted interagency meetings on the lump-sum FMF funds that State planned to obligate for Ukraine.²⁷ On July 26, 2019, State submitted a congressional notification for FMF to other countries while discussions continued on the funds designated for Ukraine.²⁸ On August 14, 2019, State transmitted another congressional notification to OMB for review.²⁹ This notification included \$26.5 million in FY 2018/19 FMF OCO funds that State planned to obligate for assistance to Ukraine.³⁰ As a result of the interagency discussions, the funds designated for Ukraine were separated from both the June 21, 2019, and August 14, 2019, notifications and merged into one notification for all Ukraine-related FMF funds.³¹ State transmitted the Ukraine-specific notification to OMB for review on September 6, 2019, and State transmitted the notification to Congress on September 11, 2019.³²

²⁴ OMB Circular No. A-11, § 22.3 (Aug. 2021).

²⁵ State 2020 Response.

²⁶ *Id.*

²⁷ OMB 2021 Response, Attachment A, at 5.

²⁸ *Id.*

²⁹ State 2020 Response.

³⁰ *Id.*

³¹ *Id.*

³² OMB 2021 Response, Attachment A, at 5–6.

DISCUSSION

At issue here is whether OMB violated the ICA when it issued the three August 2019 reapportionment letters and when it engaged in interagency policy discussions on the congressional notification for FMF funds designated for Ukraine.

The ICA operates on the constitutional premise that when Congress appropriates money to the executive branch, the President is required to obligate the funds within their period of availability. Pub. L. No. 93-344, title X, §§ 1001–1017, 88 Stat. 297, 332 (July 12, 1974), 2 U.S.C. §§ 681–688; B-331564, Jan. 16, 2020 (*citing* B-329092, Dec. 12, 2017). The President may impound funds—that is, withhold them from obligation—only under specified circumstances and only if the President follows the procedures set forth in the Act. See 2 U.S.C. §§ 683–684. The ICA separates impoundments into two exclusive categories: deferrals and rescissions. The President may temporarily withhold funds from obligation by proposing a “deferral.” 2 U.S.C. § 684. The President may also seek the permanent cancellation of funds for fiscal policy or other reasons, including the termination of programs for which Congress has provided budget authority, by proposing a “rescission.” 2 U.S.C. § 683. In either case, the President must transmit a special message to Congress that includes the amount of budget authority proposed for deferral or rescission and the reason for the proposal. 2 U.S.C. §§ 683–684. Furthermore, amounts proposed for deferral or rescission must be made available in sufficient time to be prudently obligated. B-330330, Dec. 10, 2018.

Withholding funds without transmitting a special message is a violation of the ICA. See 2 U.S.C. §§ 683–684; see *also* B-329092, Dec. 12, 2017; B-331564, Jan. 16, 2020. However, our decisions distinguish between reportable impoundments and “programmatic delays,” which are not impoundments and therefore do not require the President to transmit a special message. See, e.g., GAO, *Impoundment Control: Deferral of DOD Budget Authority Not Reported*, GAO/OGC-91-8 (Washington, D.C.: May 7, 1991), at 3–4. Programmatic delays occur when an agency is taking reasonable and necessary steps to implement a program or activity, but the obligation or expenditure of funds is unavoidably delayed. B-329739, Dec. 19, 2018. Therefore, the reason for a delay, not the delay itself, is the key to determining whether the Act’s requirements apply. B-290659, July 24, 2002.

Distinguishing between impoundments and programmatic delays is particularly difficult in programs that confer substantial discretion to the implementing agency. See B-222215, Mar. 28, 1986. A careful examination of the facts and circumstances is necessary to determine whether an unlawful impoundment has occurred. See B-329739, Dec. 19, 2018. For instance, the reason for the withholding or delay, the historical rate of obligations for the relevant program, the ultimate obligation of funds within their period of availability, and policy statements or instructions to withhold from executive branch officials may be relevant in determining whether a delay or withholding is an improper impoundment. See, e.g., B-320091, July 23, 2010 (no impoundment where funds were obligated at rates comparable to years in which

nearly all funds were obligated before the end of the funds' period of availability); B-331298, Dec. 23, 2020 (no impoundment where funds were not withheld and were obligated at a "robust yet measured pace"); B-329092, Dec. 12, 2017 (withholding funds pursuant to direction from agency officials and cancellation proposal in President's budget was an impoundment).

Apportionment Letters

We first consider whether the three reapportionment letters OMB issued in August 2019 constituted improper impoundments under the ICA.

We note an inherent tension between OMB's apportionment authority and the ICA's prohibition on withholding funds absent the transmission of a special message. By definition, an apportionment by time period will "withhold" some funds now, in order to ensure funds are available in the future. Nevertheless, the ICA does not require the President to transmit a special message each time OMB makes a routine apportionment that subdivides an appropriation by time period. Indeed, the legislative history of the ICA suggests that Congress did not intend the special message procedures to apply to routine apportionments. As a Senate report explained, if OMB apportions an appropriation on a quarterly basis, the apportionment will necessarily hold "in reserve the balance for subsequent quarters so as not to incur a deficiency. The Committee does not regard such reservations as impoundments, provided that the apportionment is a good faith effort to implement the program or activity." S. Rep. No. 93-121 (1973), at 26.

However, OMB's authority to apportion is not so broad that it renders the ICA meaningless. OMB certainly cannot fail to apportion funds in order to avoid their obligation nor can apportionment be used to substitute the President's policy priorities for those of the Congress. See B-331564, Jan. 16, 2020; *State Highway Comm'n of Missouri v. Volpe*, 479 F. 2d 1099 (8th Cir. 1973) (noting the apportionment power cannot be used to "jeopardize the policy" of the appropriation); H. Rep. No. 81-1797, at 311 (1950) ("[T]here is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds."). Instead, a proper application of OMB's apportionment authority and the ICA's procedures construes them harmoniously, so that both statutes have full effect. See 2B Sutherland, *Statutes & Statutory Construction*, § 53:1 (There is "a duty to construe statutes harmoniously where reasonable.").

Our decisions on programmatic delays are instructive. GAO has long recognized that some delays in the obligation or execution of budget authority are not impoundments because they are not intentional withholdings and occur when an agency is taking the reasonable and necessary steps to carry out the program or activity. See, e.g., B-333110, June 15, 2021 (finding no impoundment where obligations were paused to ensure compliance with environmental, stakeholder consultation, and procurement statutes); B-291241, Oct. 8, 2002 (finding no impoundment where OMB did not apportion amounts while it conducted a "vigorous

and healthy internal legal discussion” regarding the applicability of a statutory cap). Apportionments are a necessary part of executing almost every federal program. As a result, routine apportionments—that is, those that are reasonable and necessary to avoid deficiencies—are not subject to the procedural requirements of the ICA. However, where OMB abuses its apportionment authority in order to intentionally delay or preclude the obligation of budget authority, the ICA’s procedures must apply. See B-331564, Jan. 16, 2020.

Here, the August 3, 2019, reapportionment letter was not an impoundment subject to the ICA. OMB issued the August 3, 2019, apportionment letter to collect an accounting of the unobligated balances in the affected accounts.³³ Because OMB may need to know the current unobligated balance in an account in order to make its apportionment and reapportionment decisions, it can reasonably request such an accounting to carry out its apportionment authority. See 31 U.S.C. § 1512(a) (authority to reapportion appropriations). The pause that accompanied the request for an accounting was also reasonable, as it allowed OMB to base its apportionment decision-making on current information. Without a pause, the accounting could have been out-of-date before OMB received it, as State and USAID might have continued obligating funds during the period between the preparation of the accounting and OMB’s reapportionment decision. Cf B-291241, Oct. 8, 2002 (finding no impoundment where OMB failed to apportion amounts while it conducted a “vigorous and healthy internal legal discussion” to ensure an agency did not violate a statutory cap). Therefore, the pause was necessary to ensure that OMB could collect the information from the agencies, consider the information, and make reapportionment decisions while the accounting remained correct. Further, the August 3 letter ensured that amounts would become available three days after OMB received the accounting, even if OMB took no action. This helped ensure that the funds would be available in an expeditious manner.

As a result, OMB’s actions here do not demonstrate an intent to prevent or delay the ultimate obligation of the funds. First, OMB requested the accounting well before the funds expired, allowing sufficient time for the funds to be obligated once they became available.³⁴ Second, there was not a date certain for the release of the funds; rather, OMB would make the funds available a short time after State and USAID provided the requested accounting.³⁵ Any agency with adequate funds control mechanisms should be able to provide such an accounting in short order, allowing for a minimal pause in obligations. In fact, State and USAID provided the requested information quickly, and OMB made the funds available shortly after

³³ OMB 2021 Response, Attachment A, at 7; August 3 Letter.

³⁴ See August 3 Letter.

³⁵ August 3 Letter.

receiving the accounting.³⁶ In all, the funds were unavailable for obligation for 6 calendar days.³⁷

In short, the reapportionment action in the August 3 letter may have resulted in a brief delay in obligations for the affected accounts. However, the nature of a request for an accounting, the certain availability of the amounts after provision of the accounting, and the expeditious manner in which any agency should be able to provide such an accounting, all indicate that OMB's action here was within the reach of its authority to apportion amounts. Therefore, the reapportionment action in the August 3 letter was not an improper impoundment under the ICA.

As with the reapportionment action in the August 3 letter, the reapportionment actions in the August 9 and August 29, 2019, letters similarly were not improper impoundments under the ICA, as OMB did not withhold funds from obligation. OMB reapportioned the unobligated balances in the relevant accounts by days and weeks respectively, exercising its authority to apportion by "other time periods."³⁸ The August 9 letter explicitly required that the daily rate be calculated to ensure all funds were available for obligation by the end of the fiscal year, and the August 29 letter made one-quarter of remaining unobligated balances available for obligation on each of four Sundays in September.³⁹ Therefore, by the end of the fiscal year, OMB had made all amounts available for obligation.

The August 9 and August 29 reapportionment letters may have caused a delay in the obligation of funds, but any such delay was not reportable under the ICA. OMB typically apportions funds in the affected accounts by program, rather than by time.⁴⁰ However, OMB's apportionment authority permits it to depart from typical practice in this fashion. The change in apportionment type required State and USAID to take additional steps before obligating funds, which may have caused some unavoidable delays in program execution.⁴¹ However, any such delays were a result of the agencies taking the necessary steps to obligate and expend funds consistent with the terms of the validly issued apportionments. Such delays are programmatic and are not improper impoundments under the ICA. See, e.g. B-333110, June 15, 2021 (delays to ensure compliance with statutory requirements are programmatic).

³⁶ See OMB 2021 Response, Attachment A, at 1–2.

³⁷ See August 3 Letter; August 9 Letter; see *also* State August 2019 Response.

³⁸ August 9 Letter; August 29 Letter.

³⁹ August 9 Letter; August 29 Letter.

⁴⁰ We are not aware of any limit on OMB's apportionment authority that requires OMB to apportion accounts in the same manner from year to year.

⁴¹ See State 2021 Response.

Although we find no improper withholding here, we do note that both State and USAID told OMB that the daily and weekly rate apportionments were “detrimental” to program operations. State explained that this process was not consistent with prior year-end spending guidance and required changes to its established financial processes, including implementing additional controls on the obligation of funds.⁴² We are aware of no evidence that State did not continue to obligate funds during this time. In fact, State explained that, consistent with its normal practice, it continued to work with bureaus and posts to obligate the funds prior to the end of the fiscal year.⁴³ Even so, State explained that it was unable to obligate certain funds in the Economic Support Fund appropriation before the amounts expired, despite its best efforts to do so, resulting in a higher unobligated balance than in prior years.⁴⁴ We are aware of no evidence to suggest OMB issued the daily and weekly rate apportionments to force the expiration of these funds. In the absence of such evidence, the sole fact that these funds expired unobligated is insufficient to establish that OMB improperly withheld them.

Congressional Notification for FMF Funds

By law, State must notify Congress before it can obligate FMF funds. 22 U.S.C. § 5476. OMB instructs agencies to submit such notifications to OMB for approval. OMB Circular No. A-11, § 22.3 (Aug. 2021). Next, we must determine whether OMB impermissibly impounded FMF amounts during the period in which OMB held, and did not transmit to Congress, a notification from State.

As discussed above, programmatic delays are not subject to the ICA’s special message requirements. Instead, the ICA requires the President to transmit a special message to Congress when he wishes to withhold funds from obligation. 2 U.S.C. §§ 683–684. Deferrals are temporary withholdings of budget authority, and the ICA authorizes deferrals only in limited circumstances: to provide for contingencies; to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or as specifically provided by law. 2 U.S.C. § 684. There are no other permissible reasons for a deferral, including policy reasons. The legislative history of the 1987 amendments to the ICA indicates that Congress explicitly contemplated and rejected the idea that the President may defer funds to advance his own policies at the expense of those enacted by Congress. See *generally*, H.R. Rep. No. 100-313, at 66–67 (1987); see *also* S. Rep. No. 93-688,

⁴² State November 2019 Response.

⁴³ *Id.*

⁴⁴ Other accounts affected by the August 2019 reapportionment letters had unobligated expired balances, but the amount of these balances was consistent with prior fiscal years. *Id.*; State 2021 Response. The existence of unobligated balances in an account does not necessarily indicate an impoundment. B-331298, Dec. 23, 2020.

at 75 (1974) (explaining that the objective of the amendments was to ensure that “the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress”). GAO decisions have applied this principle. See, e.g., B-331564, Jan. 16, 2020; B-237297.3, Mar. 6, 1990. This elementary principle garners agreement across the branches of government: in a letter to GAO on this matter, OMB agreed that the President may not withhold funds “simply because he disagrees with the policy underlying a statute.”⁴⁵ As such, a deferral for policy reasons violates the ICA.

Based on the evidence before us, OMB’s actions did not constitute a deferral for policy reasons. OMB initially received a draft congressional notification from State on June 21, 2019, that included FY 2019 FMF assistance to be distributed to Ukraine.⁴⁶ State transmitted the final notification to Congress several weeks later, on September 11, 2019.⁴⁷ In the interim, OMB conducted interagency meetings with State and other interagency partners, and State notified Congress of its intent to obligate FMF funds for other countries.⁴⁸ OMB did not divulge the content of these discussions; however, policy discussions are a reasonable part of program execution where the President has significant discretion in administering the program.

Importantly, the program at issue here—Foreign Military Financing—confers substantial statutory discretion to the President in carrying out the program. Section 2 of the Arms Export Control Act provides that the Secretary of State, under the President’s direction, must carry out the program, “to the end that the foreign policy of the United States would be best served thereby.” 22 U.S.C. § 2752(b). Section 23, which authorizes the FMF program, provides that the President may finance the procurement of defense articles and services “on such terms and conditions as he may determine. . . .” *Id.* § 2763(a). And, section 38 authorizes the President to control the import and the export of defense articles and services to further “world peace and the security and foreign policy of the United States” *Id.* § 2778(a)(1). These provisions confer substantial discretion and require the President to exercise considerable judgment before FMF funds can be obligated.

In addition, Congress generally appropriates amounts for FMF in a lump sum directly to the President, without specifying amounts for particular countries and programs. See, e.g., Pub. L. No. 116-6, 133 Stat. at 288. Similarly, here, Congress did not specifically designate funds for Ukraine. See *id.*; Pub. L. No. 115-141, 132 Stat. at 970. Because the President had such wide discretion in obligating these funds, it

⁴⁵ OMB 2019 Response, at 6.

⁴⁶ OMB 2021 Response, Attachment A, at 5.

⁴⁷ *Id.*

⁴⁸ *Id.*

was reasonable and necessary for State, OMB, and other interagency partners to communicate regarding the best use of the funds within the scope of the appropriation. As such, to the extent such interagency discussions delayed the transmission of the congressional notification, such a delay was programmatic and not subject to the ICA's special message requirements.⁴⁹

The discretion provided by both FMF's authorization and appropriation distinguish this situation from OMB's 2019 actions with respect to the USAI. See B-331564, Jan. 16, 2020. In our 2020 decision, we concluded that OMB improperly impounded USAI funds in order to conduct a policy process to determine the best use of the funds. *Id.* In that instance, the executive branch was required to obligate and expend USAI funds for security assistance to Ukraine; failure to expend funds for Ukraine was not a permissible outcome of any such policy process. Therefore, withholding those funds violated the ICA, given the limited discretion provided by the appropriation. Here, however, Congress did not designate FMF funds for Ukraine, and the administration was free to consider whether to provide any FMF assistance for Ukraine at all. That wide grant of discretion necessitated a policy process to permit executive branch officials to determine a use of the FMF funds that was consistent foremost with the law but also with the President's policy priorities. Therefore, based on the information before us, the interagency discussions undertaken here by OMB and State were a reasonable part of FMF program execution.

In short, the interagency discussions may have resulted in a brief delay in the transmission of the congressional notification, a necessary prerequisite to obligating FMF funds. However, the statutory discretion vested in the President and the inherent flexibility of a lump-sum appropriation indicate that OMB and State's actions were consistent with the authority provided by the FMF program. Therefore, based on the facts before us, OMB did not impermissibly impound FMF amounts when it held, but did not transmit, a congressional notification from State.

CONCLUSION

Based on the information before us, we conclude that OMB did not violate the ICA when it issued three reapportionment letters in August 2019 or when it engaged in interagency policy discussions regarding State's plan to obligate FMF funds for Ukraine. OMB issued the reapportionment letters pursuant to its apportionment authority, and we see no evidence that OMB intentionally withheld the relevant funds

⁴⁹ As a threshold matter, it is not clear that the congressional notification was delayed beyond what is typical for the program. The time OMB takes to review FMF congressional notifications varies; for FMF designated for Ukraine, such reviews have lasted anywhere from a few days to a few months. State 2021 Response, at 7. In this instance, the congressional notification for FMF for Ukraine took a little under 3 months to reach Congress, which is not significantly longer than in previous fiscal years. *Id.* at 6–7.

in contravention of the ICA. Further, OMB's consideration of a congressional notification regarding foreign assistance funds State designated for Ukraine was not a reportable impoundment. To the extent OMB delayed the obligation of the funds, the delay was the result of programmatic considerations and therefore not an impoundment requiring transmission of a special message.

However, we note that the President, and by extension OMB and other executive branch agencies, is constitutionally bound to faithfully execute appropriations by prudently obligating them before their expiration. See U.S. Const. art. II, § 3; B-330330, Dec. 10, 2018. This duty requires OMB to consider both programmatic needs and agency capacity to carry out these needs as it makes apportionment decisions, so that agencies have sufficient time to prudently obligate amounts before they expire. Similarly, agencies must take all necessary and available steps to prudently obligate amounts prior to their expiration, even if OMB apportions the amounts in a manner that departs from prior practice or that disrupts the agency's usual practices.

To facilitate Congress's oversight of OMB's apportionment authority, Congress may wish to consider requiring the publication of apportionment and reapportionment documents. The publication of apportionments would enhance congressional oversight not only by alerting Congress to potential impoundments but also by improving congressional visibility into OMB's exercise of an authority that has significant ramifications both for executive agency operations and for Congress and its constitutional power of the purse. We have discussed this issue in prior testimony before the House Committee on the Budget.⁵⁰ B-333181, Apr. 29, 2021, at 12–13.



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⁵⁰ Pending legislation also proposes such a requirement. See H.R. 5314, 117th Cong. title V, § 502 (2021).



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Decision

Matter of: Office of Management and Budget—Reconsideration—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing

File: B-331564.2

Date: March 17, 2022

DIGEST

Our decision in B-331564.1 characterized fiscal year (FY) 2019 appropriations for foreign military financing (FMF) as lump sum amounts, even though a general provision incorporated by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries. We are issuing this reconsideration to assess whether this omission was material to the outcome of the decision. Because the Arms Export Control Act confers substantial discretion to the President to carry out the FMF program, we reaffirm our conclusion in our prior decision. The Office of Management and Budget did not violate the Impoundment Control Act when it conducted interagency discussions that may have delayed the transmission of a congressional notification regarding the agencies intent to obligate FY 2019 FMF funds.

DECISION

This is a reconsideration of our decision in B-331564.1, February 10, 2022, in which we concluded that the Office of Management and Budget (OMB) did not violate the Impoundment Control Act of 1974 (ICA)¹ when it conducted interagency discussions regarding the plan to obligate fiscal year (FY) 2018 and 2019 foreign military financing (FMF) funds for Ukraine. We are issuing this reconsideration because our prior decision characterized FY 2019 appropriations for FMF as lump sum amounts, without addressing section 7019 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019 (Section 7019), which incorporated

¹ Pub. L. No. 93-344, title X, §§ 1001–1017, 88 Stat. 297, 332–339 (July 12, 1974), 2 U.S.C. §§ 681–688.

by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries, including Ukraine.² We will modify or reverse a prior decision if it contains a material error of fact or law.³ As such, we consider whether this omission was material to the outcome of the decision. Because the Arms Export Control Act (AECA)⁴ confers substantial discretion to the President in carrying out FMF, we conclude that conducting interagency discussions regarding a congressional notification for FMF funds for Ukraine constituted a programmatic delay. Therefore, the omission was not material, and we reaffirm our original conclusion that OMB did not violate the ICA.

In accordance with our regular practice, we contacted OMB and the Department of State (State) to confirm factual information and their legal views on this matter.⁵ We received and considered responses from both agencies.⁶

² Pub. L. No. 116-6, div. F, title VII, § 7019, 133 Stat. 267, 307–308 (Feb. 15, 2019); H.R. Conf. Rep. No. 116-9, at 869 (2019). Section 7019 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, incorporated by reference into law line-item amounts, within the FY 2018 FMF appropriation, for specific countries, including \$95 million for Ukraine. Pub. L. No. 115-141, div. K, title VII, § 7019, 132 Stat. 833, 873–874 (Mar. 23, 2018); 2 House Appropriations Committee Print on H.R. 1625, at 1805 (2018). OMB and State complied with this direction on September 28, 2018, when OMB apportioned \$95 million of FY 2018 FMF amounts for Ukraine. Email from GAO Liaison, State, to Assistant General Counsel on Appropriations Law, GAO (Dec. 12, 2019); Email from GAO Liaison, State, to Senior Staff Attorney, GAO (Jan. 19, 2021), Attachment, at 8; Letter from General Counsel, OMB, to General Counsel, GAO (Dec. 11, 2019), at 3. The FY 2018 FMF funds included in the September 11, 2019 congressional notification were amounts appropriated for FMF in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, designated for Overseas Contingency Operations/Global War on Terrorism. Department of State, *Congressional Notification*, CN 19-286 (Sept. 11, 2019) (CN 19-286); Pub. L. No. 115-141, 132 Stat. at 970.

³ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), at 9–10, available at <https://www.gao.gov/products/gao-06-1064sp>.

⁴ Pub. L. No. 90-628, 82 Stat. 1320 (Oct. 22, 1968), 22 U.S.C. §§ 2751–2778, 2779–2799aa-2.

⁵ Email from Managing Associate General Counsel, GAO, to General Counsel, OMB (Feb. 16, 2022); Email from Managing Associate General Counsel, GAO, to Acting Legal Adviser, State (Feb. 16, 2022).

⁶ Email from Deputy General Counsel, OMB, to Managing Associate General Counsel, GAO (Mar. 5, 2022); Email from Director, GAO Liaison, State, to Managing Associate General Counsel, GAO (Mar. 5, 2022).

BACKGROUND

In B-331564.1, we addressed, in part, whether OMB violated the ICA when it conducted interagency discussions regarding the obligation of FY 2018 and 2019 FMF funds for Ukraine where these discussions may have delayed the transmission of a congressional notification for such funds, a necessary prerequisite to obligating the FMF funds.⁷ The decision concluded that OMB did not violate the ICA with respect to the interagency discussions because of “the statutory discretion vested in the President and the inherent flexibility of a lump sum appropriation.”⁸

After we issued B-331564.1, we determined that we should also address the import of Section 7019, which incorporated by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries. Section 7019(a) provides, among other things, that funds appropriated under title IV of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019, shall be made available in the amounts specifically designated in the tables included in the joint explanatory statement accompanying the Act. The FMF appropriation falls under title IV of the Act.⁹ The joint explanatory statement includes tables for several countries, specifying certain amounts from the FMF and other accounts for assistance for those countries, including Ukraine.¹⁰

Section 7019(b) authorizes State to deviate from amounts in the joint explanatory statement’s tables by up to 10 percent. If the Secretary of State wishes to deviate by more than 10 percent, the Secretary may do so under certain conditions, “subject to prior consultation with, and the regular notification procedures of, the Committees on Appropriations.”¹¹ In short, Section 7019 directs the agencies to spend the specified FMF amount for certain countries, including Ukraine, with flexibility to deviate as set forth in Section 7019.

⁷ State is required to notify Congress of planned FMF obligations for specific countries 15 days in advance of making such obligations. 22 U.S.C. § 2394-1; Pub. L. No. 115-141, § 7015(c), 132 Stat. at 870; Pub. L. No. 116-6, § 7015(c), 133 Stat. at 303. Therefore, funds could not be obligated for FMF for Ukraine until 15 days after September 11, 2019, the date State transmitted the congressional notification for these funds. CN 19-286.

⁸ B-331564.1, at 13.

⁹ Pub. L. No. 116-6, 133 Stat. at 288–289.

¹⁰ H.R. Conf. Rep. No. 116-9, at 869 (table for Ukraine making specific amounts from various accounts, including \$115 million in FMF amounts, available for Ukraine).

¹¹ Pub. L. No. 116-6, § 7019(b), 133 Stat. at 308.

DISCUSSION

At issue here is whether we made a material error of fact or law in B-331564.1 when we did not address that Section 7019 incorporated by reference into law line-item amounts for Ukraine, within the FY 2019 FMF appropriation, in concluding that no violation of the ICA had occurred. For the reasons explained below, this omission is not material. We reaffirm the conclusion in our prior decision.

Our conclusion in B-331564.1 that OMB did not violate the ICA when it conducted interagency discussions that may have delayed transmission of a congressional notification relied, in part, on the discretion inherent in obligating lump sum appropriations.¹² We explained that such discretion meant it was reasonable and necessary for State, OMB, and other interagency partners to communicate regarding the best use of the funds within the scope of the appropriation.¹³ However, we must consider whether the line-item appropriations within the FY 2019 FMF appropriation for specific countries further limited the President's discretion in administering the FMF program.

When amounts are appropriated for a narrow purpose, the executive branch has less discretion in executing the funds than might be the case with a lump sum appropriation.¹⁴ But to determine how much or little discretion the executive branch has in executing a line-item appropriation, we must consider the purpose of the appropriation.¹⁵ Here, Congress appropriated a lump sum appropriation “[f]or necessary expenses for grants to enable the President to carry out the provisions of section 23 of the Arms Export Control Act,”¹⁶ and then, within that larger sum, incorporated line-item amounts for Ukraine. Therefore, we must consider the discretion afforded to the President by section 23 of AECA.

In general, AECA authorizes and provides general rules for the sale of defense articles and services to foreign countries, known as foreign military sales.¹⁷ There

¹² B-331564.1, at 12–13.

¹³ *Id.*

¹⁴ B-332393, May 5, 2021, at 3 (a lump sum appropriation “allows the agency flexibility to execute its appropriation in a manner that accommodates shifting circumstances and needs . . . [and] [c]onversely, where Congress intends to limit agency discretion, it may insert a line item”).

¹⁵ See B-331888, June 11, 2020.

¹⁶ Pub. L. No. 116-6, 133 Stat. at 288.

¹⁷ See 22 U.S.C. §§ 2751–2778, 2779–2799aa-2.; see also Defense Security Cooperation Agency (DSCA), *Electronic Security Assistance Management Manual (ESAMM)*, Glossary, available at <https://samm.dsca.mil/listing/esamm-glossary> (last visited Mar. 15, 2022) (describing AECA and defining Foreign Military Sales).

are various funding sources that a country may use to pay the U.S. government for a sale.¹⁸ For example, a country may use its national funds.¹⁹ Alternatively, section 23 of AECA provides that the President may finance a country's procurement of defense articles and services using FMF funds.²⁰ Under the foreign military sales process, an eligible foreign country submits a request for defense articles or services which, after acceptance by the U.S. government, may result in a sales agreement.²¹

As discussed in our prior decision, AECA provides the President with substantial discretion to carry out FMF and foreign military sales. Under AECA, the Secretary of State, under the President's direction, is responsible for continuous supervision and general direction of sales and financing "to the end that the foreign policy of the United States would be best served thereby."²² In addition, section 23 of AECA specifically provides that the President may finance the procurement of defense articles and services "on such terms and conditions as [the President] may determine. . . ."²³

The discretion provided to the President under AECA continues to support a conclusion that it was reasonable and necessary for OMB, State, and other interagency partners to hold discussions regarding FMF before amounts were obligated. Obligation of FMF to an eligible country is part of the foreign military sales process, and interagency discussions are part of implementing AECA and the FMF line-item appropriation. Further, there is no evidence that the President or OMB delayed funds because of a disagreement with the policy underlying AECA or the appropriation.²⁴ Indeed, the line-item amount for Ukraine within the FY 2019 FMF

¹⁸ ESAMM, ch. C9, § C9.7, available at <https://samm.dsca.mil/listing/chapters> (last visited Mar. 15, 2022).

¹⁹ ESAMM, ch. C9, § C9.7.1.

²⁰ See 22 U.S.C. § 2763(a); ESAMM, ch. C9, § C9.7.2.

²¹ See ESAMM, ch. C4, §§ C4.4, C4.5 (articles and services that may, and may not, be purchased under the foreign military sales program) and ch. C5 (describing the request and acceptance process for foreign military sales).

²² 22 U.S.C. § 2752(b).

²³ 22 U.S.C. § 2763(a). The President has delegated to the Secretary of Defense the authority to issue grants and loans to eligible recipients in accordance with AECA. ESAMM, ch. C9, § C9.7.2.9.2.1.3. The Secretary of Defense has further delegated this authority to the Director of DSCA, to be exercised in consultation with State and the Department of Treasury. *Id.*

²⁴ In responses to our office, OMB and State noted that there was no deviation under Section 7019 in FMF amounts designated for Ukraine for FY 2018 or 2019. Email from Deputy General Counsel, OMB, to Managing Associate General Counsel, GAO

appropriation was obligated on September 30, 2019.²⁵ The discretion afforded to the executive branch in Section 7019 is certainly more constrained than a lump sum appropriation. Nevertheless, the discretion afforded by AECA over FMF may reasonably necessitate interagency discussions, and any delays incident to such discussions were programmatic delays. As such, we find no basis to change our previous decision.

We reaffirm the conclusion reached in B-331564.1 that OMB did not violate the ICA when it conducted interagency discussions that may have delayed the transmission of a congressional notification for FY 2019 FMF funds.

CONCLUSION

Our decision in B-331564.1 did not address Section 7019 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019, which incorporated by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries. However, AECA provides the President substantial discretion in carrying out FMF, and OMB's actions were a reasonable exercise of programmatic discretion. Upon reconsideration, we have no basis to modify the conclusions reached in our prior decision that OMB did not violate the ICA when it conducted interagency discussions about a congressional notification.



Edda Emmanuelle Perez
General Counsel

(Mar. 5, 2022); Email from Director, GAO Liaison, State, to Managing Associate General Counsel, GAO (Mar. 5, 2022), Attachment.

²⁵ Letter from General Counsel, OMB, to General Counsel, GAO (Dec. 11, 2019), Attachment (apportionment schedule for Foreign Military Financing Program appropriated by Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019). FMF amounts are obligated upon apportionment. Pub. L. No. 116-6, 133 Stat. at 288. OMB apportions the amounts as available for either a specific country or as "unallocated." See Letter from General Counsel, OMB, to General Counsel, GAO (Jan. 19, 2021), Attachment A, at 3. Amounts that are apportioned for a specific country are considered obligated for that country once the apportionment action is taken. See *id.*

Year-in-Review: Other Recent GAO Decisions



441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Department of the Army, Fort Carson—Application of *Bona Fide* Needs Rule to Contract Modification

File: B-332430

Date: September 28, 2021

DIGEST

A modification to a firm-fixed-price contract that is within the scope of the original contract may result in an increase to the contract price. Where such a price increase arises from and is enforceable under a provision in the original contract, the agency must obligate the price increase against appropriations available when the contract was originally executed, not against appropriations available when it made the modification. Therefore, a modification to a firm-fixed-price contract to reconnect four buildings to a new water main at Fort Carson, Colorado must be obligated against Operations and Maintenance, Army appropriations for fiscal year 2019, when the contract was executed, rather than against amounts appropriated for fiscal year 2020, when the modification was made.

DECISION

A certifying officer for the United States Army Garrison, Fort Carson (Fort Carson) has requested our decision under 31 U.S.C. § 3529 regarding the application of the *bona fide* needs rule to a contract modification.¹ Specifically, the certifying officer questions whether Fort Carson should obligate either fiscal year 2019 or fiscal year 2020 Operations and Maintenance, Army appropriations for the price increase resulting from a modification to a contract to replace a water main at Fort Carson.² As explained below, a modification to a firm-fixed-price contract that is within the scope of the original contract may result in an increase to the contract price. Where

¹ Letter from Garrison Resource Management Officer, Fort Carson, to Comptroller General, GAO (Aug. 11, 2020) (Request Letter).

² *Id.*

such a price increase arises from and is enforceable under a provision in the original contract, the agency must obligate the price increase against appropriations available when the contract was originally executed, not against appropriations available when it made the modification. Accordingly, Fort Carson must in this case obligate the price increase against the fiscal year 2019 Operations and Maintenance, Army appropriation.

In accordance with our regular practice, we contacted Fort Carson to seek factual information and its legal views on this matter.³ Fort Carson responded with its explanation of the pertinent facts and its legal analysis, along with additional information.⁴

BACKGROUND

On October 11, 2018, Fort Carson officials decided to repair or replace the water main that runs along a street on the installation.⁵ Accordingly, on November 9, the Army issued a firm-fixed-price task order contract (contract) under an existing indefinite-delivery, indefinite-quantity contract. The contract work specifications required the contractor to perform work related to replacing the water main, including re-establishing connections between the existing buildings and the new water main corresponding to the connections that had connected the buildings to the old water main.⁶

After the contract was formed, unanticipated site conditions, coupled with possible discrepancies in the design drawings, arose.⁷ Accordingly, in June 2020, the contracting officer determined that a contract modification was necessary to carry out the work necessitated by the unanticipated site conditions, as well as to carry out

³ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 5, 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to Contract and Fiscal Law Attorney, Fort Carson (Oct. 21, 2020).

⁴ Letter from Contract and Fiscal Law Attorney, Fort Carson, to Assistant General Counsel, GAO (Nov. 19, 2020) (Response Letter); E-mail from Contract and Fiscal Law Attorney, Fort Carson, to Senior Attorney, GAO, *Subject: RE: [Non-DoD Source] GAO Letter to Army B-332430 (UNCLASSIFIED)* (Nov. 19, 2020) (Response E-mail).

⁵ Facilities Engineering Work Request, DA Form 4283 (Oct. 11, 2018).

⁶ Response Letter, at 1.

⁷ For example, the drawings showed the presence of existing service lines that were not actually present at the site. In addition, though the contract documents stated that the contractor was to re-establish existing connections, in some cases the drawings did not depict the re-establishment of these connections. Response Letter.

necessary work despite the possible discrepancies.⁸ The contracting officer estimated that the modification would result in additional costs for the contractor.⁹ The contracting officer determined that the modification was within the scope of the contract and, to cover the increased price, requested a total of \$162,505 in funds that were available at the time of execution of the contract, which were fiscal year 2019 Operations and Maintenance, Army appropriations.¹⁰

However, the certifying officer believes that Fort Carson must obligate the increased price against amounts available at the time of the modification, which are fiscal year 2020 Operations and Maintenance, Army appropriations, rather than against funds available at the time of execution of the contract.¹¹ In 2019, Fort Carson conducted a study that recommended the demolition of certain buildings, including the four subject buildings.¹² However, Fort Carson chose not to follow the recommendation to abandon and demolish the four buildings, and instead decided to proceed with re-establishing the water lines to the buildings.¹³ Due to the difference in opinion between the certifying officer and other Fort Carson officials, the certifying officer has requested our decision.¹⁴

DISCUSSION

At issue here is whether the modification is a *bona fide* need of fiscal year 2019 or of fiscal year 2020.

By law, “an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability.” 31 U.S.C. § 1502(a). In other words, annual appropriations that are made for a specific fiscal year are only available to fulfill a genuine or “*bona fide* need” of the fiscal year the funds are appropriated. B-317139, June 1, 2009; 73 Comp. Gen. 77 (1994).

Whether a particular expenditure constitutes a *bona fide* need of a particular fiscal year depends on the specific facts and circumstances of the expenditure. See

⁸ Request Letter, Enclosure 3.

⁹ *Id.*

¹⁰ *Id.*; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. A, title II, 132 Stat. 2981, 2984 (Sept. 28, 2018).

¹¹ Request Letter, at 1; Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. A, title II, 133 Stat. 2317, 2321 (Dec. 20, 2019).

¹² Response Letter, at 1.

¹³ *Id.*

¹⁴ Request Letter.

70 Comp. Gen. 469, 470 (1991). This is particularly true of contract modifications that increase the contract price. Which fiscal year appropriations to obligate for a price increase resulting from a contract modification depends on whether the modification is within the general scope of the contract. If the modification is within the general scope, the next question is whether the modification is attributable to, and enforceable under, a provision of the contract that renders the government liable to make an equitable adjustment. 65 Comp. Gen. 741 (1986).

Government contracts typically include a standard provision, known as the “changes clause,” that permits the government to make changes in the work within the general scope of the contract. 48 C.F.R. § 43.205. For example, the government may change contract specifications, the method or manner of performance of the work, or direct the contractor to accelerate performance. 48 C.F.R. § 52.243-4. The changes clause requires the contracting officer to make an equitable adjustment to compensate the contractor if such a change increases the contractor’s expenses or time required for the work. See, e.g., 48 C.F.R. § 52.243-4(d). By agreeing to the changes clause, the contractor agreed to perform any within-scope changes the government may order, and the government agreed to compensate the contractor for any such change orders. 23 Comp. Gen. 943, 945 (1944).

At contract execution, the agency does not obligate amounts to cover potential change orders that may result in future price increases since it does not know whether a change will result in a liability for the government, let alone the amount for which the government may be liable. 23 Comp. Gen. at 945. Should the government issue a change order, its liability to make an equitable adjustment arises from and is enforceable under a provision of the original contract—specifically, the changes clause. Because this liability arises under the original contract, it is also known as an “antecedent liability.” See, e.g., 59 Comp. Gen. 518, 522 (1980). A change order creates no new liability: “the fact remains that the obligations and liabilities of the parties respecting such changes are fixed by the terms of the original contract, and the various amendments merely render definite and liquidated the extent of the Government’s liability in connection with such changes.” 23 Comp. Gen. at 945.

Therefore, a modification made within the general scope of a contract which results in an upward price adjustment by operation of a clause of the original contract is a *bona fide* need of the year in which the contract was originally executed. To fund the price adjustment, the agency must obligate appropriations available at the time of contract formation, rather than appropriations available at the time it modifies the contract. *Id.*; see also 71 Comp. Gen. 502 (1992); 59 Comp. Gen. at 521.

Here, the agency issued a modification pursuant to a clause of the original contract—in this case, the changes clause—and created an increased cost because

of the operation of that clause.¹⁵ The modification made changes to account for site conditions that differed from the original drawings and other discrepancies between the drawings and specifications.¹⁶ The contracting officer determined that this modification increased the cost to and time required from the contractor, thus entitling the contractor to an equitable adjustment under the changes clause. Thus, the modification relates back to an antecedent liability of the original contract, and the additional price resulting from the modification is properly obligated against amounts available for the original contract—here, amounts available from the fiscal year 2019 Operations and Maintenance, Army appropriation.

The certifying officer contends that the *bona fide* need to connect the buildings to the new water main did not arise until fiscal year 2020. He states that Fort Carson decided to abandon the buildings and that it removed the buildings from the scope of the contract to repair or replace the water main.¹⁷ He states after the buildings were removed from the contract, Fort Carson then decided to connect the buildings to the water main.¹⁸ Accordingly, the certifying officer states that Fort Carson should obligate the increased price of the modification against fiscal year 2020 Operations and Maintenance, Army appropriations. Request Letter, at 2; *see, e.g.*, B-206283-O.M., Feb. 17, 1983 (concluding that missiles deleted from a previous fiscal year's contract are *bona fide* needs of the fiscal year in which they are later purchased). However, our review of the documents before us shows that Fort Carson did not decide to abandon the buildings. While Fort Carson had conducted a study in 2019 that recommended demolishing the four buildings at issue here, Fort Carson did not follow the recommendations of that study.¹⁹

Accordingly, the Fort Carson legal counsel informed us that officials never removed the four buildings from the scope of the original contract.²⁰ Furthermore, the contracting officer determined that connecting the four buildings to the new water main remained within the scope of the original contract at the time that the modification was issued, a determination with which the Fort Carson legal counsel agreed.²¹ We see no basis to disagree with the determinations of the contracting officer and of the Fort Carson legal counsel.

¹⁵ Request Letter, Encl. 3.

¹⁶ Response Letter, at 2.

¹⁷ Request Letter, at 2.

¹⁸ *Id.*

¹⁹ Response Letter, at 1.

²⁰ *Id.*

²¹ Request Letter, Encl. 3; Request Letter, Encl. 4, at 2.

CONCLUSION

A modification to a firm-fixed-price contract that is within the scope of the original contract may result in an increase to the contract price. Where such a price increase arises from and is enforceable under a provision in the original contract, the agency must obligate the price increase against appropriations available when the contract was originally executed, not against appropriations available when it made the modification. Accordingly, Fort Carson must obligate the increased price against the fiscal year 2019 Operations and Maintenance, Army appropriation.



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441 G St. N.W.
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Decision

Matter of: Office of Congressional Workplace Rights—Transfer Authority

File: B-332003

Date: October 5, 2021

DIGEST

The Congressional Accountability Act (CAA) applied various employment-related laws to agencies across the legislative branch and established a single dedicated appropriation to pay awards and settlements arising from these laws. The CAA also created the Office of Congressional Workplace Rights (OCWR) and vested it with a central role in administering the CAA. The CAA vests OCWR with statutory authority to transfer amounts from this single appropriation to the appropriations of other agencies as necessary to carry out the provisions of the CAA, thereby overcoming the general prohibition on transfers in 31 U.S.C. § 1532.

DECISION

The Office of Congressional Workplace Rights (OCWR) requested an advance decision under 31 U.S.C. § 3529 concerning its administration of a single dedicated appropriation for paying awards and settlements arising from various statutory provisions related to fair employment and occupational safety and health within the legislative branch. Letter from General Counsel, OCWR, to General Counsel, GAO (Mar. 16, 2020) (Request Letter). Through its work, OCWR may determine that an employee (the prevailing employee) of a legislative branch agency (the employing agency) is entitled to back pay. As explained below, we conclude that OCWR may transfer amounts from the single dedicated appropriation to the appropriations of employing agencies for ultimate payment of back pay awards and settlements.¹

¹ OCWR also asked us whether it or the employing agency is responsible for issuing a form W-2 to the employee and the Internal Revenue Service (IRS). Because this question involves the administration of the tax laws, we will not address it further. OCWR should consider discussing this matter with IRS. OCWR further inquired whether amounts in the dedicated appropriation are available for the payment of payroll taxes and fringe benefits associated with a back pay award or settlement. We continue to consider that issue.

Our practice when rendering decisions is to obtain the legal views of the relevant agencies and establish a factual record on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. OCWR provided information and its legal views in its request letter and through follow-up correspondence. Request Letter; Email from General Counsel, OCWR, to Senior Attorney, GAO (Aug. 10, 2020). OCWR's request to us for a decision arose in part due to orders that OCWR issued in matters involving USCP. Request Letter, at 4. Accordingly, at our request, USCP also provided us with information and its legal views. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USCP (Aug. 11, 2020); Letter from Employment Counsel, USCP, to Assistant General Counsel for Appropriations Law, GAO (Aug. 25, 2020) (Response Letter).

BACKGROUND

The Congressional Accountability Act (CAA) established OCWR to administer and enforce various provisions related to fair employment and occupational safety and health within the legislative branch.² Specifically, the CAA provides workplace protections to covered legislative branch employees by incorporating by reference portions of thirteen civil rights, labor, and workplace safety laws. Request Letter, at 2. OCWR provides a means of dispute resolution for legislative branch employees who allege violations under the CAA. Section 415(a) of the CAA created a Treasury account with a dedicated permanent indefinite appropriation (hereinafter referred to as the Section 415(a) appropriation) to make payments pursuant to the act. 2 U.S.C. § 1415(a). OCWR administers the Section 415(a) appropriation.³

In 2019, OCWR promulgated a rule regarding the process for making back pay payments from the Section 415(a) appropriation. OCWR Procedural Rules § 9.04(d) (June 2019); see 165 Cong. Rec. H4896, H4915-16; 165 Cong. Rec. S4105, S4124-25 (daily ed. June 19, 2019). Under this process, OCWR transfers from the Section 415(a) appropriation to the employing agency an amount that corresponds to the withholdings and deductions from the employee's back pay. OCWR makes a

² CAA, Pub. L. No. 104-1, title III, § 301, 109 Stat. 3, 24 (Jan. 23, 1995), as amended by the Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397, title III, § 308, 132 Stat. 5297, 5325 (Dec. 21, 2018). OCWR was formerly named the Office of Compliance.

³ The Section 1415(a) appropriation is a permanent, indefinite appropriation. The CAA provides that, with certain exceptions, "only funds which are appropriated to an account of the Office in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements," and that "[t]here are appropriated for such account such sums as may be necessary to pay such awards and settlements." 2 U.S.C. § 1415(a).

disbursement from the Section 415(a) appropriation directly to the employee for the net pay—that is, the gross pay minus the deductions transferred to the employing agency.⁴

OCWR ordered USCP in two cases to make payments of back pay to prevailing employees. Request Letter, at 4. OCWR disbursed the payments of net back pay directly to the prevailing employees and indicated it would transfer funds to USCP so that USCP could remit the withholdings and deductions of the prevailing employees to the appropriate third parties or government agencies. *See id.*; *see also* Response Letter, Attachment A, at 6. USCP believed that it had no authority to accept transferred amounts from OCWR or to make any payments using such transferred amounts. Response Letter, Attachment A, at 5; Request Letter, at 4. Accordingly, USCP did not accept the transfers from OCWR or remit withholdings or deductions to third parties. *Id.* USCP suggested that OCWR request our decision on the issue. *Id.*

DISCUSSION

At issue is whether OCWR may transfer all or part of a back pay payment and associated payments, such as tax withholdings, to the employing agency for ultimate payment. By law, OCWR administers the Section 415(a) appropriation. 2 U.S.C. § 1415(a). As is the case with any appropriation, OCWR may transfer amounts from the Section 415(a) appropriation to another appropriation only where permitted by law. 31 U.S.C. § 1532. Therefore, we must determine whether some provision of law authorizes OCWR to transfer amounts from the Section 415(a) appropriation to the appropriation of the employing agency.

The CAA's Provision of Transfer Authority

In some instances, Congress enacts specific authority for an agency to “transfer” amounts from one appropriation to another. *See, e.g.*, B-330862, Sept. 5, 2019 (statute authorized an official to “transfer” amounts between appropriations); B-290659, Oct. 31, 2002 (statute permitted amounts “to be transferred” to another appropriation). In other instances, Congress enacts transfer authority not by using the specific word “transfer” but, rather, by enacting a statute that otherwise makes clear that amounts may be moved from one appropriation to another.

For example, the Department of Education proposed to perform a cooperative study of mathematics and science education in the United States and Japan. B-217093, Jan. 9, 1985. The Department of Education and the Japan-United States Friendship Commission proposed to pay for the study in part by transferring to the Department

⁴ OCWR's rule also provides other processes to make back pay payments from the Section 415(a) appropriation; for example, OCWR may transfer amounts directly to the payroll administrator or disbursing office, as applicable. OCWR Procedural Rules § 9.04(d).

of Education amounts appropriated to the Friendship Commission. *Id.* We noted that the Friendship Commission was not specifically authorized to transfer amounts to other federal agencies and that the relevant legislative history made no mention of transfers. *Id.* Nevertheless, we also noted that the Friendship Commission's authorizing statute vested it with broad authority to fund scholarly activities between Japan and the United States as well as to support "cultural and educational activities." We concluded that the statute authorized the Friendship Commission to transfer amounts to other agencies when the project receiving funding fell within the ambit of the Friendship Commission's authorizing statute.⁵ *Id.* See also, e.g., 60 Comp. Gen. 686 (1981); B-195775, Sept. 10, 1979; B-182398, Mar. 29, 1976.

In this case, the CAA covers employees who work in many different entities of the legislative branch, with each of these entities receiving one or more of its own appropriations. See 2 U.S.C. § 1301(a)(3) ("covered employee[s]" include those in, among other entities, the Senate, the House of Representatives, the Capitol Police, and the Congressional Budget Office). Though the CAA applies to employees in many different legislative branch entities, Congress established a single entity—OCWR—to resolve claims brought under the CAA. 2 U.S.C. § 1381. Congress also established a single appropriation—the Section 415(a) appropriation—and made only this appropriation available for the payment of all awards and settlements that may arise from any of the legislative branch entities that are subject to the CAA. 2 U.S.C. § 1415.

These three factors—the CAA's applicability across the legislative branch, whose entities are funded with different appropriations; OCWR's central role in administering the CAA; and the sole availability of the Section 415(a) appropriation to pay awards and settlements—all indicate that OCWR may transfer amounts from the Section 415(a) appropriation to the appropriations of other legislative branch agencies as OCWR finds such transfers to be necessary to carry out the purposes of the Section 415(a) appropriation. These transfers are a necessary consequence of the statutory framework that the CAA and the various appropriations of the legislative branch establish.

In light of the above, we conclude that the CAA vests OCWR with sufficient statutory authority to overcome the general prohibition on transfers in 31 U.S.C. § 1532. OCWR may therefore transfer all or part of a payment from the Section 415(a) appropriation to the appropriations of employing agencies for ultimate payment of back pay awards and settlements.

⁵ We cautioned that the Friendship Commission likely was not authorized to transfer amounts to other federal entities to carry out studies for which such entities had already received appropriations. B-217093.

USCP's Views

USCP has raised several concerns regarding accepting transferred amounts from OCWR. First, USCP is concerned that it could not accept amounts transferred to it because it believes that the miscellaneous receipts statute, 31 U.S.C. § 3302(b), would require it to deposit the amounts transferred into miscellaneous receipts in the Treasury. Response Letter, Attachment A, at 5. The miscellaneous receipts statute applies where an officer of the government receives money for the government from an outside source. See, e.g., B-321387, Mar. 30, 2011 (agency violated miscellaneous receipts statute where it directed a private developer to deposit cash rent payments in an escrow account); B-318274, Dec. 23, 2010 (agencies violated miscellaneous receipts statute where they sold land and used the proceeds to purchase other land). It does not apply where an agency properly transfers amounts from one appropriation to another. Thus, the miscellaneous receipts statute would not bar USCP from accepting amounts that OCWR may properly transfer for the limited purpose of carrying out the Section 415(a) appropriation.

Similarly, such transfers would not augment USCP's appropriation. An augmentation arises where an agency obtains and retains money from an outside source without statutory authority. B-327376, Feb. 19, 2016. Here, the transfers are authorized by law—specifically, by the CAA. In addition, as 31 U.S.C. § 1532 clearly states, transferred amounts are available “for the same purpose and subject to the same limitations provided by the law appropriating the amount.” Thus, amounts OCWR may transfer to, for example, USCP for the payment of a particular award remain available only for the payment of that particular award, and not to satisfy any other purposes for which USCP's appropriation are otherwise available.

Finally, USCP also believes that there are mechanisms other than transfers that may be available to OCWR, and that OCWR should use these mechanisms. Specifically, USCP states that OCWR could instruct USCP's payroll processor to obligate the Section 415(a) appropriation directly in order to make the necessary payments for withholdings such as payroll and income taxes. Response Letter, Attachment A, at 5-6; see also B-321823, Dec. 6, 2011 (the Department of the Treasury established allocation accounts to make defined amounts that were appropriated to one agency available for obligation by other agencies, as permitted by the applicable statutory framework).

As the entity charged with primary responsibility for administering the CAA and the Section 415(a) appropriation, OCWR is vested with authority to use the appropriate mechanisms available to it by law. These mechanisms include the authority to transfer Section 415(a) amounts to other agencies as discussed above. OCWR may exercise its transfer authority in a manner consistent with law, even if other mechanisms are available to it. Although OCWR may exercise its transfer authority if it so chooses, OCWR's Procedural Rules also provide for the use of other mechanisms that are mutually agreeable to OCWR and the employing agency. OCWR Procedural Rules § 9.04(d)(3). This permits OCWR and the employing

agency to proceed in a spirit of comity by using any mechanism that satisfies applicable legal requirements while promoting the efficient operations of both agencies as well as those of other agencies with a stake in the process, such as the Department of the Treasury and payroll processors.

CONCLUSION

The CAA vests OCWR with authority to transfer amounts from the Section 415(a) appropriation to the appropriations of employing agencies for ultimate payment of back pay awards and settlements and associated payments, such as for tax withholdings.



Edda Emmanuelli Perez
General Counsel

Resources

<https://www.gao.gov/legal/appropriations-law/forum>

- Participants of this year's forum can download forum materials for this year, and prior years, from the hyperlink above. Additional information about GAO's annual appropriations law forum can also be found on this webpage.

<https://www.gao.gov/legal/appropriations-law/red-book>

- The Red Book is GAO's multi-volume treatise concerning federal fiscal law. More information about the Red Book can be found on the webpage in the hyperlink above. Please also note that forum participants may email questions they may have during the forum to redbook@gao.gov. Time permitting, speakers and panelists will attempt to answer any questions that are received. If we are not able to answer your question during the forum, GAO will follow up with you after the forum.

<https://www.gao.gov/legal/appropriations-law/resources>

- Additional information about the Antideficiency Act and GAO's roles and responsibilities with regard to the act can be found in the hyperlink above.

<https://www.gao.gov/legal/appropriations-law/appropriations-law-training>

- GAO provides a course taught by experienced GAO appropriations law attorneys. More information about the class, registration enrollment, and a complete course outline can be found in the hyperlink above.

<https://www.gao.gov/products/gao-05-734sp>

- GAO's Budget Glossary can be found in the hyperlink above. This document provides standard terms, definitions, and classifications for the government's fiscal, budget, and program information. It is a basic reference document for Congress, federal agencies, and others interested in the federal budget-making process.

<https://www.gao.gov/legal/federal-vacancies-reform-act>

- GAO's appropriations law team also fulfills GAO's responsibilities under the Federal Vacancies Reform Act of 1998. The act requires executive departments and agencies to report certain information about vacancies in presidentially appointed, Senate-confirmed positions to Congress and the Comptroller General. More information about this work can be found in the hyperlink above.

<https://www.gao.gov/legal/other-legal-work/congressional-review-act>

- GAO's appropriations law team also fulfills GAO's responsibilities under the Congressional Review Act. The Congressional Review Act requires GAO to report on major rules. More information about this work can be found in the hyperlink above.

Contributors

The 2022 Appropriations Law Forum was organized by the Appropriations Law Group (AL) within GAO's Office of the General Counsel. AL attorneys write appropriations law decisions, provide legal support to internal GAO clients, teach the Principles of Appropriations Law course, and respond to requests for informal technical assistance from officials and staff in all three branches of the federal government. AL attorneys are also in the process of updating the *Principles of Federal Appropriations Law* treatise and *A Glossary of Terms Used in the Federal Budget Process*. AL also maintains a repository for Antideficiency Act violations reported by executive branch agencies and issues an annual summary report. Lastly, the group also carries out statutory responsibilities under the Congressional Review Act, the Davis-Bacon Act, and the Federal Vacancies Reform Act.

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