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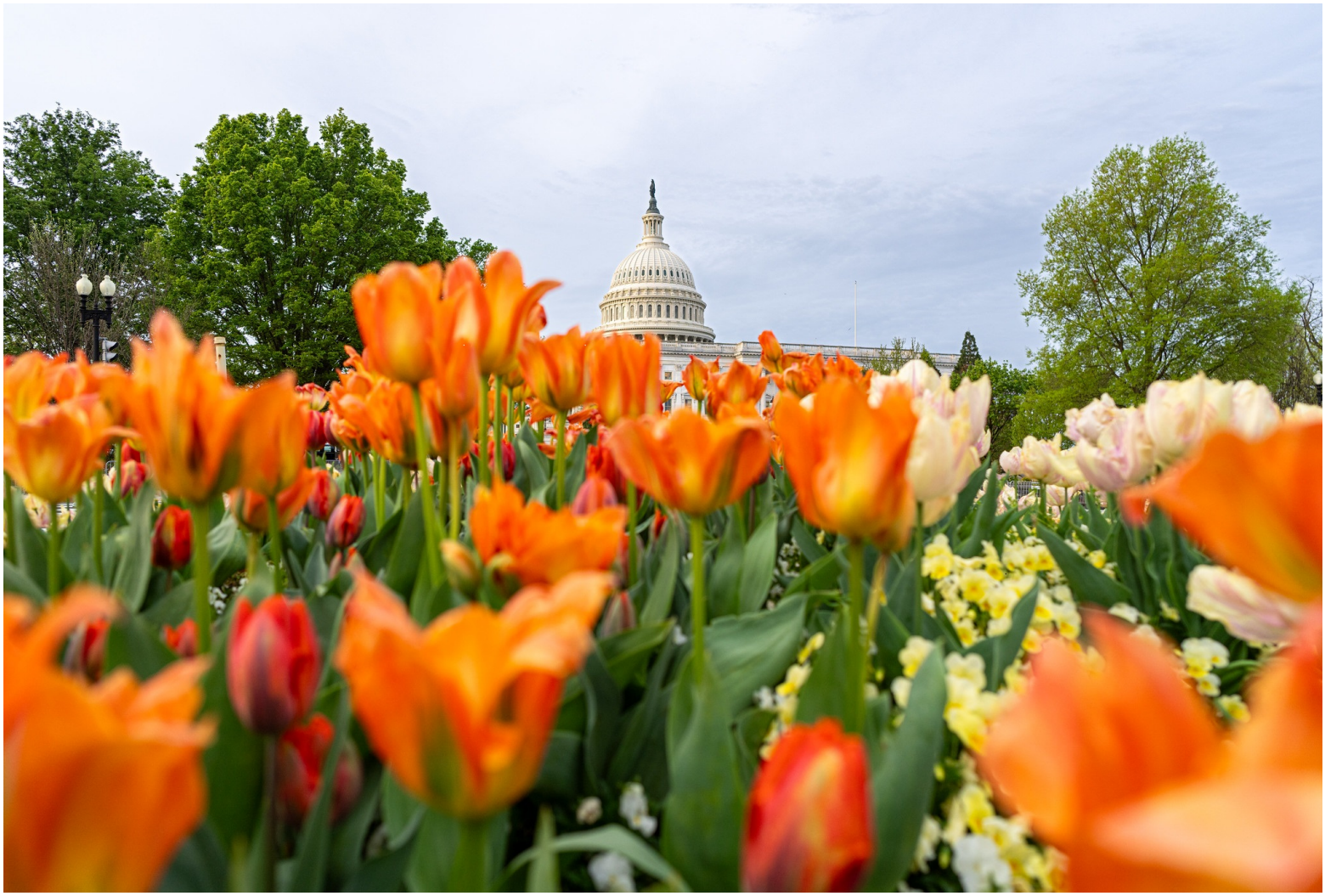

2024

APPROPRIATIONS LAW FORUM

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

June 4, 2024

Fellow appropriations law practitioners,

Welcome to GAO's Office of the General Counsel annual appropriations law forum. During today's forum, you will hear from GAO's senior management and appropriations law attorneys about GAO's recent appropriations law decisions and other timely appropriations law topics.

In these materials, you will find the forum agenda, speaker biographies for our panelists, and copies of all the appropriations law decisions we issued since last year's forum. In addition, we have included a resource guide identifying potential appropriations issues for political appointees. It is our hope that this guide will help you quickly spot and begin researching issues that may arise when working with new appointees--especially those who may be unfamiliar with the use of appropriated funds.

As always, if you have any specific questions regarding appropriations law issues, we invite you to reach out to us via RedBook@GAO.gov. Our appropriations law team is always available to provide informal technical assistance or to provide information about how you can request a formal decision from our office.

Sincerely,

Shirley A. Jones

Managing Associate General Counsel

2024 Appropriations Law Forum

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Cover image: Spring 2024 on the U.S. Capitol Campus
Source: Architect of the Capitol

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

AGENDA

9:00am **Welcome**

Edda Emmanuelli Perez, General Counsel
Government Accountability Office

9:05am **Working with GAO: Framework for GAO Decisions & Opinions**

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

9:25am **Revolving Funds & Government Corporations**

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

Holly Firlein, Senior Attorney
Government Accountability Office

Dana Ledger, Senior Attorney
Government Accountability Office

Karly Newcomb, Senior Staff Attorney
Government Accountability Office

9:55am **Recording & *Bona Fide* Needs Statutes: Other Transaction Agreements & Travel**

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

Will Shakely, Senior Attorney
Government Accountability Office

Zach Buchta, Staff Attorney
Government Accountability Office

10:25am **Impoundments: Border Barrier Construction**

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

Doug Sahmel, Senior Attorney
Government Accountability Office

10:40am **Break**

11:00am **New Presidential Term: Role of Executive Agencies & Appropriations Attorneys**

Julie Matta, Deputy General Counsel
Government Accountability Office

Seth S. Greenfeld, Senior Assistant General Counsel
U.S. General Services Administration

Kristine Hassinger, Assistant General Counsel for Appropriations Law
Government Accountability Office

Andrew Howard, Senior Attorney
Government Accountability Office

11:35am **Availability of Appropriations as to Purpose: Motor Vehicles, Furnishing & Redecorating, Communication Services**

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

Kristine Hassinger, Assistant General Counsel for Appropriations Law
Government Accountability Office

Heather Stryder, Senior Staff Attorney
Government Accountability Office

Daniella Royer, Staff Attorney
Government Accountability Office

12:05pm **Tracking the Funds: Community Project Funding & Congressionally Directed Spending**

Edda Emmanuelli Perez, General Counsel
Government Accountability Office

12:20pm **Closing Remarks**

Kristine Hassinger, Assistant General Counsel for Appropriations Law
Government Accountability Office

List of Appropriations Law Decisions
September 2023 to May 2024

1. **Architect of the Capitol—Purchase and Use of Motor Vehicles**

   B-333508, Sept. 7, 2023

   The Architect of the Capitol (AOC) obligated $49,033.64 against its Capital Construction and Operations appropriation for the purchase of a passenger motor vehicle for the then-Architect's use. AOC also obligated $37,458.74 against its Capitol Police Buildings, Grounds and Security appropriation for the purchase and installation of emergency vehicle lighting, communications equipment, and a customized seating arrangement in the vehicle. Under 31 U.S.C. § 1343(b), an agency may expend an appropriation to buy or lease a passenger motor vehicle only for the use of specified individuals or as specifically provided by law. While AOC had authority to purchase a passenger motor vehicle under this provision, we conclude that AOC violated a statutory price limitation on such a purchase. Because AOC exceeded the amount available for the purchase of a passenger motor vehicle, we also find that AOC violated the Antideficiency Act. AOC did not violate the purpose statute, however, when it obligated appropriations to purchase and install emergency vehicle lighting, communications equipment, and seating equipment in the vehicle.

   AOC also obligated appropriations for expenses associated with the then-Architect's use of AOC vehicles to travel between his residence and place of work, incidental stops along his commute, and general family use including weekend trips to a craft brewery and out-of-town trips. The then-Architect had discretion to determine that agency appropriations were available for his use of AOC vehicles to carry out his statutory duties, provided that he properly determined that such use was necessary to carry out the emergency functions vested in him by law. However, such discretion is not unlimited. Appropriations are not available for personal expenses that lack any relationship to government business. Thus, AOC violated the purpose statute when it obligated appropriations for expenses associated with the use of AOC motor vehicles by the then-Architect's family members.

2. **U.S. Department of Agriculture—Use of Commodity Credit Corporation Funds for Various Programs**

   B-334146.1, Sept. 20, 2023

   The U.S. Department of Agriculture (USDA) transferred Commodity Credit Corporation (CCC) funds to USDA agencies to carry out new financial assistance programs that were not specifically identified in USDA's fiscal year (FY) 2021 budget submission. While section 5 of the Commodity Credit Corporation Charter Act (CCC Charter Act), 15 U.S.C. § 714c, authorizes CCC, a USDA wholly owned government corporation, to use its funds to carry out a budget submitted to and approved by Congress pursuant to the Government Corporation Control Act (GCCA), GCCA does not require corporations to delineate specific

programs in their budget submissions prior to carrying them out. Therefore, USDA was not required to include these programs in its FY 2021 budget submission and did not violate section 5 of the CCC Charter Act or the Antideficiency Act when it transferred funds for the programs where such programs otherwise carried out the purposes of CCC's funds.

Additionally, USDA announced the Partnerships for Climate-Smart Commodities (PCSC), which is a grant-based program that supports the marketing and production of "climate-smart agricultural commodities." The Food Security Act authorizes USDA to carry out various activities under the Environmental Quality Incentives Program (EQIP), including a grant program to carry out certain projects for pollution reduction and practices for the storage of carbon in soil. Because the principal purpose of PCSC is to expand the market for climate-smart agricultural commodities, PCSC is not a part of the grant program authorized by EQIP and, accordingly, not subject to EQIP's restrictions. Rather, PCSC is authorized under section 5(e) of the CCC Charter Act, which authorizes USDA to use CCC funds to expand domestic markets for agricultural commodities.

3. **U.S. Department of Health and Human Services—Obligations for Communication Services**

B-332531, Nov. 16, 2023

The Centers for Medicare & Medicaid Services (CMS), within the U.S. Department of Health and Human Services, awarded task orders for communication services regarding new agency goals and initiatives. Under the purpose statute, 31 U.S.C. § 1301(a), an agency may not use appropriations for impermissible personal expenses. Further, under government-wide appropriations prohibitions, an agency may not use appropriations for publicity or propaganda, or for publicity experts. Under the Antideficiency Act, 31 U.S.C. § 1341, an agency may not incur obligations in excess of available appropriations.

We conclude that CMS did not violate the purpose statute, publicity or propaganda prohibition, or publicity experts prohibition when it obligated appropriations for task orders for communication services. The task orders did not call for services that were impermissible personal expenses, require production of prohibited publicity or propaganda, or require contractors to serve as prohibited publicity experts. Further, CMS obligated the proper appropriation account for the communication services task orders. We also conclude that CMS did not violate the Antideficiency Act.

4. **Revolving Funds: Key Features**

B-335844, GAO-24-107270, Jan. 17, 2024

What GAO Found
Only Congress can make public money available to federal agencies. Congress does so by making appropriations, which take a variety of forms. One such form is a revolving fund, which authorizes an agency to retain and use specified receipts for particular purposes. Revolving funds are intended to finance cyclical, business-like operations. The activity financed by a revolving fund will collect receipts from the public or other federal agencies and use those receipts to finance the fund's ongoing operations. Often, the activity supported by a revolving fund will become self-sustaining, eliminating the need for future annual appropriations.

There is a key feature of revolving funds that distinguishes them from other appropriations: the receipts collected by the fund are available without the need for further congressional action and without fiscal year limitation.

Even so, revolving funds remain appropriations. As such, they can only be created by Congress. Agencies must have explicit statutory authority to operate a revolving fund. The statute authorizing the creation of a revolving fund will specify the receipts which the fund may collect and retain, define the fund's authorized uses, and authorize the agency to use the collected receipts for the specified purposes without fiscal year limitation.
In addition, revolving funds are subject to the legal restrictions on the use of appropriated funds. These restrictions include:

- The purpose statute, which requires that agencies use appropriated funds only for the purposes for which Congress appropriated them;
- The Antideficiency Act, which forbids agencies from incurring obligations (that is, legal liabilities to make payments) or making expenditures that exceed the amount available in an appropriation or fund; and
- The recording statute, which requires agencies to record obligations against available appropriations as they incur them.

Similarly, agencies doing business with a revolving fund must also comply with appropriations law restrictions. These requirements ensure that revolving funds—like other appropriations—are spent in accordance with the law.

Prior GAO work has addressed many agency activities financed by various revolving funds, as well as the financial and management issues that arise as agencies carry out revolving fund activities.

5. **U.S. Department of Health and Human Services—Application of Fiscal Law to Other Transactions**

B-333150, April 8, 2024

The National Heart, Lung, and Blood Institute (NHLBI) within the National Institutes of Health (NIH) violated the recording statute when it recorded obligations for three other transaction agreements (OTAs) at the time it issued the respective Notices of Award for such agreements. The recording statute requires an agency to record the full amount of its obligation against funds available at the time it incurs the obligation. However, as is the case here, award notices do not establish an obligation if another document has already established the agency's legal liability for the project or if the notices condition funding on the agency's approval of the applicant's plan, the execution of a future agreement, or both.

NHLBI also violated the recording statute when it recorded a liability for one of the agreements in an amount that included funds that were not available to the awardee until NHLBI approved their release in the future. An agency may not generally record an obligation if the government's liability is subject to a precondition, and the satisfaction of the condition is in the government's control.

NHLBI did not violate the bona fide needs statute when it entered into the three OTAs with fiscal year appropriations, even though the agreements covered activities that would be conducted over multiple years, because the purposes of the agreements were to provide federal assistance to facilitate medical research. When the principal purpose of the transaction is to provide federal assistance, then the agency's need is fulfilled when it awards funds from the currently available appropriation, regardless of when the recipient will expend the awarded funds.

NHLBI complied with the bona fide needs statute when it modified one of the agreements but did not alter the agreement's scope or purpose. A modification is a bona fide need of the year in which the agreement was originally executed when there is a continuing need for the work contemplated in the agreement and the purpose and scope of the agreement remain unchanged.

6. **Social Security Administration Office of the Inspector General—Use of Appropriations in Response to a Council of the Inspectors General on Integrity and Efficiency Investigation**

B-336076, April 18, 2024

In May 2022, the Integrity Committee (IC) of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) initiated an investigation into allegations made against the Inspector General of the Social Security

Administration (SSA) and other SSA Office of the Inspector General (OIG) staff. SSA OIG personnel cooperated with the investigation by responding to requests for documents and sitting for interviews.

SSA appropriations are generally available for expenses incurred in carrying out its mission and functions. This includes cooperating with the CIGIE IC investigation as such efforts aid SSA OIG in carrying out its mission and functions, including administering a statutorily authorized SSA program. In addition, SSA OIG did not accept uncompensated services from CIGIE IC and, therefore, SSA OIG did not augment its appropriation. Because SSA OIG did not obligate its appropriation in excess of legally available amounts or in violation of a statutory prohibition on the use of appropriations, SSA OIG did not violate the Antideficiency Act.

7. **Department of Homeland Security—Border Barrier Construction and Obligations**

B-335757, April 22, 2024

In fiscal years 2018 through 2021, Congress appropriated amounts to the Department of Homeland Security (DHS) for constructing barriers, commonly known as a border wall, along the United States' southern border. In January 2021, a presidential proclamation directed officials to pause all construction and obligation of funds for the border wall, to the extent permitted by law.

Unless Congress has enacted a law providing otherwise, executive branch officials must take care to ensure that they prudently obligate appropriations during their period of availability. The Impoundment Control Act of 1974 (ICA) allows the President to withhold funds from obligation, but only under strictly limited circumstances and only in a manner consistent with that Act. In 2021, we concluded that neither the proclamation nor its implementation violated the ICA. B-333110, June 15, 2021. We conclude that DHS has continued to incur obligations against these appropriations at a rate consistent with the ICA.

8. **U.S. Department of the Navy, Naval Sea Systems Command, Southwest Regional Maintenance Center—Application of the Bona Fide Needs Statute to Temporary Duty (TDY) Travel Orders**

B-335838, April 30, 2024

Certifying officers from the U.S. Department of the Navy (Navy), Naval Sea Systems Command, Southwest Regional Maintenance Center (SWRMC), approved 178 travel orders for active-duty service members to perform temporary duty (TDY) travel in fiscal year (FY) 2023. SWRMC obligated an FY 2023 appropriation for the approved travel orders. In FY 2024, Navy directed the certifying officers to modify the travel orders to include additional costs.

Travel, including TDY travel, is a *bona fide* need of the year in which the travel takes place. The travel at issue here occurred in FY 2023 and therefore was a *bona fide* need of FY 2023. Increases to these travel costs constitute an antecedent liability, which should be charged to the FY 2023 appropriation initially charged for the travel. If there is insufficient budget authority to cover these costs, Navy must report an Antideficiency Act violation.

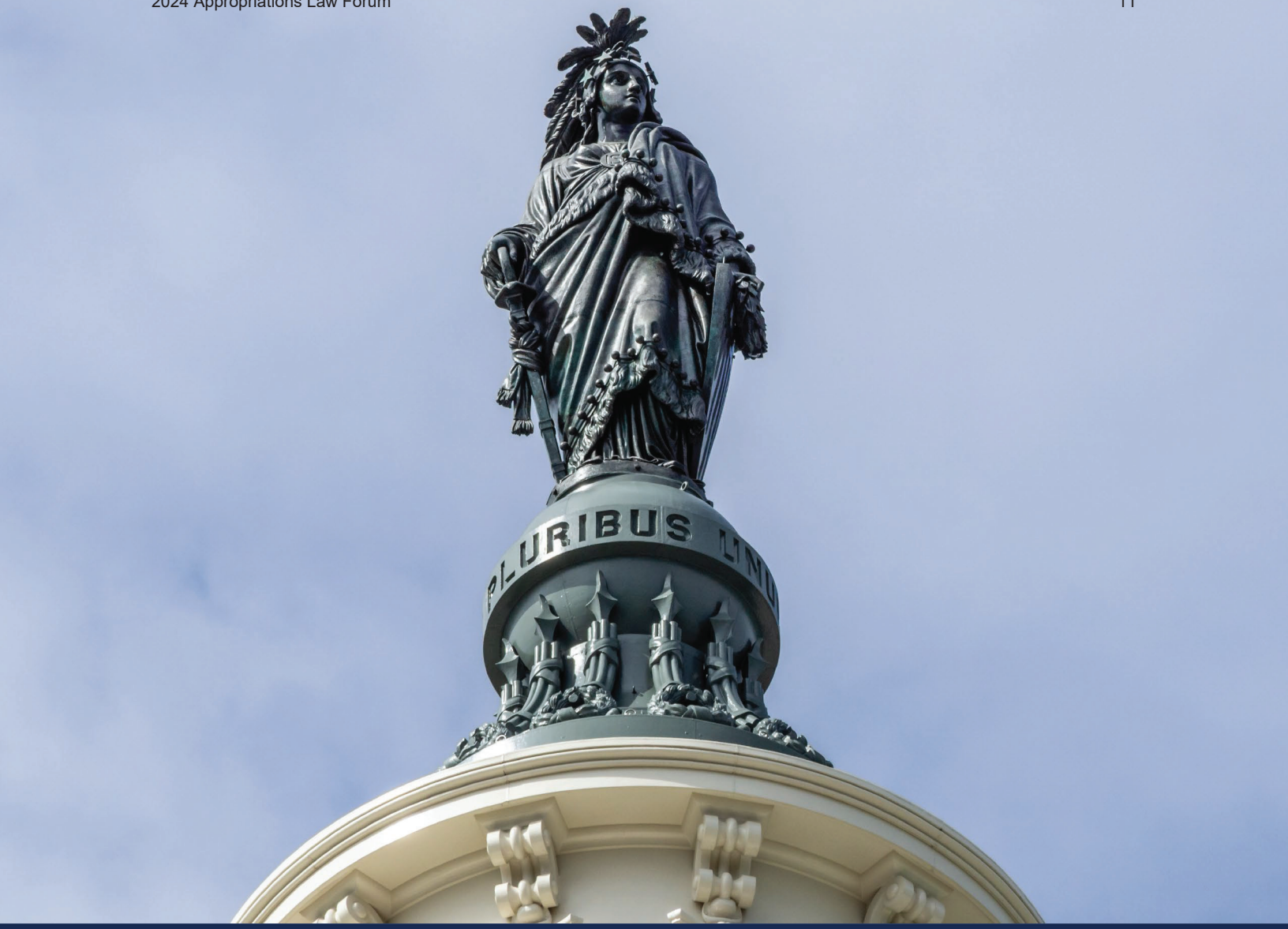
9. **Department of Commerce, Office of Inspector General—Applicability of Statutory Notification Requirement to Costs Related to Current and Anticipated Offices**

B-335459, May 8, 2024

The Department of Commerce Office of Inspector General (OIG) installed sound attenuation technology on its office exterior to protect the privacy of sensitive conversations inside its office. OIG also planned to relocate its current furniture to its new, anticipated office, and the General Services Administration (GSA) plans to make alterations to prepare the office for OIG occupancy. Section 710 of the Financial Services and General Government Appropriations Act, 2023 prohibits an agency from obligating or expending an amount more than $5,000 to furnish, redecorate, purchase furniture for, or make improvements for the office of a presidential appointee during the period of appointment without prior notification to the House and Senate Appropriations Committees.

Section 710 applies to the cost of installing the sound attenuation technology for the entire suite of offices assigned to the Inspector General as well as to any spaces directly controlled or primarily used by the Inspector General, even if the technology was installed on the exterior of OIG's office perimeter. Section 710 also applies to expenses to relocate furniture to the Inspector General's new office space because these expenses "furnish" the office by supplying what the office needs. However, section 710 does not apply to costs related to construction and alteration of the Inspector General's anticipated office because it is not yet directly controlled or primarily used by the Inspector General, and thus, does not meet the statutory definition of "office" under section 710.

Working with GAO: Framework for GAO Decisions & Opinions



February 2024

GAO's Protocols for Legal Decisions and Opinions

GAO

GAO-24-107329

GAO's Mission

GAO exists to support the Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people.

GAO's Work

GAO performs a range of oversight-, insight-, and foresight-related work to support the Congress, including the following:

- evaluations of federal programs, policies, operations, and performance;
- management and financial audits to determine whether public funds are spent efficiently, effectively, and in accordance with applicable laws;
- investigations to assess whether illegal or improper activities are occurring;
- analyses of the financing for government activities;
- legal decisions on agency compliance with the Congressional Review Act, the Federal Vacancies Reform Act, and matters of appropriations law including, the Antideficiency Act and the Impoundment Control Act;
- policy analyses to assess needed actions and the implications of proposed actions; and
- additional assistance to the Congress in support of its oversight, appropriations, legislative, and other responsibilities.

Core Values

Mission Values: Accountability · Integrity · Reliability

People Values: Valued · Respected · Treated Fairly

Source: GAO (front and inside front covers).

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U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Letter from Comptroller General

February 21, 2024

This document contains updated protocols for the Government Accountability Office's (GAO) legal decisions and opinions. GAO's Office of the General Counsel (OGC) issues decisions and opinions primarily on appropriations law, the Congressional Review Act (CRA), and the Federal Vacancies Reform Act (Vacancies Act), although we may address other legal subjects where we have developed particular expertise. The decisions and opinions of the Comptroller General concerning the use and obligation of appropriated funds are grounded in statute and have a well-established and recognized heritage dating back to the mid-19th century. Our decisions and opinions under the CRA and the Vacancies Act are similarly grounded in statute to support congressional oversight of agency rulemaking and vacancies in presidentially appointed, Senate-confirmed positions, respectively. We describe in a separate publication our process for considering bid protests.

These protocols explain our approach to rendering decisions and opinions, including how the Congress or federal agencies may request them and how we develop the legal and factual record upon which they rely. Importantly, these protocols provide a consistent framework for issuing legal decisions and opinions. The resulting decisions and opinions, in turn, support the Congress's constitutional power of the purse and further congressional oversight.

We first released these protocols in 2006 and have found that they help make our work more efficient and effective. This update reflects those long-standing practices, while also making helpful improvements to ensure more consistent communication with the Congress. Similar to our approach for our Congressional Protocols for our audit work, we sought feedback from cognizant committees about these updates to establish a shared understanding of our process for accepting and rendering legal decisions and opinions.

Along with everyone at GAO, I look forward to using these protocols to serve the Congress and the American people. We will continue to monitor the application of these protocols and, in consultation with the Congress, will consider what, if any, refinements are needed. I encourage you to contact the Office of the General Counsel at 202-512-5400 or via email at LegalProtocols@gao.gov if you have any questions or comments on these protocols.

Gene L. Dodaro
Comptroller General of the United States

REQUESTS FOR LEGAL OPINIONS: PROCESS AND TIMING

GAO provides legal opinions to congressional requesters on

- Matters of appropriations law, including evaluating an agency's compliance with statutes like the Antideficiency Act or the Impoundment Control Act, and
- Agency compliance with the Congressional Review Act and the Federal Vacancies Reform Act.[1]

Making a Request 	Contact our Congressional Relations office to set up a call with our Office of General Counsel. GAO attorneys will assist you in identifying relevant legal provisions that may apply to your request. Requests may come from the chairs or ranking members of committees or subcommittees or from individual members.	E-mail a request letter to our Congressional Relations office. Your request letter may provide facts and your views to GAO. Our Congressional Relations office will let you know we have received your letter.	Once we accept your request, we will email you a letter identifying an attorney contact and when we expect to start work.
Developing the Record 	Our opinions apply the law to established facts and are based on a record establishing the legal positions of the relevant parties.	In order to complete our record, we will request facts and the agency's legal position through a development letter. We do not audit the facts that agencies submit for legal opinions. We stay in contact with the agency regarding the response. An agency's failure to respond will not prevent our attorneys from issuing an opinion where sufficient facts otherwise exist.	The development letter will specify a deadline for the response, usually 4 weeks out, depending on the timing of the work and the complexity of the issues.
Issuing the Legal Opinion 	We will notify you as a legal opinion moves to the General Counsel for signature and confirm an issuance date. Interim briefings and updates will also be provided.	Our attorneys will meet with you to issue the legal opinion virtually or in person to brief you on the conclusion. The opinion will be publicly released on the day of issuance and cannot be restricted. The agency will receive the opinion shortly after you do.	The opinion will go through our normal distribution process to relevant congressional committees, including GAO's and the agency's appropriations and oversight committees. We will also distribute it to our daily email subscribers and post it on our website.

Agency requests for advance legal decisions on appropriations law issues can be submitted directly to the Office of General Counsel.

[1] Pursuant to the Competition in Contracting Act, GAO also issues legal decisions resolving disputes over the award of federal contracts to parties who file a bid protest. GAO issues regulations that explain the bid protest process. See Title 4 of the Code of Federal Regulations (C.F.R.), Part 21.

Statutory Authority and Responsibilities

GAO's Office of the General Counsel (OGC) is responsible for providing legal opinions to the Congress, its committees, its Members, as well as legal decisions to accountable officers and heads of executive agencies. GAO, under various statutory authorities, examines the use of federal funds, certain aspects of agency rulemaking, time periods of acting service for presidentially appointed and Senate-confirmed positions, and other legal topics to help the Congress make effective funding, policy, and oversight decisions.

Appropriations Law

GAO has statutory responsibilities for appropriations law matters that support the Congress's constitutional power of the purse. In carrying out these responsibilities, GAO issues both decisions to certain agency officials and opinions at the request of Members of the Congress. These products differ in their statutory underpinnings but carry equal precedential weight. In 2020, we began referring to both decisions and opinions as "legal decisions," and changed the format of our opinions to more closely match our decisions. This allowed for the inclusion of a brief digest summary in opinions to the Congress. It also made it easier to identify GAO's appropriations law products. For additional information on the origins of legal decisions and the establishment of GAO and its history, see Chapter 1 of *Principles of Federal Appropriations Law*.

Legal Opinions

The Congress has directed the Comptroller General to investigate all matters related to the receipt, disbursement, and use of public money, 31 U.S.C. § 712(1), and to evaluate the results of programs and activities carried out by the government under existing law, 31 U.S.C. § 717(b). The Comptroller General evaluates and reports on compliance with laws and regulations in GAO audits and investigations.[1] In addition, and independently of an audit or investigation, OGC will analyze and opine on the proper use of federal funds and properties or on the scope and exercise of authority by federal officers and employees at the request of the Congress, its committees, and its Members.[2]

Agency Decisions

The Comptroller General issues decisions to disbursing and certifying officers (accountable officers) and heads of agencies under

[1] *See* GAO, *Government Auditing Standards,* GAO-21-368G (Washington, D.C.: Apr. 2021), at ¶¶ 6.39 (financial audits), 9.35–9.36 (performance audits). Where OGC becomes aware of potential issues of compliance with laws such as those governing the obligation, expenditure, or the impoundment of public funds, among others, OGC follows up with inquiries that could result in the issuance of a self-initiated decision.

[2] See 31 U.S.C. § 717.

31 U.S.C. § 3529. This authority is integral to the Comptroller General's duty to settle the accounts of the United States under 31 U.S.C. § 3526.[3] In recognition of the Comptroller General's account settlement authority[4], the Congress has designated the Comptroller General as the administrative officer authorized to relieve accountable officers from liability for physical loss or losses from illegal, improper, or erroneous certifications and payments under certain circumstances (*e.g*. the loss or deficiency was not the result of negligence by the official).[5] Related statutes provide authority for the Comptroller General to relieve Legislative and Judicial Branch accountable officers from liability as well.[6] It is these statutes that represent the statutory foundation for Comptroller General decisions on the obligation, expenditure, and accounting of appropriated funds.

Additionally, GAO has statutory responsibility to monitor and report on Executive Branch compliance with the Impoundment Control Act, which prohibits agencies from withholding or delaying budget authority from obligation or expenditure unless the President transmits a special message to the Congress.[7] With respect to impoundments, the Comptroller General reports to the Congress any ongoing impoundment that has not been reported by the President in accordance with the relevant statutory procedures.[8] When an improper impoundment is no longer ongoing, GAO may report to the Congress when notification would enhance congressional oversight.

Congressional Review Act

GAO also has statutory responsibilities under the CRA which requires all federal agency rules to be submitted to both houses of the Congress and

[3] Since the turn of the 19th century, the Congress has provided disbursing and certifying officers (accountable officers) and heads of agencies the right to request decisions from the Comptroller General in advance of an audit and settlement of an account. 31 U.S.C. § 3529. For additional information, see Chapter 1 of *Principles of Federal Appropriations Law.*

[4] 31 USC § 3526. The decisions of the Comptroller General are binding on GAO when auditing and investigating federal programs and activities and settling government accounts. Although the decisions of the Comptroller General are conclusive on the Executive Branch, 31 U.S.C. § 3526(d), it is for the executive agencies to implement and enforce the decisions of the Comptroller General.

[5] 31 U.S.C. §§ 3527 and 3528.

[6] 2 U.S.C. §§ 142b, 142e, 142l, 1904, and 28 U.S.C. § 613.

[7] 2 U.S.C. § 686.

[8] 2 U.S.C. § 686(a).

GAO before they can take effect.[9] GAO's primary role under the CRA is to report to the Congress on each major rule regarding whether the promulgating federal agency's submission to GAO indicates that it has complied with the procedural steps required by various acts and Executive Orders governing the regulatory process.[10] In conjunction with this statutory responsibility, GAO also issues opinions on CRA related questions when requested by Members of the Congress. These opinions address issues such as whether an agency document that was not issued as a rulemaking meets the CRA definition of a rule.

Federal Vacancies Reform Act

The Vacancies Act establishes requirements for temporarily filling vacant positions in Executive Branch agencies that require presidential appointment and Senate confirmation.[11] This act identifies who may temporarily serve, for how long, and what happens when no one is serving under the act and the position is vacant. GAO issues letters to the Congress and the President reporting violations of the act's time limitations.[12] In conjunction with this statutory responsibility, GAO has been asked by Members of the Congress to issue opinions on issues related to the Vacancies Act. These opinions address issues such as the legality of an acting official's continued service.

Scope of Protocols

These protocols cover requests for legal decisions from the Congress, its committees, and its Members; requests for legal decisions from accountable officers and heads of agencies; legal decisions initiated under the Comptroller General's own authorities; and requests for informal technical assistance.

GAO also conducts audits, evaluations, and investigations of federal programs, activities, and financial transactions.[13] Resulting GAO audit reports reflect legal analysis conducted during the audit, evaluation, or investigation, and may include findings related to compliance with laws and regulations. GAO's protocols for audit, evaluative, and investigative work are covered in GAO's *Agency Protocols*, GAO-19-55G (Washington, D.C.: Jan. 2019) and GAO's *Congressional Protocols*, GAO-17-767G (Washington, D.C.: July 2017). The applicable protocols for addressing

[9] 5 U.S.C. § 801.

[10] 5 U.S.C. § 801(a)(2).

[11] 5 U.S.C. § 3345.

[12] 5 U.S.C. § 3349.

[13] GAO reports are published on GAO's website.

questions of compliance with laws and regulations that arise during the course of an audit, evaluation, or investigation engagement are determined on a case-by-case basis considering such factors as congressional needs and the nexus to the engagement and taking into account GAO's Congressional and Agency Protocols.

The procedures governing bid protests of a solicitation for offers by a government agency or of the award of a contract are not found in this document, but in 4 C.F.R. part 21.[14]

Approach to Rendering Legal Decisions

When rendering legal decisions, GAO provides independent analyses and applications of the law. To achieve these objectives, GAO bases its decisions and opinions on its best judgment of what the law requires, not on an advocate's crafting of plausible arguments in support of a particular point of view. GAO strives to produce thorough, well-researched, and well-reasoned decisions, informed by agency explanation of pertinent facts and its views on the law, which respect the difficult judgments the Congress must make concerning the use of the nation's resources and the roles and responsibilities of the government. Along with the rest of GAO products, legal decisions are professional, objective, fact-based, nonpartisan, and nonideological. Similarly, our legal decisions conform to GAO's core values of accountability, integrity, and reliability.

Requesting a Legal Decision

By statute, disbursing and certifying officials and heads of agencies are entitled to an advance decision of the Comptroller General concerning the obligation, expenditure, and accounting of appropriated funds.[15] In addition, as a matter of law and long-standing practice, the Comptroller General renders opinions (referred to as legal decisions) to committees of the Congress on matters within their jurisdiction and to individual Members of the Congress.[16] Requests for a legal decision should be made in writing, signed by the requestor(s), and addressed to the Comptroller General or the General Counsel. While there is no specific format for a request, the request letter should identify the issue(s); the applicable facts and circumstances giving rise to the issue(s), including any relevant documentation; the identity of any courts or other legal tribunals considering the issue(s); the requester's views, if any, on the

[14] See also *Bid Protests at GAO: A Descriptive Guide*, GAO-18-510SP (May 2018).

[15] 31 U.S.C. § 3529.

[16] 31 U.S.C. § 717(b).

legal issue(s); and, to the extent pertinent, any remedial action that the requestor may propose.

A sample request letter is provided in Appendix A.

Considerations for Accepting Requests

GAO can only undertake work that is within the scope of its authority and competency. In determining whether to accept requests for legal decisions and opinions, GAO will consider a range of factors, including the scope and timing of related work, GAO's statutory authority and responsibilities, and whether adequate information is readily available.

There are several types of issues upon which GAO will not decide or opine. With respect to criminal matters, GAO will not decide or opine on matters subject to ongoing criminal investigations, nor will GAO decide or opine on requests concerning the application of criminal statutes. As appropriate, GAO will refer such requests to responsible law enforcement authorities.

In the area of federal procurement, to protect the integrity of GAO's statutory bid protest jurisdiction, GAO will not accept requests to review or evaluate an agency contracting action where accepting the request would have the effect of circumventing statutory rules such as those regarding standing, timeliness, or those otherwise governing protests to GAO.[17] As previously noted, a separate publication describes our process for considering bid protests.[18]

Although these issues rarely arise, GAO will decline to decide or opine on an issue that is committed by law to a discretionary administrative determination such as those typically involving political, military, or international affairs.

GAO may also decline to decide or opine on issues that would pose conflicts or create confusion in view of other pending legal matters. Relevant considerations include the following:

- whether the same or similar legal issues are pending before administrative or judicial forums.

[17] See 4 C.F.R. § 21.1, 21.2; B-290488, May 30, 2002.

[18] *Bid Protests at GAO: A Descriptive Guide*, GAO-18-510SP (May 2018).

- whether any related audit or investigation is ongoing or imminent by another governmental entity including but not limited to agency Inspectors General.

In any matter where the constitutionality of an act of the Congress is drawn into question, GAO will indulge a heavy presumption in favor of constitutionality or avoid the issue where possible. GAO will only address the constitutionality of an act of the Congress where the Supreme Court has directly addressed the constitutionality of the act at issue and avoidance is not possible.

Commitment to Congressional Requesters

In order to meet the needs of the Congress, GAO will communicate with all congressional requesters regarding GAO's estimated timeframes. [19] Generally, within 10 business days of receipt of a congressional request for a decision, GAO will indicate in writing whether GAO has accepted or declined the request, and if not, the reasons therefor. If the request is accepted, the acceptance letter will explain any procedures or steps that will be taken unique to the request, identify the point of contact for the decision, and state when GAO expects to start work. After accepting the request, GAO will initiate a meeting with the congressional requester's staff generally within 20 business days to gain a better understanding of the nature of the legal questions. During this meeting, GAO will discuss the standard process for issuing a legal decision and estimated time frames. In addition, GAO may explain and clarify, as necessary, the legal issues that will be addressed.

GAO does not provide interim briefings on potential conclusions of any ongoing legal decision. However, GAO will keep the congressional requester(s) informed about its progress by communicating the following dates: 1) when the GAO development letter is sent to the responsible agency, which is generally within 30 days of receipt of the request; 2) the date that GAO requested their response; 3) when GAO receives the agency's response;[20] and 4) if we did not receive a response from the agency within the requested timeframe, our planned next steps to solicit a response or the necessary information.

[19] Similarly, where an Executive Branch agency submits a legal decision request, GAO will work with the Executive Branch requester on an individual basis to assist the agency in compliance with relevant legal requirements.

[20] Consistent with GAO's Congressional Protocols, access may be provided to congressional requesters at the conclusion of the engagement upon receipt of a written request.

GAO will provide an estimated issuance date for the legal decision once it is in the final stage of our internal review process. GAO will confirm the issuance date no later than 48-72 hours in advance. GAO will also offer to brief the congressional requesters on the contents of the legal decision on the date it is to issue, prior to its public release.

After confirming the issuance date with the congressional requesters, GAO will notify committees of jurisdiction and the relevant agency about the legal decision's planned issuance. GAO will offer to brief them on the legal decision after its public release, typically the same day as issuance to the requesters.

Withdrawal of Requests

Once GAO accepts a request for a decision, GAO will issue its decision unless the matter is rendered moot by subsequent events, the request is timely withdrawn[21], or, for reasons discussed above in considerations for accepting requests, the matter is subsequently determined not susceptible to a legal review. There may be situations where the withdrawal of a request may not result in the termination of the decision. GAO may still issue a decision on its own initiative where the matter presented raises issues that GAO deems to be in the public interest, or the matter involves GAO's statutory responsibilities.

Requestors may withdraw their request in writing by contacting the GAO point of contact assigned to their request.

Developing the Record

GAO's approach to developing the record for a legal decision provides an opportunity for federal agencies to provide factual information, relevant legal information, and the agency's legal position on the matter.[22] Typically, GAO solicits agency views of the facts and the law through correspondence it refers to as a "development letter." GAO may solicit views of other interested congressional committees or nonfederal entities, public and private, where they have a particular stake or interest in the matter under consideration. GAO will also consider information and views set forth in the request letter and other relevant and available information. GAO does not perform an audit of the information submitted pursuant to

[21] Timeliness for this purpose is a function of the applicable facts and circumstances, including whether a decision is still warranted.

[22] GAO may choose not to solicit agency views where the record is already sufficiently developed or due to unavoidable time constraints.

our development letters. GAO may conduct its own independent research and analysis to supplement the information provided.

The development letter will specify a response date, generally about 2 to 4 weeks, depending on a variety of factors such as the urgency of the matter or the complexity of the issues. On request, and for good cause, GAO will extend the response date.

If an agency declines or fails to respond to a development letter, it will not preclude GAO from issuing a decision or opinion. In that case, GAO may rely on available information to issue its decision or opinion. If the necessary information is not readily available, GAO will notify the requesters to discuss next steps.

GAO may hold discussions with the relevant agency to clarify the facts and issues presented by a request. Discussions occur orally or by e-mail and are ex parte. Oral discussions are not transcribed. GAO may hold discussions with other interested congressional committees or nonfederal entities, public and private, where they have a particular stake or interest in the matter under consideration.

Any Member of the Congress may offer relevant information to GAO on ongoing legal decisions.

Where an agency declines or fails to respond to GAO's development letter in a timely fashion, GAO may so note it in the decision.

Unlike GAO audit products, GAO does not provide draft copies of its decision (or development letters) for agency comment, nor does it provide conclusions or draft copies to the requesting accountable officers or agency heads or requesting committee or Member's staff.

Legal Decision Issuance and Release

Unlike audit reports and products covered by GAO's Congressional Protocols, GAO does not place holds on the issuance of a legal decision. Additionally, GAO will coordinate with congressional requesters to issue a legal decision during a congressional recess unless the congressional requester asks GAO to do otherwise. Once a decision is issued to the requestor, GAO will publicly release the decision and post a copy on our website. Before public dissemination of a decision, GAO will redact any proprietary data, classified information, or other information the public release of which is restricted by statute.

Reconsideration Requests

GAO gives precedential weight to its prior legal decisions. However, GAO may modify or reverse a prior decision if it rests upon an error of fact or law, or if GAO becomes aware of relevant and material information, not reasonably available at the time of the original decision, that would have caused GAO to resolve the matter differently.

A requestor or other entity with a stake in a recent decision may request reconsideration. Requests must be in writing, addressed to the Comptroller General or the General Counsel, and must contain an explanation of the alleged error of fact or law or new relevant and material information. If the request is premised on new relevant and material information, the request must include that information and the reasons why it was not previously presented for consideration during GAO's development of the original decision.

GAO will consider and respond to all timely requests for reconsideration and will modify or reverse a prior decision if necessary pursuant to the above standard. Although timeliness for this purpose is a function of the applicable facts and circumstances, GAO will not entertain requests for reconsideration made more than a year after issuance of the disputed decision.

Notifications of Ongoing Work

All congressional offices have, through the Senate and House intranet connections to GAO, access to a list of ongoing decisions that were requested or initiated after March 1, 2023, but are not yet published, except for those cases where the reporting of such work would result in disclosing classified or other sensitive information. For any ongoing legal work on requested decisions—except for classified or other sensitive work—GAO will disclose, if asked (e.g., by Members, congressional staff, agencies, or the press), the source of the request and a description of the key issue(s) to be addressed.[23]

Resources and Informal Technical Assistance

In addition to its legal products, GAO publishes its *Principles of Federal Appropriations Law* (the Red Book), which is a multi-volume treatise to be used as a general guide and starting point to research fiscal law. Fiscal and budgetary terms used throughout the Red Book are based on *A Glossary of Terms Used in the Federal Budget Process*, which GAO publishes in cooperation with the Secretary of the Treasury and the Directors of the Office of Management and Budget (OMB) and the

[23] Information regarding the status of pending bid protests can be accessed from GAO's on-line docket on the GAO website.

Congressional Budget Office (CBO).[24] These resources and others are published on GAO's website.

GAO attorneys may also provide informal technical assistance to congressional staff, agency officers, and employees on issues upon which the attorneys have developed a particular competence. Although GAO attorneys may offer insights and observations based on prior GAO decisions and their individual experience and knowledge, GAO attorneys do not, and should not be construed to, be providing formal Comptroller General legal positions on the matter. Any views GAO attorneys may express are personal to the attorney based on their independent research and do not represent the views of the Comptroller General or GAO. Any informal technical assistance is not controlling on any subsequent legal decisions.

In offering informal technical assistance, GAO attorneys are not a substitute for agency or legal counsel. Typically, GAO attorneys provide quick turnaround, informal assistance in response to telephone or e-mail inquiries. Their assistance may range from explaining a law, the rationale behind a prior legal decision, or a legal position taken in a GAO audit report. They may also refer the officer or employee to a line of case law that may help them understand or address an issue; explain a passage or discussion in the Red Book or a GAO audit report; advise on available options or approaches (including submission of the matter for a formal legal decision) to resolve a matter; or provide assistance drafting legislation on matters where GAO has developed a particular competence. Submit requests for informal technical assistance to your Congressional Relations Advisor or the Office of Congressional Relations at (202) 512-4400 or congrel@gao.gov (for Members of the Congress and congressional staff only); to redbook@gao.gov (for appropriations law questions or general law matters); to fedrules@gao.gov (for CRA questions); or federalvacancies@gao.gov (for Vacancies Act questions).

[24] 31 U.S.C. § 1112(c).

Appendix A: Sample Request for a Legal Decision

[INSERT REQUESTOR'S LETTERHEAD]

The Honorable Gene Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Comptroller General Dodaro:

I/We write to request a legal determination from GAO regarding [Provide an explanation of the legal issue(s)].

The facts and circumstances giving rise to our request are as follows: [Identify the document(s), action(s), or other facts giving rise to the legal issue(s). Relevant information may include, for example, the titles of agency publications or pronouncements, along with their date of issuance and citations to the Federal Register or other location where they appear].

To our knowledge the following other authorities are considering this issue(s): [If you are aware that the same or a similar issue(s) is pending before a court or other legal tribunal, provide relevant information such as the caption of any lawsuit(s) and the reason why you believe a decision from GAO is warranted notwithstanding such other proceedings].

Our views on the legal issue(s) are as follows: [To the extent you have an opinion about the proper resolution of the legal issue(s), provide an explanation of your opinion, along with citations to—and a discussion of—relevant laws and authorities. Also discuss the potential consequences of the legal issue being resolved in the manner proposed (and/or in another potential manner), including consequences both for you and any others having equities].

Sincerely,

[Signature of requestor(s)]

[Title should identify status as authorized requester e.g., certifying officer, disbursing officer, agency head, or congressional requester.]

cc: General Counsel Edda Emmanuelli Perez

GAO's Mission

The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

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Washington, DC 20548

Revolving Funds & Government Corporations

United States Government Accountability Office

Testimony

Before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives

For Release on Delivery
Expected at 2:00 p.m. ET
Wednesday, January 17, 2024

REVOLVING FUNDS

Key Features

Statement of Julia C. Matta, Deputy General Counsel

GAO-24-107270

GAO Highlights

Highlights of GAO-24-107270, a testimony before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives

January 17, 2024

REVOLVING FUNDS

Key Features

Why GAO Did This Study

GAO's mission is to support Congress in meeting its constitutional responsibilities, including its oversight of the use of public funds. GAO has particular expertise in the area of appropriations law, which governs the use of appropriations made by Congress and protects Congress's power of the purse. GAO's *Principles of Federal Appropriations Law* manual provides information on many topics related to this area of the law, including revolving funds.

The hearing is to examine revolving funds at the Department of Veterans Affairs. GAO's testimony provides background information on revolving funds. This testimony is based on GAO's prior legal work related to revolving funds, including the *Principles of Federal Appropriations Law* manual.

This testimony describes key features of revolving funds, including their establishment, types of revolving funds, and the applicability of key appropriations law principles.

What GAO Found

Only Congress can make public money available to federal agencies. Congress does so by making appropriations, which take a variety of forms. One such form is a revolving fund, which authorizes an agency to retain and use specified receipts for particular purposes. Revolving funds are intended to finance cyclical, business-like operations. The activity financed by a revolving fund will collect receipts from the public or other federal agencies and use those receipts to finance the fund's ongoing operations. Often, the activity supported by a revolving fund will become self-sustaining, eliminating the need for future annual appropriations.

There is a key feature of revolving funds that distinguishes them from other appropriations: the receipts collected by the fund are available without the need for further congressional action and without fiscal year limitation.

Even so, revolving funds remain appropriations. As such, they can only be created by Congress. Agencies must have explicit statutory authority to operate a revolving fund. The statute authorizing the creation of a revolving fund will specify the receipts which the fund may collect and retain, define the fund's authorized uses, and authorize the agency to use the collected receipts for the specified purposes without fiscal year limitation.

In addition, revolving funds are subject to the legal restrictions on the use of appropriated funds. These restrictions include:

- The purpose statute, which requires that agencies use appropriated funds only for the purposes for which Congress appropriated them;
- The Antideficiency Act, which forbids agencies from incurring obligations (that is, legal liabilities to make payments) or making expenditures that exceed the amount available in an appropriation or fund; and
- The recording statute, which requires agencies to record obligations against available appropriations as they incur them.

Similarly, agencies doing business with a revolving fund must also comply with appropriations law restrictions. These requirements ensure that revolving funds—like other appropriations—are spent in accordance with the law.

Prior GAO work has addressed many agency activities financed by various revolving funds, as well as the financial and management issues that arise as agencies carry out revolving fund activities.

View GAO-24-107270. For more information, contact Julia C. Matta at (202) 512-4023 or MattaJ@gao.gov.

B-335844

GAO-24-107270

Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee:

Thank you for the opportunity to discuss key features of revolving funds, including how they are established, revolving fund types, and the applicability of key appropriations law principles. Like all appropriations, revolving funds represent an exercise of Congress' power of the purse. The framers vested Congress with this power by providing in the Constitution that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[1] Appropriations represent legal authority granted by Congress to incur obligations and to make payments for the purposes, during the time periods, and up to the amount limitations specified in the appropriations acts.[2] This arrangement ensures that the government remains accountable to the will of the people and provides a key check on the power of the other branches. It also ensures that agencies may not act without authority from Congress.

Congress has built on this constitutional foundation by enacting statutes that further congressional control over the public fisc. For example, the "miscellaneous receipts" statute, 31 U.S.C. § 3302(b), requires agencies to deposit funds received from sources outside of congressional appropriations into the appropriate general fund of the Treasury, unless the agency is otherwise authorized to retain and use the funds. Without an appropriation, agencies may not withdraw funds from the Treasury once deposited. This statute ensures that agencies remain dependent on Congress for appropriations to finance their operations, preserving Congress' role as controller of the public purse.

Applying these appropriations statutes requires balancing Congress' congressional power of the purse with the legitimate need for some executive flexibility in carrying out funded activities. This balance is notable in the area of revolving funds.

[1] U.S. Const., art. I, § 9, cl. 7.

[2] *See United States ex rel. Becker v. Westinghouse Savannah River Co.,* 305 F.3d 284, 286 n. 1 (4th Cir. 2002), *citing* GAO, *Principles of Federal Appropriations Law,* Vol. 1, 2nd ed., ch. 1, OGC-94-33 (Washington, D.C.: Nov. 1991).

Typical statutory authority for a revolving fund permits an agency to retain receipts and deposit them into the fund to finance the fund's operations.[3] Revolving funds are therefore exceptions to the miscellaneous receipts statute discussed above. The concept of a revolving fund is to permit the financing of some entity or activity on a more "business-like" basis. Laws that establish revolving funds may authorize agencies to perform work for the public, other federal agencies, or both. A 1977 GAO report summarized revolving funds in this way:

> "In concept, expenditures from the revolving fund generate receipts which, in turn, are earmarked for new expenditures, thereby making the Government activity a self-sustaining enterprise. The concept is aimed at selected Government programs in which a buyer/seller relationship exists. . . . Such a market atmosphere is intended to create incentives for customers and managers of revolving funds to protect their self-interest through cost control and economic restraint, similar to those that exist in the private business sector."[4]

This description remains as true today as it was nearly 50 years ago. Thus, a revolving fund amounts to "a permanent authorization for a program to be financed, in whole or in part, through the use of its collections to carry out future operations."[5] Importantly, revolving funds are appropriations and are therefore subject to the legal restrictions on the use of appropriated funds. A key feature of revolving funds distinguishes them from annual appropriations: the generated or collected receipts are available for expenditure for the authorized purposes of the fund without the need for further congressional action and without fiscal year limitation. Because of this feature, revolving funds are permanent appropriations.[6]

From an agency perspective, revolving fund authority provides a few advantages: increased flexibility for the agency, as funds are available without further congressional action; increased flexibility as funds are available without fiscal year limitation; and streamlined interagency

[3] *See* GAO, *A Glossary of Terms Used in the Federal Budget Process,* GAO-05-734SP (Washington, D.C.: Sept. 2005), at 88 (Budget Glossary).

[4] GAO, *Revolving Funds: Full Disclosure Needed for Better Congressional Control,* GAO/PAD-77-25 (Washington, D.C.: Aug. 30, 1977), at 2; *see also* GAO, *Commerce Working Capital Fund: Policy and Performance Measure Enhancements Could Help Strengthen Management,* GAO-23-104624 (Washington, D.C.: Dec. 2022).

[5] *Id.* at 47.

[6] Budget Glossary, at 88.

transactions that avoid the legal and administrative requirements of the Economy Act.

Establishment of Revolving Funds

Perhaps the most fundamental rule relating to revolving funds is that a federal agency may not establish a revolving fund unless it has specific statutory authority to do so. As stated previously, the miscellaneous receipts statute requires that any money a federal agency receives from any source outside of its congressional appropriations be deposited in the general fund of the Treasury unless otherwise provided. Since this requirement is statutory, exceptions must be statutory. Thus, agencies have no authority to administratively establish revolving funds.

The legislative authority creating a revolving fund must be explicit, though there is no prescribed formula. There is a long-established pattern of using the term "revolving fund" to mean the authority to retain specified receipts and to use them for authorized purposes without further congressional action and without fiscal year limitation.[7] However, as long as the statute contains the required elements, use of the phrase "revolving fund" is not necessary. To create a revolving fund, a statute must do the following:

- Specify the receipts or collections which the agency is authorized to credit to the fund;
- Define the fund's authorized uses;
- Authorize the agency to use receipts for those purposes without fiscal year limitation.

The receipts in a revolving fund may be generally categorized as either initial receipts or ongoing/operational receipts. The typical revolving fund may receive an initial infusion of working capital to enable it to finance operations until the fund begins to receive operational receipts. The initial capital is normally furnished as part of the legislation establishing the fund, and there may be a requirement that the fund repay the initial investment. The initial funds may be in the form of a lump-sum appropriation, a transfer from an existing appropriation or fund, a transfer of property, borrowing authority, or some combination of these.

After the initial capitalization, the defining feature of a revolving fund is its ability to retain and use ongoing receipts. A revolving fund can also mean "a fund which when reduced is replenished by new funds from specific

[7] B-209680, Feb. 24, 1983; 1 Comp. Gen. 704 (1922); 26 Comp. Dec. 295 (1919).

sources," whether or not generated by the fund's operations.[8] The statute will prescribe the types of receipts that may be credited to the fund, and only these authorized receipts may be credited to the fund's balance.

Revolving Fund Types

GAO has identified three broad categories of revolving funds—public enterprise, trust, and intragovernmental. These designations are helpful in organizing our discussion, but they do not denote substantive legal differences, with the exception of trust funds. Since all three categories are revolving funds, they share the common elements of revolving funds: they are created by act of Congress and they authorize the use of receipts without further congressional action.

A *public enterprise revolving fund* derives most of its receipts from sources outside the federal government. It usually involves a business-type operation which generates receipts that are in turn used to finance a continuing cycle of operations. Although not necessarily legally required, public enterprise funds are often largely self-sustaining.[9]

A *trust revolving fund account* is similar to other types of revolving funds except that it is used for specific purposes or programs in accordance with a statute that designates the fund as a trust fund.

An *intragovernmental revolving fund's* receipts come primarily from other government agencies, programs, or activities. It is designed to carry out a cycle of business-type operations with other federal agencies or separately funded components of the same agency. Some intragovernmental revolving funds perform services or provide goods themselves, while others enter into contracts with private vendors.

Intragovernmental funds include funds frequently designated in law as supply funds, working capital funds, and franchise funds, among others. Supply funds finance the operation and maintenance of an agency's supply system. Working capital funds generally finance the centralized provision of common services within an agency. Working capital funds may also provide goods or services to other agencies on a reimbursable basis. A franchise fund is a type of intragovernmental revolving fund designed to compete with similar funds of other agencies to provide common administrative services. Examples of such services include accounting, financial management, information resources management,

[8] 23 Comp. Gen. 986, 988 (1944).

[9] B-302962, June 10, 2005.

personnel, contracting, payroll, security, and training. Franchise funds are intended to encourage competition among agencies in providing these services to increase efficiency and reduce costs.

Applicability of Key Appropriations Law Principles to Revolving Funds

All of the types of funds discussed above share a fundamentally important characteristic of revolving funds: they are all appropriations. Hence, funds in a revolving fund are appropriated funds. This rule flows from the Appropriations Clause of the Constitution and the miscellaneous receipts statute,[10] which together require the deposit of receipts and restrict the withdrawal of those receipts from the Treasury.[11] The authority for an agency to obligate or expend collections without further congressional action amounts to a continuing appropriation or permanent appropriation of the collections.[12] Even revolving funds that have paid back an initial capitalization and become self-sustaining remain appropriations.[13]

Because a revolving fund is an appropriation, it will be subject to the statutes that guide and restrain agencies' use of appropriated funds. Appropriations have three key characteristics: purpose, time, and amount. Appropriations are also subject to a recording requirement for obligations. Congress has enacted statutes that pertain to each of these characteristics, and these statutes apply to revolving funds.

Purpose

The purpose statute requires that appropriated funds may be used only for the purposes for which they were appropriated. [14] The purpose statute applies to revolving funds in exactly the same manner as it applies to other appropriations.

First and foremost, we look to the statute creating the revolving fund to determine the fund's authorized purposes. The terms of the statute, in conjunction with other applicable statutory provisions, define the fund's availability. For example, prior to its 2009 amendment, the General Services Administration's Working Capital Fund, which was available for the expenses of operating "a central blueprinting, photostating, and

[10] 31 U.S.C. § 3302(b).

[11] U.S. Const., art. I, § 9, cl. 7; 31 U.S.C. § 3302(b).

[12] *United Biscuit Co. of America v. Wirtz,* 359 F.2d 206, 212 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 971 (1966); 73 Comp. Gen. 321 (1994).

[13] 60 Comp. Gen. at 326; 35 Comp. Gen. at 438.

[14] 31 U.S.C. § 1301(a).

duplicating service"[15] could not be used to finance the agency's central library or travel office, as these functions did not fall within the authorized purposes of the fund.[16]

While the statute is the first and most important source for determining purpose availability, it cannot be expected to spell out every detail. If the statute does not address a particular item, the next step is to apply the "necessary expense" rule, which allows appropriations to be used for those items that bear a reasonable and logical relationship to the stated purpose of the appropriation. This means that a revolving fund is available for expenditures which are directly related to, and which materially contribute to accomplishing an authorized purpose of, the fund and which are not otherwise specifically provided for or prohibited. For example, the Bureau of Engraving and Printing Fund is available "to operate the Bureau of Engraving and Printing." [17] Under this quite general language, the Fund has been held to be available for various alterations and improvements to the Bureau's real property, as these are clearly necessary costs of operating and maintaining the Bureau.[18]

Prohibitions on the use of appropriated funds will apply to the use of revolving funds unless some statutory exception applies. For example, appropriated funds are generally not available to pay for personal expenses, such as clothing and food.[19] As a result, revolving funds are not available for such expenses, unless Congress has explicitly authorized it. In analyzing the purpose availability of a revolving fund, as with any other appropriation, the agency has reasonable discretion in selecting its means of implementation, as long as its exercise is consistent with the statutory objectives and limitations.

Time

Each appropriation has a period of availability that specifies when it is available for use. Appropriations will fall into one of three categories: fiscal year or annual appropriations, which are available for single fiscal year; multiple year appropriations, which are available for a specified period of time greater than one fiscal year; and no-year appropriations, which are available without fiscal year limitation. Appropriations are

[15] 40 U.S.C. § 3173 (2006).

[16] B-208697, Sept. 28, 1983.

[17] 31 U.S.C. § 5142.

[18] B-104492, Oct. 4, 1951.

[19] *See, e.g.,* 65 Comp. Gen. 738 (1986) (food); 63 Comp. Gen. 245 (1984) (clothing).

generally only available for those goods and services that an agency needs during the appropriation's period of availability.[20] For example, an appropriation for a single fiscal year may only be used to purchase those goods and services the agency requires during that fiscal year. This is often called the *bona fide* needs rule, and it ensures that agencies use their appropriations in a timely manner consistent with the terms of the enacting legislation. No-year appropriations and funds available without fiscal year limitation are not subject to the *bona fide* needs rule.

Receipts and collections earned through a revolving fund's operations are available without fiscal year limitation. This continuing availability of receipts and collections that a revolving fund has earned through its operations has long been recognized as an inherent characteristic of a revolving fund.[21] Thus, the various rules governing the obligation and expenditure of fixed-year appropriations with respect to time generally do not apply to receipts and collections that a revolving fund has earned. Instead, the funds are available until expended, for the goods and services the fund requires at any time.[22]

However, a federal agency entering a transaction with a revolving fund must still satisfy the various time rules that apply to its own appropriation. Specifically, the customer agency must obligate its appropriation for a *bona fide* need within the specified period of availability.[23] In addition, when an agency withdraws funds from its appropriation and makes them available to a revolving fund, the withdrawn amounts retain their time character until the revolving fund has actually earned them by performing the service or ordering the good that the customer agency requested.[24]

As a result, unless otherwise specifically provided by law, balances that have not been earned during the ordering appropriation's period of availability must be returned to the customer agency. For example, a

[20] 31 U.S.C. § 1502(a).

[21] While the more modern statutes tend to include specific language such as "without fiscal year limitation" without more, the term "revolving fund" alone would be construed to mean the same thing. 1 Comp. Gen. 704 (1922); 26 Comp. Dec. 296 (1919).

[22] *See* B-326945, Sept. 28, 2015 (discussing a no-year appropriation) ("Because the appropriation's temporal availability is unlimited, the temporality of the needs that the appropriation may satisfy is also unlimited.").

[23] 31 U.S.C. § 1502(a).

[24] *See* B-306975, Feb. 27, 2006; B-288142, Sept. 6, 2001.

2001 decision involving the Library of Congress's FEDLINK revolving fund addressed the time availability of funds transferred by a customer agency. FEDLINK's authorizing statute provides that amounts in the revolving fund are available "without fiscal year limitation."[25] However, for the funds to inherit this characteristic, the Library has to earn them. FEDLINK customers advance funds to the Library based on the estimated cost of their order. Where the advance exceeds the Library's actual cost, the Library must return the excess to the ordering agency before the end of the appropriation's period of availability. The Library cannot reserve the unexpended amounts to cover future year orders placed by the customer agency but instead must return excess funds to the customer agency.[26]

Amount

As discussed above, the amount within a revolving fund may be made up of an initial appropriation and operating receipts. A common feature of most revolving funds is that they are intended to operate on a break-even basis, or reasonably close to it, over the long term.[27] Thus, while revolving funds are intended to facilitate business-like operations, they are not generally intended to be profit-making enterprises. Many revolving fund statutes include a requirement for the periodic payment of surplus amounts to the general fund of the Treasury.[28]

As with other appropriations, authorities and limitations relating to the amount that can be obligated or expended apply to revolving funds unless specifically exempted. The most important law relating to amount is the Antideficiency Act, which by its terms applies to an "appropriation or fund."[29] The Antideficiency Act prohibits the overobligation or expenditure of appropriated funds and prohibits the obligation of anticipated receipts. These limitations apply to revolving funds, including any relevant annual limitations on obligations from the fund.[30]

[25] 2 U.S.C. §182c.

[26] B-288142, Sept. 6, 2001.

[27] Several franchise funds are authorized to retain a reasonable operating reserve and up to 4 percent of total annual income as a reserve for acquisition of capital equipment and enhancement of support systems. *See, e.g.,* Pub. L. No. 104-208, § 113.

[28] *See, e.g.,* 38 U.S.C. § 3749 (Department of Veterans Affairs Small Business Loan Revolving Fund).

[29] 31 U.S.C. § 1341(a)(1)(A).

[30] *See* 72 Comp. Gen. 59 (1992); B-248967.2, Apr. 21, 1993.

The law is violated by creating an obligation in excess of available budgetary resources. Available budgetary resources may include amounts received from other government accounts that represent valid obligations of the ordering account or could include amounts received from the public.[31] A revolving fund can also violate the Antideficiency Act by overspending a specific monetary limitation, or by charging an appropriation that is not legally available for a particular expense.[32]

The Antideficiency Act also requires the apportionment of appropriations and funds by the Office of Management and Budget (OMB).[33] Apportionment subdivides an appropriation to prevent overobligation and promote the most effective and economical use of funds.[34] Revolving funds are subject to apportionment,[35] and an overobligation of a revolving fund's apportionment violates the Antideficiency Act.[36]

Another important concept related to the amount character of appropriations is the rule against augmentation, which generally prevents federal agencies from supplementing their appropriations from outside sources. The miscellaneous receipts statute is the primary manifestation of this rule, which provides that an agency may not retain for credit to its own appropriations anything Congress has not expressly authorized. As we noted above, a revolving fund is an exception to the requirement that receipts be deposited into the general fund of the Treasury. However, agencies may only deposit into a revolving fund those receipts that the governing legislation specifies. Depositing unauthorized amounts into a revolving fund is an unauthorized augmentation which violates the miscellaneous receipts statute. Congress specifies the source of money

[31] Available budgetary resources do not include anticipated receipts from transactions that have not yet occurred. B-195316-O.M., Jan. 30, 1980. Therefore, an agency may not obligate against anticipated receipts unless explicitly authorized to do so.

[32] B-120480, Sept. 6, 1967.

[33] 31 U.S.C. § 1511(a), 1512.

[34] GAO, *A Glossary of Terms Used in the Federal Budget Process,* GAO-05-734SP (Washington, D.C.: Sept. 2005), at 12–13.

[35] *See* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget,* § 120.5; *id.* at Exhibit 120I.

[36] 31 U.S.C. § 1517(a).

and property that should make up a revolving fund, and additional sources cannot be added without statutory authorization.[37]

Obligation Requirement

One of the ways agencies track their use of appropriated funds—and ensure compliance with the statutes discussed above—is by recording obligations. The recording statute, 31 U.S.C. § 1501, requires agencies to document obligations as they are incurred. A 1953 decision put it this way:

> "In order to determine the status of appropriations, both from the viewpoint of management and the Congress, it is essential that obligations be recorded in the accounting records on a factual and consistent basis throughout the government. Only by the following of sound practices in this regard can data on existing obligations serve to indicate program accomplishments and be related to the amount of additional appropriations required."[38]

The primary purpose of the recording statute is to ensure that agencies record only those transactions which meet specified standards for legitimate obligations.[39] Transactions that do not meet the statutory criteria are not proper obligations and shall not be recorded.

Nothing exempts revolving funds from the obligation recording provisions of 31 U.S.C. § 1501. When a revolving fund does something that meets one of the statutory recording criteria, it must, just like other appropriations, record an obligation.[40] For example, when a revolving fund enters into a contract, it must record an obligation equal to its legal liability under the contract against amounts in the fund.

Furthermore, only transactions that meet the statutory criteria for an obligation may be recorded against the revolving fund. For example, agreements that lack the requisite specificity may not be recorded as obligations. In a 2007 decision, GAO considered interagency agreements between the Department of Defense (DOD) and a revolving fund of the Department of Interior. The agreements at issue did not identify the specific items or services that DOD wanted the revolving fund to acquire

[37] B-149858-O.M., Aug. 15, 1968.

[38] 32 Comp. Gen. 436, 437 (1953).

[39] 71 Comp. Gen. 109 (1991); 54 Comp. Gen. 962, 964 (1975); *see also* Senate Committee on Government Operations, *Financial Management in the Federal Government,* S. Doc. No. 87-11, at 85 (Dec. 24, 1973).

[40] *See, e.g.,* 72 Comp. Gen. 59 (1992).

on its behalf. Since specificity is a requirement for a proper obligation, the agreements did not obligate DOD's funds. DOD sent more specific information for the orders to the revolving fund at a later date, which served to obligate DOD's appropriations; however, at that point, DOD's appropriations had expired and they were not available for obligation in the fiscal year when the orders were perfected. Accordingly, when the revolving fund later used these funds, the revolving fund improperly used prior year funds from the ordering agency in violation of the bona fide needs rule, discussed above.[41] Proper recording of obligations and a return of unexpended expired balances to the ordering agency is essential to avoid such violations.

Concluding Remarks

In conclusion, revolving funds can be useful funding mechanisms where Congress wishes to provide agencies some flexibility in carrying out business-like operations. Revolving funds are nevertheless appropriations that are subject to statutory restrictions on the use of public money. As such, agencies must use prudence and caution in obligating and expending revolving funds to ensure that their use is consistent with the relevant statutes.

GAO's engagement work on agency financial operations has touched on revolving funds in a variety of contexts.[42] GAO staff are available to discuss this work with you in more detail if you wish.

Chairwoman Kiggans, Ranking Member Mrvan, and members of the Subcommittee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have.

Contact Information

If you or your staff have any questions about this testimony, please contact Julia C. Matta, Deputy General Counsel, at (202) 512-4023 or mattaj@gao.gov. Contact points for our Offices of Congressional

[41] B-308944, July 17, 2007.

[42] As part of this engagement work, GAO has identified four key operating principles for effective management of working capital funds based on a review of governmentwide guidance on business principles, internal controls, managerial cost accounting, and performance management. *See, e.g.,* GAO, *Personnel Vetting: DOD Should Improve Management and Operation of its Background Investigation Working Capital Fund,* GAO-23-105812 (Washington, D.C.: July 2023); GAO, *Commerce Working Capital Fund: Policy and Performance Measure Enhancements Could Help Strengthen Management,* GAO-23-104624 (Washington, D.C.: Dec. 2022); GAO, *Revolving Funds: Additional Pricing and Performance Information for FAA and Treasury Funds Could Enhance Agency Decisions on Shared Services*, GAO-16-477 (Washington, D.C.: May 2016).

Relations and Public Affairs may be found on the last page of this statement.

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Decision

Matter of: U.S. Department of Agriculture—Use of Commodity Credit Corporation Funds for Various Programs

File: B-334146.1

Date: September 20, 2023

DIGEST

The U.S. Department of Agriculture (USDA) transferred Commodity Credit Corporation (CCC) funds to USDA agencies to carry out new financial assistance programs that were not specifically identified in USDA's fiscal year (FY) 2021 budget submission. While section 5 of the Commodity Credit Corporation Charter Act (CCC Charter Act), 15 U.S.C. § 714c, authorizes CCC, a USDA wholly owned government corporation, to use its funds to carry out a budget submitted to and approved by Congress pursuant to the Government Corporation Control Act (GCCA), GCCA does not require corporations to delineate specific programs in their budget submissions prior to carrying them out. Therefore, USDA was not required to include these programs in its FY 2021 budget submission and did not violate section 5 of the CCC Charter Act or the Antideficiency Act when it transferred funds for the programs where such programs otherwise carried out the purposes of CCC's funds.

Additionally, USDA announced the Partnerships for Climate-Smart Commodities (PCSC), which is a grant-based program that supports the marketing and production of "climate-smart agricultural commodities." The Food Security Act authorizes USDA to carry out various activities under the Environmental Quality Incentives Program (EQIP), including a grant program to carry out certain projects for pollution reduction and practices for the storage of carbon in soil. Because the principal purpose of PCSC is to expand the market for climate-smart agricultural commodities, PCSC is not a part of the grant program authorized by EQIP and, accordingly, not subject to EQIP's restrictions. Rather, PCSC is authorized under section 5(e) of the CCC Charter Act, which authorizes USDA to use CCC funds to expand domestic markets for agricultural commodities.

DECISION

This responds to a request for a decision regarding whether the Commodity Credit Corporation (CCC) was authorized to use its funds for certain financial assistance programs prior to including them in a budget program submitted to and approved by Congress in accordance with the Commodity Credit Corporation Charter Act (CCC Charter Act), 15 U.S.C. §§ 714–714p, and whether this use of funds violated the Antideficiency Act.[1] The request also separately asks whether the Partnerships for Climate-Smart Commodities (PCSC) is a grant program authorized by the Environmental Quality Incentives Program (EQIP) and therefore subject to funding restrictions applicable to that program.[2] We conclude that the U.S. Department of Agriculture (USDA) did not violate the CCC Charter Act or the Antideficiency Act when it used CCC funds for programs that were not specifically included in its budget submission to Congress. In addition, we conclude that PCSC is not part of the grant program authorized under EQIP and not subject to that program's restrictions. Rather, PCSC is authorized under section 5(e) of the CCC Charter Act, which authorizes USDA to use CCC funds to expand domestic markets for agricultural commodities.

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

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[1] Letter from Senator Roger Marshall, M.D., Ranking Member, Subcommittee on Conservation, Climate, Forestry, and Natural Resources, Committee on Agriculture, Nutrition, and Forestry, to the Comptroller General (Mar. 22, 2022) (Request Letter).

[2] *Id.* at 3-5.

[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; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USDA (May 23, 2022); Email from Assistant General Counsel for Appropriations Law, GAO, to Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA (Sept. 22, 2022); Email from Acting Assistant General Counsel for Appropriations Law, GAO, to Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA (Mar. 2, 2023); Emails from Assistant General Counsel for Appropriations Law, GAO, to Acting Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA (June 23, 2023; June 27, 2023); Emails from Assistant General Counsel for Appropriations Law, GAO, to Deputy Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA (Aug. 3, 2023; Aug. 7, 2023).

[4] Letter from Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA, to Assistant General Counsel for

(continued...)

BACKGROUND

Overview of the Commodity Credit Corporation

CCC is a wholly owned government corporation within USDA that was established by the CCC Charter Act.[5] It is managed by a board of directors under "the general supervision and direction" of the Secretary of Agriculture.[6] Under section 5 of the CCC Charter Act, CCC "is authorized to use its general powers only to" carry out activities that fall within seven enumerated areas or "such other operations as the Congress may specifically authorize or provide for."[7]

CCC operations are funded by capital stock of $100 million,[8] borrowing authority,[9] and appropriations.[10] USDA explains that certain programs, such as CCC's disaster, foreign assistance, and credit reform programs, are financed by

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Appropriations Law, GAO (Aug. 29, 2022) (with attachment) (USDA First Response); Letter from Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Oct. 27, 2022) (with attachment) (USDA Second Response); Letter from Associate General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA, to Acting Assistant General Counsel for Appropriations Law, GAO (Mar. 21, 2023) (with attachments) (USDA Third Response); Letter from Deputy Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (July 21, 2023) (with attachment) (USDA Fourth Response); Emails from Acting Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Aug. 7, 2023; Aug. 8, 2023) (USDA Fifth Response).

[5] 31 U.S.C. § 9101(3)(A); 15 U.S.C. § 714.

[6] 15 U.S.C. § 714g(a).

[7] *Id*. § 714c. CCC's general powers are specified in section 4 of the CCC Charter Act, 15 U.S.C. § 714b.

[8] 15 U.S.C. § 714e.

[9] CCC has two permanent, indefinite borrowing authorities: non-credit reform (15 U.S.C. § 714b(i)) and credit reform (2 U.S.C. §§ 661–661f). Under the CCC Charter Act, CCC's non-credit reform borrowing authority is a general power. 15 U.S.C. § 714b(i). This decision concerns only the non-credit reform borrowing authority.

[10] *E.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. A, tit. II, 136 Stat. 4459, 4476–77 (Dec. 29, 2022).

appropriations;[11] most programs, though, are financed through CCC's borrowing authority, which is capped at $30 billion.[12]

To ensure CCC has sufficient funds to operate, Congress provides CCC in annual appropriations acts with an indefinite appropriation to reimburse CCC's net realized losses, as specified in CCC's annual audited financial statement.[13] Occasionally, CCC has needed to fund activities that would "strain" the $30 billion borrowing cap prior to the annual appropriation;[14] in those situations, Congress has provided CCC an appropriation to reimburse CCC's net realized losses prior to the enactment of its annual appropriation.[15]

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[11] CCC, *Annual Management Report Fiscal Year 2021*, at 5 (*Annual Management Report Fiscal Year 2021*), *in* USDA, Office of Inspector General (OIG), *Commodity Credit Corporation's Financial Statements for Fiscal Years 2021 and 2020*, Audit Report No. 06403-0004-11 (Nov. 15, 2021), *available at* https://www.oversight.gov/sites/default/files/oig-reports/USDAOIG/06403-0004-11FR508.pdf (last visited Aug. 16, 2023); *see, e.g.*, Pub. L. No. 117-328, div. A, tit. V, 136 Stat. at 4491 (authorizing CCC "to provide the services, facilities, and authorities for the purpose of implementing [the McGovern-Dole International Food for Education and Child Nutrition Program Grants], subject to reimbursement from" an appropriation made to USDA's Foreign Agricultural Service).

[12] *Annual Management Report Fiscal Year 2021*, at 5. While indefinite, the non-credit reform borrowing authority is limited by the amount of debt CCC may have; CCC's aggregate borrowings may not at any time exceed $30 billion. 15 U.S.C. § 714b(i).

[13] *See* 15 U.S.C. § 713a-11 ("There is authorized to be appropriated annually for each fiscal year by means of a current, indefinite appropriation . . . an amount sufficient to reimburse Commodity Credit Corporation for its net realized loss incurred during such fiscal year, as reflected in its accounts and shown in its report of its financial condition as of the close of such fiscal year."). The term "net realized loss" is not defined in law. USDA explains that it determines the net realized loss by "calculating the net costs of revenues, expenses and transfers" to the borrowing authority account. USDA First Response, at 2. Revenues may include "loan repayments, inventory sales, interest income, [and] fees." *Annual Management Report Fiscal Year 2021*, at 5.

[14] USDA First Response, at 2.

[15] *Id.*; *see, e.g.*, Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, § 173, 134 Stat 709, 725 (Oct. 1, 2020) (anomaly in continuing resolution providing reimbursement prior to the completion of CCC's financial statement and audit); CARES Act, Pub. L. No. 116-136, § 11002, 134 Stat. 281, 509 (Mar. 27, 2020) (appropriating sums to reimburse CCC's net realized losses).

Although CCC receives funds for its operations, it has no employees and carries out its programs through other agencies' employees and facilities.[16] CCC does not directly use its funds; it instead exercises its borrowing authority and transfers the borrowed funds to other USDA offices and agencies that carry out its programs.[17] CCC recognizes a net realized loss in the FY during which funds were borrowed and transferred regardless of when the performing agency may actually spend the funds.[18]

Specific USDA programs at issue

$3 billion investment programs

USDA announced a series of programs in Press Release No. 0209.21 on September 29, 2021, that were to be funded by CCC's borrowing authority.[19] Labeling the programs a "[c]omprehensive [i]nvestment [p]ackage," USDA publicized "$3 billion in investments that will support drought resilience and response, animal disease prevention, market disruption relief, and purchase of food for school nutrition programs."[20] USDA transferred funds for the programs on September 27, 2021, and September 29, 2021, to "USDA offices and agencies in anticipation of carrying out programs in accordance with the purposes announced in Press Release No. 0209.21."[21] According to USDA, the agencies began funding these programs in FY

[16] 15 U.S.C. § 714i ("The Corporation may, with the consent of the agency concerned, accept and utilize, on a compensated or uncompensated basis, the officers, employees, services, facilities, and information of any agency of the Federal Government, including any bureau, office, administration, or other agency of the Department of Agriculture, and of any State, the District of Columbia, any Territory or possession, or any political subdivision thereof.").

[17] USDA Fifth Response.

[18] *Id*. An agency that receives funds transferred from CCC retains those funds until expended. It will not transfer the funds back to CCC if the program for which the transfer was made will no longer be carried out; the agency will use the funds to fulfill other programs authorized under section 5 of the CCC Charter Act or return the funds to the Treasury. *Id*.

[19] USDA, Press Release No. 0209.21, *USDA Announces $3 Billion Investment in Agriculture, Animal Health, and Nutrition; Unveils New Climate Partnership Initiative, Requests Public Input* (Sept. 29, 2021), *available at* https://www.fns.usda.gov/news-room/usda-0209.21 (last visited Aug. 16, 2023) (Press Release No. 0209.21).

[20] *Id.*

[21] USDA First Response, at 1, 5–6.

2022.[22]

Partnerships for Climate-Smart Commodities program

USDA also used Press Release No. 0209.21 to publicize a request for information on PCSC.[23] USDA described PCSC as a grant-based program that supports the marketing and production of "climate-smart commodities"[24] through a set of pilot projects that provide financial assistance to producers and landowners.[25] On February 7, 2022, USDA announced that it would begin using CCC funds to finance projects through PCSC.[26]

DISCUSSION

At issue here is whether USDA was required by section 5 of the CCC Charter Act to include the $3 billion investment programs in its budget submission to Congress in advance of transferring CCC funds to other agencies to conduct those activities. Additionally at issue is whether PCSC is part of a grant program authorized by EQIP and therefore subject to that program's restrictions.

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[22] *Id*. at 7–8.

[23] Press Release No. 0209.21. USDA transferred the funds for PCSC on February 4, 2022, and September 29, 2022, and provided advance notification to Congress of the transfers. USDA Third Response.

[24] According to USDA, a climate-smart commodity is "an agricultural commodity that is produced using agricultural (farming, ranching or forestry) practices that reduce greenhouse gas emissions or sequester carbon." USDA, Press Release No. 0038.22, *USDA to Invest $1 Billion in Climate Smart Commodities, Expanding Markets, Strengthening Rural America* (Feb. 7, 2022), *available at* https://www.usda.gov/media/press-releases/2022/02/07/usda-invest-1-billion-climate-smart-commodities-expanding-markets (last visited Aug. 16, 2023) (Press Release No. 0038.22); *see* USDA, *Partnerships for Climate-Smart Commodities – Building Markets and Investing in America's Climate-Smart Farmers, Ranchers & Forest Owners to Strengthen U.S. Rural and Agricultural Communities*, No. USDA-NRCS-COMM-22-NOFO0001139, at 6 (Feb. 7, 2022) (Partnerships NOFO). Although the original Partnerships NOFO is no longer available on Grants.gov, the March 11, 2022, version, which includes extended application due dates and additional clarifying edits, is available at https://www.grants.gov/web/grants/view-opportunity.html?oppId=337878 (last visited Aug. 16, 2023).

[25] Press Release No. 0038.22; *see* Partnerships NOFO, at 2.

[26] Press Release No. 0038.22; Partnerships NOFO.

Budget submission requirements of section 5 of the CCC Charter Act

Section 5 of the CCC Charter Act authorizes CCC to use its general powers, including its available funds, "[i]n the fulfillment of its purposes and in carrying out its annual budget programs submitted to and approved by the Congress pursuant to chapter 91 of title 31."[27] The phrase "chapter 91 of title 31" refers to the Government Corporation Control Act (GCCA), provisions of which govern wholly owned government corporations' annual budget submissions.[28]

While GCCA requires Congress to "consider" wholly owned government corporations' annual budget programs and make "necessary appropriations," it permits wholly owned government corporations to carry out activities authorized by another law.[29] Further, GCCA authorizes the President to "submit changes in a budget program of a corporation at any time."[30]

GCCA requires corporations to annually prepare a "business-type budget" for the budget program, to be submitted to the President for transmittal to Congress as part of the President's Budget.[31] This budget must contain specified information, including estimates of the financial condition and operations of the current and following FYs; information to make known the financial condition and operations of the corporation, including estimates of operations by major activities; and provisions for emergencies and contingencies.[32] Notably, GCCA does not require the annual budget program to delineate every specific program and activity a corporation intends to carry out in the upcoming FY.[33]

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[27] 15 U.S.C. § 714c.

[28] 31 U.S.C. §§ 9101–9110.

[29] *Id*. § 9104(a), (b)(1).

[30] *Id*. § 9103(c).

[31] *Id*. § 9103(a), (c). A business-type budget was intended to be a "plan of operations" that would provide flexibility to account for the "extremely difficult" forecasting of economic conditions that would affect corporations' operations. S. Rep. No. 79-694, at 6; H.R. Rep. No. 79-856, at 5–6.

[32] 31 U.S.C. § 9103(b).

[33] Congress considered and rejected language in initial versions of the bills that became GCCA that would have prohibited corporations from conducting activities that were not specifically authorized by Congress each fiscal year. S. 469, 79th Cong. § 104 (1945); H.R. 2051, 79th Cong. § 104 (1945); H.R. 2177, 79th Cong. § 104 (1945). One revision would have required corporations to lay out "all operations" in their budget programs. *To Provide for Financial Control of Government Corporations: Hearings Before the House Committee on Expenditures in the Executive Departments*, 79th Cong. 102 (1945), at 192 (statement of C.G. Garman).

For FY 2021—the year in which CCC transferred funds to carry out the $3 billion investment programs—USDA submitted a budget program for CCC to the President, which was transmitted to Congress in the FY 2021 President's Budget Appendix.[34] Although the budget did not specifically refer to the $3 billion investment programs, USDA's FY 2021 budget submission for CCC contained the information required by GCCA. Because USDA's budget submission complied with GCCA, USDA also complied with section 5 of the CCC Charter Act when it transferred CCC funds to other USDA agencies for the $3 billion investment programs where such programs otherwise carried out the purposes of CCC's appropriations.[35] Additionally, CCC did not violate the Antideficiency Act.[36]

Our conclusion that section 5 of the CCC Charter Act does not require USDA to delineate the specific programs that CCC plans to fund is consistent with the broad discretion Congress has afforded government corporations generally and CCC specifically.[37] For example, Congress gives government corporations "a high degree of autonomy and flexibility in the carrying on of programs involving activities of a business nature."[38]

CCC's autonomy and flexibility are evidenced by its authority to "determine the character of and the necessity for its obligations and expenditures and the manner in

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[34] *2021 Budget Appendix*, at 101–11.

[35] It is axiomatic that CCC may only use its funds for the purposes for which they were appropriated. 31 U.S.C. § 1301; *see* B-223857, Feb. 27, 1987 (holding that funds borrowed by CCC are appropriated funds). USDA acknowledges that it may use CCC's borrowing authority only "in the fulfillment of its purposes" as provided in section 5 of the CCC Charter Act. USDA First Response. USDA explains that the $3 billion investment programs were authorized under the provisions of section 5. *Id*.

[36] The Antideficiency Act prohibits an officer or employee of the U.S. Government, including a wholly owned corporation such as CCC, from obligating or expending appropriated funds in excess or advance of an available appropriation, unless authorized by law. 31 U.S.C. § 1341. The funds that CCC borrows from the Treasury are subject to the Antideficiency Act. *See* B-223857, Feb. 27, 1987. Here, there is no indication that USDA exceeded the $30 billion aggregate borrowing limitation.

[37] *See* B-193573, Dec. 19, 1979, at 2 (recognizing "the flexibility which the corporate form is intended to permit" in accordance with the corporation's charter, which GCCA neither expands nor diminishes); B-58306(2)-O.M., Nov. 14, 1950, at 1 (recognizing CCC's "broad authority").

[38] S. Rep. No. 79-694, at 12; *see id.* at 7 (stating that "the corporate form loses much of its peculiar value without reasonable autonomy and flexibility in its day-to-day decisions and operations"); H.R. Rep. No. 79-856, at 4.

which they shall be incurred, allowed, and paid."[39] This "character and necessity" provision is a hallmark of broad corporate discretion.[40] In addition, CCC has "such powers as may be necessary or appropriate for the exercise of the powers specifically vested in the Corporation, and all such incidental powers as are customary in corporations generally."[41]

While CCC has broad corporate discretion, there are at least three processes through which Congress oversees CCC's activities: the appropriations process, CCC reports and audits, and legislative authorization. It is through the appropriations process that the requirement in section 5 of the CCC Charter Act that CCC's budget be approved by Congress is met. For example, Congress exercises its approval of CCC's annual budget when it enacts the annual appropriation for CCC's net realized losses.[42] Congress can also enact restrictions or conditions on CCC's funds in the annual appropriations act.[43]

CCC is also subject to regular reporting requirements and audits. For example, CCC is required to submit an annual management report on its financial condition and operations to Congress, with copies to the President, OMB, and the Comptroller General.[44] Additionally, CCC is required to send Congress quarterly itemized reports of "all expenditures over $10,000" made under two provisions of the CCC Charter Act, including section 5.[45] And GCCA requires the USDA OIG to audit

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[39] 15 U.S.C. § 714b(j).

[40] B-193573.

[41] 15 U.S.C. § 714b(m).

[42] *E.g.*, Pub. L. No. 117-328, div. A, title II, 136 Stat. at 4476 ("The following corporations and agencies are hereby authorized to make expenditures, within the limits of funds and borrowing authority available to each such corporation or agency and in accord with law, and to make contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Government Corporation Control Act as may be necessary in carrying out the programs set forth in the budget for the current fiscal year for such corporation or agency, except as hereinafter provided.").

[43] For example, Congress enacted in the FY 2023 appropriations act a new proviso that requires USDA to notify the congressional appropriations committees "in writing 15 days prior to the obligation or commitment of any emergency funds from" CCC. Pub. L. No. 117-328, div. A, title II, 136 Stat. at 4477.

[44] 31 U.S.C. § 9106. The CCC Charter Act requires CCC to annually submit a report of its "business" with the Secretary of Agriculture, with a copy sent to the President, who sends it to Congress. 15 U.S.C. § 714k.

[45] 15 U.S.C. § 714k.

CCC's financial statements and requires the audit report to be submitted to Congress.[46]

Further, as USDA recognizes, "CCC funds are used to implement specific programs established by Congress as well as to carry out activities under the broad authorities of the CCC Charter Act."[47] Congress's legislative powers allow it to direct CCC's spending, including by responding to corporate action that Congress determines exceeds a corporation's powers, disregards the will of the Congress, or is simply unnecessary.[48]

Our conclusion here is generally consistent with USDA's legal views and historical practice.[49] USDA interprets section 5 of the CCC Charter Act as "describ[ing] two types of actions under the Charter Act for which Congress has limited CCC's use of its general powers: when the CCC is fulfilling its purposes, and when it is carrying out a budget program."[50] In either instance, USDA acknowledges that CCC's programs must fall within one of the specific purposes listed in section 5.[51] USDA's interpretation of section 5 comports with "the decades-long practices of Congress and the CCC in fulfilling CCC's purposes."[52] Accordingly, USDA does not always amend its budgets to include CCC programs that are authorized by congressional mandate[53] or section 5.[54]

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[46] 31 U.S.C. § 9105(a)(1).

[47] USDA, *Commodity Credit Corporation*, *available at* https://www.usda.gov/ccc (last visited Aug. 21, 2023).

[48] *See* H.R. Rep. No. 79-856, at 6; *see*, *e.g.*, Agricultural Improvement Act of 2018, Pub. L. No. 115-334, § 3201, 132 Stat. 4490, 4609, 4615 (Dec. 20, 2018) (amending the Agricultural Trade Act of 1978, 7 U.S.C. § 5623(b), (f), to require CCC to "establish and carry out" a "Market Access Program" and spend not less than $200 million in each of FYs 2019 through 2023).

[49] USDA First Response, at 3-5.

[50] *Id.* at 3.

[51] *Id.* at 3, 4. USDA notes that its view of section 5 preserves CCC's flexibility to address "unexpected and urgent agricultural issues within the scope of CCC's purposes under the CCC Charter Act that arise throughout the year." *Id.* at 3.

[52] *Id.* at 3.

[53] *See* 15 U.S.C. § 714c(h) (authorizing CCC to "[c]arry out such other operations as the Congress may specifically authorize or provide for"); USDA First Response, at 3 (stating that subsection (h) "represent[s] the bulk of CCC spending").

[54] USDA First Response, at 3; *see* 31 U.S.C. § 9103(c). USDA also informed us that it has "historically" used GCCA's budget amendment process to notify Congress of "new activities" and programs undertaken pursuant to section 5 "not because it is statutorily required, but because it has proven a useful means for Administrations

(continued...)

Partnerships for Climate-Smart Commodities program

We next consider the legal authority for PCSC. Specifically, we consider whether PCSC is authorized by the Food Security Act and, thus, subject to the restrictions applicable to EQIP.[55]

The Food Security Act authorizes various activities under EQIP.[56] The general purposes of EQIP include promoting agricultural production, forest management, and environmental quality as compatible goals and optimizing environmental benefits.[57] EQIP's conservation innovation grant program authorizes grants, in part, for projects that ensure effective transfer of innovative technologies, such as market systems for pollution reduction.[58]

PCSC and EQIP have overlapping, yet distinct, objectives. Through PCSC, USDA financially assists producers in implementing practices that reduce greenhouse gas emissions or sequester carbon to create a market for commodities produced using greenhouse gas reduction or carbon sequestration technologies.[59] EQIP assists producers in developing techniques that promote environmental enhancement and protection, as well as agricultural production and forest resource management.[60] Although both programs provide grants to producers using measures to improve environmental quality, EQIP's statutory charge does not prioritize the creation and expansion of markets for specified "climate-smart" commodities.[61] EQIP may even be used to more appropriately utilize forest resources or to promote agricultural production for commodities that are not produced using climate-smart

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and the Congress to coordinate and monitor their respective activities relating to the CCC." *Id.* at 4. Our conclusion that USDA was not required to delineate the $3 billion investment programs in the budget does not limit USDA's ability to continue to use GCCA's budget amendment process in this manner.

[55] 16 U.S.C. § 3839aa-8(a)(2)(C). EQIP includes various funding limitations depending on the type of grant. For example, $25 million is available for each of FYs 2019 through 2031 for grants involving on-farm conservation innovation trials. *Id.* § 3839aa-8(c)(2).

[56] *Id*. §§ 3839aa-3839aa–8.

[57] *Id*. § 3839aa.

[58] *Id*. § 3839aa-8.

[59] USDA First Response, at 8; Press Release No. 0038.22.

[60] 16 U.S.C. §§ 3839aa-3839aa–8.

[61] USDA Second Response, at 1; s*ee* 16 U.S.C. §§ 3839aa–3839aa-8.

technologies.[62] Therefore, PCSC could not be authorized as part of the Food Security Act's EQIP and is not subject to the restrictions applicable to EQIP.

When we review whether an appropriation is available for a particular expenditure, we ask whether the expenditure falls within the agency's legitimate range of discretion.[63] Here, we similarly consider whether carrying out PCSC pursuant to section 5 of the CCC Charter Act falls within USDA's legitimate range of discretion. USDA explains that PCSC is authorized by section 5(e), which authorizes USDA to use CCC funds to "[i]ncrease the domestic consumption of agricultural commodities."[64] USDA explains that PCSC is authorized by this section because it is an agricultural commodity production program that incentivizes producers to implement large-scale pilot projects with the goal of creating market opportunities for commodities produced using climate-smart practices.[65] Congress vested in USDA the authority to administer CCC's authorities and to determine whether a particular program helps "increase the domestic consumption of agricultural commodities." Because the principal focus of PCSC is on the expansion of markets for climate-smart commodities, we agree that it is authorized by section 5(e) of the CCC Charter Act.

CONCLUSION

USDA did not violate the CCC Charter Act or the Antideficiency Act when it did not include several new financial assistance programs in its budget submission prior to transferring funds for those programs, where those programs otherwise carried out the purposes of CCC's appropriation. In addition, PCSC is authorized under section 5(e) of the CCC Charter Act and not the Food Security Act.

Edda Emmanuelli Perez

Edda Emmanuelli Perez
General Counsel

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[62] *See* 16 U.S.C. §§ 3839aa, 3389aa-2. According to USDA, it could not implement a grant program such as PCSC under EQIP specifically because EQIP has "requirements and restrictions that would not be compatible" with aspects of PCSC. USDA Second Response, at 1.

[63] *See, e.g.,* B-333826, Apr. 27, 2022, at 4 (citing B-223608, Dec. 19, 1988).

[64] 15 U.S.C. § 714c(e); *see* USDA Second Response, at 1.

[65] *See* USDA Second Response, at 1.

Recording & *Bona Fide* Needs Statutes: Other Transaction Agreements & Travel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: U.S. Department of Health and Human Services—Application of Fiscal Law to Other Transactions

File: B-333150

Date: April 8, 2024

DIGEST

The National Heart, Lung, and Blood Institute (NHLBI) within the National Institutes of Health (NIH) violated the recording statute when it recorded obligations for three Other Transaction Agreements (OTAs) at the time it issued the respective Notices of Award for such agreements. The recording statute requires an agency to record the full amount of its obligation against funds available at the time it incurs the obligation. However, as is the case here, award notices do not establish an obligation if another document has already established the agency's legal liability for the project or if the notices condition funding on the agency's approval of the applicant's plan, the execution of a future agreement, or both.

NHLBI also violated the recording statute when it recorded a liability for one of the agreements in an amount that included funds that were not available to the awardee until NHLBI approved their release in the future. An agency may not generally record an obligation if the government's liability is subject to a precondition, and the satisfaction of the condition is in the government's control.

NHLBI did not violate the *bona fide* needs statute when it entered into the three OTAs with fiscal year appropriations, even though the agreements covered activities that would be conducted over multiple years, because the purposes of the agreements were to provide federal assistance to facilitate medical research. When the principal purpose of the transaction is to provide federal assistance, then the agency's need is fulfilled when it awards funds from the currently available appropriation, regardless of when the recipient will expend the awarded funds.

NHLBI complied with the *bona fide* needs statute when it modified one of the agreements but did not alter the agreement's scope or purpose. A modification is a *bona fide* need of the year in which the agreement was originally executed when there is a continuing need for the work contemplated in the agreement and the purpose and scope of the agreement remain unchanged.

DECISION

This responds to a request from the U.S. Department of Health and Human Services, Office of Inspector General (HHS OIG), on whether and how fiscal law, including the recording statute and the *bona fide* needs statute, applies to three specific National Heart, Lung, and Blood Institute (NHLBI) Other Transaction Agreements (OTAs).[1] The request stemmed from a 2021 HHS OIG audit of NHLBI's compliance with federal requirements for Other Transactions.[2] As explained below, we conclude that NHLBI did not comply with the recording statute with respect to when NHLBI recorded amounts for the three agreements and with respect to the amount that NHLBI recorded for one of the agreements. We further conclude that NHLBI complied with the *bona fide* needs statute with respect to the three agreements and the obligations NHLBI actually incurred, as well as when it modified one of the agreements.

In accordance with our regular practice, we contacted HHS to seek factual information and its legal views on this matter.[3] HHS responded with its explanation of the pertinent facts and legal analysis.[4] We also requested[5] and received additional information from HHS OIG.[6]

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[1] Letter from Acting Chief Counsel to the Inspector General, HHS OIG, to General Counsel, GAO (Apr. 8, 2022) (Request Letter).

[2] Request Letter; HHS OIG, *The National Heart, Lung, and Blood Institute Did Not Fully Comply with Federal Requirements for Other Transactions*, A-04-20-04078 (Apr. 2021) (HHS OIG Audit), *available at* https://oig.hhs.gov/oas/reports/region4/42004078.asp (last visited Apr. 1, 2024).

[3] GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), *available at* https://www.gao.gov/products/gao-24-107329. Letter from Assistant General Counsel for Appropriations Law, GAO, to Associate General Counsel, General Law Division, HHS (June 6, 2022); Letter from Managing Associate General Counsel, GAO, to Associate General Counsel, General Law Division, HHS (Aug. 8, 2022) (Follow-Up Development Letter).

[4] Letter from Associate General Counsel, General Law Division, HHS, to Managing Associate General Counsel, GAO (Mar. 6, 2023) (HHS OGC Response).

[5] Email from Senior Attorney, GAO, to Senior Counsel, HHS OIG (July 5, 2022); Email from Senior Attorney, GAO, to Senior Counsel, HHS OIG (July 21, 2022).

[6] Emails from Senior Counsel, HHS OIG, to Senior Attorney, GAO (July 11, 2022) (with attachments); Email from Senior Counsel, HHS OIG, to Senior Attorney, GAO (Aug. 3, 2022) (with attachments).

BACKGROUND

NHLBI

NHLBI is one of the Institutes, Centers, and Offices of the National Institutes of Health (NIH).[7] NHLBI's mission is to provide global leadership for a research, training, and education program to promote the prevention and treatment of heart, lung, and blood disorders and enhance the health of all individuals so that they can live longer and more fulfilling lives.[8] This includes carrying out the National Heart, Blood Vessel, Lung, and Blood Diseases and Blood Resources Program (NHLBI Program). *See* 42 U.S.C. § 285b-3. NHLBI receives annual appropriations to carry out its activities.[9]

Statutory Authority for Other Transaction Agreements (OTAs)

NHLBI has statutory authority to enter into OTAs[10] under section 285b-3 of title 42. The law states:

> In carrying out the [NHLBI] Program, the Director of the Institute, under policies established by the Director of NIH[,] . . . subject to section 284(b)(2) of this title[11] and without regard to section 3324 of title 31 and section 6101 of title 41, may enter into such contracts, leases, cooperative agreements, *or other transactions*, as may be necessary in

[7] HHS OIG Audit, at 2.

[8] NHLBI, *About the NHLBI*, *available at* https://www.nhlbi.nih.gov/about (last visited Apr. 1, 2024); *see* 42 U.S.C. §§ 285b, 285b-3(a).

[9] *See*, *e.g.,* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. H, title II, 131 Stat. 135, 524 (May 5, 2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. H, title II, 132 Stat. 348, 720 (Mar. 23, 2018); 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. B, title II, 132 Stat. 2981, 3074 (Sept. 28, 2018); *see also* HHS OGC Response, at 4, 6–7.

[10] Congress has not defined OTAs or Other Transactions, but the term is understood to refer to a government transaction other than a procurement contract, grant, or cooperative agreement. *See, e.g.*, GAO, *Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities*, GAO-16-209 (Washington, D.C.: Jan. 2016), at 1; B-412711, May 16, 2016, at 6 (citing GAO, *Defense Acquisitions: DOD Has Implemented Section 845 Recommendations but Reporting Can Be Enhanced*, GAO-03-150 (Washington, D.C.: Oct. 2002), at 1).

[11] Section 284(b)(2) includes requirements for entering into contracts, grants, and cooperative agreements, but does not mention OTAs or purport to apply to them.

> the conduct of the Director's functions, with any public agency, or with any person, firm, association, corporation, or educational institutions.

42 U.S.C. § 285b-3(b)(3) (emphasis added).[12]

NHLBI OTA Process

NHLBI entered into all three OTAs submitted with the request under section 285b-3.[13] NHLBI stated that they generally began the OTA process after NHLBI identified a gap in the prevailing science or problem to be solved and issued announcements soliciting applications for funding.[14] Following the awardee's submission of an initial proposal and, in some cases, negotiations between NHLBI and the awardee, NHLBI issued a Notice of Award (NOA), and NHLBI and the awardee executed an OTA.[15] NHLBI treated the NOAs as providing the documentary basis for obligating funds,[16] and the entire amount listed in each NOA was obligated from the annual NHLBI appropriation available when the NOA was issued.[17] The NOAs and OTAs for each of the three transactions at issue were finalized toward the end of a fiscal year with a period of performance that extended

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[12] In addition to the instruments described in section 285b-3(b)(3), NHLBI is also authorized to provide grants for certain purposes. 42 U.S.C. § 285b-3(b)(2)(B), (4).

[13] Other Transaction Agreement Concerning the Integration of Trans-omics for Precision Medicine (TOPMED) and Other Heart, Lung, Blood, and Sleep (HLBS) Data Sets With the NIH Data Commons, Agreement No. 1OT3HL142478-01 (Sept. 28, 2017) (Dataset Integration OTA), at 5; Other Transaction Agreement Concerning NHLBI Data STAGE Coordinating Center, Agreement No. 1OT3HL147154-01 (Aug. 10, 2018) (Data STAGE Coordinating Center OTA), at 5; Other Transaction Agreement Concerning Cure Sickle Cell Initiative Manufacturing Resource Platform, Agreement No. 1OT3HL152932 (Sept. 26, 2019) (CureSCi Manufacturing Resource Platform OTA), at 5.

[14] *See* NHLBI General Responses to HHS OIG Questions on Pricing, Funding, and Other Award Execution Matters (Aug. 28, 2020) (NHLBI General Responses), at 3.

[15] *See* HHS OIG Audit, at 2–3, 9; NHLBI General Responses, at 7 (discussing the negotiation process); NHLBI Specific Responses to HHS OIG Questions on Pricing, Funding, and Other Award Execution Matters (Aug. 28, 2020) (NHLBI Specific Responses), at 1 (chart created by HHS OIG showing information on various OTAs, including the three at issue here). The NOA issuance date was not always the same as the OTA execution date. *See* NHLBI Specific Responses, at 1–2.

[16] *See* HHS OIG Audit, at 3; *see also* NIH, *Other Transactions Policy Guide for NIH Staff* (May 5, 2021) (2021 NIH OT Policy), at 104 (issued after the three OTAs were executed and stating that the NOA serves as the documentary evidence for recording an OT obligation).

[17] *See* Request Letter; HHS OGC Response.

into future fiscal years.[18] NHLBI subsequently made modifications to all three OTAs, sometimes issuing new NOAs and obligating additional funds. In line with HHS OIG's request, we limit our analysis to the three original OTAs and one particular modification.[19]

First OTA: Dataset Integration OTA

On June 16, 2017, NIH issued a funding announcement soliciting applications for the pilot phase of the NIH Data Commons, an initiative intended to accelerate new biomedical discoveries by providing a cloud-based platform where investigators could store, share, and access biomedical research.[20] On September 26, 2017, NHLBI issued an NOA in the amount of $2.85 million and recorded an obligation for that amount.[21] NHLBI signed the OTA on September 27, 2017.[22] The purpose of the agreement was to integrate certain heart, lung, blood, and sleep datasets within the broader NIH Data Commons initiative.[23] The initial term of the OTA was three years, though the Statement of Budgetary Projections (Budget Statement) provided for only an initial one-year period of performance.[24] NHLBI restricted the amount of obligated funds available to the awardee, authorizing the awardee to expend up to one-fourth of the $2.85 million each quarter of the first year of the agreement.[25] NHLBI and the awardee made modifications to the OTA on July 6, 2018.[26]

Second OTA: Data STAGE Coordinating Center OTA

In 2018, NHLBI solicited applications for a coordinating center for its Data STAGE consortium, a group of academic institutions developing a cloud-based platform for heart, lung, blood, and sleep research investigators to find, access, share, store, and compute on large scale data sets in order to facilitate the development of novel

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[18] *See* NHLBI Specific Responses, at 1; Dataset Integration OTA, at 1, 5; Data STAGE Coordinating Center OTA, at 1, 6; CureSCi Manufacturing Resource Platform OTA, at 1, 5.

[19] *See* Request Letter.

[20] NIH, *NIH Data Commons Pilot Phase*, Funding Announcement (FA) Number RM-17-026 (June 16, 2017), at 5, *available at* https://commonfund.nih.gov/sites/default/files/RM-17-026_CommonsPilotPhase.pdf (last visited Apr. 1, 2024).

[21] NHLBI Specific Responses, at 1–2.

[22] Dataset Integration OTA, at 1.

[23] *Id.* at 4–5.

[24] *Id.* at 5, Attachment 2.

[25] *Id.* at Attachment 2.

[26] Dataset Integration OTA, Modification 1 (July 6, 2018).

diagnostic tools, therapeutic options, and prevention strategies for heart, lung, blood, and sleep disorders.[27] On August 10, 2018, NHLBI and the awardee signed an OTA.[28] NHLBI issued an NOA on August 13, 2018, listing $5,798,287 for the OTA and recorded an obligation for that amount.[29] Both the term of the agreement and period of performance were five years.[30] The OTA did not include any restrictions on the amount of funds available to the awardee other than the $5,798,287 ceiling.[31]

Third OTA: CureSCi Manufacturing Resource Platform OTA

In 2018, NHLBI launched the Cure Sickle Cell Initiative (CureSCi) to support technologies and treatments related to curing sickle cell disease.[32] As part of that initiative, on September 26, 2019, NHLBI and the awardee signed an OTA to establish a resource platform consisting of a consortium of manufacturers and facilities to support genetic therapies for sickle cell disease.[33] NHLBI issued an NOA on September 27, 2019, listing $5,641,200 for the OTA and recorded an obligation for that amount.[34] Both the term of the agreement and period of performance were four years.[35]

NHLBI restricted the amount of funds initially available to the awardee. Only $501,361 was available for the performance of certain milestones; the remaining funds were restricted until certain conditions had been met and NHLBI approved a request from the awardee to lift the funding restriction.[36] Specifically, the remaining

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[27] Memorandum from Chief, Heart Development and Structural Diseases Branch, to Director, NHLBI, *To obtain approval to enter into an Other Transaction Agreement to establish a Coordinating Center for the NHLBI Data STAGE* (Mar. 7, 2018); Data STAGE Coordinating Center OTA, at 3, 5, Attachment 1.

[28] Data STAGE Coordinating Center OTA, at 1.

[29] *Id.*; NHLBI, *Notice of Award*, Award No. 1OT3HL147154-01 (Aug. 13, 2018) (Data STAGE Coordinating Center NOA); Follow-Up Development Letter, at 4 (summarizing obligations); HHS OGC Response, at 6 (confirming obligations).

[30] Data STAGE Coordinating Center OTA, at 6, Attachment 2.

[31] *Id.*

[32] CureSCi Manufacturing Resource Platform OTA, at 3.

[33] *Id.* at 4, Attachment 1.

[34] NHLBI, *Notice of Award*, Award No. 1OT3HL152932-01 (Sept. 27, 2019) (CureSCi Manufacturing Resource Platform NOA); Follow-Up Development Letter, at 5 (summarizing obligations); HHS OGC Response, at 7 (confirming obligations).

[35] CureSCi Manufacturing Resource Platform OTA, at 5, Attachment 2.

[36] *Id.* at Attachment 2.

funds would be restricted until NHLBI approved manufacturing facilities for funding.[37] In addition, NHLBI would review the awardee's progress and financial reports before determining whether to approve the awardee's request to lift the restriction.[38]

DISCUSSION

At issue here is how fiscal law, including the recording statute and the *bona fide* needs statute, applies to the three specific OTAs that are the subject of HHS OIG's request. In particular, the primary issues presented here are: (1) when did NHLBI incur obligations for the OTAs; (2) what amount should be recorded for those obligations; and (3) whether those obligations satisfy the *bona fide* needs statute.

Recording Statute

(1) Obligating Event

The recording statute, 31 U.S.C. § 1501, requires that an agency record an obligation when there is sufficient documentary evidence of the government's liability and record the amount of the obligation based on such evidence. *See, e.g.*, B-329712, Oct. 15, 2020. It also specifies the type of documentary evidence necessary to record an obligation for different types of transactions, including procurement contracts, grants, and cooperative agreements. *See* 31 U.S.C. § 1501(a)(1), (5); B-226782, Oct. 20, 1987 (procurement contracts); B-316372, Oct. 21, 2008 (grants); B-321297, Aug. 2, 2011 (cooperative agreements). And when no specific provision applies, the recording statute includes a catch-all provision requiring agencies to record an obligation when there is documentary evidence of a "legal liability of the [g]overnment against an available appropriation or fund." *See* 31 U.S.C. § 1501(a)(9); B-329712, Oct. 15, 2020; B-332205, Aug. 9, 2023.

OTAs are considered something other than procurement contracts, grants, or cooperative agreements and are not covered by the specific categories listed in the recording statute. *See* GAO-16-209; 31 U.S.C. § 1501(a). Accordingly, liabilities for these types of agreements should be recorded as an obligation pursuant to section 1501(a)(9) when there is documentary evidence of the government's legal liability.

Unless constrained by limitations or restrictions in the relevant OTA authority, agencies have discretion in determining the form of their OTAs. *See* GAO-16-209, at 4–5. To determine what type of documentary evidence is sufficient to record an obligation for an OTA, it is helpful to consider whether the transaction resembles one of the instruments expressly described in the recording statute, like a contract or grant, and, if so, to look to the documentary requirements for that instrument.

[37] *Id.* at Attachments 1–2.

[38] *Id.* at Attachment 2.

NHLBI's organic statute authorizes the NHLBI Director to enter into OTAs as may be necessary to carry out the NHLBI Program, which consists of a broad array of activities to support research, training, health information, and dissemination, and the establishment of programs to promote the diagnosis, treatment, and prevention of heart, lung, and blood disorders. *See* 42 U.S.C. § 285b-3. In addition to OTAs, NHLBI may enter into both traditional procurement instruments (contracts and leases) and federal assistance instruments (cooperative agreements) with any public agency, person, firm, association, corporation, or educational institution to carry out the NHLBI Program. 42 U.S.C. § 285b-3(b)(3). Therefore, we must consider the characteristics of the specific OTAs at issue to determine which type of traditional instrument they most closely resemble.

The Federal Grant and Cooperative Agreement Act of 1977 (FGCAA) establishes criteria to differentiate among grants, cooperative agreements, and contracts. 31 U.S.C. §§ 6301–6308; B-328615, May 9, 2017. The differences between contracts, on one hand, and grants and cooperative agreements, on the other, hinge on the purpose of the transaction.[39] If the principal purpose of the transaction is to acquire goods or services for the direct benefit or use of the government, the agency should use a procurement contract. 31 U.S.C. § 6303. On the other hand, if the purpose is to provide federal assistance by transferring something of value (like money, property, or services) to the recipient to carry out an authorized public purpose of support or stimulation, the agency should use a grant or cooperative agreement. 31 U.S.C. §§ 6304–6305.

All three OTAs at issue here are focused on facilitating medical research of various diseases and disorders. NHLBI considers its OTAs to be akin to federal assistance instruments and stated that their purpose is to transfer something of value to the recipient to carry out an authorized public purpose.[40] In particular, NHLBI asserted that its OTAs are used to solve problems faced by the general scientific community, like finding a genetic cure for sickle cell disease, or to facilitate rapidly changing science.[41]

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[39] The FGCAA also distinguishes between grants and cooperative agreements based on the degree of the government's involvement. 31 U.S.C. §§ 6304–6305. Both instruments are subject to the same part of the recording statute, section 1501(a)(5). *See* B-316372, Oct. 21, 2008; B-321297, Aug. 2, 2011.

[40] NHLBI General Responses, at 4.

[41] NHLBI General Responses, at 4. We further note that NIH also uses grants and cooperative agreements, traditional federal assistance instruments, for similar projects. *See* NIH, *Common Fund Data Ecosystem, Funding Opportunities*, *available at* https://commonfund.nih.gov/dataecosystem/FundingOpportunities (last visited Apr. 1, 2024) (listing grant, cooperative agreement, and OTA funding opportunities to integrate and make accessible various datasets); NIH, *NIH Grants*

(continued...)

With respect to the three OTAs at issue here, we agree with NHLBI. The activities covered by the three OTAs are within the broad scope of the NHLBI Program and appear intended to promote national interests such as making medical data accessible to researchers and providing resources to support the development of medical treatments, rather than to satisfy a specific governmental need for a supply or service. In addition, the awardees fall within the wide-ranging universe of entities with which NHLBI may enter into federal assistance agreements under section 285b-3.

Given the purposes of the three OTAs, we look to the documentary requirements for traditional federal assistance instruments (grants and cooperative agreements) for guidance in determining when to record an obligation for these three transactions.

Section 1501(a)(5) requires an agency to record an obligation for a traditional federal assistance instrument based on evidence of an agreement or approved plans authorized by law.[42] This generally occurs at the time of a grant award, *see* B-316372, Oct. 21, 2008, B-289801, Dec. 30, 2002, or when an authorized government official signs a cooperative agreement. *See* B-321297, Aug. 2, 2011.

In previous decisions, we have identified the types of terms and conditions that must be included in a federal assistance award notice for it to establish an obligation. Specifically, award notices establish an obligation if the notice reflects the acceptance of an awardee's application, specifies the project approved and the amount of funding, and imposes a deadline for acceptance by the awardee. B-316372, Oct. 21, 2008; B-126652, Aug. 30, 1977. The notices addressed in those decisions also expressly stated that the award constituted an obligation, *see* B-316372, Oct. 21, 2008, B-126652, Aug. 30, 1977, and included the relevant terms and conditions. B-126652, Aug. 30, 1977. In contrast, we have determined that award notices do not establish an obligation if the notices condition funding on the agency's approval of the applicant's plan, the execution of a future agreement, or both. B-197274, Feb. 16, 1982 (involving "reservation and notification" letters sent by the Department of Housing and Urban Development (HUD) to federal assistance applicants).

Policy Statement § 15.1 (Dec. 2022), *available at* https://grants.nih.gov/grants/policy/nihgps/HTML5/section_15/15.1_general.htm (last visited Apr. 1, 2024) (Consortium Agreements-General).

[42] Section 1501(a)(5) also requires agencies to record an obligation for grants or subsidies payable from appropriations that are "required to be paid in specific amounts fixed by law or under formulas prescribed by law." 31 U.S.C. § 1501(a)(5)(A); B-316915, Sept. 25, 2008.

Here, each OTA involved two primary events: (1) NHLBI's issuance of an NOA[43]; and (2) the execution of an OTA between NHLBI and the awardee. For each OTA, these two events occurred in the same fiscal year but not on the same day. For two of the OTAs, NHLBI issued the NOA after the OTA was executed[44]; for the other OTA, NHLBI issued the NOA before the OTA was executed.[45] In each instance, NHLBI treated issuance of the NOA as the point of obligation for the award.[46]

In analyzing when an obligation arises, we consider the specific language of the relevant documents. *See* B-316372, Oct. 21, 2008. Each NOA lists the project title, award calculation, the awardee, as well as other information, and states that NIH "hereby awards an other transactions award in the amount of [$X]" to the awardee in support of the referenced project.[47] The NOAs state that "[a]cceptance of this award including the 'Terms and Conditions' is acknowledged by the award recipient when funds are drawn down or otherwise obtained from the Payment Management System."[48] However, the NOAs further state that they are issued pursuant to the authorities in the special terms and conditions sections of the documents and are subject to those requirements as well as other referenced, incorporated, or attached terms and conditions.[49] The special terms and conditions section of each NOA, in turn, states that the NOA is "for funding reservation only" and is not the official OTA, which "is in the award file."[50]

Each OTA provides detailed information on the scope, term, and administration of the project.[51] Each OTA also includes a "Statement of Milestones and Objectives" that describes the scope of the arrangement and the awardee's responsibilities.[52] In terms of funding, each OTA includes a Budget Statement that states that the awardee "is authorized to expend funds up to the amounts reflected in the 'Funds

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[43] We only received copies of the initial Data STAGE Coordinating Center and CureSCi Manufacturing Resource Platform NOAs. Given the similarities between those NOAs, we assume, for purposes of this decision, that the initial Dataset Integration NOA contained similar terms.

[44] *See* Data STAGE Coordinating Center NOA; CureSCi Manufacturing Resource Platform NOA.

[45] *See* NHLBI Specific Responses, at 1.

[46] HHS OIG Audit, at 3. We note that this practice is consistent with the 2021 NIH OT Policy. *See* 2021 NIH OT Policy, at 104.

[47] *See*, *e.g.*, Data STAGE Coordinating Center NOA.

[48] *See*, *e.g.*, *id.*

[49] *See*, *e.g.*, *id*.

[50] *See*, *e.g.*, *id*. at § IV.

[51] *See*, *e.g.*, Data STAGE Coordinating Center OTA.

[52] *E.g., id.* Attachment 1.

Authorized'" section of the Budget Statement.[53] The OTAs further provide that NIH/NHLBI's "liability to make payments to the [awardee] is limited to only those funds obligated under the [OTA] or by modification to the [OTA]," subject to the availability of funds.[54]

Examining both the OTAs and NOAs for each transaction, we conclude that NHLBI incurred an obligation when it signed the OTAs, as that was the point at which the government incurred a legal liability to provide funds to the awardees. The OTAs, not the NOAs, represent the agreement between NHLBI and the awardees.[55] The OTAs also contain the terms and conditions we have determined must be included in federal assistance award notices to establish an obligation. *See* B-316372, Oct. 21, 2008; B-126652, Aug. 30, 1977. In particular, the OTAs specify the terms of the arrangements, reflect the acceptance of the awardees' applications, and specify the projects approved and the amounts of funding.[56] The OTAs also expressly authorize the awardees to expend funds for which NHLBI is liable and do not reference or condition funds on the issuance of an NOA, which, for two of the transactions, was issued after the OTA was signed.[57]

In contrast, the NOAs specifically reference the OTAs in their special terms and conditions sections as separate and distinct from the NOAs and clarify that the NOAs are "for funding reservation only."[58] This language indicates that each NOA contemplates the existence of a separate OTA for the relevant project, and the NOAs merely represent the administrative reservation of funds for the project rather than a legally enforceable commitment to expend funds. In other words, in the

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[53] *E.g., id.* Attachment 2.

[54] *E.g., id.* at Art. V.A.

[55] *E.g.*, Data STAGE Coordinating Center OTA, Art. XIII (stating that the OTA "constitutes the entire agreement of the [p]arties and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions among the [p]arties").

[56] *See*, *e.g.*, Data STAGE Coordinating Center OTA. Previous decisions involving open-ended award notices also emphasized that the relevant notices imposed a deadline for awardee acceptance. B-316372, Oct. 21, 2008; B-126652, Aug. 30, 1977. Because the OTAs are signed agreements between the parties rather than open-ended notices, we conclude that the absence of such a deadline in the OTAs is not material to our analysis. *Cf.* B-321297, Aug. 2, 2011 (concluding that an agency should record an obligation for a cooperative agreement when an authorized government official signs the agreement, without any mention of the need for a deadline for awardee acceptance).

[57] *See* Data STAGE Coordinating Center NOA (issued three days after execution of the OTA); CureSCi Manufacturing Resource Platform NOA (issued the day after execution of the OTA).

[58] *See*, *e.g.*, Data STAGE Coordinating Center NOA.

absence of an OTA, it does not appear that the NOAs independently authorized awardees to incur costs for which NHLBI would be liable. When issued before the OTA, the NOA was akin to a "reservation and notification" letter, which we (and courts) have found to be insufficient to establish an obligation because liability was conditioned on additional agency action. *See* B-197274, Feb. 16, 1982; *Champaign County, Illinois v. U.S. Law Enforcement Assistance Administration*, 611 F.2d 1200, 1205 (7th Circ. 1979) ("A reservation of funds does not amount to a formal award especially when . . . the agency has indicated further correspondence is needed."); *cf.* B-316372; B-126652, Aug. 30, 1977 (involving notices that expressly stated that the award constituted an obligation). And when issued after the OTA, the NOA merely represented the administrative implementation of the agreement, which had already established NHLBI's legal liability.

Because the OTAs, not the NOAs, established NHLBI's legal liability to expend funds for the transactions, NHLBI incurred obligations when an authorized NHLBI official signed the OTA for each of the three transactions.[59] As such, in each instance NHLBI violated the recording statute.

(2) Amount of Obligation

Having determined that NHLBI incurred an obligation for each of the three transactions when the OTAs were executed, we now examine the liability that NHLBI should have recorded for each OTA. A major purpose of the recording statute is to provide Congress a reasonably precise picture of an agency's financial requirements so it can more accurately assess the agency's future appropriation needs. *See* 64 Comp. Gen. 410 (1985). The recording statute thus requires an agency to record the full amount of its obligation against funds available at the time it incurs the obligation. *See, e.g.*, B-327242, Feb. 4, 2016. This includes amounts for which the government's liability depends on future events that are outside its control. *See* B-300480, Apr. 9, 2003. The recording statute likewise prohibits an agency from overrecording the obligation amount. *See* 64 Comp. Gen. 410. In particular, an agency may not record an obligation if the government's liability is subject to a precondition and the satisfaction of the condition is in the government's control. *See id*. This rule "results in a more accurate picture of an agency's needs being presented to the Congress because unless and until the agency acts to satisfy the condition, it really has no need for funds." *Id.* at 414.

[59] Because all three OTAs contemplate that NHLBI would "have continuous involvement with the" awardee, *see*, *e.g.*, Data STAGE Coordinating Center OTA, at 5, they are more akin to cooperative agreements than grants. *See* 31 U.S.C. §§ 6304–6305. Agencies must record obligations for cooperative agreements when an authorized government official signs the agreement. *See* B-321297, Aug. 2, 2011. Accordingly, we view the agency's signing of the agreement as the obligating event for each of the OTAs.

For example, HUD violated the recording statute when it recorded obligations for "reservation and notification letters" sent to financial assistance applicants, even though the letters conditioned funding on HUD's approval of the applicant's plan/final proposal, the execution of a future agreement, or both. B-197274, Feb. 16, 1982. We noted in the decision that final approval of the applicant's plan required more than perfunctory action by HUD; it required HUD to exercise discretion and judgment to determine whether the applicant met all legal and administrative requirements, and HUD retained sole control over whether a final contract would be entered into with the applicant. *Id.* Because funding was conditioned on HUD's future approval, the applicant's actions in response to the letters, such as submitting additional items to HUD, could not, on their own, result in future liability for HUD. *Id.* Accordingly, these letters did not result in an obligation. *Id.*

In contrast, preconditions that are solely within the awardee's control do not affect when the agency incurs an obligation. *See* B-300480, Apr. 9, 2003; B-325526, July 16, 2014. In that situation, "the government should obligate funds to cover the maximum amount of the liability," and then deobligate funds if the government's liability is subsequently reduced because the preconditions are not met. B-300480, Apr. 9, 2003. For example, a statutory grant program administered by the Election Assistance Commission (EAC) directed EAC to make payments to states under a prescribed formula, provided that the state certified that it met certain statutory preconditions. B-316915, Sept. 25, 2008. We concluded that EAC incurred an obligation for the grant payments by operation of law regardless of when or if a particular state submitted a certification because the states had the ability to fulfill the preconditions without any action on the part of the agency. *Id.*

Looking at the obligations recorded for the three OTAs at issue, NHLBI recorded an obligation of $2.85 million for the Dataset Integration OTA when the associated NOA was issued on September 26, 2017.[60] The OTA, signed on September 27, 2017, lists the "Funds Authorized" as $2.85 million as well as four "Quarterly Authorizations" of $712,500 for the first year of the agreement, and the OTA states that the awardee "is authorized to expend funds up to the amounts reflected in" those sections.[61]

As discussed above, NHLBI should have recorded an obligation for this OTA when the OTA was signed on September 27, 2017, rather than when NHLBI issued the NOA on September 26, 2017. Although NHLBI violated the recording statute by recording the obligation too early, we conclude that NHLBI properly recorded the amount of the obligation for the OTA as $2.85 million. An obligation occurs when an agency incurs a legal liability for payment, or a legal duty that could mature into a legal liability for payment by virtue of actions beyond the control of the agency. B-300480, Apr. 9, 2003. Although, at the time the OTA was executed, the awardee

[60] Request Letter, at 3; NHLBI Specific Responses, at 1–2.

[61] Dataset Integration OTA, Attachment 2.

was only authorized to expend funds up to the quarterly authorization of $712,500 rather than the full $2.85 million award, the awardee's ability to expend the remaining funds was conditioned only on the passage of time, which was outside NHLBI's control. *See* B-300480, Apr. 9, 2003; B-325526, July 16, 2014. Instead, this provision merely delayed the awardee's expenditure of the funds and did not affect the total amount awarded or NHLBI's liability for that total amount when it executed the OTA. *See* B-300480, Apr. 9, 2003. NHLBI therefore properly recorded the obligation amount as $2.85 million, the maximum amount of its potential liability when the OTA was executed.

NHLBI recorded an obligation of $5,798,287 for the Data STAGE Coordinating Center OTA on August 13, 2018.[62] The OTA lists the "Funds Authorized" as this amount and states that the awardee "is authorized to expend funds up to" that amount.[63] The OTA also provides that the awardee "is authorized to allocate and expend funds as needed in support of all Milestones and Objectives in the [OTA]."[64] The OTA does not otherwise restrict the amount of funds the awardee is authorized to expend. Although NHLBI violated the recording statute by recording the obligation when NHLBI issued the NOA on August 13, 2018, instead of when NHLBI signed the OTA on August 10, 2018, NHLBI properly recorded the amount of the obligation for the OTA as $5,798,287.

NHLBI recorded an obligation of $5,641,200 for the CureSCi Manufacturing Resource Platform OTA on September 27, 2019.[65] Like the other two agreements, this OTA provides that the awardee "is authorized to expend funds up to" the amounts reflected in the "Funds Authorized" column.[66] The amount listed under "Federal Funds Authorized" is $5,641,200, but a separate column titled "Authorization Description/Notes" states:

> **$501,361 are available** for performance of Operational Milestone 1 and Operational Milestone 2. The remaining awarded funds of **$5,139,839 are restricted** until facilities for manufacturing are approved for funding and remain subject to the programmatic requirements of the NHLBI. *Awardee should submit request to [Agreements Officer (AO)] & [Scientific Program Director (SPD)] to lift funding restrictions. Upon recommendation from SPD and based on satisfactory review of*

[62] Request Letter, at 4.

[63] Data STAGE Coordinating Center OTA, Attachment 2.

[64] *Id.*

[65] Request Letter, at 4–5.

[66] CureSCi Manufacturing Resource Platform OTA, Attachment 2.

> *progress and financial reports, AO will lift restrictions and notify Awardee.*[67]

The OTA thus only authorized the awardee to expend up to $501,361 on two of the four milestones described in the Statement of Milestones and Objectives.[68] The remaining amount referenced in the OTA was not available without a request from the awardee and NHLBI approval based on its review of the awardee's progress and financial reports, as well as approval of manufacturing facilities for funding.[69]

The initial OTA therefore only constituted a definite commitment to pay the awardee up to $501,361. NHLBI's liability for additional amounts was subject to a precondition, and NHLBI's actions, not the awardee's, controlled whether that precondition would be satisfied. With respect to the restricted funds, the OTA was similar to HUD's reservation and notification letters in B-197274. *See* B-197274, Feb. 16, 1982. The OTA did not commit NHLBI to provide those restricted amounts to the awardee; such amounts would only be made available after NHLBI approved the awardee's request, and that determination required more than perfunctory action on NHLBI's part. Specifically, NHLBI was required to exercise its discretion and judgment in reviewing the awardee's financial and progress reports and deciding whether to approve manufacturing facilities for funding.[70] NHLBI retained control over whether to modify the OTA to unrestrict additional funds and was free to disapprove the awardee's request, thereby leaving the funds restricted and unavailable to the awardee.[71]

As discussed above, NHLBI should have recorded the obligation for the OTA when NHLBI signed the OTA on September 26, 2019, not when NHLBI issued the NOA on September 27, 2019. In addition, NHLBI should have recorded an obligation only in the amount of $501,361 when the OTA was signed, as NHLBI's potential liability for further amounts was subject to a precondition, satisfaction of which was in NHLBI's control. *See* 64 Comp. Gen. 410.

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[67] *Id.* Both the AO and SPD were government employees. *See id.* at 3–4 (defining the positions), 7–8 (identifying the AO and SPD as "NIH Points of Contact").

[68] *See id.* at Attachment 1.

[69] *See id.* at Attachment 2; Attachment 1 (describing the process for NHLBI approval of proposed consortium members and NHLBI approval of consortium members for specific manufacturing projects); *see also* NHLBI, *Standard Operating Procedure (SOP): Guidance for Other Transactions Authority*, § 4.3.5.2 (June 25, 2019) (describing "restricted funds" as "not available for reimbursement or payment").

[70] *See* CureSCi Manufacturing Resource Platform OTA, Attachment 2.

[71] *Id.* at 6–7 (describing the process for modifying the OTA).

Bona Fide Needs Statute

The *bona fide* needs statute provides that a time-limited appropriation is available only to fulfill a genuine or "*bona fide*" need that arises during the period of availability of the appropriation. 31 U.S.C. § 1502(a); B-289801, Dec. 30, 2002. This means that an agency may not obligate current, annual appropriations for the *bona fide* needs of future fiscal years without statutory authority. *See* B-322455, Aug. 16, 2013. We have long held that the *bona fide* needs statute applies to all federal government activities carried out with appropriations, regardless of the funding mechanism used. *See, e.g.*, B-289801, Dec. 30, 2002; B-229873, Nov. 29, 1988. The statute therefore applies to activities carried out with OTAs.[72]

Compliance with the *bona fide* needs statute is measured at the time the agency incurs an obligation and depends on the purpose of the transaction and the nature of the obligation. B-289801, Dec. 30, 2002 (citing 61 Comp. Gen. 184, 186 (1981)). Here, NHLBI obligated funds for awardee activities that would begin or continue in a future fiscal year. The *bona fide* needs analysis therefore depends on both the purpose and nature of the contemplated activities.

As discussed above, the principal goal of the three OTAs was to provide funds to the awardee to carry out a public purpose of support or stimulation authorized by law, namely facilitating medical research, either through making medical data accessible or providing resources to support the development of medical treatments.

When the principal purpose of a transaction is to provide federal assistance, in other words, to transfer something of value to the recipient to carry out an authorized public purpose of support or stimulation, the agency's need is fulfilled when it awards funds from a currently available appropriation, regardless of when the recipient will expend the awarded funds. B-229873, Nov. 29, 1988; B-289801, Dec. 30, 2002. Accordingly, we evaluate whether the award was made during the period of availability of the appropriation charged and furthers the authorized purposes of the program. B-289801, Dec. 30, 2002. In addition, when multiple-year instruments are used, we examine whether instruments of that duration are in accordance with the agency's statutory authority. *See id.*

In this instance, all three OTAs were executed near the end of the fiscal year, and NHLBI charged the annual appropriation current at the time.[73] As noted above, NHLBI violated the recording statute by recording obligations when it issued the

[72] HHS shares this view. *See* Email from Associate General Counsel, General Law Division, HHS, to HHS OIG (Dec. 22, 2020); 2021 NIH OT Policy, at Appendix H; NHLBI, *Standard Operating Procedure (SOP): Guidance for Other Transactions Authority*, § 5.3.4.3 (Mar. 22, 2022) (2022 NHLBI OT Policy); *see also* HHS OGC Response (discussing how to apply the *bona fide* needs statute to the three OTAs).

[73] *See* Follow-Up Development Letter; HHS OGC Response.

NOAs for the transactions instead of when it signed the OTAs. However, this error did not affect the agency's compliance with the *bona fide* needs statute because, for each transaction, NHLBI's issuance of the NOA and signing of the OTA both occurred in the same fiscal year.

All three OTAs were entered into under NHLBI's organic statute, which allows the agency to use OTAs to carry out the NHLBI Program, subject to policies established by the Director of NIH. 42 U.S.C. § 285b-3. This includes providing for research and establishing programs related to heart, lung, and blood disorders. *Id.* The purpose of the three OTAs was to facilitate research related to these disorders as part of the NHLBI Program.

In addition, we have not identified any provisions in the statute, the appropriations acts for the relevant years, or the NIH policies in effect when the OTAs were executed that limit the duration of NHLBI OTAs.[74] NHLBI therefore had broad discretion in establishing the duration of its OTAs. *See* B-289801, Dec. 30, 2002 (concluding that because the statute governing a grant program did not establish any requirements beyond the basic objective, the agency had broad discretion and awarding 2-year grants fell within that discretion).

The three OTAs had terms between three and five years. Given that the relevant statutory authority affords NHLBI broad discretion in using OTAs to carry out the NHLBI Program, we conclude that entering into these multiyear OTAs was within that discretion.

As discussed above, NHLBI recorded an obligation for the CureSCi Manufacturing Resource Platform OTA in an amount that included both unrestricted and restricted funds, and the recording statute dictates that NHLBI should have only recorded an obligation for the unrestricted funds. Compliance with the *bona fide* needs statute is measured at the time the agency incurs an obligation. B-289801, Dec. 30, 2002. Notwithstanding NHLBI's actions, NHLBI only incurred an obligation for the unrestricted amount, and that obligation was consistent with the *bona fide* needs statute because it was charged to the NHLBI annual appropriation available when the agreement was signed and furthered the authorized purposes of the NHLBI Program. Compliance with the *bona fide* needs statute with respect to the restricted amount, on the other hand, would be assessed when the relevant preconditions were satisfied and NHLBI incurred an obligation for those funds.[75]

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[74] *Cf.* 2022 NHLBI OT Policy, § 5.3.4.3 (issued after the three OTAs were signed and stating that the budget period for OTAs "may be for one year or multiple years depending on the strategic and programmatic goals of the initiative").

[75] Because our decision focuses on NHLBI's compliance with the *bona fide* needs statute with respect to the original CureSCi Manufacturing Resource Platform OTA, we make no determination as to whether NHLBI complied with the *bona fide* needs statute with respect to modifications made to the agreement in subsequent fiscal

(continued...)

Based on the foregoing, NHLBI complied with the *bona fide* needs statute with respect to the three original OTAs and the obligations NHLBI actually incurred.

Dataset Integration OTA Modification

The requester also asked how the *bona fide* needs statute applies to the first modification of the Dataset Integration OTA.[76] Specifically, NHLBI and the awardee made modifications to the OTA, including revisions to the Statement of Milestones and Objectives, on July 6, 2018.[77] NHLBI did not modify the funding for the agreement or record a new obligation associated with the modification.[78]

NHLBI obligated fiscal year (FY) 2017 funds for the Dataset Integration OTA and modified the agreement in FY 2018, raising the question of whether the modified agreement constitutes a *bona fide* need of FY 2017 or FY 2018.

In determining whether a modification to an agreement providing federal assistance represents a *bona fide* need of the year in which the agreement was originally executed rather than the year the modification was made, there are three conditions that must be satisfied: (1) the *bona fide* need for the project continues; (2) the purpose of the agreement remains the same; and (3) the revised agreement has the same scope as the original agreement. 58 Comp. Gen. 676 (1979) (applying this analysis to a grant); *see* B-322628, Aug. 3, 2012. We have noted that the agreement's purposes help identify those aspects that make up substantial and material features of the agreement and establish its scope. *See* 58 Comp. Gen. 676.

If these conditions are met, then the modification is a *bona fide* need of the year in which the agreement was originally executed. 58 Comp. Gen. 676. If the conditions are not met, then the modification creates a new obligation chargeable to appropriations available at the time of the modification. *Id.*; *see* 57 Comp. Gen. 459 (1978).

The modification added a definition for "Science Officers" and revised the points of contact.[79] The modification also revised the introductory section of the Statement of

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years to unrestrict previously restricted amounts. If such modifications created new obligations chargeable to the annual appropriations available at the time of the modifications, NHLBI would violate the *bona fide* needs statute if it instead charged the obligations for the newly unrestricted amounts to its FY 2019 appropriation.

[76] Request letter, at 4.

[77] Dataset Integration OTA, Modification 1.

[78] *Id.*

[79] Dataset Integration OTA, Modification 1.

Milestones and Objectives. The original statement provided that the OTA's purpose was to collaborate on the integration of heart, lung, blood, and sleep datasets with the NIH Data Commons Pilot Phase Consortium and that this involved harmonizing and making accessible the datasets to those entities developing the NIH Data Commons.[80] The modified statement provides that the purpose of the OTA is to effectively develop an NHLBI Data STAGE for research investigators who need to access and use large scale heart, lung, blood, and sleep datasets and indicates that the NHLBI Data STAGE would be a cloud-based platform providing tools and applications to enable these capabilities and would be integrated within the NIH Data Commons ecosystem.[81] Regarding the listed milestones, the modification deleted two deliverables from Milestone 3 that were set to take place within a few months after the original agreement was signed.[82] The modification also added a new Milestone 4, "Work Activities," which includes specific objectives aimed at: (1) enhancing the usability of the datasets and tools for a variety of users; (2) facilitating the combination and reuse of datasets; (3) integrating datasets into a scalable, secure, and collaborative multi-cloud infrastructure; and (4) working with other OT awardees and the larger community to incorporate common systems to facilitate data use and to provide training and support.[83] Finally, the modification increased the initial period of performance in the Budget Statement from one year to 18 months (the total 36-month term of the agreement remained unchanged).[84]

We have previously determined that modifications substituting a new project with different objectives in place of the original project establish a new obligation chargeable to the appropriation currently available when the modification is made. 57 Comp. Gen. 459. In contrast, we have determined that changes to nonmaterial aspects of the project (those that would not have affected the government's initial decision to provide funding) do not create a new obligation. *See* 58 Comp. Gen. 676.

Looking at the original OTA and the modification, we conclude that the overarching purpose of the OTA remained the same and there was a continuing need to provide assistance for the project when the modification was made. The modification did not amend the Goals/Objectives of the OTA, and the purpose of the modified OTA remained unchanged: to integrate certain heart, lung, blood, and sleep datasets within a broader NIH initiative.

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[80] Dataset Integration OTA, Attachment 1.

[81] Dataset Integration OTA, Modification 1, Attachment 1.

[82] *See* Dataset Integration OTA, Attachment 1; Dataset Integration OTA, Modification 1, Attachment 1.

[83] Dataset Integration OTA, Modification 1, Attachment 1.

[84] Dataset Integration OTA, Modification 1, Attachment 2.

The modification did not create a new or separate undertaking or enlarge the scope of the project. The changes to the Statement of Milestones and Objectives merely clarified and refined what the end result of the integration would be (creation of the NHLBI Data STAGE platform) and specific activities the awardee would undertake as part of that integration (Milestone 4). The modification did not alter any substantial or material aspects of the project and therefore did not alter the scope of the OTA. Accordingly, the modification was a *bona fide* need of the year, FY 2017, in which the agreement was originally executed and did not create a new obligation at the time it was made in FY 2018. NHLBI therefore complied with the *bona fide* needs statute with respect to this modification.

CONCLUSION

NHLBI did not comply with the recording statute with respect to the obligating event for the three OTAs at issue; the OTA, not the NOA, established NHLBI's liability for payment to the awardee. NHLBI also did not comply with the recording statute with respect to the obligation amount recorded for one of the OTAs because NHLBI included an amount for which its liability was subject to a precondition within the agency's control. However, NHLBI complied with the *bona fide* needs statute with respect to the agreements and the obligations NHLBI actually incurred, as well as when it modified one of the OTAs.

Edda Emmanuelli Perez
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
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Decision

Matter of: U.S. Department of the Navy, Naval Sea Systems Command, Southwest Regional Maintenance Center—Application of the *Bona Fide* Needs Statute to Temporary Duty (TDY) Travel Orders

File: B-335838

Date: April 30, 2024

DIGEST

Certifying officers from the U.S. Department of the Navy (Navy), Naval Sea Systems Command, Southwest Regional Maintenance Center (SWRMC), approved 178 travel orders for active-duty service members to perform temporary duty (TDY) travel in fiscal year (FY) 2023. SWRMC obligated an FY 2023 appropriation for the approved travel orders. In FY 2024, Navy directed the certifying officers to modify the travel orders to include additional costs.

Travel, including TDY travel, is a *bona fide* need of the year in which the travel takes place. The travel at issue here occurred in FY 2023 and therefore was a *bona fide* need of FY 2023. Increases to these travel costs constitute an antecedent liability, which should be charged to the FY 2023 appropriation initially charged for the travel. If there is insufficient budget authority to cover these costs, Navy must report an Antideficiency Act violation.

DECISION

This responds to a request for a decision from the Southwest Regional Maintenance Center (SWRMC) regarding whether an expired fiscal year (FY) 2023 appropriation may be charged for additional travel costs resulting from an FY 2024 modification to approved travel orders for travel that occurred in FY 2023.[1]

[1] Letter from Certifying Officers, SWRMC, to Comptroller General (Dec. 11, 2023) (Request Letter), at 1.

In accordance with our regular practice,[2] we contacted the U.S. Department of the Navy (Navy) to seek factual information and its legal views on this matter.[3] Navy provided a written response explaining the pertinent facts and its legal views.[4] We also sought additional information from the requesting certifying officers clarifying their views.[5]

BACKGROUND

Military travelers sent on temporary duty (TDY) travel receive per diem allowances for meals that vary depending upon several factors, including whether the traveler is a service member or a civilian employee, the location of the travel, and the number of government-provided meals available to them.[6] In November 2022, SWRMC active-duty service members were sent on TDY travel to Singapore to support the Maintenance Execution Team (MET), which was performing preventative maintenance on ships located at the Changi Naval Base.[7] The travel orders for these travelers authorized a lower per diem allowance for meals than what MET leadership believed was authorized by the Joint Travel Regulations (JTR),[8] which sets travel policy and allowances for uniformed service members.[9]

MET leadership sought a legal opinion on the authorized per diem allowance for these travelers from the Office of the Chief of Naval Operations (OPNAV) Military

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[2] GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), *available at* https://www.gao.gov/products/gao-24-107329.

[3] Letter from Assistant General Counsel, GAO, to Assistant General Counsel, Financial Management and Comptroller, U.S. Department of the Navy (Jan. 25, 2024).

[4] Letter from Assistant General Counsel, Financial Management and Comptroller, U.S. Department of the Navy, to Assistant General Counsel, GAO (Feb. 22, 2024) (Navy Response Letter).

[5] Email from Assistant General Counsel, GAO, to Certifying Officers, SWRMC, *Subject: RE: Advanced* [sic] *Decision Request* (Jan. 9. 2024).

[6] Request Letter, Attachment 4 at 2-33.

[7] Navy Response Letter, at 1.

[8] Request Letter, Attachment 6 at 2.

[9] Defense Travel Management Office, *Joint Travel Regulations, available at* https://www.travel.dod.mil/Policy-Regulations/Joint-Travel-Regulations/ (last visited Apr. 11, 2024).

Compensation Policy.[10] Based on JTR, OPNAV concluded that the military travelers should have received a higher per diem meal allowance.[11]

Following the OPNAV opinion, Navy directed SWRMC to modify the 178 travel orders authorized during FY 2023 so that the travelers would receive the higher per diem meal allowance.[12] Certifying officers requested a decision from GAO regarding whether the cost increase resulting from modified travel orders could be charged to the expired FY 2023 appropriation, which funded the initial travel costs.[13]

DISCUSSION

At issue here is whether SWRMC may charge an expired FY 2023 appropriation for additional travel costs resulting from an FY 2024 modification to travel orders for travel that occurred in FY 2023.

A time-limited appropriation may only be obligated to meet a legitimate, *bona fide* need of the fiscal year for which the appropriation was made. 31 U.S.C. § 1502(a). What constitutes a *bona fide* need of a fiscal year depends largely on the facts and circumstances of a particular case. 70 Comp. Gen. 469 (1991). GAO has held that TDY travel is a *bona fide* need of the year in which the travel occurs. *Id*. For example, we considered what fiscal year should be charged for TDY travel that spans more than one fiscal year. *Id.* We concluded that the expenses of TDY travel should be charged to whatever fiscal year appropriation is current at the time travel occurs. *Id.* However, tickets for round trip transportation may be charged against the appropriation current at the time the employee embarks on TDY travel, even though the employee will not use the second portion of the ticket until the following fiscal year. 26 Comp. Gen. 961 (1947).

Here, the travel orders were issued and approved in FY 2023, and the travel took place in FY 2023.[14] Because the travel occurred in FY 2023, it constituted a need of FY 2023. Therefore, SWRMC complied with the *bona fide* needs statute when it obligated FY 2023 funds for the travel costs.[15]

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[10] Request Letter, Attachment 6 at 1.

[11] *Id.* at 18.

[12] Request Letter, at 1.

[13] *Id.* at 1, 5.

[14] Navy Response Letter, at 1.

[15] We note that Navy reported it records obligations for travel at the time travel orders are issued. *Id.* at 2-3. GAO has held that the recording statute, 31 U.S.C. § 1501(a)(7), requires an agency to record an obligation for travel when the travel is performed or when a ticket is purchased for the travel. 70 Comp. Gen. 469.

Next, we consider whether the modification of a travel order in a subsequent fiscal year is a *bona fide* need of the year in which the order is modified or the year in which the travel took place.

We have long held that a modification that falls within the general scope of a contract that results in an upward price adjustment is a *bona fide* need of the year in which the contract was originally executed. B-332430, Sept. 28, 2021. This is because the government's liability arises under the original contract and constitutes an "antecedent liability." *Id.* Antecedent liabilities should be charged to the same appropriation that funded the underlying contract, rather than appropriations available at the time of modification. *Id.*

Though the liabilities at issue here are not created by contract, similar principles apply. Where government employees perform official travel, a liability arises for the government to pay for the travel when it occurs, so the travel constitutes a *bona fide* need of that year. *See* 70 Comp. Gen. 469 (1991). Where it is later determined there are additional costs associated with the travel, these costs relate back to an antecedent liability associated with the travel. Accordingly, the increased costs should be charged to the appropriation that originally funded the travel.

Here, active-duty service members performed official travel in FY 2023, and SWRMC incurred a liability for that travel with an FY 2023 appropriation. In FY 2024, Navy determined that the costs for the travel had increased. Because the increased costs are associated with travel that occurred in FY 2023, SWRMC must charge the costs to the expired FY 2023 appropriation.[16]

CONCLUSION

Increased costs associated with travel that occurred in FY 2023 must be charged to the expired FY 2023 appropriation that was initially charged for the travel. If Navy has insufficient budget authority available to make the adjustment, it must report an Antideficiency Act violation.

Edda Emmanuelli Perez

Edda Emmanuelli Perez
General Counsel

[16] Although these funds have expired, they remain available for five fiscal years for recording, adjusting, and liquidating obligations properly chargeable to the appropriation account. 31 U.S.C. § 1553(a).

Impoundments: Border Barrier Construction

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Department of Homeland Security—Border Barrier Construction and Obligations

File: B-335747

Date: April 22, 2024

DIGEST

In fiscal years 2018 through 2021, Congress appropriated amounts to the Department of Homeland Security (DHS) for constructing barriers, commonly known as a border wall, along the United States' southern border. In January 2021, a presidential proclamation directed officials to pause all construction and obligation of funds for the border wall, to the extent permitted by law.

Unless Congress has enacted a law providing otherwise, executive branch officials must take care to ensure that they prudently obligate appropriations during their period of availability. The Impoundment Control Act of 1974 (ICA) allows the President to withhold funds from obligation, but only under strictly limited circumstances and only in a manner consistent with that Act. In 2021, we concluded that neither the proclamation nor its implementation violated the ICA. B-333110, June 15, 2021. We conclude that DHS has continued to incur obligations against these appropriations at a rate consistent with the ICA.

DECISION

In response to a congressional request, this decision addresses whether the Department of Homeland Security (DHS) has complied with the Impoundment Control Act (ICA) as it executes amounts appropriated specifically for border fencing or barriers for fiscal years 2018, 2019, 2020, and 2021.[1] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, title X, §§ 1001–1017, 88 Stat. 297, 332–339 (July 12, 1974), 2 U.S.C. §§ 681–688.

[1] Letter from Representative Jodey Arrington, Chairman, House Budget Committee, and Representative Jack Bergman, Chair of the Oversight Task Force, House Budget Committee, to Comptroller General (Nov. 9, 2023).

In accordance with our regular practice, we contacted DHS to seek factual information and its legal views on this matter.[2] DHS provided both in its response.[3]

BACKGROUND

Congress appropriated funds to DHS for a barrier system or fencing for fiscal years 2018 through 2021.[4] On January 20, 2021, the President issued a Proclamation pausing border barrier construction and obligations to the extent permitted by law.[5] The Proclamation also ended the prior Administration's emergency declaration, stating the new policy that "no more American taxpayer dollars be diverted to construct a border wall."[6] Among other things, the Proclamation further directed the

[2] GAO, *GAO's Protocols for Legal Decisions and Opinions,* GAO-24-107329 (Washington, D.C.: Feb. 2024), *available at* www.gao.gov/products/gao-24-107329; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, DHS (Dec. 11, 2023).

[3] Letter from Assistant General Counsel for Appropriations and Fiscal Law, DHS, to Assistant General Counsel for Appropriations Law, GAO (Feb. 16, 2024) (with attachments) (Response Letter).

[4] For each year, Congress provided to DHS's U.S. Customs and Border Protection (CBP) a lump-sum appropriation for construction activities in its Procurement, Construction, and Improvements (PC&I) account. B-333110, June 15, 2021. For fiscal year 2018, of the amounts Congress appropriated to CBP for PC&I, $1.375 billion was made available for border fencing. DHS Appropriations Act, 2018, Pub. L. No. 115-141, div. F, title II, § 230, 132 Stat. 348, 605, 616–617 (Mar. 23, 2018). For fiscal year 2019, $1.375 billion was made available for primary pedestrian fencing, including levee fencing. DHS Appropriations Act, 2019, Pub. L. No. 116-6, div. A, title II, § 230(a)(1), 133 Stat. 13, 15, 28 (Feb. 15, 2019). For fiscal year 2020, $1.375 billion is available for "construction of barrier system along the southwest border." DHS Appropriations Act, 2020, Pub. L. No. 116-93, div. D, title II, § 209(a)(1), 133 Stat. 2317, 2502, 2511 (Dec. 20, 2019). And for fiscal year 2021, Congress provided $1.375 billion for the "construction of barrier system along the southwest border." DHS Appropriations Act, 2021, Pub. L. No. 116-260, div. F, title II, § 210, 134 Stat. 1182, 1448, 1456–1457 (Dec. 27, 2020). These barrier appropriations are available for five fiscal years. Response Letter, Appendix, at 1; *see* B-333110, June 15, 2021. After fiscal year 2021, Congress has not appropriated funds specifically for border barriers.

[5] Proclamation No. 10142 of January 20, 2021, *Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, 86 Fed. Reg. 7225 (Jan. 27, 2021).

[6] 86 Fed. Reg. 7225.

Secretaries of Homeland Security and Defense to work with other officials and develop a plan for redirecting border wall funds.[7]

In a 2021 decision, we reviewed the Proclamation's pause. B-333110, June 15, 2021. We concluded neither the Proclamation nor its implementation violated the ICA. First, DHS had almost fully obligated its fiscal year 2018, 2019, and 2020 appropriations for barrier construction.[8] Second, although most of DHS's 2021 appropriation was unobligated, the delays stemmed from DHS meeting statutory requirements and developing funding plans. Therefore, these delays were programmatic, not impoundments.

Also in 2021, DHS issued its Border Wall Plan outlining how it would use barrier funds.[9] As relevant here, the plan stated DHS would "undertake a thorough review and replanning process" for projects funded by its fiscal year 2017 through 2020 appropriations.[10] This process could include rescinding or revising legal waivers issued under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA);[11] conducting standard environmental planning; assessing the use of barrier funds to remediate or mitigate environmental damage from past border wall construction; consulting with stakeholders; and reviewing pending eminent domain actions.[12] For the fiscal year 2021 funds, the plan set the following priority order for their use: addressing contingencies; closing out or remediating former Department of Defense (DOD) projects; and planning the next highest priority projects.[13]

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[7] 86 Fed. Reg. 7226.

[8] The small remaining unobligated balances were consistent with sound administrative funds control practices that may reasonably result in small amounts of expired, unobligated balances. B-333110, June 15, 2021, at 12.

[9] Response Letter, Attachment 1 (DHS, *Department of Homeland Security Border Wall Plan Pursuant to Presidential Proclamation 10142* (June 9, 2021)) (Border Wall Plan).

[10] Border Wall Plan, at 2.

[11] Pub. L. No. 104-208, div. C, title I, § 102(c), 110 Stat. 3009-546, 3009-555 (Sept. 30, 1996), *as amended by* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, title I, § 102, 119 Stat. 302, 306 (May 11, 2005).

[12] Border Wall Plan, at 2–3; Response Letter, at 4–5.

[13] Border Wall Plan, at 3–5; Response Letter, at 5. DOD ceased funding barrier construction projects in 2021 and turned over its projects to DHS. Response Letter, Appendix, at 3; DOD, Deputy Secretary of Defense Memorandum for Director, Office of Management and Budget, *Department of Defense Plan for the Redirection of Border Wall Funds* (June 10, 2021). *See also* B-333110, June 15, 2021, at 9 & n.36.

In July 2022, DHS amended its plan.[14] The amendment stated DHS would "prioritize the expenditure of the FY18-2021 appropriations" to continue addressing remediation and mitigation requirements from past barrier construction, and to "install barrier system attributes" in areas with physical barriers.[15]

In October 2023, the Secretary of Homeland Security issued a determination waiving 26 federal laws to expedite the construction of barriers and roads in an area of "high illegal entry" in Texas.[16] He did so by invoking his authority under IIRIRA to waive all legal requirements that, in the Secretary's sole discretion, are necessary to ensure expeditious barrier construction.[17]

The consistency of DHS's border wall expenditures with the purpose statute, 31 U.S.C. § 1301(a), is the subject of ongoing federal court litigation. *See General Land Office of Texas v. Biden*, Civil Action No. 7:21-cv-00272, and *Missouri v. Biden*, Civil Action No. 7:21-cv-00420 (S.D. Tex., Mar. 8, 2024) (Tipton, J.) (granting a preliminary injunction barring DHS from using its fiscal year 2020 and 2021 barrier appropriations for activities other than constructing "new physical barriers (or their equivalents) at the Southwest border"). We do not address the purpose statute here in our analysis of DHS's rate of obligation in compliance with the ICA.

DISCUSSION

At issue is whether DHS has continued to obligate amounts appropriated specifically for barrier construction for fiscal years 2018 through 2021.[18] We conclude that it has.

Unless Congress has enacted a law providing otherwise, executive branch officials must take care to ensure that they prudently obligate appropriations during their period of availability. B-329739, Dec. 19, 2018; B-330330, Dec. 10, 2018. The amount of time required for prudent obligation, however, will vary from one program to another. B-330330. The ICA imposes no specific requirements on the executive

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[14] Response Letter, Attachment 2 (DHS, *Amendment to DHS Border Wall Plan Pursuant to Presidential Proclamation 10142* (July 11, 2022)) (amended Border Wall Plan); Response Letter, at 5.

[15] Amended Border Wall Plan, at 1; Response Letter, at 5.

[16] Notice of Determination, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 88 Fed. Reg. 69214 (Oct. 5, 2023).

[17] 88 Fed. Reg. 69214. *See* 8 U.S.C. § 1103 note.

[18] As in B-333110, June 15, 2021, our scope here does not include Treasury Forfeiture Fund amounts or DOD amounts used for border fencing or barrier systems. In a previous decision, we examined DOD's transfer authority relative to border fence construction. B-330862, Sept. 5, 2019.

branch as to the rate at which it must obligate or expend budget authority. B-319189, Nov. 12, 2010.

The ICA allows the President to withhold funds from obligation, but only under strictly limited circumstances and only in a manner consistent with that Act. B-329739; B-330330. The President has no unilateral authority to withhold funds from obligation. B-330330. In particular, agencies may not withhold amounts from obligation for policy reasons: "[f]aithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law." B-331564, Jan. 16, 2020. A violation of the ICA may result where an official within or outside of an agency, such as in the Office of Management and Budget (OMB), directs the withholding of budget authority. B-331298, Dec. 23, 2020.

The Administration's stated policy Is that "no more American taxpayer dollars be diverted to construct a border wall."[19] But the ICA does not forbid executive branch officials from having policy preferences. *See* B-331564. Rather, it does not permit the executive to withhold amounts because of those preferences. *Id*. Thus, the central issue in our analysis is not the Administration's stance on the desirability of the construction of a border wall but, rather, is whether DHS has obligated appropriated amounts in a manner consistent with the ICA.

As an initial matter, we note that DHS states OMB has not ordered it to withhold from obligation any amounts appropriated for border barrier construction.[20] DHS also states that at no time has it withheld barrier amounts from obligation.[21] Therefore, we turn to DHS's actual obligations to determine whether there is any indication of an improper withholding. We conclude there is not.

Fiscal years 2018-2020 barrier funds

As in our prior review, DHS has almost fully obligated the amounts appropriated for fiscal years 2018 and 2020 for barrier construction projects.[22] As of January 8, 2024, DHS obligated nearly all of the $1.375 billion appropriated for fiscal year 2018, leaving an expired balance of $340,000.[23] However, sound administrative funds

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[19] 86 Fed. Reg. 7225.

[20] Response Letter, Appendix, at 3.

[21] Response Letter, Appendix, at 4.

[22] Response Letter, Appendix, at 2; Response Letter, at 12.

[23] Response Letter, Appendix, at 1–2. In addition to amounts it obligated, DHS transferred about $54 million to other appropriations. Response Letter, Appendix, at 1–2 n.3; Response Letter, at 6 n.28. DHS states that it made this transfer pursuant to authority in a recurring provision of its annual appropriation act. Response Letter, Appendix, at 1–2 n.3; Response Letter, at 6 n.28; *see* Pub. L. No. 116-260, § 503(c), 134 Stat. at 1469.

control practices may reasonably result in small amounts of expired, unobligated balances. B-333110, June 15, 2021. The rate at which DHS has incurred obligations against its 2018 appropriation is, therefore, consistent with the ICA.

As of January 8, 2024, DHS has obligated 84 percent of the amount appropriated for fiscal year 2019, down from a corresponding amount of 98 percent as of March 31, 2021.[24] DHS states the lower obligated balance is due to "variables in the contracting process" beyond its control.[25]

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-331564.1, Feb. 10, 2022. Here, DHS explains it intended to use $274 million of its remaining unobligated fiscal year 2019 barrier funding to build additional barriers in Texas.[26] But on September 8, 2023, the U.S. Army Corps of Engineers (USACE), with which DHS had entered into an interagency agreement, deobligated and returned $114 million in fiscal year 2019 funds.[27] Accordingly, DHS immediately began planning to award a contract for a project it believed would almost fully obligate its remaining fiscal year 2019 funds.[28] Though DHS awarded the contract on September 28, 2023, the successful bid was lower than expected and thus did not require DHS to obligate its entire remaining balance.[29] With only 2 days remaining before the fiscal year 2019 funds expired on September 30, 2023, DHS lacked sufficient time to plan and award contracts to obligate the remaining balance.[30] As a result, the fiscal year 2019 appropriation has an expired balance of $146.4 million.[31]

DHS's explanation is sufficient to show these events constitute a programmatic delay. DHS was taking reasonable and necessary steps to use its remaining unobligated fiscal year 2019 barrier funds, but the project's complex contracting process and USACE's late return of unobligated funds prevented DHS from

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[24] *See* Response Letter, Attachment 3. B-333110, June 15, 2021, at 9 n. 38. In addition to amounts it obligated, DHS transferred about $69 million to other appropriations. *See* footnote 23 above (noting DHS's use of transfer authority); Response Letter, Appendix, at 2 n.4; Response Letter, at 6 n.29, and Attachment 3.

[25] Response Letter, at 12.

[26] Response Letter, at 12.

[27] Response Letter, at 12.

[28] Response Letter, at 12–13.

[29] Response Letter, at 12–13.

[30] Response Letter, at 12–13.

[31] Response Letter, at 6. Although these funds have expired, they remain available for five fiscal years for recording, adjusting, and liquidating obligations properly chargeable to the appropriation account. 31 U.S.C. § 1553(a).

prudently obligating the funds before the fiscal year's end.[32] Therefore, we find these circumstances reflect a programmatic delay, and that DHS did not intend to withhold those amounts from obligation in violation of the ICA. *See* B-329092, Dec. 12, 2017 (ICA violations "hinge on whether the agency clearly intended to withhold the obligation of budget authority").

As of January 8, 2024, DHS has obligated most of the $1.375 billion appropriated for fiscal year 2020, leaving an unobligated balance of about $12 million.[33] This amount remains available for obligation through September 30, 2024.[34] This remaining balance represents less than 1 percent of the amount appropriated. This amount stands in reasonable proportion both to the time that has elapsed since these funds first became available in calendar year 2019 and to the several months that these funds will remain available for obligation before they expire at the end of fiscal year 2024. Thus, as with its obligations of its 2018 appropriation, the rate at which DHS has incurred obligations against its 2020 appropriation is also consistent with the ICA.[35]

Fiscal year 2021 barrier funds

As of January 8, 2024, DHS had obligated about 47 percent of its $1.375 billion appropriation for barrier construction for fiscal year 2021, with about 48 percent of that appropriation remaining available for obligation.[36] DHS states it is taking steps to select barrier projects for funding per its amended Border Wall Plan, and it will continue to do so until these funds expire on September 30, 2025.[37] Thus, these funds will remain available for obligation for more than one full fiscal year, DHS states that it will continue to obligate them consistent with a written plan, and we are aware of no order to withhold these funds from obligation. Considering these factors, the unobligated balance of the 2021 appropriation does not suggest an improper impoundment, and we conclude that the rate at which DHS is incurring obligations against this appropriation is consistent with the ICA.

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[32] *See* Response Letter, at 13.

[33] Response Letter, Appendix, at 2.

[34] Pub. L. No. 116-93, 133 Stat. at 2506, 2511.

[35] Response Letter, Attachment 3.

[36] Response Letter, Appendix, at 2; Response Letter, at 6 and Attachments 3 and 5. DHS has obligated $644.2 million, of which it has expended $334.8 million. Response Letter, Attachment 3. And $662.1 million remains available for obligation. *Id*. The obligated and unobligated balances do not sum to the enacted appropriation of $1.375 million because DHS has transferred to other appropriations $68.8 million, or about 5 percent, of the $1.375 billion appropriation. *See* footnote 23 above; Response Letter, Appendix, at 2 n.8; Response Letter, at 6 n.27, and Attachment 3.

[37] Response Letter, Appendix, at 2, 4.

Discretionary authority to waive legal requirements

Finally, we note that nothing in the ICA requires the Secretary of Homeland Security to expedite barrier construction by exercising his discretionary authority to waive legal requirements. The Secretary has statutory authority to waive all legal requirements where determined necessary to ensure expeditious construction of barriers along the border. B-333110, June 15, 2021. Crucially, this broad authority is discretionary: IIRIRA provides the Secretary with "a choice of whether to waive any laws and, if so, which laws to waive." *Id*. at 13 n.59.

Agencies must take reasonable and necessary steps to implement programs and to prudently obligate amounts. B-329739, Dec. 19, 2018; B-330330.1, Dec. 10, 2018. But the ICA imposes no "specific requirements on the Executive Branch as to the rate at which budget authority must be obligated or expended." B-319189, Nov. 12, 2010. Applying these principles here, the ICA does not compel the Secretary to use IIRIRA's waiver authority to achieve a certain result relative to barrier construction. Regardless of whether the Secretary exercises this authority, so long as DHS is prudently obligating amounts and not improperly withholding them, there is no ICA violation. Therefore, the ICA does not require the Secretary to issue waivers to expedite barrier construction.[38]

CONCLUSION

Since our 2021 decision, DHS has continued to incur obligations against amounts appropriated specifically for border barriers for fiscal years 2018 through 2021 at a rate consistent with the ICA.

Edda Emmanuelli Perez
General Counsel

[38] As we observed in our 2021 decision, Congress could modify the Secretary's discretion by amending the law. B-333110, June 15, 2021, at 13 n.59.

New Presidential Term: Role of Executive Agencies & Appropriations Attorneys

Executive Branch Counsel Panelist Biography

Seth. S. Greenfeld (U.S. General Services Administration)

Seth Greenfeld is a Senior Assistant General Counsel with the U.S. General Services Administration, Office of the General Counsel, General Law Division. He has been with GSA since 2004. Currently, his practice focuses primarily on administrative support provided by GSA to external Federal clients through GSA's Commissions and Boards Services program. In this capacity, he advises approximately 30 micro agencies, pursuant to interagency support agreements, as well as GSA service providers, on a myriad of topics including employment law, contracting, Congressional relations, and fiscal law. Seth is also the primary attorney for GSA's Office of Congressional and Intergovernmental Affairs, the Paperwork Reduction Act program office, the GSA Federal Records program, and GSA's Presidential transition support effort pursuant to the Presidential Transition Act. In addition to his GSA work, Seth is also a JAG in the Air Force Reserve, which he joined after serving five and a half years on active duty.

Appropriations Law Resources for Political Appointees

2024 Appropriations Law Forum

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BUSINESS CARDS

An agency may reasonably determine that its appropriations are available to obtain business cards for employees who regularly deal with the public or organizations outside their immediate office. B-280759, Nov. 5, 1998.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.6.e, GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds for business cards).

COMMUNICATIONS WITH THE PUBLIC

Lobbying

"Indirect" or "grassroots" lobbying is a type of lobbying in which agency officials contact third parties—either members of special interest groups or the general public—and urge them to contact their legislators to support or oppose something. There are provisions, such as the government-wide anti-lobbying provision, that prohibit the use of appropriated funds for grassroots lobbying activities.[1]

- For example, the Environmental Protection Agency (EPA)'s inclusion of hyperlinks to the websites of environmental action groups within an agency blog post constituted a clear appeal to the public to contact Congress in opposition to pending legislation, in violation of the grassroots lobbying restriction. B-326944, Dec. 14, 2015.

Publicity and Propaganda

Each year, a provision in the annual Financial Services and General Government Appropriations Act prohibits agencies from using appropriations "directly or indirectly, including by private contractor, for publicity or propaganda purposes" not authorized by Congress.[2] This provision prohibits three forms of communications: those that are purely partisan, self-aggrandizing, or covert. B-332531, Nov. 16, 2023. Here are some cases with an example from each category:

- Purely Partisan—Because the communications at issue were connected to HHS's official activities and were not designed to aid a particular party or candidate, the communications were not purely partisan. B-329199, Sept. 25, 2018.

- Self-Aggrandizing—Self-aggrandizement is defined as publicity of a nature tending to emphasize the importance of the agency or activity in question, noting that one of the prohibition's primary targets is communication with an obvious purpose of puffery. HHS communications were not self-aggrandizing as they were not designed to persuade the public of HHS's importance. B-326944, Dec. 14, 2015.

- Covert—The Centers for Medicare & Medicaid Services engaged in covert propaganda when the agency created and provided news stations with prepackaged news stories, designed to be included in news broadcasts without alteration without identifying the agency as the source. B-302710, May 19, 2004.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § D.1.a., GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds for lobbying).

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[1] For example, *see* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, title VII, § 715, 136 Stat. 4459, 4708 (2022).

[2] For example, *see* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, title VII, § 718, 136 Stat. 4459, 4708 (2022).

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § D.1.b., GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds for publicity or propaganda).

COMMUNICATIONS WITH CONGRESS

Anti-Gag Provisions

The right of employees to petition or provide information to Congress, its committees, or its members may not be interfered with or denied. 5 U.S.C. § 7211. Compensation may also be restricted for employees and officers of the federal government who prohibit or prevent, or threaten to prohibit or prevent, any other federal employee from communicating with Congress about matters relating to their employment.[3] The purpose of this prohibition is to preserve federal employees' First Amendment rights, as well as to ensure that Congress has access to information it needs from employees who are working to implement agency programs. B-302911, Sept. 7, 2004. Where supervisors have interfered with these goals, such as by threatening punishment if an employee provides information to a congressional committee, this provision is violated, and compensation is restricted. *Id.*

Nominees' Travel

Nominees may need to incur travel expenses to testify before Congress prior to their confirmation and employment with the federal government. Generally, a nominee's travel expenses are considered personal and are not payable using appropriated funds. *See* B-139458, Dec. 18, 1973. However, if official business is conducted while the nominee is in Washington, D.C. to testify, such as meeting with officials in the office to which they are nominated, and that business is determined to be of "substantial benefit" to the agency, the agency may be able to use appropriated funds for the travel. *Id.*

[3] *See* Pub. L. No. 117-328, div. A, title VII, § 713, 136 Stat. 4704, 4707 (Dec. 29, 2022).

COMPENSATION

Voluntary Services and Waiver of Compensation

The Antideficiency Act, 31 U.S.C. § 1342, prohibits the government from accepting voluntary services. Therefore, federal employees whose salaries have been set by statute may not waive their compensation. Several GAO and Supreme Court decisions have discussed the legality of compensation waivers. Here are some examples:

- When Congress fixes an employee's salary at a specified rate, the employee cannot waive compensation or work for a different rate. *Glavey v. United States,* 182 U.S. 595 (1901).
- Voluntary services rules apply to nonfederal commissioners when their rate of compensation was fixed by statute. B-322832, Mar. 20, 2012.
- Where another rule, such as the dual compensation provision, prohibits an employee from receiving compensation, their service in that position does not violate the voluntary services prohibition because the nominee is not "volunteering" their services. B-309301, June 8, 2007.
- If the salary for a position is not specified by statute, or if only the maximum amount is set by Congress, then a waiver of compensation by the employee may be permissible in the absence of other restrictions. B-193587, Apr. 2, 1979.

Dual Compensation

The "dual compensation" provision, 5 U.S.C. § 5533, generally prohibits an employee whose compensation is fixed by statute or regulation from receiving compensation from more than one federal position for more than an aggregate of 40 hours a week. However, a federal employee who is currently serving in one position may also be named to simultaneously fill another position within the agency. Because the dual compensation prohibition would be a statutory bar on the employee's claiming a right to the second salary, there is also no voluntary services issue since the employee would neither be volunteering their service nor waiving their compensation.

- For example, the voluntary services prohibition, 31 U.S.C. § 1342, did not prevent the incumbent Chief Information Officer (CIO) at the Federal Election Commission from simultaneously serving as Staff Director and being compensated only for the CIO position. B-321744, June 23, 2011.

Officials Temporarily Serving in Positions Requiring Senate Confirmation

Officials temporarily serving in positions requiring Senate confirmation may also be subject to additional statutory compensation restrictions. For example, under 5 U.S.C. § 5503, if an individual were appointed during a Senate recess to a position requiring Senate confirmation, and that position were vacant while the Senate had been in session, that individual would generally be prohibited from receiving compensation until they were confirmed by the Senate.

Furthermore, compensation is prohibited for individuals who carry out the responsibilities of presidentially appointed, Senate confirmed positions in an acting or temporary capacity if they

have been nominated for the position and the nomination has been submitted twice and then returned by the Senate or withdrawn by the President.[4] Additionally, compensation is prohibited for individuals who are filling a position for which their nomination has previously been submitted to and rejected by the Senate.[5]

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § D.2, GAO-17-797SP (Washington, D.C.: 2017) (compensation restrictions).

GAO, *Principles of Federal Appropriations Law*, 3rd ed., 2016 rev., ch. 6, § C.3, GAO-06-382SP (Washington, D.C.: Feb. 2016) (voluntary services prohibition).

[4] *See* Pub, L. No. 111-8, div. D, title VII, § 749, 123 Stat. 630, 693 (Mar. 11, 2009).

[5] *See* Pub. L. No. 110-161, div. D, title VII, § 709, 121 Stat. 1972, 2021 (Dec. 26, 2007).

ENTERTAINMENT

Some agencies receive annual appropriations to be used for "reception and representation" ("R&R") purposes—which is generally understood to include entertainment. While the entertainment must be "official" in nature, the agency head is typically afforded discretion as to the expenditure of their R&R funds. B-231627, Feb. 3, 1989.

Even if appropriated funds are not available for entertainment purposes, an agency with authority to receive donated funds, *see infra*, **GIFTS & AWARDS**, may be able to use those funds where such entertainment expenses are in furtherance of official agency purposes. *See* B-330494, Nov. 24, 2020; B-206173, Feb. 23, 1982.

Additionally, food is generally a personal expense for which appropriated funds may not be used, *see infra,* **FOOD & DRINK**, but R&R funds may be used to purchase refreshments and meals in connection with official agency events. GAO has said that some common characteristics of official agency events include those that have a mixed ceremonial, social, or business purpose, and those that are hosted in a formal sense by high-level agency officials. Generally, before- or after-hours business meetings or work sessions do not meet this definition. B-223678, June 5, 1989.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.4.e, GAO-17-797SP (Washington, D.C.: 2017) (entertainment of government personnel).

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.5.n, GAO-17-797SP (Washington, D.C.: 2017) (use of reception and representation funds).

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.6.h, GAO-17-797SP (Washington, D.C.: 2017) (entertainment for persons other than government personnel).

FOOD & DRINK

Appropriated funds are generally not available to purchase food and drink for employees, as they are considered a personal expense. However, some agencies have specific statutory authority to cover such expenses. Other agencies may cover these expenses if they show that they are required in order to accomplish a statutory responsibility. GAO has applied this rule in several different circumstances. Here are some examples:

- Appropriated funds are not available for an agency to purchase bottled water for its employees unless potable drinking water is not available. B-324781, Dec. 17, 2013; B-318588, Sept. 29, 2009.

- Appropriated funds are not available to purchase disposable plates and utensils absent a showing that doing so would advance the agency's statutory mission and that the benefit to the agency clearly outweighs ancillary benefits to individuals. If providing the disposable utensils is merely for the convenience of the employees, they are considered a personal expense. B-326021, Dec. 23, 2014.

- Appropriated funds may be available to provide food at an Equal Employment Opportunity (EEO) cultural awareness event. GAO's test for evaluating these cases considers two key questions: (1) Whether the food is part of a formal program intended by the agency to raise cultural awareness and further EEO objectives, and (2) whether the food is merely a permissible sampling of the cultural cuisine or whether it would instead constitute a meal to the employee. B-301184, Jan. 15, 2004. If, for example, the food is provided at lunchtime, the employees are not advised to make their own arrangements for lunch, and the nature of the offerings reflects what would typically be offered at a meal, then appropriated funds may not be available for that purpose. *Id.*

In certain cases, an agency may be able to use appropriated funds to purchase food for nonemployees. In addition to food for entertainment purposes, *see supra*, **ENTERTAINMENT**, an agency may be able to provide food to nonemployees where doing so would further a statutory mission. Here are a few examples:

- Appropriated funds may be available to provide food and refreshments to focus group participants if the agency can articulate a reasonable justification that doing so incentivizes effective, quality participation in information collection directly related to advancing specific statutory objectives. B-304718, Nov. 9, 2005. However, the agency must adequately articulate this reasoning and link the provision of food to the quality of information provided at the focus group. B-318499, Nov. 19, 2009.

- Where providing food to nonfederal personnel is determined to be essential in order to accomplish the agency's statutory mission, appropriated funds may be used for this purpose. B-310023, Apr. 17, 2008. However, the agency must sufficiently demonstrate the connection between the food provided and the accomplishment of its objectives. *Id.* For example, "embarrassment" at not providing food to nonfederal personnel at an agency event is not a sufficient justification on its own. B-317423, Mar. 9, 2009.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.5, GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds for food).

GAO 2011 Appropriations Law Forum Materials, “Can Your Agency Use Appropriated Funds for Meals and Light Refreshments?”, (“Food Tree”), Mar. 10, 2011.

GIFTS & AWARDS

Awards

The Government Employees' Incentive Awards Act (GEIAA), 5 U.S.C. §§ 4501–4506, authorizes the payment of cash awards to federal employees in recognition of accomplishments and special acts or service in connection with their employment. Career appointees to the Senior Executive Service (SES) are also eligible to receive performance and rank awards. 5 U.S.C. § 5384.

GAO has interpreted OPM's awards regulations to permit an agency to procure items at a nominal cost to be used as honorary nonmonetary awards under GEIAA. B-271511, Mar. 4, 1997. Although food is generally considered to be a personal expense for which appropriated funds may not be used, *see supra,* **FOOD & DRINK**, GEIAA also permits food to be given to employees in recognition of contributions to the government. B-271511, Mar. 4, 1997. Relatedly, agencies may use appropriated funds to host an awards ceremony recognizing employees and provide food to attendees. B-288536, Nov. 19, 2001.

Providing Gifts

Appropriated funds cannot be used to give out personal gifts unless the agency has specific statutory authority or doing so would directly advance a statutory mission. Here are some examples:

- The National Telecommunications and Information Administration (NTIA) could use appropriated funds to purchase gift cards to incentivize participation in a survey related to one of their programs. NTIA was able to demonstrate that the gift cards would directly benefit the agency's efforts to receive information that was essential to the success of the program. B-310981, Jan. 25, 2008.

- Similarly, the U.S. Fish and Wildlife Service was able to use appropriated funds to purchase items such as t-shirts, baseball caps, stocking caps, and coffee mugs with messages about eider conservation to be distributed to local communities. B-318386, Aug. 12, 2009. The agency was able to demonstrate that "traditional" outreach approaches in the area had been unsuccessful and that the distribution of these items would directly help to educate hunters about the agency's efforts by turning members of the community into "walking billboards" for their conservation initiatives. *Id.*

- On the contrary, appropriated funds were not available for the Consumer Product Safety Commission to provide gift cards to participants in one of its information-spreading initiatives because the agency was unable to demonstrate how providing the gift cards would directly further its goal of increasing information flow to "hard to reach" populations. B-323122, Aug. 24, 2012.

Receiving Gifts

An agency may not accept gifts of money, services, or real or personal property offered to the government without express statutory authority to do so. An agency that receives a donation of money without authority to accept it must deposit it in the Treasury as miscellaneous receipts.

Agencies that lack gift acceptance authority must report gifts of property to the General Services Administration to comply with applicable regulations. *See* 41 C.F.R. § 102-36.405.

An agency must also have specific statutory authority to accept conditional gifts which impose additional terms on their use. *See* B-319246, Sept. 1, 2010. For example, the National Institutes of Health had statutory authority to accept conditional gifts, which would allow it to accept grant funds from nongovernment sources to be used for a particular purpose. B-255474, Apr. 3, 1995.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.6.c., GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds for awards).

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.6.j., GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds to give gifts).

GAO, *Principles of Federal Appropriations Law*, 3rd ed., 2006 rev., ch. 6, § E.3, GAO-08-978SP (Washington, D.C.: Feb. 2006) (gifts and donations to the government).

GAO 2015 Appropriations Law Forum Materials, “Donations, Gifts, and Free Services” Flowchart, Mar. 12, 2015.

HOLIDAY & GREETING CARDS

An agency generally may not use appropriated funds to pay for the cost of holiday and greeting cards. GAO has determined that the cost of these cards is a personal expense of the officer who authorizes them, even when the agency's name appears on the card. B-247563.4, Dec. 11, 1996. If, however, the purpose of the card is to disseminate information and transact official government business, the expense may be considered official, and appropriated funds may be used to send them. 64 Comp. Gen. 382 (B-217555, Mar. 20, 1985); B-133991, Nov. 25, 1957.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.4.f, GAO-17-797SP (Washington, D.C.: 2017) (sending holiday and greeting cards using appropriated funds).

HOSTING CONFERENCES AND MEETINGS

The miscellaneous receipts statute, 31 U.S.C. § 3302(b), prohibits an agency from collecting fees from attendees at a conference and then keeping those fees to defray the cost of hosting the event, unless the agency has specific statutory authority to do so. An agency similarly cannot permit a contractor to charge a fee and retain the funds on its behalf.

- For example, the National Institutes of Health (NIH) could not charge an attendance fee at conferences and retain the proceeds, nor permit its contractor to do so, because NIH lacked statutory authority. B-306663, Jan. 4, 2006.

If an agency is hosting a conference and wishes to provide food and refreshments to attendees, GAO has laid out several criteria for the agency to consider before it may do so. These include whether meals and refreshments are incidental to the conference, whether they are important to ensuring full participation in conference events and discussions, and whether the food is provided as part of a larger schedule of events.[6]

- For example, NIH could pay for meals and light refreshments at its conference since it satisfied these criteria. B-300826, Mar. 3, 2005.

If an agency is hosting a conference and wishes to enter into no-cost contracts with third-party vendors to receive services the vendor would otherwise provide for a fee, it may do so as long as the contract stipulates that the contractor would provide its services at no cost to the government. In addition, an agency should still consider whether the contract is supported by consideration and whether entering into the no-cost contract would be wise in light of the effectiveness of the conference, the objectives of the agency, and possible implications for ethical rules. *See* B-308968, Nov. 27, 2007.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § D.5, GAO-17-797SP (Washington, D.C.: 2017) (meetings and conventions).

GAO 2006 Appropriations Law Forum Materials, "Meetings & Conferences: Public/Private Sponsorship," Apr. 4, 2006 (discussing various partnership types when hosting a conference).

GAO 2008 Appropriations Law Forum Materials, "No-Cost Contracts," Mar. 13, 2008 (discussing the use of no-cost contracts for conference services).

[6] *But see* Memorandum Opinion for the General Counsel, Environmental Protection Agency (EPA), *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences,* 31 Op. Off. Legal Counsel 54, 55-56 (Apr. 5, 2007) (interpreting 31 U.S.C. § 1345 more strictly than GAO, DOJ's Office of Legal Counsel has held that § 1345 prohibits Executive Branch agencies from providing food and refreshments to non-federal conference attendees unless the agency has specific legal authority to do so).

INSURANCE

The federal government self-insures its own risk of loss, so appropriated funds are not generally available to purchase insurance unless Congress provides specific statutory authority for that purpose. 21 Comp. Gen. 928, 929 (B-25040, Apr. 15, 1942); B-237654, Feb. 21, 1991. In some situations, we might find a nonstatutory exception if the rationale underlying the general rule does not apply. For example, *see* B-290162, Oct. 22, 2002.

The self-insurance rule does not apply to privately owned property temporarily entrusted to the government. 17 Comp. Gen. 55 (1937). However, insurance may be purchased on loaned private property when the owner requires insurance coverage as part of the transaction. If the owner does not require insurance, private insurance is not a necessary expense, and the government should self-insure. 63 Comp. Gen. 110 (B-212447, Dec. 7, 1983).

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § D.4., GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds for insurance).

MEMBERSHIP FEES

Appropriated funds may not be used to pay membership fees of an employee in a society or association unless an appropriation is expressly available for that purpose. 5 U.S.C. § 5946. An agency may, however, purchase a membership in its own name if the membership would be of primary benefit to the agency, and an administrative determination has been made that the agency membership is necessary to carry out the functions of the agency. B-205768, Mar. 2, 1982.

There might also be an exception if the fee is authorized under the Government Employees Training Act (GETA). 5 U.S.C. § 4109. Under GETA, membership fees may be paid if the fee is a necessary cost directly related to the training or a condition precedent to undergoing the training.

- Agencies have authority to pay for employee training under GETA, but agencies generally do not have the authority to pay for membership fees unless the fee is a necessary cost directly related to the training itself or payment of the fee is a condition precedent to undergoing the training. B-302548, Aug. 20, 2004.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § D.1.6, GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds for membership fees).

OFFICE REDECORATING

The Financial Services and General Government Appropriations Act typically includes a provision that prohibits an agency from obligating or expending an amount in excess of $5,000 to furnish, redecorate, purchase furniture for, or make improvements for the office or suite of offices of a presidential appointee during the period of appointment, without prior notification to the House and Senate Appropriations Committees.[7] If the agency exceeds $5,000, and does not provide notification, it may also violate the Antideficiency Act, 31 U.S.C. § 1341(a).

- The U.S. Department of Housing and Urban Development (HUD) violated the prohibition when it obligated funds for the purchase of a dining set for the HUD Secretary's dining room and for the purchase and installation of a new dishwasher and associated water treatment system in the kitchen connected to the dining room, without providing advance notice to the proper congressional committees. B-329955, May 16, 2019. Further, because HUD obligated appropriated funds in a manner specifically prohibited by law, HUD violated the Antideficiency Act. *Id.*

- The Environmental Protection Agency (EPA) violated the prohibition when it failed to notify the appropriations committees prior to obligating in excess of $5,000 for the installation of a soundproof privacy booth for the office of the Administrator during the period of his appointment. B-329603, Apr. 16, 2018. Because EPA used its appropriations in a manner specifically prohibited by law, EPA violated the Antideficiency Act. *Id.*

[7] For example, *see* Consolidated Appropriations Act 2023, Pub. L. No. 117-328, div. E, title VII, § 710, 136 Stat. 4459, 4708 (2022).

SEASONAL & HOLIDAY DECORATIONS

An agency may use appropriated funds to purchase seasonal decorations "where the purchase is consistent with work-related objectives [such as enhancement of morale], agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee." 67 Comp. Gen. 87 (B-226011, B-226900, Nov. 17, 1987).

For example, appropriated funds could be used to buy Christmas decorations for an interpretive display at the Grant-Kohrs Ranch National Historic Site where such an expense was directly related to the National Park Service's authority in administering historic sites. B-226781, Jan. 11, 1988. Agencies should, however, be sensitive to the display of religious symbols. 67 Comp. Gen. 87 (1987).

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.4.f.2., GAO-17-797SP (Washington, D.C.: 2017).

TRANSPORTATION

Government Vehicles

The use of government vehicles for home-to-work transportation to certain offices is limited under 31 U.S.C. § 1344. These include, among others, the President and Vice President, some members of the Executive Office of the President, the Chief Justice and Associate Justices of the Supreme Court, and some diplomatic and law enforcement officials. Use of the vehicles for those authorized by statute is limited to official purposes. GAO has also interpreted this statute to mean that if the official is not permitted to use a government vehicle under the statute, they are similarly prohibited from hiring a chauffeur or driver for home-to-work transportation. 62 Comp. Gen. 438 (B-210555, June 3, 1983).

Section 1343 of title 31 of the United States Code generally requires statutory authorization before an agency can use appropriated funds to purchase a passenger motor vehicle. However, even if an agency has the requisite statutory authority to purchase a vehicle, it is limited in the amount of money it may spend to do so. Each year in the annual appropriations act, Congress designates the government-wide price limitation on vehicles purchased with appropriated funds.[8] Expenditures on motor vehicles in excess of these limitations result in a violation of the Antideficiency Act. B-333508, Sept. 7, 2023.

Appointees who are provided government vehicles may not allow their family members to use the vehicle in their absence. The Architect of the Capitol violated the purpose statute, 31 U.S.C. § 1301(a), when he allowed his family members to use his government vehicle while he was not present and without official justification. *Id*.

Personal Vehicles and Transit Benefits

While regular commuting costs are considered a personal expense of the employee for which appropriated funds are not available, if the employee is traveling to a location other than their official duty station for official purposes that primarily benefit the agency, an employee may be entitled to reimbursement for that travel under the agency's travel policy. B-329479, Dec. 22, 2020.

Additionally, employees may be able to receive a transit subsidy under the Federal Employees Clean Air Incentives Act, 5 U.S.C. § 7905. The Act authorizes the heads of agencies to establish programs such as transit benefit programs to encourage employees to travel to and from work using means other than single-occupancy vehicles. We have looked at several related issues, for example:

- Rideshare Services—GAO has determined that this authorization does not include use of a rideshare service to travel to and from work. Commuting using a rideshare service was a personal expense to be borne by the employee. B-332633, June 3, 2021.

- Parking—If an employee drives a personal vehicle to work, an agency is permitted to use appropriated funds to provide parking where it is necessary to avoid a significant impairment to the agency's operating efficiency. B-322337, Aug. 3, 2012.

[8] *See, e.g.*, Pub. L. No. 117-328, div. E, title VII, § 702, 136 Stat. 4459, 4704 (Dec. 29, 2022).

- Battery Recharging Stations—Agencies may not use appropriated funds to install battery recharging stations for privately owned hybrid or electric vehicles absent express statutory authority. B-320116, Sept. 15, 2010. Section 6364 of title 42 of the United States Code may provide this authority to the General Services Administration and agencies that lease property from it.

Additional GAO Resources

GAO, *Principles of Federal Appropriations Law*, 4th ed., 2017 rev., ch. 3, § C.4.d, GAO-17-797SP (Washington, D.C.: 2017) (use of appropriated funds for transit benefits and parking).

GAO, *Principles of Federal Appropriations Law*, 3rd ed., 2008 rev., ch. 12, § E, GAO-08-978SP (Washington, D.C.: Sept. 2008) (acquisition and use of motor vehicles).

Availability of Appropriations as to Purpose: Motor Vehicles, Furnishing & Redecorating, Communication Services

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Architect of the Capitol—Purchase and Use of Motor Vehicles

File: B-333508

Date: September 7, 2023

DIGEST

The Architect of the Capitol (AOC) obligated $49,033.64 against its Capital Construction and Operations appropriation for the purchase of a passenger motor vehicle for the then-Architect's use. AOC also obligated $37,458.74 against its Capitol Police Buildings, Grounds and Security appropriation for the purchase and installation of emergency vehicle lighting, communications equipment, and a customized seating arrangement in the vehicle. Under 31 U.S.C. § 1343(b), an agency may expend an appropriation to buy or lease a passenger motor vehicle only for the use of specified individuals or as specifically provided by law. While AOC had authority to purchase a passenger motor vehicle under this provision, we conclude that AOC violated a statutory price limitation on such a purchase. Because AOC exceeded the amount available for the purchase of a passenger motor vehicle, we also find that AOC violated the Antideficiency Act. AOC did not violate the purpose statute, however, when it obligated appropriations to purchase and install emergency vehicle lighting, communications equipment, and seating equipment in the vehicle.

AOC also obligated appropriations for expenses associated with the then-Architect's use of AOC vehicles to travel between his residence and place of work, incidental stops along his commute, and general family use including weekend trips to a craft brewery and out-of-town trips. The then-Architect had discretion to determine that agency appropriations were available for his use of AOC vehicles to carry out his statutory duties, provided that he properly determined that such use was necessary to carry out the emergency functions vested in him by law. However, such discretion is not unlimited. Appropriations are not available for personal expenses that lack any relationship to government business. Thus, AOC violated the purpose statute when it obligated appropriations for expenses associated with the use of AOC motor vehicles by the then-Architect's family members.

DECISION

In August 2021, the Architect of the Capitol (AOC) Inspector General requested our decision on whether "in consideration of any and all laws, statutes, orders and rules, the purchase of [an AOC] motor vehicle and motor vehicle accessories is proper."[1] Specifically, the Inspector General noted his concern that AOC purchased a motor vehicle using its Capital Construction and Operations appropriation, but then outfitted the vehicle with accessories purchased using its Capitol Police Buildings, Grounds, and Security appropriation. The Inspector General also asked whether the then-Architect's[2] use of AOC vehicles violated appropriations law or other applicable statutes or orders.[3]

Given this broad request, we met with AOC Office of Inspector General (OIG) officials to discuss the scope of our legal decision and the development of the factual record underlying the request.[4] We agreed with AOC OIG that we would refrain from initiating our legal decision process on these matters pending the completion of AOC OIG's investigation.[5]

Over the course of the next year, AOC OIG developed the factual record as part of its ongoing investigation. On October 26, 2022, AOC OIG issued its Report of Investigation finding the then-Architect abused his authority, misused government property, and wasted taxpayer money, among other violations.[6] AOC OIG also publicly released an Investigative Summary of its findings.[7] In the Investigative

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[1] Letter from the Inspector General, AOC, to Comptroller General, GAO (Aug. 13, 2021) (Request Letter).

[2] The President terminated the then-Architect's appointment as Architect of the Capitol on February 13, 2023. Letter from Assistant to the President for Presidential Personnel, Executive Office of the President, to then-Architect of the Capitol, AOC (February 13, 2023).

[3] Request Letter, at 4.

[4] Telephone Conversation with Counsel to the Inspector General and Assistant Inspector General of Operations, AOC OIG, Assistant General Counsel, GAO, and Staff Attorney, GAO (Aug. 23, 2021).

[5] Letter from Assistant General Counsel, GAO, to Inspector General, AOC (Sept. 13, 2021).

[6] AOC OIG, *Report of Investigation*, 2021-0011-INVI-P (Oct. 26, 2022) (AOC OIG Report).

[7] AOC OIG, *Investigative Summary, J. Brett Blanton, Architect of the Capitol, Abused His Authority, Misused Government Property and Wasted Taxpayer Money, Among Other Substantiated Violations*, 2021-0011-INVI-P (Oct. 26, 2022), *available at* https://aocoig.oversight.gov/reports/investigation/j-brett-blanton-architect-capitol-abused-his-authority-misused-government (last visited Sept. 5, 2023) (AOC OIG Investigative Summary).

Summary, AOC OIG detailed AOC's purchase of a passenger sport-utility vehicle for use by the then-Architect and AOC's purchase and installation of motor vehicle accessories on the vehicle. The Investigative Summary also described specific incidents in which then-Architect and his family used AOC vehicles for travel between his residence and place of work as well as "weekend trips to a craft brewery, out-of-town trips and general family use."[8]

In numerous decisions, we have addressed appropriations law issues pertaining to the purchase and use of government vehicles.[9] For instance, we have evaluated agency authority to purchase or lease passenger motor vehicles. *See* 45 Comp. Gen. 184 (1965); 13 Comp. Gen. 226 (1934). We have considered agency compliance with statutory price limitations on the purchase of motor vehicles. *See* 40 Comp. Gen. 205 (1960); 32 Comp. Gen. 345 (1953). We have also issued decisions evaluating whether government vehicles were used for "official purposes" such that appropriations would be available for expenses associated with such use. *See* 62 Comp. Gen. 438 (1983); B-305864, Jan. 5, 2006; B-195073, Nov. 21, 1979.

With this background in mind, we reviewed the AOC OIG Report and Investigative Summary to determine what, if any, appropriations law issues were present among AOC OIG's findings. Based on facts as established by AOC OIG, we identified these appropriations law issues: (1) whether AOC complied with statutory price limitations in annual appropriations acts and the Antideficiency Act when it purchased a passenger motor vehicle for $49,033.64; (2) whether AOC complied with the purpose statute when it obligated $37,458.74 to purchase and install motor vehicle accessories on the vehicle; and (3) whether AOC complied with the purpose statute when it obligated appropriations for the use of AOC vehicles by the then-Architect and his family members.

In accordance with our regular practice, we contacted AOC for its legal views and factual information on this matter.[10] In response, AOC provided information and its legal views[11] along with a statement from the then-Architect stating his views.[12] AOC subsequently provided additional information regarding the agency's efforts to

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[8] AOC OIG Investigative Summary, at 2.

[9] *See generally* GAO, Principles of Federal Appropriations Law, 3rd ed., Vol. III, ch. 12, § E, GAO-08-978SP (Washington, D.C.: Sept. 2008).

[10] GAO, Procedures and Practices for Legal Decisions and Opinions, GAO-06-1064SP (Washington, D.C.: Sept. 5, 2006), *available at* https://www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to General Counsel, AOC (Dec. 15, 2022).

[11] Letter from General Counsel, AOC, to Assistant General Counsel, GAO (Feb. 6, 2023) (Response Letter).

[12] Response Letter, Attachment (Then-Architect's Statement).

recover funds from the then-Architect over substantiated violations found in the AOC OIG Report.[13]

BACKGROUND

In 2021, AOC OIG initiated an investigation into the then-Architect after receiving a hotline complaint from a private citizen concerning potential misuse of an AOC vehicle.[14] On October 26, 2022, AOC OIG issued its Report of Investigation finding the then-Architect abused his authority, misused government property, and wasted taxpayer money among other violations.[15] AOC OIG also publicly released an Investigative Summary of its findings.[16]

The AOC OIG Report and Investigative Summary provided facts related specifically to AOC's purchase of the vehicle and associated accessories. In fiscal year 2021, AOC obligated $49,033.64 against its Capital Construction and Operations appropriation for the purchase of a passenger sport-utility vehicle for the then-Architect's use.[17] AOC also obligated $37,458.74 against its Capitol Police Buildings, Grounds and Security appropriation for the purchase and installation of emergency vehicle lighting, communications equipment, and a customized seating arrangement in the vehicle.[18]

AOC OIG's Investigative Summary also detailed specific incidents of the then-Architect's use of AOC vehicles.[19] It stated that AOC vehicles intended for home-to-work transportation by the then-Architect "were consistently used as personal vehicles by [the then-Architect] and his family for weekend trips to a craft brewery, out-of-town trips and general family use."[20] The then-Architect was also observed transporting his daughter to and from school and sporting events in AOC vehicles.[21] Additionally, AOC OIG confirmed that the then-Architect's spouse and daughter regularly drove AOC vehicles without the presence of the then-Architect.[22]

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[13] Letter from Acting Architect of the Capitol to J. Brett Blanton (Apr. 21, 2023).

[14] AOC OIG Investigative Summary, at 1.

[15] AOC OIG Report.

[16] AOC OIG Investigative Summary.

[17] AOC OIG Investigative Summary, at 5; Response Letter, at 1.

[18] AOC OIG Investigative Summary, at 5.

[19] *See* AOC OIG Investigative Summary (providing further detail on specific incidents of the then-Architect's use of AOC vehicles).

[20] AOC OIG Investigative Summary, at 2.

[21] AOC OIG Investigative Summary, at 5.

[22] AOC OIG Investigative Summary, at 2.

DISCUSSION

In this decision, we address the following issues: first, AOC's compliance with a statutory price limitation and the Antideficiency Act when it purchased a passenger motor vehicle for the then-Architect's use; second, AOC's compliance with the purpose statute when it obligated appropriations to purchase and install motor vehicle accessories on the vehicle; and third, AOC's compliance with the purpose statute in relation to the use of AOC vehicles by the then-Architect and his family members.

Purchase of Motor Vehicle

Statutory Price Limitations in Annual Appropriations Acts

Under 31 U.S.C. § 1343(b), an agency may expend an appropriation to buy or lease a passenger motor vehicle only for the use of specified individuals or as specifically provided by law. For fiscal year 2021, AOC received its annual Capital Construction and Operations appropriation that was available in part for "purchase or exchange, maintenance, and operation of a passenger motor vehicle." Legislative Branch Appropriations Act, 2021, Pub. L. No. 116-260, div. I, title I, 134 Stat. 1628, 1644 (Dec. 27, 2020). Thus, AOC had specific statutory authority to purchase a passenger motor vehicle as required by 31 U.S.C. § 1343(b).

In addition to requiring statutory authority for the purchase of a passenger motor vehicle, section 1343 sets specific price limitations on such a purchase. Specifically, section 1343 provides that "an agency may use an appropriation to buy a passenger motor vehicle . . . only at a total cost" that "is not more than the amount specified in a law." 31 U.S.C. § 1343(c)(1).[23] As applicable here, an "agency" is "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101. This broad definition encompasses AOC which, therefore, is an "agency" that is subject to the statutory price limitation of section 1343.[24]

Each year, the Financial Services and General Government Appropriations Act establishes the particular "amount specified in a law" that is the price limitation of section 1343. *See, e.g.,* Pub. L. No. 117-328, div. E, title VII, § 702, 136 Stat. 4459,

[23] 31 U.S.C. § 1343(c) sets additional limitations including a requirement that the total cost of the passenger motor vehicle includes the price of systems and equipment the Administrator of General Services decides is incorporated customarily in standard passenger motor vehicles completely equipped for ordinary operation.

[24] Language in the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2023 is consistent with this conclusion. It states that AOC must comply with 31 U.S.C. § 1343 and is limited by the statutory controls over motor vehicle acquisition including the price limitation. 168 Cong. Rec. S8553, S9207 (daily ed. Dec. 20, 2022).

4704 (Dec. 29, 2022); Pub. L. No. 117-103, div. E. title VII, § 702, 136 Stat. 49, 293 (Mar. 15, 2022); Pub. L. No. 116-93, div. C, title VII, § 702, 133 Stat. 2317, 2484 (Dec. 20, 2019). For fiscal year 2021, that Act provided that "the maximum amount allowable during the current fiscal year in accordance with subsection 1343(c) of title 31, United States Code, for the purchase of any passenger motor vehicle . . . is hereby fixed at $19,947." Pub. L. No. 116-260, div. E, title VII, § 702.

During fiscal year 2021, AOC obligated $49,033.64 against its Capital Construction and Operations appropriation for the purchase of a passenger motor vehicle for use by the then-Architect.[25] Because the obligated amount of $49,033.64 exceeds $19,947, AOC violated the statutory price limitation in the annual appropriation act.

Application of the Antideficiency Act

We now consider whether AOC's violation of the statutory price limitation is also a violation of the Antideficiency Act. An agency violates the Antideficiency Act if it incurs an obligation in excess of legally available amounts. 31 U.S.C. § 1341(a). If a statute specifically prohibits a particular use of appropriated funds, the agency does not have an amount "available" for that purpose. If the agency nevertheless incurs an obligation for that purpose, it has incurred an obligation exceeding an amount available in an appropriation in violation of section 1341(a)(1)(A). *See* B-330095, July 22, 2020.

Determining the amount available for a particular obligation or expenditure begins with an examination of the agency's appropriations act, but the inquiry does not end there. B-317450, Mar. 23, 2009. Agencies must also consider the effect of all laws that address the availability of appropriations for that expenditure. If a statute, whether enacted in an appropriation or other law, prohibits or otherwise limits an agency from using its appropriations for a particular purpose, the agency does not have an amount available for that purpose. B-317450, Mar. 23, 2009. *See also Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes. . . ."); *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1084 (Fed. Cir. 2003) ("[I]f there is a statutory restriction on available appropriations for a program, either in the relevant appropriations act or in a separate statute, the agency is not free to increase funding for that program beyond that limit"). It is with this foundation in mind that we interpret the scope of the Antideficiency Act.

An agency violates the Antideficiency Act when it obligates or expends appropriated funds in violation of a statutory prohibition. *See* B-330095, July 22, 2020; B-326944, Dec. 14, 2015. For example, the Office of Science and Technology Policy (OSTP) violated a prohibition in an appropriations act when it participated in the U.S.-China Dialogue on Innovation Policy and the U.S.-China Strategic and Economic Dialogue. B-321982, Oct. 11, 2011. The appropriations act prohibited OSTP from engaging in

[25] Response Letter, at 1.

bilateral activities with China or Chinese-owned companies unless specifically authorized. Because OSTP's participation in the events resulted in the obligation of funds in violation of this prohibition, OSTP also violated the Antideficiency Act.

An agency also violates the Antideficiency Act when it obligates or expends appropriated funds without first satisfying a statutory requirement conditioning the use of those funds. For instance, the Environmental Protection Agency (EPA) violated the Antideficiency Act when it failed to comply with a congressional notification requirement before obligating funds in excess of $5,000 for the purchase and installation of a soundproof privacy booth in the office of the Administrator. B-329603, Apr. 16, 2018; *see* Financial Services and General Government Appropriations Act, 2017, Pub. L. No. 115-31, div. E, title VII, § 710, 131 Stat. 135, 379 (May 5, 2017). Congress had conditioned the availability of funds over the $5,000 threshold on the agency's compliance with the notification requirement. Because EPA failed to notify the Committees on Appropriations of its proposed obligation, its funds were not legally available for such a purpose. B-329603, Apr. 16, 2018. As that decision demonstrates, agencies must apply statutory prohibitions, conditions, and limitations when determining whether an appropriation is available.

Applying these principles of law here, we must consider not only the amount provided to AOC in its appropriations, but also AOC's compliance with section 1343 and the corresponding statutory price limitation set in law. Section 1343 establishes that an agency may use an appropriation to buy a passenger motor vehicle "only at a total cost" that "is not more than the amount specified in a law." 31 U.S.C. § 1343(c)(1). By using the language "only," "not more than," and "total cost," Congress set out to cap the amount an agency could use for the purchase of a passenger motor vehicle. The law then specified an exact amount for fiscal year 2021, providing that "the maximum amount allowable during the current fiscal year in accordance with subsection 1343(c) of title 31, United States Code, for the purchase of any passenger motor vehicle . . . is hereby fixed at $19,947 . . ." Pub. L. No. 116-260, 134 Stat. at 1430. The law also specified that AOC's Capital Construction and Operations appropriation was available for the purchase of one vehicle. Pub. L. No. 116-260, 134 Stat. at 1644 ("for purchase . . . of a passenger motor vehicle. . . ."). In other words, for AOC, the total amount available from the Capital Construction and Operations appropriation for the purchase of a passenger motor vehicle was $19,947.

As previously noted, AOC violated this fiscal year 2021 statutory price limitation when it obligated $49,033.64 against its Capital Construction and Operations appropriation for the purchase of a passenger motor vehicle. Because no funds were available to AOC beyond the statutory price limitation of $19,947, AOC also violated the Antideficiency Act.

That AOC may have had sufficient unobligated balances beyond the statutory price limitation in its Capital Construction and Operations appropriation does not change

our conclusion. While the Capital Construction and Operations appropriation vested specific authority in AOC to purchase a passenger motor vehicle, such authority does not render section 1343 and the corresponding statutory price limitation ineffective. It is a well-settled rule of statutory construction that statutes should be construed harmoniously so as to give maximum effect to both whenever possible. *See* B-330935, May 20, 2019; B-328237, Dec. 15, 2016; B-291241, Oct. 8, 2002. Here, we must read AOC's appropriation and section 1343 harmoniously. With its Capital Construction and Operations appropriation, AOC had authority to purchase a passenger motor vehicle, but section 1343 limited the amount available for such a purchase to the statutory price limitation that Congress set. Because AOC obligated its appropriation for a passenger motor vehicle in excess of the statutory price limitation, AOC violated the Antideficiency Act and should report an Antideficiency Act violation.

Purchase and Installation of Motor Vehicle Accessories

Application of the Purpose Statute

We next consider whether AOC complied with the purpose statute when it obligated its Capitol Police Buildings, Grounds and Security appropriation to purchase and install motor vehicle accessories in the vehicle.

Under the purpose statute, agencies may obligate appropriations only for the purposes for which they were provided. 31 U.S.C. § 1301(a). Because each authorized expense need not be stated explicitly in an appropriation, we apply a three-part test, known as the necessary expense rule, to determine whether an appropriation is available for a particular purpose. Under the necessary expense analysis, an appropriation is available for a particular purpose if the 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-333826, Apr. 27, 2022; B-331419, July 1, 2021. In regard to step 2, we are unaware of any statutory provision that specifically prohibits the use of AOC appropriations for motor vehicle accessories. Accordingly, at issue here are steps 1 and 3.

Step 1: reasonable, logical relationship to the appropriation

Under step 1 of the necessary expense analysis, a reasonable, logical relationship must exist between the appropriation and the expense. The text of the appropriation is the starting point for this analysis. AOC's Capitol Police Buildings, Grounds and Security appropriation was available, in part, for the "resilience and security programs" of AOC. 2 U.S.C. § 1865(b). The law does not define or otherwise limit the scope of the "resilience and security programs" provided for by this appropriation. Where the law does not specifically prescribe the activities to be funded by an appropriation, an agency has discretion to determine how to carry out the objects of its appropriation. *See* B-331419, July 1, 2021 (the Department of

Homeland Security had discretion to use its appropriations to establish facilities to achieve the objectives of an immigration-related initiative). 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, but whether the expenditure falls within the agency's legitimate range of discretion. B-333826, Apr. 27, 2022 (the Election Assistance Commission had authority to permit the use of grant funds to provide security and threat-monitoring services to local election officials); B-223608, Dec. 19, 1988 (the U.S. Army Corps of Engineers could not use funds appropriated for establishing and maintaining safety programs to purchase ice scrapers with a promotional safety message written on them).

An illustrative example of the proper exercise of agency discretion can be found in our decision on Capitol Police activities following the September 11, 2001, attacks. In August 2004, the Capitol Police implemented a new counterterrorism security measure called the Security Traffic Checkpoint Program (STCP) in response to an elevated national threat level in Washington, D.C. B-303964, Feb. 3, 2005. The program entailed 14 security traffic checkpoints along two main avenues leading to the Capitol. Capitol Police officers were required to staff the checkpoints around the clock in 12 hour shifts, resulting in considerable overtime expenses. Capitol Police financed the expenses with money transferred to it from the Emergency Response Fund (ERF), which was established by law to fund counterterrorism measures and support national security, among other things. We concluded that the overtime payments were a proper use of the ERF because the Capitol Police had articulated a reasonable nexus between the overtime expenditure and the appropriation charged. *Id.* at 5 ("Law enforcement agencies are entitled to discretion in deciding how best to protect our national institutions, such as the United States Congress, its Members, staff, and facilities. . . . The STCP checkpoints, clearly, were a counterterrorism measure, and certainly fall within the very broad scope of 'supporting national security'").

Also illustrative are our conclusions in a pair of decisions involving the Department of Housing and Urban Development's (HUD) gun buyback programs. In the first decision, we concluded that HUD *did not* have authority to fund a gun buyback program as part of its Public Housing Drug Elimination Grants Program (PHDEG). B-285066, May 19, 2000. HUD justified the gun buyback program as an initiative to reduce drug-related crime, but the underlying PHDEG statute only permitted the use of grants funds for programs to reduce drug use, not drug-related crime. Thus, the structure and language of the PHDEG program statute limited HUD's discretion to fund gun-buybacks. *Id.* In another decision, however, we concluded that HUD OIG *did* have authority to fund a gun buyback initiative. B-285066.2, Aug. 9, 2000. There, Congress had appropriated funds to HUD OIG to combat violent crime in public and assisted housing under the Operation Safe Home program. Because the Operation Safe Home program did not have a separate authorizing statute, use of funds appropriated for the program were governed by the language of the appropriation itself. Between the broad language of the appropriation and the little statutory language limiting HUD OIG's discretion, we concluded that HUD OIG had

authority to use funds appropriated for Operation Safe Home for gun buyback programs. *Id.*

In the present case, AOC obligated $37,458.74 against its Capitol Police Buildings, Grounds and Security appropriation to purchase and install emergency vehicle lighting, communications equipment, and seating equipment in the vehicle.[26] Like HUD OIG's appropriation in B-285066.2, AOC's appropriation gave the agency broad discretion to determine what expenditures it needed to accomplish the appropriation's "resilience and security" purposes. AOC justified these expenses as necessary for AOC's resilience, security, and continuity of operations programs, including the Architect's service as a member of the Capitol Police Board.[27] AOC purchased the upgraded vehicle package for its safety features and layout, permitting concealment of U.S. Capitol Police radio and other equipment.[28] AOC also explained that the lighting kit, sirens, radio, and satellite phone have been installed on all Capitol Police Board member vehicles for their response, emergency access, and communication capability, since shortly after September 11, 2001.[29] Given AOC's explanation of these expenses and the broad language of the Capitol Police Buildings, Grounds and Security appropriation, AOC's decision to use this appropriation to purchase these motor vehicle accessories fell within AOC's legitimate range of discretion. We, therefore, find that step 1 of the necessary expense analysis has been met.

Step 3: expense is not otherwise provided for

Under step 3 of the necessary expense analysis, AOC must obligate for the motor vehicle accessories the appropriation most specifically available for this purpose. Where both a general and a specific appropriation are available for a given expenditure, an agency must use the specific appropriation to the exclusion of the more general appropriation. B-332530, Feb. 18, 2021.

In fiscal year 2021, AOC received a Capital Construction and Operations appropriation that was available for the agency's necessary expenses, "in connection with the facilities and activities under the care of [AOC]." Pub. L. No. 116-260, 134 Stat. at 1644. In contrast, AOC's Capitol Police Buildings, Grounds and Security appropriation was available, in relevant part, for AOC "resilience and security programs . . ." 2 U.S.C. § 1865(b).

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[26] AOC Investigative Summary, at 5. *See also* Response Letter, at 1 (AOC stated that it obligated $38,763.00 for the purchase and installation of motor vehicle accessories).

[27] The Capitol Police Board, comprised of the House and Senate Sergeants at Arms, the Architect of the Capitol, and the Chief of Capitol Police (a non-voting member), is charged with overseeing and supporting the Capitol Police. 2 U.S.C. § 1901a.

[28] Response Letter, at 1.

[29] *Id.*

We conclude that, as between the two appropriations, the expenditures at issue here were properly obligated against the Capitol Police Buildings, Grounds and Security appropriation. The primary purpose of purchasing and installing these motor vehicle accessories was to achieve the resilience and security objectives of the Capitol Police Buildings, Grounds and Security appropriation, thus making it the more specific appropriation. Even if AOC could conclude that the Capital Construction and Operations appropriation was also available for the purchase and installation of motor vehicle accessories, the security purposes of this equipment make the Capitol Police Buildings, Grounds and Security appropriation more specifically available.

As such, AOC properly obligated against the Capitol Police Buildings, Grounds and Security appropriation in accordance with the purpose statute.

Use of Motor Vehicle

Application of the Purpose Statute to Use by the Then-Architect

Our next consideration is whether AOC appropriations were available for expenses incurred in relation to the then-Architect's use of AOC vehicles. Appropriated funds are available only for the purposes for which they have been provided. 31 U.S.C. § 1301(a). As part of our analysis of whether an appropriation is available for a particular purpose, we must consider whether an expenditure constitutes a personal expense.

In general, appropriated funds are not available for the personal expenses of an employee. *See* B-332633, June 3, 2021; B-305864, Jan. 5, 2006; *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1349 (D.C. Cir. 2012). Congress may, however, enact a statute that authorizes an agency to use its appropriations for what would otherwise be considered a personal expense. B-330935.2, Oct. 24, 2019. For example, in 1993, Congress enacted the Federal Employees Clean Air Incentives Act authorizing each agency head to establish a program to encourage employees to use means other than single occupancy motor vehicles to commute to and from work. Pub. L. No. 103-172, § 2(a), 107 Stat. 1995 (Dec. 2, 1993), 5 U.S.C. § 7905. *See also* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, title III, § 3049, 119 Stat. 1144, 1711–12 (Aug. 10, 2005) (requiring that agencies in the National Capital Region implement a transit benefits program as described in section 2 of Executive Order No. 13150); Exec. Order No. 13150, *Federal Workforce Transportation*, 65 Fed. Reg. 24613 (Apr. 26, 2000).

In the absence of express statutory authority, the expense may still be permissible as a necessary expense of the appropriation in question. Application of the necessary expense analysis in these cases involves a refinement particular to personal expenses: in the absence of express statutory authority, an agency's appropriation is available for personal expenses only if the expense is an essential, constituent part of the effective accomplishment of a statutory responsibility,

notwithstanding the collateral benefit to the individual. B-325023, July 11, 2014. As one would expect of any agency legal determination, a finding that appropriations are available for a personal expense must be rooted in a sound interpretation of applicable statutes as well as in the sound application of relevant legal precedents. It is this framework that informs how we read the extent of AOC's authority pertaining to the use of AOC vehicles by government officials.

Under 31 U.S.C. § 1343(b), an agency may expend an appropriation to buy or lease a passenger motor vehicle only for the use of specified individuals or as specifically provided by law, *i.e.*, for official purposes. In addition, for most agencies, 31 U.S.C. § 1344 strictly limits the circumstances in which agencies may obligate their appropriations to use vehicles to provide home-to-work transportation. Such vehicle use is subject to numerous statutory conditions and limitations. *See*, *e.g.*, 31 U.S.C. § 1344(a)(2)(B) (permitting limited vehicle use in particular circumstances when approved in writing by the head of the agency involved); 31 U.S.C. § 1344(b) (permitting home-to-work travel for specifically listed high-ranking federal officials); 31 U.S.C. § 1344(e) (requiring the Administrator of General Services to promulgate regulations on the use of these authorities); 31 U.S.C. § 1344(f) (requiring agencies to maintain logs establishing the official purpose of home-to-work travel).

Important to this decision, by law, the Architect of the Capitol is explicitly excluded from the strict vehicle use limitations of 31 U.S.C. § 1344. *See* 31 U.S.C. § 1344(h)(2)(A)(ii) (defining "Federal agency" for the purposes of section 1344 to exclude "the Senate, House of Representatives, or Architect of the Capitol, or the officers or employees thereof . . ."). Although section 1344 itself does not apply to AOC, AOC's discretion is still limited by the general principles regarding personal expenses.

Under the purpose statute, appropriations generally are not available for personal expenses such as the provision of home-to-work travel. *See* B-330935.2, Oct. 24, 2019; B-305864, Jan. 5, 2006. We will find exceptions to the general rule against using appropriated funds for personal expenses only after careful consideration of particular factual circumstances in which an agency can demonstrate that the item will directly advance an agency's statutory mission and objectives. B-318386, Aug. 12, 2009. For instance, we concluded that the Daniel K. Inouye Asia-Pacific Center for Security Studies (Center) could use its appropriated funds to purchase COVID-19 self-test kits where the use of the kits would allow the agency to safely carry out its statutory mission. B-333691, Feb. 8, 2022. By statute, the Center served as a forum for research, communication, training, and exchange of ideas involving military and civilian participants. 10 U.S.C. § 342. The purchase of COVID-19 self-test kits was permissible because they would allow the Center to facilitate courses, workshops, and engagements in support of its statutory mission while maintaining a safe workplace environment. In contrast, appropriations were not available to purchase disposable cups, plates, and cutlery for employee use, where the Department of Commerce did not demonstrate that the provision of items directly advanced its statutory mission. B-326021, Dec. 23, 2014.

With this framework in mind, AOC's range of discretion here is informed by specific statutory authorities of AOC and the Architect. As the head of AOC, the Architect is charged with the care and superintendence of the Capitol. 2 U.S.C. § 1812. In the event of an emergency involving the safety of human life or the protection of property, AOC may incur obligations and make expenditures for the support and maintenance of the Office of the Architect if, in the judgment of the Architect, such obligations and expenditures are necessary to respond to the emergency. 2 U.S.C. § 1827.

The Architect also serves as member of the Capitol Police Board, along with the House and Senate Sergeants at Arms. 2 U.S.C. § 1901a(a)(2). The Capitol Police Board has "wide-ranging responsibilities and . . . the Board's scope is unique by comparison" to other oversight bodies. GAO, *Capitol Police Board: Fully Incorporating Leading Governance Practices Would Help Enhance Accountability, Transparency, and External Communication*, GAO-17-112 (Washington, D.C.: Feb. 2017), at 1. Like the Architect, the Capitol Police Board has specific statutory functions related to emergencies and security at the Capitol complex. For example, the Capitol Police Board is charged with overseeing and supporting the Capitol Police, which in turn polices Capitol buildings and grounds. 2 U.S.C. § 1961. The Capitol Police Board also has authority to direct and detail members of the Capitol Police to provide protection to Members of Congress and others. 2 U.S.C. § 1966. The Capitol Police Board's other statutory duties include designing, installing, and maintaining security systems for the Capitol buildings and grounds, 2 U.S.C. §§ 1964–1965; controlling the regulation and movement of all traffic within the Capitol grounds, 2 U.S.C. § 1969; and issuing regulations governing the use of law enforcement authority by Capitol Police, 2 U.S.C. § 1967.

Here, by reference to statutory authorities described above, we find no violation of the purpose statute. By vesting the Architect with these authorities and functions, the law grants the Architect a range of discretion to determine how to fulfill those functions. The then-Architect stated that the nature of his position as a member of the Capitol Police Board and the head of the agency necessitated his use of AOC vehicles for virtually all travel.[30] In his view, the use of AOC vehicles was necessary in order to be ready and available to perform his functions in the event of an emergency. The then-Architect stated that the AOC vehicle's special equipment allowed him to expeditiously proceed to Capitol grounds and immediately communicate with Capitol Police and other members of the Capitol Police Board.[31] Additionally, he stated that limiting his use of AOC vehicles to a direct commute between his residence and the Capitol grounds would thwart the emergency readiness function of the Architect.[32]

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[30] Then-Architect's Statement.

[31] *Id.*

[32] *Id.*

Given the broad authorities conferred on the Architect by law, the then-Architect had discretion to determine how to utilize AOC appropriations to carry out the wide-ranging statutory responsibilities of the agency, Architect, and Capitol Police Board. Additionally, AOC is explicitly excluded by name from the strict limitations on vehicle use on other agencies in 31 U.S.C. § 1344, thus permitting AOC more flexibility in its use of motor vehicles. In light of these considerations, we conclude that the then-Architect had discretion to determine that AOC appropriations were available for his use of AOC vehicles to carry out his statutory duties, provided that the then-Architect properly determined that his use of AOC vehicles was necessary to carry out the emergency functions vested in him by law.

While we recognize the discretion afforded to the Architect in carrying out emergency functions, there are reasonable questions raised regarding whether it was prudent or necessary for AOC to obligate or expend its appropriations in this manner. There is often more than one way an agency may accomplish its statutory duties. It may have been possible for the then-Architect to fulfill his critical statutory duties without the use of an AOC vehicle. However, the existence of a reasonable alternative use of the funds at issue does not, standing alone, necessarily render the then-Architect's determinations improper. Instead, the proper question is whether an agency's use of funds falls within a permissible range of discretion. *See* B-329446, Sept. 17, 2020. Beginning in fiscal year 2023, Congress has since constrained such discretion by including a prohibition on the use of AOC appropriations for a home-to-work vehicle for the Architect or a duly authorized designee in the annual appropriations act. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. I, title I, 136 Stat. 4459, 4927 (Dec. 29, 2022).

We note that our conclusions on the vehicle's availability for official purposes focus on an evaluation of the legal availability of AOC appropriations. Even if some of the then-Architect's vehicle use was permitted by law, such usage could still have fallen short of a prudent use of taxpayer dollars and may also have been wasteful and abusive.[33]

Application of the Purpose Statute to the Use by Family Members

AOC OIG also presented additional facts related to the use of AOC vehicles, namely the use of AOC vehicles by family members.[34] Specifically, AOC OIG confirmed that

[33] Nor do we opine on the application of AOC policies and procedures. Such issues are addressed by the AOC OIG in its report on this matter. *See* 2 U.S.C. § 1808; AOC OIG Report; AOC OIG Investigative Summary. Based on the findings and substantiated allegations as determined in the AOC OIG Report, AOC informed the then-Architect that $12,516.76 would be withheld from his final payment from the agency. Letter from Acting Architect of the Capitol to J. Brett Blanton (Apr. 21, 2023).

[34] Investigative Summary, at 2.

the then-Architect's spouse and daughter regularly used AOC vehicles without the presence of the then-Architect in the vehicle.[35]

The then-Architect had discretion to determine that agency appropriations were available for his use of AOC vehicles to carry out his statutory duties. However, such discretion is not limitless. Appropriations are not available for personal expenses that lack any relationship to government business. Accordingly, we have declined to find appropriations available for the use of government vehicles by non-government persons. *See* B-211586-O.M., July 8, 1983 ("We think that agency funds were never appropriated for the purpose of accommodating non-government persons traveling unaccompanied by their governmental sponsor on presumably personal errands."). Government vehicles are to be used for official purposes, which generally would not extend to permitting non-AOC persons to operate the vehicle while the Architect was not present. In this case, there is no such explanation or justification for the personal use of AOC vehicles by the then-Architect's family, nor would this fall within the AOC's discretion in carrying out emergency functions. As such, AOC violated the purpose statute when it obligated appropriations for expenses related to the use of AOC vehicles by the then-Architect's family members.

CONCLUSION

AOC violated the Antideficiency Act when it obligated appropriations for the purchase of a passenger motor vehicle in excess of the fiscal year 2021 statutory price limitation. AOC did not violate the purpose statute when it obligated appropriations for the purchase and installation of motor vehicle accessories on a vehicle for the then-Architect's use. The then-Architect had statutory discretion to determine that agency appropriations were available for his use of AOC vehicles to carry out his statutory duties, provided that he properly determined that such use was necessary to carry out the emergency functions vested in him by law. However, such discretion does not extend to permitting family members of the then-Architect to use the vehicle. Thus, AOC violated the purpose statute when it obligated appropriations for expenses incurred in relation to the use of AOC vehicles by the then-Architect's family members. Our conclusions here are limited to an evaluation of the legal availability of the appropriation for the specified use. We recognize that even where we find no violation of appropriations law, an agency official's use of appropriations can still be wasteful and abusive and fall short of a prudent use of taxpayer dollars.

Edda Emmanuelli Perez
General Counsel

[35] *Id.*

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Social Security Administration Office of the Inspector General—Use of Appropriations in Response to a Council of the Inspectors General on Integrity and Efficiency Investigation

File: B-336076

Date: April 18, 2024

DIGEST

In May 2022, the Integrity Committee (IC) of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) initiated an investigation into allegations made against the Inspector General of the Social Security Administration (SSA) and other SSA Office of the Inspector General (OIG) staff. SSA OIG personnel cooperated with the investigation by responding to requests for documents and sitting for interviews.

SSA appropriations are generally available for expenses incurred in carrying out its mission and functions. This includes cooperating with the CIGIE IC investigation as such efforts aid SSA OIG in carrying out its mission and functions, including administering a statutorily authorized SSA program. In addition, SSA OIG did not accept uncompensated services from CIGIE IC and, therefore, SSA OIG did not augment its appropriation. Because SSA OIG did not obligate its appropriation in excess of legally available amounts or in violation of a statutory prohibition on the use of appropriations, SSA OIG did not violate the Antideficiency Act.

DECISION

The Inspector General of the Social Security Administration (SSA) requested our decision on whether SSA appropriations are available for expenses incurred as the SSA Office of the Inspector General (OIG) cooperated with an investigation by the Integrity Committee (IC) of the Council of the Inspectors General on Integrity and Efficiency (CIGIE).[1] The SSA Inspector General also asked whether SSA OIG

[1] Letter from Inspector General, SSA, to Managing Associate General Counsel (Feb. 23, 2024) (Request Letter).

improperly augmented appropriations by accepting services from CIGIE IC and the Department of Justice (DOJ) OIG.[2] Finally, the SSA Inspector General asked whether either activity also resulted in a violation of the Antideficiency Act.[3]

Our practice when issuing decisions is to obtain the views of relevant agencies to establish a factual record and to establish the agencies' legal positions on the subject matter of the request.[4] In this case, the SSA Inspector General's request letter and attached documentation provided the factual background and SSA OIG's legal position on the matter.[5]

BACKGROUND

SSA OIG carries out a number of functions in its mission to conduct oversight of SSA programs and operations. *See* 5 U.S.C. §§ 402, 404. Among other things, the Inspector General Act of 1978 directs SSA OIG to "provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of" SSA and "recommend corrective action concerning . . . problems, abuses, and deficiencies." 5 U.S.C. § 404(a). In addition, SSA OIG administers SSA's civil monetary penalty (CMP) program under a delegation from the SSA Commissioner.[6] Under section 1129 of the Social Security Act, SSA OIG may impose a CMP for certain violations of the Social Security Act. 42 U.S.C. § 1320a-8.

In May 2022, CIGIE IC initiated an investigation into allegations made against the SSA Inspector General and SSA OIG staff. CIGIE is an independent entity within the executive branch charged with addressing the integrity, economy, and effectiveness issues that transcend individual government agencies and aid in the establishment of a well-trained and highly skilled workforce in the offices of Inspectors General. 5 U.S.C. § 424(a)(2). The Integrity Committee, an entity within CIGIE, shall "receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General" and their designated staff members. 5 U.S.C. § 424(d)(1).

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[2] Request Letter, at 1.

[3] Request Letter, at 1.

[4] GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 21, 2024), *available at* https://www.gao.gov/products/gao-24-107329.

[5] *See* Request Letter.

[6] Request Letter, at 4. Pursuant to 42 U.S.C. § 1320a-8(i), the Commissioner of Social Security may delegate authority for the CMP program to the SSA Inspector General. Actions made within the scope of that delegation have the same force and effect as though performed or rendered by the SSA Commissioner. 42 U.S.C. § 902(a)(7).

Specifically, CIGIE IC sought to investigate allegations regarding abuse of authority, mismanagement of SSA's CMP program, and alleged conduct undermining the independence or integrity reasonably expected of a senior official in the Inspector General community.[7] CIGIE IC engaged DOJ OIG to act as the Assisting OIG and to conduct the factual investigation.[8] SSA OIG personnel cooperated with the investigation by responding to requests for documents and sitting for interviews with DOJ OIG.[9]

On December 20, 2023, DOJ OIG sent a Draft Interim Report to SSA OIG detailing its observations of SSA OIG's administration of the CMP program and proposed recommendations for corrective action.[10] Following receipt of the report, SSA OIG personnel spent duty time identifying and detailing to CIGIE IC and DOJ OIG what were, according to SSA OIG, material legal and factual inaccuracies in the report.[11] Additionally, SSA OIG made efforts to raise concerns regarding CIGIE IC's authority to CIGIE and CIGIE IC Chairpersons.[12] The SSA Inspector General also requested an opinion from the Office of Legal Counsel in the Department of Justice on the scope of CIGIE's authority and the proper interpretation of provisions of law pertaining to the CMP program.[13]

DISCUSSION

In this decision, we address (1) whether SSA appropriations were available under the purpose statute for SSA OIG to cooperate with a CIGIE IC investigation; (2) whether SSA OIG augmented its appropriations by receiving uncompensated services from CIGIE IC and DOJ OIG; and (3) whether SSA OIG violated the Antideficiency Act.

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[7] Letter from Chairperson, CIGIE IC, to Inspector General, SSA*, Re: Integrity Committee Case 22-048: Notification of Investigation* (May 31, 2022).

[8] Letter from Chairperson, CIGIE IC, to Inspector General, SSA*, Re: Integrity Committee Case 22-048: Notification of Investigation* (May 31, 2022).

[9] Request Letter, at 2.

[10] Request Letter, at 2.

[11] Request Letter, at 2; *see also* Letter from Inspector General, SSA, to Inspector General, DOJ, *Re: Response to Request for Review of Draft Report Dated December 19, 2023* (Jan. 19, 2024).

[12] *See* Letter from Inspector General, SSA, to Chair, CIGIE, *Re: Integrity Committee Investigation No. 22-048* (Feb. 5, 2024); Letter from Inspector General, SSA, to Chair, CIGIE, *Re: Integrity Committee Investigation No. 22-048* (Feb. 20, 2024).

[13] Letter from Inspector General, SSA, to Assistant Attorney General, Office of Legal Counsel, DOJ (Feb. 23, 2024).

Purpose Availability

Under the purpose statute, appropriated funds are available only for authorized purposes. 31 U.S.C. § 1301(a). Each authorized expense need not be stated explicitly in an appropriation. B-333826, Apr. 27, 2022; B-306748, July 6, 2006. When an expenditure is not specifically provided for in the appropriation, the expenditure is still permissible if it is reasonably necessary to carry out an authorized function or will contribute materially to the effective accomplishment of that function, and if it is not otherwise prohibited by law.[14] 72 Comp. Gen. 73 (1992); 66 Comp. Gen. 356 (1987).

We have consistently held that an agency may incur expenses necessary to carry out a statutorily authorized function. *See e.g.*, B-310865, Apr. 14, 2008. Statutes that impose substantive functions on an agency provide the agency with authority to perform those functions using applicable appropriations. *See* 71 Comp. Gen. 378 (1992).

In carrying out their missions and administering federal programs, agencies often must communicate with other entities. Communication is part of the routine business conducted by federal agencies as they work to fulfill their statutory duties. As such, appropriations are generally available for agencies to communicate about their programs. *See* B-332531, Nov. 16, 2023 (appropriations are available to inform the public about agency programs and activities). In carrying out authorized functions, agencies also have authority to explain and defend their policies. B-319834, Sept. 9, 2010; B-319075, Apr. 23, 2010; B-302504, Mar. 10, 2004. This authority is especially important in the context of oversight. Oversight entities, including Congress and Inspectors General, play a valuable role in ensuring that the government is operating in accordance with the law and that agencies are using appropriated funds properly and effectively. *See* B-334321, Feb. 8, 2023. Agencies have a duty to respond to congressional and OIG oversight. *See* B-325124.2, Apr. 5, 2016 (discussing statutory prohibition on preventing a federal officer or employee from communicating directly with Congress); B-332428, Feb. 7, 2022 (discussing agency action taken in response to OIG investigation). Thus, appropriations are available for agencies to cooperate with oversight entities regarding their activities, programs, and policies.

Here, SSA OIG's cooperation with the CIGIE IC investigation furthers legitimate purposes of the agency—namely, the effective administration of the CMP program

[14] We are unaware of any statute that specifically prohibits the use of SSA appropriations for the purposes at issue here. In the request, the SSA Inspector General notes that the Inspector General Act does not authorize an Inspector General to "publicly disclose information prohibited from disclosure by law." Request Letter, at 6. Our conclusions in this decision are reserved to matters of appropriations law. We make no comment as to SSA OIG's compliance with statutory prohibitions on the public disclosure of information.

and appropriate management and conduct by SSA OIG officials. Section 1129 of the Social Security Act authorizes the SSA Commissioner to impose CMPs for certain violations of the Social Security Act. 42 U.S.C. § 1320a-8. SSA delegated this authority to SSA OIG.[15]

Responding to requests for documents and sitting for interviews pertaining to the CMP program aids SSA OIG in its efforts to ensure the CMP program is administered effectively, in a legally sound manner, and with appropriate management and conduct by SSA OIG officials. Cooperating with CIGIE IC afforded SSA OIG the opportunity to review its policies and activities under the CMP program. SSA OIG made use of the opportunity by reviewing the Social Security Act to ensure that SSA OIG's procedures for serving notice of a CMP complied with the Act's requirements.[16]

SSA OIG personnel also used duty time to respond to DOJ OIG's Draft Interim Report.[17] In its response to DOJ OIG, SSA OIG states that it identified factual and legal inaccuracies in the report and provided its interpretation of CMP provisions in the Social Security Act.[18] The SSA Inspector General noted that the efforts undertaken by SSA OIG to research, analyze, and respond to the Draft Interim Report appear related to SSA OIG's administration of the CMP program as these are questions of program administration within the purview of SSA OIG's delegated authority.[19] We agree. As previously noted, in carrying out its authorized functions, an agency has authority to explain and defend its policies. B-319834, Sept. 9, 2010; B-319075, Apr. 23, 2010; B-302504, Mar. 10, 2004. SSA OIG did so as it explained its interpretation of the Social Security Act and provided justification for its practices in its response to the Draft Interim Report. Because SSA OIG's cooperation with the CIGIE IC investigation furthered SSA OIG's administration of the CMP program, SSA appropriations were available for this purpose.

The SSA Inspector General's request noted concern regarding CIGIE IC's underlying authority to conduct this investigation and the purpose availability of the CIGIE revolving fund[20] to fund such efforts.[21] The purpose availability of SSA appropriations is not dependent on the underlying authority or appropriations supporting CIGIE IC's efforts. Because we affirmatively determine that SSA

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[15] Request Letter, at 4.

[16] Request Letter, at 3–4.

[17] Request Letter, at 2.

[18] Letter from Inspector General, SSA, to Inspector General, DOJ, *Re: Response to Request for Review of Draft Report Dated December 19, 2023* (Jan. 19, 2024).

[19] Request Letter, at 5.

[20] 5 U.S.C. § 424(c)(3)(B).

[21] Request Letter, at 7–8.

appropriations are available for SSA OIG to cooperate with CIGIE IC on this investigation, we need not consider the purpose availability of CIGIE's revolving fund.

Augmentation

Agencies may not augment their appropriations. B-327376, Feb. 19, 2016. An augmentation occurs when an agency retains money from an outside source without statutory authority. B-332003, Oct. 5, 2021; B-307137, July 12, 2006. By making an appropriation, Congress establishes an authorized program level for that program. To permit an agency to operate beyond this level with funds derived from an outside source would usurp Congress's power of the purse. *See* 72 Comp. Gen. 164 (1993); 61 Comp. Gen. 419 (1982); B-300248, Jan. 15, 2004.

Generally, our case law on augmentation involves the receipt of money by an agency. *See* B-310725, May 20, 2008 (National Science Foundation OIG may not credit to its appropriation amounts recovered under the False Claims Act.). We have also held that an agency improperly augments its appropriations by having another party bear costs for which the agency is responsible. *See* B-300248, Jan. 15, 2004. For instance, the Small Business Administration (SBA) was required by law to conduct oversight of lenders who made SBA-guaranteed loans. B-300248, Jan. 15, 2004. SBA used a contractor to assist with this oversight function. Rather than using SBA appropriations to pay the contractor, SBA imposed a fee on its lenders and required that fee to be paid directly to the contractor. Because SBA arranged for a third party to pay for its contractual commitment, SBA had constructively augmented its appropriations. *Id.*

In the present case, SSA OIG made no arrangement to have another entity aid in its performance of its statutory function, nor did SSA OIG arrange for a third party to pay for such performance. According to SSA OIG, CIGIE IC and DOJ OIG "took it upon themselves to act as the oversight entity over SSA programs."[22] Unlike SBA, which arranged for a contractor to assist in its statutory duties and for lenders to pay that contractor, SSA OIG took no action to have CIGIE IC or DOJ OIG perform its functions while receiving payment from another party. Thus, no augmentation occurred in this case, despite the possibility that the CIGIE IC investigation may prove beneficial to SSA OIG in its own administration and oversight of the CMP program.

An improper augmentation can also result from an interagency loan of personnel on a nonreimbursable basis. 65 Comp. Gen. 635 (1986); 64 Comp. Gen. 370 (1985). For example, the Department of Labor required the assistance of administrative law judges from other agencies to adjudicate a backlog of black lung cases. 65 Comp. Gen. 635 (1986). Although the Department had statutory authority to receive detailed employees from other agencies, the statute was silent as to reimbursement

[22] Request Letter, at 6.

for those details. We concluded that absent specific statutory authority, nonreimbursable interagency details were unlawful. Such arrangements would run afoul of the purpose statute because the appropriation funding the detail would be used for the work of the receiving agency rather than being used for the objects for which they had been appropriated. As such, a nonreimbursable detail would have the effect of improperly augmenting the receiving agency's appropriation. 65 Comp. Gen. 635 (1986).

In the present case, neither CIGIE IC nor DOJ OIG detailed employees to SSA OIG. Instead, DOJ OIG investigative attorneys pursued a CIGIE IC investigation of SSA OIG in accordance with CIGIE IC policies and procedures.[23] There is no indication that SSA OIG oversaw or directed the employees of another agency to perform functions reserved to SSA. Because SSA OIG did not arrange to have CIGIE IC, DOJ OIG, or the employees thereof carry out SSA OIG's own duties, SSA OIG did not augment its appropriations.

Antideficiency Act

An agency violates the Antideficiency Act if it incurs an obligation in excess of legally available amounts or in violation of a statutory prohibition on the use of appropriations. 31 U.S.C. § 1341(a). Here, as explained above, we conclude that SSA appropriations are available to respond to a CIGIE IC investigation and that SSA OIG did not augment its appropriations. Based on the facts before us, there is no evidence that SSA OIG obligated appropriations in excess of its available funding or in violation of a statutory prohibition. As such, SSA OIG did not violate the Antideficiency Act.

CONCLUSION

In this decision we have considered several fiscal law issues, including the availability of SSA appropriations for various actions and whether such actions augmented the appropriations. We are not taking a position on the allegations regarding SSA OIG's performance of its functions under the CMP program or CIGIE IC's findings and recommendations.

SSA appropriations are available for cooperating with a CIGIE IC investigation as part of the agency's efforts to carry out its mission and authorized programs. Additionally, SSA OIG's cooperation with CIGIE IC and DOJ OIG did not amount to

[23] Request Letter, at 2; *see also* 5 U.S.C. § 424(d)(7)(A) (requiring CIGIE IC investigations to be conducted in accordance with the most current Quality Standards for Investigations issued by CIGIE or its predecessor); CIGIE, *Quality Standards for Investigations* (Nov. 15, 2011), *available at* https://www.ignet.gov/content/quality-standards (last visited Apr. 16, 2024); CIGIE, *Integrity Committee Policies and Procedures 2018* (Apr. 13, 2018), *available at* https://www.ignet.gov/content/integrity-committee-process-and-policies (last visited Apr. 16, 2024).

an improper augmentation of its appropriations. Because SSA OIG did not obligate funds in excess of available appropriations, SSA OIG did not violate the Antideficiency Act.

Edda Emmanuelli Perez
General Counsel

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
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Decision

Matter of: Department of Commerce, Office of Inspector General—Applicability of Statutory Notification Requirement to Costs Related to Current and Anticipated Offices

File: B-335459

Date: May 8, 2024

DIGEST

The Department of Commerce Office of Inspector General (OIG) installed sound attenuation technology on its office exterior to protect the privacy of sensitive conversations inside its office. OIG also planned to relocate its current furniture to its new, anticipated office, and the General Services Administration (GSA) plans to make alterations to prepare the office for OIG occupancy. Section 710 of the Financial Services and General Government Appropriations Act, 2023 prohibits an agency from obligating or expending an amount more than $5,000 to furnish, redecorate, purchase furniture for, or make improvements for the office of a presidential appointee during the period of appointment without prior notification to the House and Senate Appropriations Committees.

Section 710 applies to the cost of installing the sound attenuation technology for the entire suite of offices assigned to the Inspector General as well as to any spaces directly controlled or primarily used by the Inspector General, even if the technology was installed on the exterior of OIG's office perimeter. Section 710 also applies to expenses to relocate furniture to the Inspector General's new office space because these expenses "furnish" the office by supplying what the office needs. However, section 710 does not apply to costs related to construction and alteration of the Inspector General's anticipated office because it is not yet directly controlled or primarily used by the Inspector General, and thus, does not meet the statutory definition of "office" under section 710.

DECISION

This responds to a request for a decision from the Inspector General, Department of Commerce, regarding whether section 710 of the Financial Services and General Government Appropriations Act, 2023 requires the Office of Inspector General (OIG)

to notify the House and Senate Appropriations Committees of costs related to (1) installing sound attenuation technology to protect the privacy of sensitive conversations within OIG offices; (2) relocating furniture from the Inspector General's current office to its anticipated office; and (3) constructing and altering the Inspector General's anticipated office.[1]

Our practice when rendering decisions is to establish a factual record and to elicit the agency's legal positions on the issues raised.[2] In this instance, the Inspector General's request letter provided factual information and OIG's legal views.

BACKGROUND

OIG maintains its headquarters in Washington, DC, where OIG installed sound attenuation technology.[3] OIG plans to relocate offices to another building in the Washington, DC area.[4] OIG plans to move current furniture to the anticipated office,[5] and the General Services Administration (GSA) plans to make alterations to prepare the office for OIG occupancy.[6] The discussion below contains the additional factual information critical to our analysis and conclusion on the application of the section 710 notification requirement.

DISCUSSION

OIG raises three questions that invoke a notification requirement enacted for fiscal year 2023 and carried forward into fiscal year 2024 by a continuing resolution. Financial Services and General Government Appropriations Act, 2023, Pub. L. No. 117-328, div. E, title VII, § 710, 136 Stat. 4459, 4706 (Dec. 29, 2022), *as carried forward by* Continuing Appropriations Act, 2024 and Other Extensions Act, Pub. L. No. 118-15, div. A, § 101(5), 137 Stat. 71, 72 (Sept. 30, 2023), *as amended* by Further Continuing Appropriations and Other Extensions Act, 2024, Pub. L. No. 118-22, 137 Stat. 112 (Nov. 17, 2023); B-324481, Mar. 21, 2013 (continuing resolutions carry forward the authorities and conditions of the identified appropriation for the duration of the continuing resolution).

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[1] Letter from Inspector General, Department of Commerce, to General Counsel, GAO (July 14, 2023) (Request Letter).

[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.

[3] Request Letter, at 1-2.

[4] *Id.* at 3.

[5] *Id.* at 3.

[6] *Id.* at 5

Section 710 of the Financial Services and General Government Appropriations Act, 2023 provides:

> During the period in which the head of any department or agency, or any other officer or civilian employee of the Federal Government appointed by the President of the United States, holds office, no funds may be obligated or expended in excess of $5,000 to furnish or redecorate the office of such department head, agency head, officer, or employee, or to purchase furniture or make improvements for any such office, unless advance notice of such furnishing or redecoration is transmitted to the Committees on Appropriations of the House of Representatives and the Senate. For the purposes of this section, the term 'office' shall include the entire suite of offices assigned to the individual, as well as any other space used primarily by the individual or the use of which is directly controlled by the individual.

Pub. L. No. 117-328, § 710.

Section 710 requires an agency to notify the Appropriations Committees before it (1) obligates more than $5,000 to (2) furnish, redecorate, purchase furniture for, or make improvements for (3) the office of the appointee "[d]uring the period in which the head of any department or agency, or any other officer or civilian employee of the Federal Government appointed by the President of the United States, holds office." Pub. L. No. 117-328, § 710. The $5,000 threshold spans the entire time that the appointee holds office.[7] The Inspector General is appointed by the President with the advice and consent of the Senate, and therefore, falls under section 710's ambit. 5 U.S.C. § 401(1); 5 U.S.C.§ 403a.

In this decision, we address section 710's applicability to the following issues: first, the costs of installing sound attenuation to the exterior of the current office space; second, costs of relocating furniture to the anticipated office space; and third, costs of constructing and altering the anticipated office space.

Sound Attenuation Technology

OIG occupies a suite that includes two private offices for the Inspector General and Deputy Inspector General, as well as common office space for career staff and an entry area used by career staff and visitors. Request Letter, at 1. Although offices of the Inspector General and Deputy Inspector General are entered through the common area, both spaces have unused doors that connect to the floor's main hallway. Access to this hallway is open to anyone entering the building. *Id.* To

[7] OIG reported that the Inspector General position became vacant on January 6, 2024, and that the Deputy Inspector General began serving as Acting Inspector General on January 7, 2024. GAO's Executive Vacancy System. We note, therefore, that the $5,000 threshold will reset to begin under the tenure of the next appointee.

protect the privacy of sensitive internal discussions, OIG obligated $800 for the purchase and installation of sound attenuation technology on the exterior of the Inspector General's and Deputy Inspector General's unused office doors nearest to the hallways, as well as in public areas outside other OIG office space. *Id.* at 1-2, Attachment B.

As stated above, Section 710 requires an agency to notify the Appropriations Committees before it (1) obligates more than $5,000 to (2) furnish, redecorate, purchase furniture for, or make improvements (3) for the office of the appointee. Pub. L. No. 117-328, § 710. As an initial matter, the technology guards the sensitivity of internal discussions and increases the quality of the office by safeguarding the privacy of discussions that occur within it. Therefore, this installation clearly constitutes making an improvement under section 710.

We now consider the remaining question of whether this technology was installed "for the office." Section 710 defines "office" as "the entire suite of offices assigned to the individual, as well as any other space used primarily by the individual or the use of which is directly controlled by the individual." Pub. L. No. 117-328, § 710. Our past decisions illustrate that, as envisioned by section 710, this definition turns on whether the relevant space is "used primarily by" or "directly controlled by" the appointee. *See* B-329955, May 16, 2019; B-329603, Apr. 16, 2018.

(1) The Exterior of the Inspector General's Office Doors

As with all questions of statutory interpretation, we begin with the text. B-331094, Sept. 5, 2019; B-328237, Dec. 15, 2016; *see Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). In the presence of unambiguous language, we find that the ordinary meaning of the statute controls. B-332003.1, Oct. 05, 2022; *see Carcieri*, 555 U.S. at 387; B-326013, Aug. 21, 2014. In section 710, the plain meaning of "for" is a functional word that indicates the aim or purpose of an action or activity. *American Heritage Dictionary of the English Language* 684 (5th ed. 2011) (definition of "for"). Consistent with this definition, an object outside of a physical "office" space can still function as a benefit "for" the office without constituting a change "to" the office. Here, OIG installed this technology with the intent of safeguarding the privacy of sensitive conversations occurring within the office. Even though both installation locations may lie on or outside the perimeter of the "office", the statutory language specifies that no funds may be obligated to "make improvements *for* any such office." Pub. L. No. 117-328, § 710 (emphasis added). Here, the sound technology functions as a benefit for space directly controlled or primarily used by the appointee because the technology helps to protect the privacy of conversations in the Inspector General's office.

OIG posits that section 710 does not apply because this technology is not a benefit "to the office." Request Letter, at 2-3. However, as we have noted above, the word "for" retains a distinct, broader meaning than the word "to." Even if the improvement is not *to* the office because it is outside of its perimeter, it is nevertheless *for* the

office because it helps safeguard the privacy of conversations occurring within it. Therefore, the installation of this technology falls under the section 710's ambit of making an improvement "for" the office.

OIG obligated less than $5,000 for this technology. Request Letter, at 1-2, Attachment B. When it requested our decision, OIG also stated that the cumulative total of this technology and other relevant expenses had not exceeded this statutory threshold that triggers the notification requirement. *Id.* at Attachment B. Therefore, OIG was not required to notify the Appropriations Committees before it incurred this obligation. However, section 710's threshold is cumulative in nature and imposes the limit "[d]uring the period in which the head of any department or agency . . . holds office." Pub. L. No. 117-328, 710. Thus, OIG must include this cost as it determines whether the cumulative total under the Inspector General exceeded the $5,000 statutory threshold.

(2) The Exterior of the Deputy Inspector General's Office Doors

We apply the same statutory framework to the Deputy Inspector General's office door. Here, however, the Deputy Inspector General is not a presidential appointee.[8] While the Inspector General might have sensitive conversations inside the Deputy Inspector General's office, this office is not directly controlled or primarily used by the presidential appointee. The Inspector General may control the entire office suite, including the Deputy Inspector General's office and its perimeter on which the sound attenuation was installed. The Inspector General may also retain the ability to reorganize or reassign space within the office suite. However, because the Inspector General assigned a space to the Deputy Inspector General, that space is no longer under the Inspector General's primary use or direct control. Therefore, the installation on the Deputy Inspector General's office door does not constitute an improvement "for" the office under section 710.

Furniture Relocation

OIG plans to relocate its headquarters to another location in the Washington, D.C. area. Request Letter, at 3. OIG does not plan to purchase any new furniture but intends to move current furniture into the anticipated office. *Id.* We must, therefore, examine whether section 710 applies to this furniture relocation.

Section 710 lists four separate actions that each require notification: "furnish," "redecorate," "purchase furniture," and "make improvement." In analyzing statutory language, we assume that each word has distinct meaning and that Congress was aware of this meaning when legislating. B-329603, Apr. 16, 2018; *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citing *Babbitt v. Sweet Home Chapter of*

[8] *See* 5 U.S.C. § 401(1); 5 U.S.C.§ 403a; House of Representatives Committee on Oversight and Reform, *U.S. Government Policy and Supporting Positions*, at 28 (Dec. 2020), *available at* www.govinfo.gov/app/details/GPO-PLUMBOOK-2020 (last visited Feb. 5, 2024).

Communities for a Great Oregon, 515 U.S. 687, 698 (1995)) (noting the Court's reluctance to treat any statutory language as surplusage). We construe statutes so that each word carries "operative effect." B-329603, Apr. 16, 2018; *see United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004).

Informed by these principles, we determine that Congress intended to give distinct, operative effect to each of section 710's four limitations by listing four separate actions in the same text. Moreover, Congress used the word "or", which creates a disjunctive list. Any one condition triggers the notification requirement. B-329603, Apr. 16, 2018; *see Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975). Here, therefore, "furnish" and "purchase furniture for" must retain separate meanings.

We begin by examining the verb "furnish" in ordinary English, which means to provide what is necessary or desired, or to provide furniture for. *American Heritage Dictionary* at 712 (definition of "furnish"). In everyday use, "furnish" includes purchase of furniture, but section 710's distinct inclusion of the phrase "purchase furniture" leads us to find that "furnish" carries a broader meaning than purchase of furniture. Interpreting "furnish" to include only the purchase of furniture would result in surplusage. Our past decisions are consistent with this statutory understanding. We previously held that section 710's usage of "furnish" includes not only purchasing furniture, but also "supplying the office or space with other equipment." *See* B-329955, May 16, 2019 (a dishwasher installed in an agency head's office constituted furnishing because it equipped the office with a perceived need); B-329603, Apr. 16, 2018 (installing a soundproof privacy booth in an agency head's office constituted furnishing because it equipped the office with an asserted need). Thus, to "furnish" an office includes not only purchasing furniture, but also, consistent with its definition, providing the office with other equipment.

Section 710's distinction between furnishing and purchasing furniture applies here. Furnishing retains distinct meaning that, consistent with our other decisions, extends beyond purchasing of furniture to supplying the office with equipment. The common meaning of "supply" is to make available for use. *American Heritage Dictionary* at 1751 (definition of "supply"). Specifically, the relocation expense is a necessary component of making the furniture available for use in its new location. Moreover, consistent with our precedent, the expense is necessary to "equip [the office] with what is needed." *See* B-329603, Apr. 16, 2018.

OIG asserts that because it has already furnished the IG's office with the existing furniture and equipment, section 710 does not require an additional, duplicative notification for the expense of moving that same furniture. Request Letter, at 3-4. However, as we note above, because the word "furnish" encompasses supplying an office with equipment, OIG can execute multiple furnishings with the same furniture. Each time furniture is moved into a new office, OIG furnishes the office—regardless of the furniture's past use or purchase history—and thus must notify Congress under section 710 for each furnishing.

This interpretation is also consistent with the purpose for which Congress has enacted this requirement. Congress exercises its constitutional power of the purse when it enacts statutory notification provisions, which constitute one mechanism that Congress uses to further its constitutional authority to oversee agency use of appropriated amounts. *See* B-330720, Feb. 6, 2019 ("Advance notification requirements . . . provide a mechanism by which Congress may exercise its constitutional power of the purse"); B-327432, June 30, 2016 ("Congress has the right to predicate the availability of appropriations on compliance with specified notification requirements.") Section 710's use of the word "furnish" demonstrates Congressional intent to require agencies to notify the Appropriations Committees not only for purchases of furniture but also for other actions that constitute furnishment.

Informed by this context, we find that, for section 710 purposes, "furnishing" encompasses the costs related to furniture relocation for the Inspector General's office that OIG contemplates here.[9] Section 710's $5,000 threshold applies to the sum of relevant obligations incurred over a presidential appointee's term. This is the first time we have addressed the issue of relocation costs within the meaning of the term "furnish," and we recognize this might present a change in current agency practice. Therefore, moving forward, we note that section 710 encompasses furniture relocation costs and that OIG must include these costs in determining whether the cumulative total under an Inspector General's tenure exceeded section 710's statutory threshold. OIG should update its notifications accordingly.

Anticipated Office

Before assigning the space to OIG, GSA plans to construct the Inspector General's anticipated office and make alterations such as replacing light fixtures, reinforcing walls, and upgrading technology. Request Letter, at 5. We next consider whether the anticipated office space meets section 710's definition of "office" as a space "used primarily by" or "directly controlled" by the appointee. Pub. L. No. 117-328, § 710.

Here, the anticipated office remains under GSA's primary use and direct control. Request Letter, at 5. Although OIG has signed an occupancy agreement with GSA, OIG has not yet moved into the new office and will not be liable for payments for the

[9] We note that OIG must consider the statutory definition of "office" as it determines which obligations require notification. OIG should report relocation costs for furniture "directly controlled" or "primarily used" by the appointee. Because some relocation costs may be indirect, OIG must use a reasonable method to determine the total cost that is subject to the notification under section 710. *See*, *e.g.*, B-328065, Oct. 27, 2016 (agency must use a reasonable method to determine the amount to obligate against each of multiple appropriations available for construction projects where employees made contributions to multiple projects).

space until after construction is complete.[10] *Id*. Because the anticipated office space does not yet constitute the Inspector General's "office", section 710 does not apply to obligations related to constructing and altering the expected office.

CONCLUSION

Section 710's notification requirement applies to the cost of sound attenuation technology installed on the perimeter of the Inspector General's office. At the time it incurred the obligation, OIG had not exceeded section 710's $5,000 threshold, so no notification was necessary. However, because the $5,000 threshold applied during the Inspector General's tenure in office, OIG should have included this expense as it determined whether subsequent obligations required notification. The section 710 notification requirement also applies to the costs of relocating furniture to the Inspector General's new office but does not apply to the construction and alteration costs of OIG's anticipated office. OIG should notify the Appropriations Committees accordingly.

Edda Emmanuelli Perez
General Counsel

[10] E-mail from Acting Inspector General, Department of Commerce, to Staff Attorney, GAO, *Subject: Update on OIG's decision request about section 710's notification requirement* (Feb. 6, 2024).

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: U.S. Department of Health and Human Services—Obligations for Communication Services

File: B-332531

Date: November 16, 2023

DIGEST

The Centers for Medicare & Medicaid Services (CMS), within the U.S. Department of Health and Human Services, awarded task orders for communication services regarding new agency goals and initiatives. Under the purpose statute, 31 U.S.C. § 1301(a), an agency may not use appropriations for impermissible personal expenses. Further, under government-wide appropriations prohibitions, an agency may not use appropriations for publicity or propaganda, or for publicity experts. Under the Antideficiency Act, 31 U.S.C. § 1341, an agency may not incur obligations in excess of available appropriations.

We conclude that CMS did not violate the purpose statute, publicity or propaganda prohibition, or publicity experts prohibition when it obligated appropriations for task orders for communication services. The task orders did not call for services that were impermissible personal expenses, require production of prohibited publicity or propaganda, or require contractors to serve as prohibited publicity experts. Further, CMS obligated the proper appropriation account for the communication services task orders. We also conclude that CMS did not violate the Antideficiency Act because CMS's obligations for the task orders did not exceed amounts available.

DECISION

This responds to a request for our decision on whether the Centers for Medicare & Medicaid Services (CMS), within the U.S. Department of Health and Human Services

(HHS), contracted for communication services that violated the purpose statute, 31 U.S.C. § 1301(a), and the Antideficiency Act, 31 U.S.C. § 1341.[1]

In accordance with our regular practice,[2] we contacted HHS to seek factual information and its legal views on this matter.[3] HHS provided a response but did not provide its legal views on all of CMS's actions.[4] Following an additional request from our office, HHS provided a supplementary response with further information and its legal views.[5] We conducted a teleconference with HHS to confirm our understanding of certain information provided in its supplementary response.[6]

The Request Letter references an investigative report issued by congressional staff regarding CMS's use of contractors for communication services (Staff Report).[7] The Staff Report asserts, among other things, that CMS may have violated appropriations laws by having communications services contractors perform activities to benefit the then-CMS Administrator in their personal capacity, produce prohibited publicity or propaganda, and serve as prohibited publicity experts.[8] For example, the Staff Report refers to a particular document produced by a contractor entitled *Executive Visibility*

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[1] Letter from Senators Murray and Wyden, Representative Pallone, and former Representative Maloney, to Comptroller General (Sept. 10, 2020) (Request Letter); Letter from Representative Raskin to Comptroller General (Feb. 16, 2023).

[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.

[3] Letter from Assistant General Counsel, GAO, to General Counsel, HHS (Dec. 21, 2020).

[4] Letter from General Counsel, HHS, to Assistant General Counsel, GAO (Jan. 19, 2021) (Agency Response).

[5] Letter from Assistant General Counsel, GAO, to Acting General Counsel, HHS (Jan. 25, 2021); Letter from Acting General Counsel, HHS, to Assistant General Counsel, GAO (Mar. 28, 2022) (Supplementary Agency Response).

[6] Telephone Conversation with Deputy General Counsel, HHS (Sept. 9, 2022).

[7] Request Letter, at 1; *Investigation of CMS Administrator Seema Verma's Use of Private Communications Consultants* (Sept. 2020), *available at* https://drive.google.com/file/d/1nezMXLk6auFtFn4bzLy26k0P5CVI1Zow/view (last visited Aug. 7, 2023). The Staff Report refers to an HHS Office of Inspector General (OIG) report focused on the administration and management of the communication services contracts from a federal contracting perspective. Staff Report, at 3; HHS OIG, *CMS Did Not Administer and Manage Strategic Communications Services Contracts in Accordance with Federal Requirements*, A-12-19-20003 (July 15, 2020), *available at* https://oig.hhs.gov/oas/reports/region12/121920003.asp?utm_source=website&utm_medium=web&utm_campaign=cms-contracting-report-07-16-2020 (last visited Aug. 7, 2023) (OIG Report).

[8] Staff Report, at 49–51.

Proposal, noting that it described a plan to highlight the leadership and accomplishments of the then-CMS Administrator through targeted media opportunities.[9] Further, the Staff Report asserts that activities performed by CMS contractors emphasized the importance of the then-CMS Administrator in a manner unrelated to official CMS functions.[10] Lastly, the Staff Report suggests that CMS contractors promoted the then-CMS Administrator's public profile and personal brand.[11]

With respect to the *Executive Visibility Proposal*, HHS told us that it did not procure this document, it was not provided to HHS as a deliverable under any of its contracts or task orders, and HHS was never invoiced for this document.[12] Therefore, because HHS did not obligate appropriations for the *Executive Visibility Proposal*, we do not address it in this decision. Further, HHS did not have records of the communications described in the Staff Report for us to evaluate. As confirmed with congressional staff, this decision addresses whether the communication services that CMS contracted for, as evidenced in particular task orders' statements of work (SOW), violated appropriations laws.

This decision addresses whether CMS violated the purpose statute by (1) contracting for services that were impermissible personal expenses; (2) requiring contractors to produce prohibited publicity or propaganda; or (3) requiring contractors to serve as prohibited publicity experts.[13] We also address whether CMS violated the Antideficiency Act. We conclude that CMS did not violate the purpose statute because (1) the communication services were logically related to the purpose of CMS's appropriation and were not for personal expenses; (2) the communication services did not constitute prohibited publicity or propaganda; and (3) the contractors did not serve as prohibited publicity experts. Further, CMS obligated the proper appropriation account for the contracted services. We conclude that CMS did not violate the Antideficiency Act because it did not incur obligations in excess of amounts available.

BACKGROUND

In 2017, CMS established new goals and initiatives for the agency.[14] In connection with these efforts, CMS worked to develop a new communications strategy to "proactively communicate and gain feedback from a broad range of stakeholders."[15] In addition to

[9] *Id*. at 29, 49.

[10] *Id*. at 52.

[11] *Id*. at 52–53.

[12] Supplementary Agency Response, at 6–8.

[13] These issues were raised in the Request Letter. Request Letter, at 2.

[14] OIG Report, Appendix G, at 4.

[15] *Id*.

the in-house capacity within CMS's Office of Communications, CMS contracted for assistance with the development and execution of the new communications strategy.[16]

CMS used contracted services under four task orders: a September 2015 task order and December 2017 modification to the task order (TO 1); a July 2016 task order (TO 2); a June 2017 task order (TO 3)[17]; and an August 2018 task order (TO 4) (collectively, the task orders).[18]

Each task order had its own SOW setting forth CMS's requirements. For example, the 2015 SOW for TO 1 required the contractor to develop a multimedia campaign targeting Medicare beneficiaries to raise awareness through avenues such as social media. The 2017 modifications to the SOW required a strategic communications plan to support new initiatives. The contractor was required to reconcile feedback from a listening session tour and form a plan to communicate key findings with beneficiaries and other stakeholders, and support the CMS Administrator in implementing the communications plan.

The SOW for TO 2 required the contractor to conduct public outreach about the *HealthCare.gov* website, with the target audience being the healthy and young population. The contractor was required to emphasize paid media and digital strategies.

The SOW for TO 3 required strategic communication plans in support of HHS's major announcements, in light of new administration initiatives. The requirement included development of plans for HHS to coordinate with key stakeholders, such as patients and insurers, media groups, and other government entities.

The SOW for TO 4 required the contractor to develop and implement a strategic communications plan to support CMS's overall goals, in light of new initiatives from HHS and CMS. The requirement included a plan to ensure accurate and reliable information about CMS and its programs and services, with the target audience being Medicare beneficiaries 65 years of age or older. Additionally, the SOW required the contractor to translate complex healthcare policy into messages that resonated with key audiences.

The contracted work was performed on a time and materials (T&M) basis. This means that services were provided based on direct labor hours at specified fixed hourly rates

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[16] *Id*.

[17] The June 2017 award was a modification to an existing task order. Only the June 2017 award is relevant to this decision.

[18] *See* Agency Response, at 2, attachments (TO 1 and TO 4); Supplemental Agency Response, at 3–4, attachments (TO 2 and TO 3).

and the actual cost for materials.[19] CMS obligated its 2015, 2016, 2017, and 2018 Program Management appropriations for the task orders.[20]

DISCUSSION

At issue in this decision is whether CMS violated the purpose statute, 31 U.S.C. § 1301(a), and the Antideficiency Act, 31 U.S.C. § 1341, when it obligated appropriations for the task orders for communication services. For the reasons explained below, we conclude that CMS did not violate the purpose statute or the Antideficiency Act.

Purpose Statute

The purpose statute provides that appropriations are available only for the purposes for which they were made. When an appropriation does not plainly authorize an expense, we apply a three-step analysis to determine whether the expense is an authorized use of the appropriation. First, the expense must bear a logical relationship to the appropriation and not be an impermissible personal expense. Second, the expense must not be prohibited by law. Third, the expense must not be otherwise provided for.[21]

(1) Reasonable and Logical Relationship Between Communication Services and Program Management Appropriation

CMS's Program Management appropriation does not explicitly mention communications. The Program Management appropriation is available for, among other things, carrying out parts of the Social Security Act and CMS's other responsibilities.[22] For example, the appropriation is available to carry out titles XVIII, XIX, and XXI of the

[19] Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.601(b).

[20] Supplementary Agency Response, at 8; Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477–2478 (Dec. 16, 2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. H, title II, 129 Stat. 2242, 2611 (Dec. 18, 2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. H, title II, 131 Stat. 135, 530 (May 5, 2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. H, title II, 132 Stat. 348, 726–727 (Mar. 23, 2018).

[21] B-333691, Feb. 8, 2022; B-331419, July 1, 2021.

[22] Pub. L. No. 113-235, 128 Stat. at 2477–2478; Pub. L. No. 114-113, 129 Stat. at 2611; Pub. L. No. 115-31, 131 Stat. at 530; Pub. L. No. 115-141, 132 Stat. at 726–727. We previously reported that CMS's Program Management account "supports the agency's administration of programs under its management." GAO, *Patient Protection and Affordable Care Act: Status of CMS Efforts to Establish Federally Facilitated Health Insurance Exchanges*, GAO-13-601 (Washington, D.C., June 2013), at 12, n. 23. The Program Management account was used to fund contracts and task orders to support establishment of the federally facilitated exchanges. *Id*.

Social Security Act—which establish the Medicare and Medicaid Programs, and the Children's Health Insurance Program (CHIP)[23]—and to carry out "other responsibilities," such as the *HealthCare.gov* website.[24]

Here, the task orders require the contractors to facilitate communication regarding CMS programs, activities, and initiatives, including Medicare, Medicaid, and the *HealthCare.gov* website.[25] Communicating about these programs and activities is part of how CMS carries out the programs and activities, because agencies are responsible for informing the public about their programs and activities.[26] Therefore, the costs of communicating about CMS programs and activities is logically related to the purpose of the appropriation—to carry out CMS programs and responsibilities.

Next, we must consider whether the communication services called for under the task orders constituted an official expense of CMS as opposed to a personal expense. A personal expense is something that generally satisfies a personal need of an agency employee, such as food, clothing, or commuting. While appropriations are available to cover the costs of official agency expenses, appropriations are not available for personal expenses unless there is specific statutory authority or where the expense

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[23] 42 U.S.C. Ch. 7, subch. XVIII, subch. XIX, subch. XXI; *see also Brief Summaries of Medicare & Medicaid Title XVII and Title XIX of The Social Security Act*, Office of the Actuary, CMS, HHS (Sept. 30, 2022), at 3, 25, *available at* https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/medicareprogramratesstats/summarymedicaremedicaid (last visited Aug. 9, 2023).

[24] *See*, *e.g.*, Pub. L. No. 115-141, 132 Stat. at 726. CMS is responsible for the *HealthCare.gov* website, https://www.healthcare.gov (last visited Aug. 9, 2023). B-329199, Sept. 25, 2018, n.13.

[25] TO 1, 2015 SOW, at 1; TO 1, 2017 Modified SOW, at 1; TO 2, SOW, at 1; TO 3, SOW, at 2; TO 4, SOW, at 1, 4.

[26] B-319834, Sept. 9, 2010. Indeed, CMS has an Office of Communications and consistently requests Program Management appropriations to cover costs such as communications. CMS, *About CMS, CMS Leadership, Office of Communications*, *available at* https://www.cms.gov/About-CMS/Agency-Information/CMSLeadership/Office_OC (last visited Aug. 9, 2023); HHS, CMS, *Justification of Estimates for Appropriations Committees, Fiscal Year 2017*, at 6, *available at* https://www.cms.gov/about-cms/agency-information/performancebudget/prior_years_performance_and_budget_submissions (last visited Aug. 29, 2023); HHS, CMS, *Justification of Estimates for Appropriations Committees, Fiscal Year 2018*, at 26, *available at* https://www.cms.gov/about-cms/agency-information/performancebudget/prior_years_performance_and_budget_submissions (last visited Aug. 29, 2023).

primarily benefits the agency.[27] For example, we concluded that the Privacy and Civil Liberties Oversight Board (PCLOB) could not reimburse an employee for the costs of their commute because commuting is a personal expense.[28] Congress has authorized agencies to pay for an employee's commute only when they use public transportation, not when they use a taxi or rideshare service as was the case with the PCLOB employee.[29]

Here, CMS contracted for communication services to help it communicate with the public about programs that the agency is statutorily required to administer. The contractors were tasked with helping CMS reach target audiences and using various mediums, such as traditional media and social media, to explain its programs.[30] These services do not satisfy any personal need of CMS employees, but rather satisfy the agency's responsibility to inform the public about its programs. The fact that a contractor was tasked with helping the then-CMS Administrator communicate with beneficiaries and stakeholders on new initiatives[31] does not make the expense personal to the Administrator because the Administrator's official work duties include these types of communication activities. Furthermore, policy-making officials traditionally use government resources to explain and defend their policies.[32] Therefore, the contracted communication services were not personal expenses. We conclude step one of the purpose statute analysis is satisfied.

(2) Not Prohibited By Law: Section 718 and Section 3107

Even when an expense is logically related to the appropriation, the expense is not permissible if it is prohibited by law. Section 718 of the annual Financial Services and General Government Appropriations Act prohibits agencies from using appropriations "directly or indirectly, including by private contractor, for publicity or propaganda purposes" not authorized by Congress (Section 718).[33] Section 718 applied to CMS's Program Management appropriations obligated on the task orders.[34] In addition, section 3107 of title 5 of the United States Code, a permanent restriction, prohibits the

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[27] B-329479, Dec. 22, 2020; B-302993, June 25, 2004.

[28] B-332633, June 3, 2021.

[29] *Id*.

[30] *See*, *for example,* TO 2, SOW, at 2–3; TO 4, SOW, at 3.

[31] TO 1, 2017 Modified SOW, at 13.

[32] B-284226.2, Aug. 17, 2000; B-319834, Sept. 9, 2010.

[33] *See*, *e.g.*, Pub. L. No. 113-235, § 718, div. E, title VII, 128 Stat. at 2382; Supplementary Agency Response, at 6.

[34] Pub. L. No. 113-235, § 718, div. E, title VII, 128 Stat. at 2382; Pub. L. No. 114-113, § 718, div. E, title VII, 129 Stat. at 2477; Pub. L. No. 115-31, § 718, div. E, title VII, 131 Stat. at 381; Pub. L. No. 115-141, § 718, div. E, title VII, 132 Stat. at 591.

use of appropriations for "publicity experts" unless specifically appropriated for that purpose (Section 3107). We address each prohibition in turn.

(a) Section 718

Section 718 prohibits three forms of communications: those that are purely partisan, self-aggrandizing, or covert.[35] When we consider agency communications under Section 718, we are also mindful that it is important for agencies to be transparent with the public and that "legitimate objectives [are] served by a robust exchange of information between the government and the public."[36]

(i) Purely Partisan

Purely partisan communications are those that have no connection to an agency's official duties and are completely political in nature.[37] Communications are not purely partisan simply because they have some political content.[38] Agencies have a responsibility to explain their policies to the public and may defend those policies, even when the communications have some political content or express a certain viewpoint.[39] For example, we previously concluded that HHS's websites, social media posts, and videos on the then-administration's viewpoint on health care policy were not purely partisan because the communications concerned health care—one of HHS's official duties—and were not designed to aid a particular party or candidate and were not completely political in nature.[40] Here, the SOW for each task order is focused on informing the public about CMS's official duties, such as the Medicare Program and *HealthCare.gov* website.[41] Providing information to the public concerning official responsibilities, even when it expresses a certain viewpoint, is not purely partisan. Therefore, we conclude that the communication services called for under the task orders were not purely partisan communications.

(ii) Self-Aggrandizing

Self-aggrandizing communications are those that emphasize the importance of the agency or an activity.[42] In two prior decisions, the respective agencies engaged in

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[35] B-329199, Sept. 25, 2018.

[36] B-319834, Sept. 9, 2010, at 4–5; *see also* B-319075, Apr. 23, 2010, at 4, B-284226.2, Aug. 17, 2000, at 5.

[37] B-329199, Sept. 25, 2018.

[38] *Id*.

[39] *Id*.

[40] *Id*.; B-319075; Apr. 23, 2010.

[41] *See*, *for example*, TO 1, 2015 SOW, at 1; TO 2, SOW, at 1.

[42] B-329199, Sept. 25, 2018.

communications with the public in order to inform the public about recent changes to the Medicaid Program, in one case involving an HHS flyer and advertisements,[43] and in another involving an Environmental Protection Agency (EPA) social media post, to promote the significance and benefits of a new clean water rule.[44] In both decisions, we concluded that the communications were not self-aggrandizing because they were not praising the agency or attributing the benefits to the agency or any agency official.[45] Here, the communications called for under the task orders are similar to the communications at issue in our prior decisions on HHS and EPA. The contractors here were tasked with informing the public about CMS programs and new CMS initiatives.[46] There is no indication in the task orders that the contractors were to praise CMS or HHS, or attribute program benefits to the agency or agency officials. Therefore, we conclude that the communication services called for under the task orders were not self-aggrandizing communications.

(iii) Covert

We turn next to covert communications, which are those that conceal the agency's role in creating the material from the target audience.[47] For example, in our prior decision regarding an EPA social media post, the post did not identify EPA as the author of the message.[48] We concluded that the target audience would not be able to ascertain that EPA was the author and, therefore, the post was a prohibited covert communication.[49] In another decision, we concluded that the Department of Education (Education) engaged in covert communications when it required a contractor to regularly comment on the No Child Left Behind Act (NCLBA) without ensuring that the contractor disclosed it was acting on behalf of Education.[50] There, the contractor did not regularly, if at all, disclose to the audience that it was acting on behalf of Education when it communicated about NCLBA. By contrast, where HHS made changes to the *HHS.gov* website and *HealthCare.gov* website, and posted on its official social media accounts, we concluded the communications were clearly identifiable as agency communications and made through official agency communication channels and, therefore, were not covert.[51]

Here, the SOW for TO 1 and TO 4 included provisions to identify HHS as the source of communications. Specifically, the contractor could not publicly disseminate any

[43] B-302504, Mar. 10, 2004.

[44] B-326944, Dec. 14, 2015.

[45] B-302504, Mar. 10, 2004; B-326944, Dec. 14, 2015.

[46] *See*, *for example*, TO 4, SOW, at 1.

[47] B-329199, Sept. 25, 2018.

[48] B-326944, Dec. 14, 2015.

[49] *Id*.

[50] B-305368, Sept. 30, 2005.

[51] B-329199, Sept. 25, 2018.

communications until HHS cleared the material and the contractor was required to identify HHS as the source of the material and place the HHS logo prominently on the material.[52] Therefore, CMS took steps in TO 1 and TO 4 to ensure the target audience would know that HHS or CMS was the source of communications. The SOW provisions in TO 1 and TO 4 are in contrast to our prior decision on EPA, where the social media post was drafted to sound like it was the statement of a supporter, and our prior decision on Education, where the department made no effort to ensure the contractor disclosed Education as the source of the communications.[53]

Under TO 3, the contractor's requirement was to deliver planning documents that HHS would use to communicate about new initiatives, and there is no evidence that the contractor was required to disseminate any communications or material to the public.[54] Therefore, the services called for under TO 3 do not implicate the prohibition on covert communications.

Finally, for TO 2, the contractor was required to coordinate with CMS throughout performance, and obtain CMS input and approval during development and implementation of all public communications.[55] While TO 2 did not specifically require placement of the HHS logo on materials, we believe the requirement for CMS approval of contractor-produced material provided opportunity for CMS to ensure it was identified as the source of communications. Our prior decision on Education is distinguishable because in that case, the contractor carried out its work with little to no coordination with Education and the contractor acknowledged that it, in fact, communicated with the public to promote NCLBA on behalf of Education without disclosing that Education sponsored the commentary. Here, TO 2 required continuous input and approval of CMS on public communications, and we do not have evidence that a covert communication was actually produced by the contractor or CMS. We conclude that CMS did not contract for covert communications.

In sum, the task orders did not require contractors to produce communications that were purely partisan, self-aggrandizing, or covert. Therefore, we conclude that the communication services were not prohibited by Section 718.

(b) Section 3107

Section 3107 of title 5 of the U.S. Code prohibits the use of appropriations "to pay a publicity expert unless specifically appropriated for that purpose." CMS does not have an appropriation specifically available for publicity experts and, therefore, CMS's funds

[52] TO 1, 2015 SOW, at 5; TO 1, 2017 Modified SOW, at 5; TO 4, SOW, at 3.

[53] B-326944, Dec. 14, 2015; B-305368, Sept. 30, 2005.

[54] *See* TO 3, SOW, at 2–3.

[55] TO 2, SOW, at 3, 6, 14.

are not available for this purpose.[56] CMS asserts that the task orders did not require contractors to serve as publicity experts within the meaning of Section 3107.[57] We agree with CMS.

Section 3107 prohibits an agency from paying an individual to "extol or to advertise" the agency or individuals within the agency.[58] For example, when the Forest Service used a contractor to help produce a brochure on forest fires, we concluded that the contractor was not acting as a publicity expert under Section 3107 because the contractor's role was to help the agency more clearly communicate its policies to the public.[59] Here, CMS used contractors to help its Office of Communications communicate about new goals and initiatives related to health care.[60] The task orders did not require the contractors to extol or advertise HHS, CMS, or any individual. Helping the then-CMS Administrator or other CMS spokespeople be prepared to engage with the public about agency programs and initiatives does not extol or advertise the agency or the spokespeople, but rather is part of legitimate CMS activity. We conclude that the communication services contractors were not tasked with serving as prohibited publicity experts under Section 3107.

(3) Not Otherwise Provided For

Having concluded that the communication services here were logically related to CMS's Program Management appropriation, and that the services were not prohibited by law, we now turn to the final step in the purpose analysis: determining whether an appropriation other than CMS's Program Management account was the proper account to charge for CMS's communication services task orders. The general rule is that "a more specific appropriation prevails over a general appropriation, including where another agency has the more specific appropriation."[61] CMS has four appropriation accounts: Grants to States for Medicaid, Payments to Health Care Trust Funds, Health Care Fraud and Abuse Control Account, and Program Management.[62] None of the other accounts are more specific than the Program Management account with respect to communication services. We are not aware of any other agency having a more specific appropriation that would cover costs of communicating about CMS programs and activities. Therefore, as no other account provides for this activity, CMS's Program

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[56] Supplementary Response, at 4–5.

[57] *Id*. at 5.

[58] B-302992, Sept. 10, 2004, at 12; B-305349, Dec. 20, 2005, at 6.

[59] B-302992, Sept. 10, 2004.

[60] OIG Report, Appendix G, at 4.

[61] B-330862, Sept. 5, 2019, at 13.

[62] Pub. L. No. 113-235, 128 Stat. at 2477–2478; Pub. L. No. 114-113, 129 Stat. at 2610–2611; Pub. L. No. 115-31, 131 Stat. at 529–530; Pub. L. No. 115-141, 132 Stat. at 726–727.

Management appropriation was the appropriate account to use for the communication services task orders. We conclude that step three is satisfied. In sum, CMS did not violate the purpose statute through the communication services called for under the task orders.

Antideficiency Act

The Antideficiency Act, 31 U.S.C. § 1341, prohibits obligations in excess of amounts available. Using appropriations for a purpose prohibited by law also violates the Antideficiency Act. For example, we concluded that EPA's use of social media constituted covert propaganda in violation of Section 718.[63] Because appropriations are not available for covert propaganda, EPA did not have any funding available for this purpose, and EPA's obligations therefore exceeded amounts available. By exceeding its available appropriations, EPA violated the Antideficiency Act.[64]

Here, as explained above, we concluded that CMS used its appropriations for permissible communication services. There is no evidence that CMS obligated appropriations in excess of its available funding. Therefore, we conclude that CMS did not violate the Antideficiency Act.

CONCLUSION

CMS did not violate the purpose statute through the task orders for communication services. The task orders did not call for services that were impermissible personal expenses; the task orders did not require production of publicity or propaganda prohibited by Section 718; and the task orders did not require contractors to serve as publicity experts prohibited by Section 3107. Further, CMS's Program Management appropriation was the appropriate account to charge for the communication services. CMS's obligations under the task orders did not violate the Antideficiency Act because obligations were not in excess of amounts available.

Edda Emmanuelli Perez

Edda Emmanuelli Perez
General Counsel

[63] B-326944, Dec. 14, 2015.

[64] *Id*.

Tracking the Funds: Community Project Funding & Congressionally Directed Spending

Congressionally Directed Spending/Community Project Funding

In 2021, the Senate and House Appropriations Committees adopted a process inviting Members of Congress to request funding for specific projects. The requests were reviewed by the Appropriations subcommittees of jurisdiction. Approved requests were first included in the Consolidated Appropriations Act, 2022, which designated $9.1 billion for 4,963 projects at the request of Members of Congress. The act included provisions designating amounts of funds for particular recipients, such as local governments and nonprofit organizations, to use for these specific projects. These provisions are called "Congressionally Directed Spending" in the U.S. Senate and "Community Project Funding" in the House of Representatives. Congressionally Directed Spending/Community Project Funding (CDS/CPF) provisions have been included in subsequent appropriations acts since.

GAO's Tracking the Funds webpage contains our growing body of work in this area, including:

- Tracking the Funds: Specific Fiscal Year 2022 Provisions for Federal Agencies, GAO-22-105467 (Washington, D.C.: Sept. 12, 2022)
- Tracking the Funds: Agencies Have Begun Executing FY 2022 Community Project Funding/Congressionally Directed Spending, GAO-23-106318 (Washington, D.C.: Sept. 28, 2023)
- Tracking the Funds: Specific FY 2023 Provisions for Federal Agencies, GAO-23-106561 (Washington, D.C.: Sept. 28, 2023)
- An interactive map and chart that allows the user to track the funds by agency, location, state, and other options, for FYs 2022 and 2023.

Many CDS/CPF recipients will receive the funds through federal grants. As such, we are also including the legal appendix entitled "Obligational Events for Grants" from GAO-22-105467 here in the forum materials. We are highlighting the appendix as it provides an overview of unique obligation issues that an agency might consider when implementing CDS/CPF provisions.

Appendix VI: Obligational Events for Grants

An agency may record an obligation only when a proper event, or obligational event, occurs.[19] For grants, the time when an obligational event occurs varies depending on the nature of the grant.

In some situations, the obligational event occurs when the agency takes discretionary action to award a grant. The evidence of this obligational event may take the form of a letter of commitment or an agency's written approval of a grant application. In such cases, the obligational event arises only after the agency affirmatively takes action to award the grant.

For other grants, the obligational event may occur based on actions outside the agency's control. For example, in some circumstances the obligational event occurs immediately when the appropriation for the grant becomes law. When this occurs, the agency must still record an accounting charge against the appropriation in its obligational records. However, this charge is a reflection of—not the creation of—the obligation and usually is generated subsequent to the time the actual obligation arose. When an obligational event occurs for a grant depends on the underlying legal authorities for the specific grant at issue.

The timing has practical implications for both agencies and grantees. If the obligational event occurs when the agency takes discretionary action to award a grant, the agency must take this action before the appropriation expires. Otherwise, the appropriation will no longer be available to award funds. In contrast, if the obligational event occurs immediately when the appropriation becomes law, the amount remains obligated even after the appropriation's period of availability for new obligations expires. The agency would thus remain legally bound to pay the amount to the grantee.

If an obligational event arises when the appropriation for the grant is enacted, the appropriation's period of availability for the agency to incur new obligations may reflect Congress's expectations for the general time frames for execution of the larger appropriation from which the grant is derived. An appropriation's period of availability will also affect the manner in which the agency carries out the appropriation, as the agency must ensure it takes discretionary actions to award contracts, employ salaried workers, and award discretionary grants before the appropriation expires. However, if an obligational event arises when the appropriation for the grant is enacted, a recipient will not be barred from receiving grant amounts solely because the appropriation is no longer available for new obligations.

For example, a law established a grant program and set a formula that determined the amount due to each recipient. Before a grantee could receive a payment, it needed to file with the administering agency a certification that it met particular requirements. We concluded that the grant amounts were obligated upon enactment of the appropriation for the grant program. Accordingly, a grantee could receive its payment even if it filed the necessary certification after the appropriation was no longer available for new obligations.[20]

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[19]An obligational event is the time at which an agency incurs an obligation. In general, an obligation is a definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received. For further discussion of the obligation of appropriations, see GAO, *Principles of Federal Appropriations Law*, 3rd ed., 2006 rev., ch. 7, GAO-06-382SP (Washington, D.C.: Feb. 2006).

[20]GAO, *Election Assistance Commission—Obligation of Requirements Payments*, B-316915 (Washington, D.C.: Sept. 25, 2008).

We have not determined when the obligational event would arise for each specific grant action that agencies may take for funds designated through Community Project Funding/Congressionally Directed Spending provisions in the Consolidated Appropriations Act, 2022. However, the point at which the obligational event arises will affect the time period during which agencies must act to administer a particular grant. Where an obligational event arose on the enactment of the Consolidated Appropriations Act, 2022, the appropriation's period of availability for new obligations may not impose a legally binding deadline on when the agency must take action to provide the amounts to a grantee for its use.

In addition, some of the amounts appropriated for Community Project Funding/Congressionally Directed Spending are available without fiscal year limitation. These amounts remain available, with no fixed time limit, to agencies to incur new obligations. In these cases, an agency might face no legally binding deadline to administer grants for which the obligational event arose at the time of appropriation. Moreover, it also may face no legally binding deadline to administer funding provided through other mechanisms, such as the awarding of a contract or the payment of salaries to federal employees.

Appendix VII: GAO Contacts and Staff Acknowledgments

GAO Contacts

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Resources

https://www.gao.gov/legal/appropriations-law/forum
• Provides an overview of GAO's annual appropriations law forum and includes copies of forum materials for this year and prior years.

https://www.gao.gov/legal/appropriations-law/red-book
• Provides links to Chapters 1-3 of the 4th Edition and Chapters 5-15 of the 3rd Edition of the Red Book—GAO's multi-volume treatise concerning federal fiscal law. For questions about our case law, the Red Book, or federal fiscal law more generally, please e-mail redbook@gao.gov.

https://www.gao.gov/legal/appropriations-law/resources
• Provides an overview of the Antideficiency Act, agencies' reporting responsibilities, and information about how to submit reports to GAO. In addition, provides links to GAO's Antideficiency Act Reports Compilation through fiscal year 2023. For questions about the Antideficiency Act or to submit Antideficiency Act reports to GAO, please e-mail AntideficiencyActRep@gao.gov.

https://www.gao.gov/legal/appropriations-law/appropriations-law-training
• Provides an overview and registration instructions for GAO's virtual and in-person Principles of Appropriations Law (PAL) course, which is taught by experienced GAO appropriations law attorneys. For questions about the PAL course, please e-mail PALCourse@gao.gov.

https://www.gao.gov/products/gao-05-734sp
• Provides a link to a GAO's *A Glossary of Terms Used in the Federal Budget Process* (Budget Glossary), which provides standard terms, definitions, and classifications for the government's fiscal, budget, and program information. To provide feedback on the Budget Glossary, please e-mail budgetglossary@gao.gov.

https://www.gao.gov/legal/federal-vacancies-reform-act
• Provides an overview of the Federal Vacancies Reform Act of 1998, including a description of GAO's responsibilities under the act and information about how agencies can report information required by the act. In addition, provides links to GAO decisions regarding compliance with the act and time violation letters, and a search tool to find information about federal vacancies for the current administration and prior adminsitrations.

https://www.gao.gov/legal/other-legal-work/congressional-review-act
• Provides an overview of the Congressional Review Act, including a description of GAO's responsibilities under the act and information about how agencies can report information required by the act. In addition, provides links to GAO's major rule reports and GAO decisions regarding compliance with the act as well as access to a search database of rules and major rule reports.

Contributors

The 2024 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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