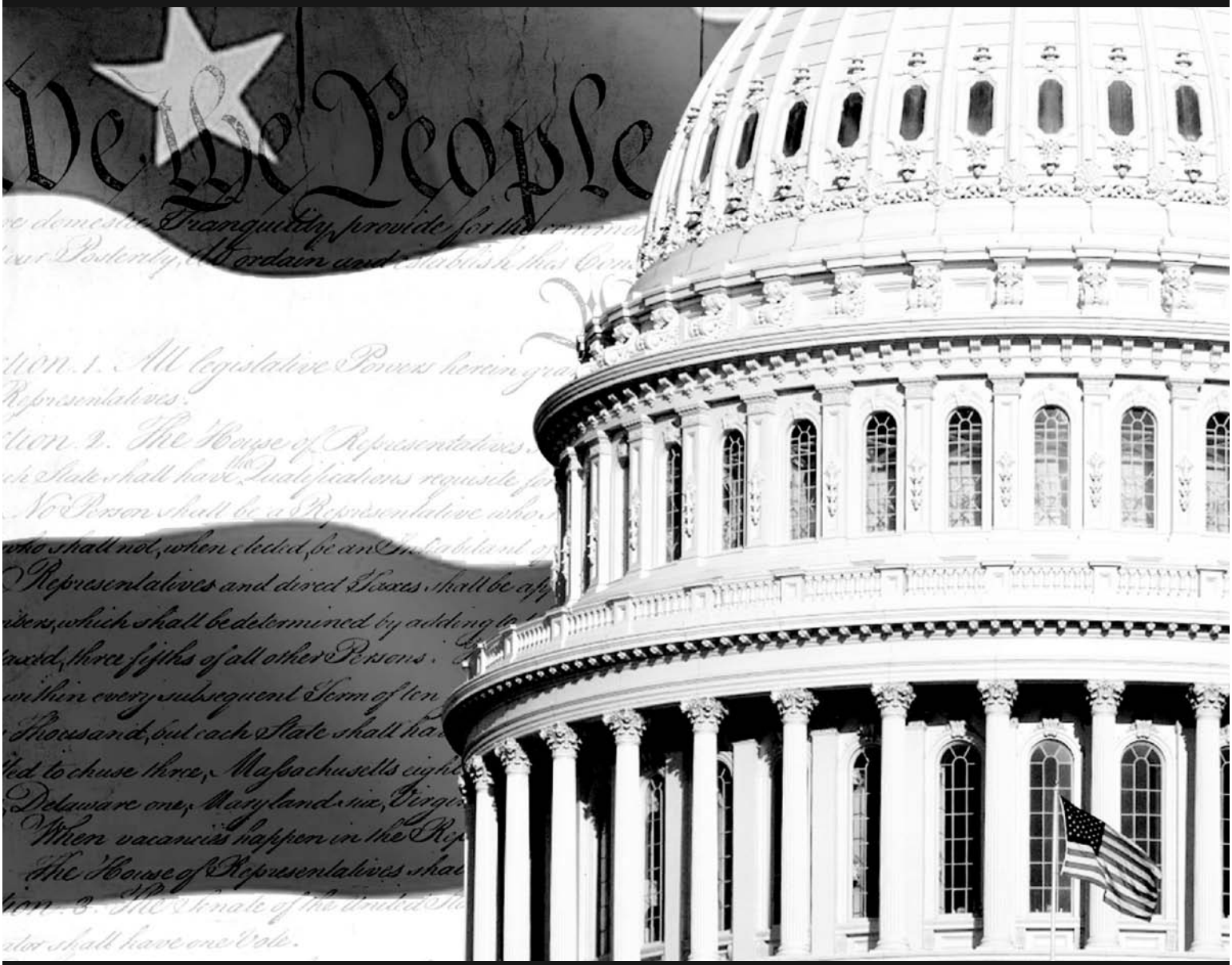
2011 APPROPRIATIONS LAW FORUM

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law …"



GAO
Accountability * Integrity * Reliability

2011 Appropriations Law Forum
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APPROPRIATIONS LAW FORUM 2011
YEAR-IN-REVIEW

I. AVAILABILITY OF APPROPRIATIONS: PURPOSE

Statutory Construction

- *U.S. Secret Service—Statutory Restriction on Availability of Funds Involving Presidential Candidate Nominee Protection*, B-319009, Apr. 27, 2010

  This opinion highlights the legal effect of incorporation by reference into an appropriations act of itemized spending limits for programs, projects and activities (PPAs) appearing in an explanatory statement.

  In fiscal year 2009, the United States Secret Service (USSS) received a lump sum fiscal year appropriation for salaries and expenses as part of that year's Department of Homeland Security appropriations act. Section 503(b) of the act imposed a reprogramming notification requirement on USSS. The language states:

  > "None of the funds provided by this Act . . . shall be available for obligation or expenditure for programs, projects, or activities through a reprogramming of funds in excess of $5,000,000 or 10 percent, whichever is less, that: (1) augments existing programs, projects, or activities; . . . that would result in a change in existing programs, projects, or activities as approved by the Congress, unless the Committees on Appropriations of the Senate and the House of Representatives are notified 15 days in advance of such reprogramming of funds."

  Section 503(b) restricts the availability of funds for obligation by means of PPA reprogramming until proper notice is provided. Itemized amounts designated for PPAs, including an amount for the Presidential Candidate Nominee Protection PPA, were found in the explanatory statement of the accompanying conference report. Section 503(e) incorporated the itemized amounts in statute, providing that "such dollar amounts specified in this Act and accompanying explanatory statement shall be subject to the conditions and requirements . . . of this section."

  As a result, amounts set forth in the explanatory statement were incorporated by reference in the appropriations act, creating a fixed amount for section 503's reprogramming reporting requirements and the Antideficiency Act.

- *Election Assistance Commission—Obligation of Fiscal Year 2004 Requirements Payments Appropriation*, B-318831, Apr. 28, 2010

  In this decision, GAO reiterated that agencies must comply with the plain meaning in their appropriations. Here, GAO concluded that the Election Assistance Commission (EAC) violated the purpose statute, 31 U.S.C. § 1301(a), when it obligated funds for certain grant expenditures to an appropriation that was available only for requirements payments to the states. EAC justified its use of the requirements payment appropriation based on language in a conference report and the Office of Management and Budget (OMB) apportionment. However, the plain language of the appropriation was clear that the appropriation was available only for requirements payments. GAO explained that an agency violates the law if it obligates funds without proper budget authority even if the agency genuinely acts in reliance on an OMB apportionment. OMB itself advises agencies not to use its apportionments to determine the legality of using funds for a given purpose.

  The grant expenditures should have been obligated to EAC's Salaries and Expenses appropriation, which was generally available for necessary expenses to carry out the Help America Vote Act, including grants. GAO explained that EAC should adjust its accounts consistent with the account closing law. If sufficient funds were unavailable, EAC should report an Antideficiency Act violation consistent with 31 U.S.C. § 1517. Alternatively, GAO suggested, EAC could request congressional ratification of its fiscal year 2004 actions. On September 29, 2010, EAC reported an Antideficiency Act violation to Congress and the President, and provided a copy to the Comptroller General. EAC noted that the agency had only been in existence for seven months at the time of the violation and relied on the General Services Administration for financial services support. EAC also was operating without a Chief Financial Officer, an Inspector General, a budget director, or federally-experienced financial staff. In its report, EAC stated that it was unable to correct the violation, but has taken steps to ensure the violation does not recur.

- *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part I*, B-319488, May 21, 2010

  In this opinion, GAO relied on the common, ordinary meaning of the words in a statute in concluding that the National Aeronautics and Space Administration (NASA) did not violate a statutory prohibition on using funds to "create or initiate" a new program, project or activity (PPA).

  The starting point of the analysis was an examination of the statutory language. The words "create" and "initiate" have no particular legal meaning, and the content of the prohibition did not indicate their definitions. In the absence of indications to the contrary, Congress is deemed to use words in their common, ordinary sense. One measure of the meaning of words is a standard dictionary, which GAO used to define "create" and "initiate."

According to *The New Oxford American Dictionary*, "create" means "to bring something into existence" while "initiate" means "cause a process or action to begin." Accordingly, GAO determined that Congress prohibited NASA from using its Exploration appropriation to bring into being a new PPA.

NASA created study teams whose activities centered on initial planning related to proposals in the President's budget request. The teams held internal planning discussions and developed documents for OMB and for the Office of Science and Technology Policy. These documents contained preliminary plans for new programs and for items proposed in the President's budget request. Some teams issued public requests for information to gather input from academia and industry for use in further planning activities, and two teams set up planning offices.

GAO examined NASA's activities in light of the common meanings of the words "create" and "initiate" and concluded that NASA did not use its Exploration appropriation to bring into being a new PPA. All the activities at issue focused on planning; the teams did not create any new programs, set up new program offices, or hire or permanently reassign any staff. The teams did not award contracts or bind NASA to taking any future course of action. In addition, the activities were in response to requests for information from OMB and the Office of Science and Technology Policy. By law, the President must formulate a budget request, and agencies must develop appropriation requests as part of the budget process. 31 U.S.C. §§ 1105, 1108(b)(1). Planning activities are an essential part of the budget process. Thus, the prohibition against using funds to create or initiate a new PPA does not preclude the use of funds to conduct planning activities.

- *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*, B-320091, July 23, 2010

  In a companion opinion to *NASA, Part I*, GAO determined that based on the common meaning of words contained in the applicable statute, the National Aeronautics and Space Administration (NASA) did not violate a statutory prohibition on using funds to terminate or eliminate a program, project, or activity (PPA). Congress prohibited NASA from using its Exploration appropriations "for the termination or elimination of any program, project or activity of the architecture for the Constellation program." According to *The New Oxford American Dictionary*, the common meaning of "terminate" is "bring to an end," while "eliminate" means "completely get rid of (something)." Thus, the statute prohibited NASA from using the Exploration appropriations to bring any Constellation PPA to an end, or to completely remove or get rid of any Constellation PPA.

  NASA financial data showed that NASA continued to allocate funds across all Constellation PPAs in amounts consistent with the allocations provided in congressional committee reports and NASA's public budget documents. In

continuing to obligate funds for all the various Constellation PPAs, NASA neither brought to an end, nor completely eliminated, any Constellation PPA. Although NASA announced shifts in priority for various Constellation expenditures, these shifts did not in themselves amount to a termination or elimination of a PPA. NASA had discretion in how it carried out the Constellation program consistent with Congress's statutory direction. Because NASA continued to obligate funds to carry out all of the Constellation PPAs, it did not violate the statutory prohibition.

- *Consumer Product Safety Commission—Period of Availability and Permissible Uses of Grant Program Appropriations*, B-319734, July 26, 2010

  In determining the period of availability of the Consumer Product Safety Commission's (CPSC) appropriations, GAO weighed the language in an authorization act and the language in an appropriation act.

  As a general matter, all appropriations in annual acts are construed to be available for obligation only during the fiscal year for which they were appropriated, unless the act expressly provides otherwise. In CPSC's case, the language of the fiscal year 2009 appropriation that funded CPSC's grant program to improve pool and spa safety differed from the language that Congress previously used to authorize that appropriation. The 2007 Virginia Graeme Baker Pool and Spa Safety Act (Safety Act) authorized to be appropriated, for each of fiscal years 2009 and 2010, $2 million to be available until expended with any amounts remaining at the end of fiscal year 2010 creditable to CPSC's enforcement account. However, in CPSC's fiscal year 2009 appropriations for this grant program, Congress actually appropriated only $2 million and specified that the funds were available until the end of fiscal year 2010. Here, the appropriations act, enacted subsequent to the Safety Act authorizing the appropriation, expressly made a lesser amount available for a shorter period. Thus the appropriations act controls.

  GAO also noted that the fiscal year 2009 appropriations act states that the $2 million appropriation is available to implement the grant program, "as provided by" the Safety Act grant program provision. GAO read this clause as more specifically defining the purpose for which the $2 million is available. A general cross-reference like this in an annual appropriations act is insufficient to make the appropriation available under the terms of the act authorizing the appropriation. An act that authorizes appropriations does not appropriate any funds to any agency.

- *NeighborWorks America—Availability of Appropriations for Grants to Affordable Housing Centers of America*, B-320329, Sept. 29, 2010

  In this decision, GAO stressed that words in an appropriations provision are construed in accordance with their plain meaning absent a specific statutory definition. NeighborWorks America, a federally-chartered nonprofit

organization, asked GAO whether its appropriations were available to make grants to Affordable Housing Centers of America (AHCOA) in light of section 418 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010. Section 418 prohibits the distribution of federal funds to "affiliates, subsidiaries, or allied organizations" of Association of Community Organizations for Reform Now (ACORN).

GAO's analysis began with the language of the statute and the meaning of the words "affiliates," "subsidiaries," and "allied organizations," none of which were defined in section 418 or its legislative history. When a word has a specific legal meaning, courts apply that meaning when construing a statute. Here, "affiliates" and "subsidiaries" were defined in *Black's Law Dictionary* and in other federal laws and regulations. Using these definitions, GAO determined that AHCOA, as presently configured, was not an affiliate or subsidiary of ACORN. Because "allied organization" had no particular legal meaning, however, GAO turned to another familiar rule of statutory construction—a word in a list is given more precise content by the neighboring words with which it is associated. GAO determined "allied organization" to mean a corporation with whom ACORN had a financial or organizational relationship, for example, through contracts and grants. After reviewing the record, GAO concluded that AHCOA was not presently an allied organization of ACORN.

GAO noted that NeighborWorks has a continuing responsibility in its grantmaking and oversight capacity to monitor any changes that might implicate the appropriations prohibition or GAO's conclusion. GAO did not opine on AHCOA's eligibility for any particular grant program or the value in making grants to AHCOA.

<u>Personal Expenses</u>

- *Architect of the Capitol—Availability of Funds for Battery Recharging Stations for Privately Owned Vehicles*, B-320116, Sept. 15, 2010

  In this case, GAO emphasized the Congressional prerogative to make public funds available for personal expenses. The Architect of the Capitol (AOC) requested a decision on whether appropriated funds may be used to install battery recharging stations on Capitol grounds for privately owned hybrid or electric vehicles. AOC also asked whether a program may be established where employees and Members of Congress reimburse AOC for the recharging and utility costs of their private electric or hybrid vehicles. To both questions, GAO answered that absent statutory authority to purchase and install recharging stations, or to establish a reimbursable program, AOC could not use appropriated funds for these purposes.

  It is well established that an employee's commuting expenses are personal expenses, and absent specific statutory authority, personal expenses are not

payable from appropriated funds. GAO viewed the installation and operation of recharging stations for employees' and Members' personal vehicles as a personal expense facilitating their commute between home and work. This would be akin to providing fuel for personal vehicles. Congress, as a matter of public policy, may authorize agencies to use appropriations for expenses otherwise considered to be personal in nature, as it did in the Federal Employees Clean Air Incentives Act, authorizing transit pass programs.

Prohibitions on Publicity or Propaganda, and Lobbying

- *Department of Health and Human Services—Use of Appropriated Funds for "HealthReform.gov" Web site and "State Your Support" Web page*, B-319075, Apr. 23, 2010

  Last year, GAO responded to several requests concerning the prohibitions against using appropriated funds for publicity or propaganda, and lobbying purposes. In the first of three opinions, GAO highlighted the distinction between gauging public opinion and encouraging the public to contact members of Congress. The decision addresses, also, the legitimate activity of informing and educating the public on the Administration's priorities, as well as explaining and defending those priorities.

  In 2009, the Department of Health and Human Services (HHS) launched a Web site in support of the Administration's position on health care reform while reform legislation was pending before Congress. The site offered users the opportunity to endorse the Administration's position by electronically signing a form letter addressed to the President. The letter affirmed the user's commitment to "work with you [the President] and our Congressional leaders to enact legislation this year which provides affordable, high quality coverage for all Americans."

  The anti-lobbying prohibition found in 18 U.S.C. § 1913, as well as in section 717 of the Financial Services and General Government Appropriations Act, 2009, and section 503 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 2009, bars the use of appropriated funds for indirect or "grassroots" lobbying aimed at defeating or supporting legislation currently pending before Congress. In determining whether or not an agency has violated this prohibition, GAO has articulated a bright-line rule requiring evidence that the agency made a clear, explicit appeal to the public to contact Members of Congress in support of the agency's position on legislation pending before Congress. This rule balances the activity that the prohibitions are intended to address against the agency's responsibility to communicate with the American people on policies and priorities.

  In this case, GAO recognized that some Web users might have inferred from the Web site a suggestion to contact members of Congress. However, the

Web site itself contained no explicit or direct appeal to the public to contact members of Congress in support of or opposition to pending legislation. Thus, it did not constitute grassroots lobbying.

Further, section 720 of the government-wide general provisions of the Omnibus Appropriations Act, 2009, prohibits the use of appropriated funds for publicity or propaganda purposes, including purely partisan purposes. While GAO thought some of the HHS materials unorthodox and declined to express an opinion as to their effectiveness to achieve HHS's stated goals, GAO found that the HHS materials were not purely partisan. For example, the Web site omitted some information regarding the impact of legislation on Medicare beneficiaries' coverage and costs and may have highlighted some of the positive aspects of Medicare changes. It also contained expressions of opinions from Members of both Democratic and Republican parties. Nevertheless, GAO could not say that the Web site was devoid of any connection with official agency functions or was completely political in nature. Thus, GAO found that the materials it contained were not purely partisan. The prohibition does not bar all materials that have some political content or express a certain point of view on a topic of political importance. To find otherwise, GAO said "would severely curtail legitimate communications of an agency's policies and its defense of those policies."

- *Department of Health and Human Services—Use of Appropriated Funds for Medicare Brochure*, B-319834, Sept. 9, 2010

  In a second opinion, GAO concluded that while the Department of Health and Human Services' (HHS) Medicare brochure contained instances of abbreviated information and a positive view of the Patient Protection and Affordable Care Act (PPACA) not universally shared, nothing in the brochure constituted purely partisan, self-aggrandizing, or covert communications.

  The brochure focused on the benefits of PPACA and gave a brief overview of PPACA. It did not provide a comprehensive summary of changes to Medicare to be implemented as a result of PPACA, and sometimes provided abbreviated information that omitted significant details about PPACA. By its nature, there is limited space in a brochure. It would not have been reasonable to expect the brochure to contain comprehensive information on PPACA. It referred beneficiaries to other official sources for further information.

  The publicity or propaganda prohibition does not bar materials that support a particular view or justify the agency's policies. Indeed, it is important for the public to understand the philosophical underpinnings of the policies advanced by elected officials and their staff in order for the public to evaluate and form opinions on those policies.

- *Department of Health and Human Services—Use of Appropriated Funds for Technical Assistance and Television Advertisement*, B-320482, Oct. 19, 2010

  In a third opinion regarding Department of Health and Human Services (HHS) activities, GAO determined that HHS did not violate the publicity or propaganda prohibition (1) when an HHS contractor, on his own accord and not pursuant to the contract or other direction from HHS, authored opinion pieces and gave congressional testimony in support of the Administration's health care policy proposals, or (2) when it used appropriations to produce and distribute television advertisements in support of the Administration's proposals, notwithstanding a lack of detail in the advertisements and some overstatements.

  In March 2009, HHS contracted with an economist to produce technical memoranda on estimated changes in health insurance coverage and other associated costs and impacts of various health care policies under legislative consideration. Subsequent to the contract award, the economist authored opinion pieces appearing in national newspapers, and twice testified before a Senate committee on health care policy. He was not acting at the behest of HHS when he testified or wrote opinion pieces, nor did HHS contract with him to make public statements favorable to any HHS-favored policy. The facts here stand in contrast to the facts in B-305368, Sept. 30, 2005, where the Department of Education had contracted with a radio and television personality to comment regularly on the No Child Left Behind Act without assuring disclosure of the Department's role in the communication.

  After the enactment of the Patient Protection and Affordable Care Act (PPACA) in December 2009, HHS retained an advertising firm to produce and air 30-second television ads aimed at Medicare beneficiaries, educating them on changes to Medicare as a result of the PPACA. Each ad began with the words, "An Important Message from Medicare," appearing on-screen in readable typeface for 4 seconds. Each ad ended with a picture of the HHS seal, the Medicare 800-number, the medicare.gov internet address and in the case of two of the ads, the words "Paid for by the U.S. Department of Health and Human Services" appeared as well.

  GAO noted that agencies have a responsibility to inform the public about their policies and programs, and HHS has a responsibility to inform Medicare beneficiaries about the program. The advertisements were linked to responsibility, as they provided beneficiaries with some information regarding recent changes to the Medicare program while also directing beneficiaries to additional sources of information. GAO noted that the ads lacked detail about the changes and two of the three advertisements overstated one of the benefits of the changes in the law. However, notwithstanding the overstatements and the lack of detail in the advertisements, HHS had established a link between the content and its official functions and the content of the ads did not constitute a purely partisan message.

Local Taxes

- *Letter to the Attorney General of the District of Columbia—Use of GAO's Appropriations to Pay the District of Columbia Stormwater Fee*, B-320795, Sept. 29, 2010

  GAO determined that GAO's appropriations were not available to pay a local tax for which Congress has not legislated a waiver of the sovereign immunity of the United States government, established in the Supremacy Clause of the U.S. Constitution. GAO informed both the Attorney General of the District of Columbia and the U.S. Department of the Treasury's Commissioner of the Financial Management Service.

  In March 2010, GAO was notified that beginning in fiscal year 2011 all government properties in the District of Columbia (District) would be assessed a stormwater fee by the District Department of the Environment (DDOE), and collected by the District Water and Sewer Authority (presently known as D.C. Water). DDOE uses amounts collected to defray costs of stormwater management activities required under a U.S. Environmental Protection Agency permit issued to the District.

  GAO determined that the stormwater fee arose automatically from GAO's status as a property owner, not upon the provision of a service or the granting of a privilege to GAO, and was assessed in order to raise revenue to fund core government functions. GAO noted that while section 313(a) of the Clean Water Act did waive sovereign immunity from many state and local environmental requirements, it did not explicitly waive the federal government's sovereign immunity from taxation by state and local governments. In contrast, the impervious surface area charge for sewer services imposed by D.C. Water was not a tax. It was imposed on all rate payers to cover the costs of capital improvements to the sewer system and treatment facilities, and represents a fair approximation of services provided to GAO.

  On January 4, 2011, Public Law 111-378 amended section 313, enacting a waiver of sovereign immunity for taxes such as this. The amendment also imposes several limitations: (1) payments or reimbursements of waived assessments may not be made using funds from "any permanent authorization account in the Treasury; and (2) each instrumentality of the federal government "shall not be obligated to pay or reimburse any fee, charge, or assessment [waived], except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment."

II. AVAILABILITY OF APPROPRIATIONS: AMOUNT

Antideficiency Act: 31 U.S.C. § 1341

- *Election Assistance Commission—Obligation of Fiscal Year 2004 Requirements Payments Appropriation*, B-318831, Apr. 28, 2010

  In this decision, GAO advised the Election Assistance Commission (EAC) that if it were unable to correct a violation of the purpose statute, 31 U.S.C. § 1301(a), through an account adjustment, the agency would be in violation of the Antideficiency Act.

  In fiscal year 2004, Congress appropriated amounts "to carry out a program of requirements payments to States as authorized by section 257 of the Help America Vote Act [HAVA] of 2002." HAVA section 257 established a mandatory grant program to make payments, called requirements payments, to states for election reform. EAC obligated some of these funds for poll worker and mock election grants, not requirements payments, in violation of the purpose statute. GAO said that EAC should adjust its accounts by charging the obligations for poll workers and mock election grants to its salaries and expenses appropriation, which was available for the purpose of poll work and mock election grants. If, after an account adjustment, insufficient funds were available, GAO recommended that EAC either report an Antideficiency Act violation, or request a congressional ratification of its fiscal year 2004 actions.

  EAC agreed with GAO's conclusion that the purpose statute was violated but it was unable to correct the violation through an account adjustment. On September 29, 2010, EAC reported an Antideficiency Act violation.

- *U.S. Secret Service—Statutory Restriction on Availability of Funds Involving Presidential Candidate Nominee Protection*, B-319009, Apr. 27, 2010

  This opinion addresses the Antideficiency Act consequences for failure to limit obligations in accordance with amounts itemized in a conference report that were incorporated by reference into legislated reprogramming restrictions.

  The opinion examined Presidential Candidate Nominee Protection obligations incurred by the United States Secret Service (USSS) and concluded that USSS violated the Antideficiency Act. Section 503(b) of the fiscal year 2010 Homeland Security Appropriations Act required USSS to notify the House and Senate Committees on Appropriations 15 days in advance of reprogrammings in excess of $5 million among the activities itemized in the conference report accompanying the appropriations act. In this case, USSS spent $5,100,000 more than was itemized for the Presidential Candidate Nominee Protection but failed to notify the committees of the reprogramming until 5 months after the fact. Because DHS and USSS notified Congress 5 months after

reprogramming amounts in excess of $5 million, section 503(b) was violated, and the reprogrammed $5.1 million for candidate protection was not legally available for obligation, resulting in an Antideficiency Act violation.

- *Department of the Army—The Fiscal Year 2008 Military Personnel, Army Appropriation and the Antideficiency Act*, B-318724, June 22, 2010

  In this opinion, GAO concluded that an agency has violated the Antideficiency Act if the accounting records of the appropriation show that total obligations at the end of the fiscal year exceed the available balance of the appropriation even if the agency cannot identify the obligation that exceeded the amount available. If an agency manages its appropriation during the fiscal year by reference to estimated obligations or projections of obligations, the agency runs a risk of violating the Antideficiency Act.

  GAO was asked whether the Army had sufficient funds in the fiscal year 2008 Military Personnel, Army (MPA) appropriation to cover costs related to bonuses and Permanent Change of Station (PCS) moves. The Army Budget Office (Army Budget) managed the MPA appropriation, but did not make decisions with respect to the particular activities under it. Rather, program managers at various offices incurred obligations against the appropriation and forwarded the information to Defense Finance and Accounting Service (DFAS) for payment. Army Budget, however, did not receive the same documentation from program managers supporting the recording of an actual obligation that program managers sent to DFAS. Instead, Army Budget recorded estimated obligations and then adjusted the estimates based on actual disbursement data from DFAS weeks or months later. In November 2008, Army Budget identified a $200 million shortfall in the fiscal year 2008 MPA appropriation.

  GAO concluded that the Army violated the Antideficiency Act. Army expense reports clearly showed that the MPA appropriation had less than $200 million available at the end of fiscal year 2008. The Army, in a preliminary investigation, acknowledged that the account was overobligated. The Army explained that it relied on estimated obligations for accounting purposes rather than actual data provided by program managers because of inadequate financial management systems. The Army's practice of relying on estimated obligations does not relieve the Army of responsibility for complying with the Antideficiency Act. GAO recommended that the Army may wish to consider providing program managers with administrative subdivisions of the MPA account to help ensure that the Army complies with the Antideficiency Act.

Antideficiency Act, Voluntary Services Prohibition: 31 U.S.C. § 1342

- GAO, *Food and Drug Administration: Response to Heparin Contamination Helped Protect Public Health; Controls That Were Needed for Working With External Entities Were Recently Added*, GAO-11-95 (Washington, D.C.: October 2010)

  In this report, GAO explained that the voluntary services prohibition of the Antideficiency Act is intended to protect the government from unexpected claims for compensation. An agency can accommodate the prohibition with a written agreement between the individual volunteer and the agency stipulating that the individual has no expectation of payment, will not file a claim against the government, and that the government has no liability for the services.

  In 2008, the Food and Drug Administration (FDA) responded to a crisis involving the contamination of heparin, a medication used to prevent and treat blood clots. At the time, FDA engaged external scientists to provide the agency with technical and factual advice.

  The Antideficiency Act prohibits the government from accepting voluntary services beyond those authorized by law except for emergencies involving the safety of human life or protection of property. GAO found that FDA's acceptance of voluntary services from the external scientists exposed the agency to the risk of claims for payment for services provided. The fundamental purpose of the voluntary services prohibition is to preserve the integrity of the appropriations process by preventing agencies from effectively incurring obligations in excess of or in advance of appropriations by accepting voluntary services with the expectation that Congress will later recognize a "moral obligation" to pay for the services rendered. Consistent with this underlying purpose, voluntary services are those that are not rendered under a prior contract, or with an advance agreement that they will be gratuitous.

  FDA noted that it accepted voluntary services under the prohibition's emergency exception, pointing to the public health emergency that required the agency to quickly identify and assemble scientific expertise. While the existence of an emergency would provide a legal basis under the prohibition for an agency to accept voluntary services, it would not protect it from subsequent claims for payment. To the contrary, the acceptance of services under the emergency exception would still give rise to obligations for which payment must be made. The Antideficiency Act exception permits an agency, during an emergency to incur those obligations notwithstanding the lack of an appropriation to liquidate the obligations. To guard against future claims for compensation, an agency must obtain a written agreement from those providing voluntary services stating that the individual has no expectation of payment, will not file a claim against the government, and that the government has no liability.

In response to GAO's report, FDA adopted procedures for the acceptance of gratuitous services from external scientific and other experts in emergency situations.

III. AVAILABILITY OF APPROPRIATIONS: TIME

- *United States Capitol Police—Advances to Volpe Center Working Capital Fund*, B-319349, June 4, 2010

  In this decision, GAO explained that funds advanced to a working capital fund through an interagency agreement retain their fiscal year characteristic until "earned" by the working capital fund. GAO was asked whether amounts advanced by the United States Capitol Police (USCP) from a fiscal year 2003 appropriation to the Department of Transportation's Volpe Center Working Capital Fund (Volpe) were available to cover obligations incurred by Volpe in fiscal year 2009, after USCP's fiscal year 2003 appropriation had been canceled by operation of law.

  Pursuant to USCP's account closing statute (2 U.S.C. § 1907(d)), which mirrors the general account closing statutes at 31 U.S.C. §§ 1551–1553, unexpended balances, both obligated and unobligated, are withdrawn by operation of law on September 30 of the fifth fiscal year following the fiscal year for which they were provided—in this case, September 30, 2008. The case turned on whether time-limited appropriations advanced into a "no-year" working capital fund assume the "no-year" character of the fund. If the amounts advanced in March 2007 took on the no-year character of Volpe's working capital fund, USCP's account closing law would not have barred Volpe from obligating the funds in fiscal year 2009. If the March 2007 advance retained its fiscal year 2003 character, however, USCP would need to use fiscal year 2009 or no-year appropriations to cover Volpe's fiscal year 2009 agreement in order to avoid an Antideficiency Act violation.

  Under 31 U.S.C. § 1532, when an agency withdraws funds from its appropriation and makes them available for credit to another appropriation, amounts withdrawn are available for obligation only during the fiscal year of availability of the appropriation from which the amount was drawn. We have previously held that withdrawn amounts retain their time character and do not assume the time character of the appropriation to which they are credited, unless otherwise specifically provided by law. Consequently, amounts withdrawn from a fiscal year appropriation and credited to a no-year fund retain their fiscal year identity until earned by the no-year fund.

  Thus, the fiscal year 2003 funds advanced to Volpe would need to be used by Volpe in one of two ways no later than September 30, 2008. Volpe could incur costs to perform work for USCP and thus "earn" the advance. Alternatively,

Volpe could have entered into a contract or interagency agreement and obligated the funds by September 30.

- GAO, *Intragovernmental Revolving Funds: NIST's Interagency Agreements and Workload Require Management Attention*, GAO-11-41 (Washington, D.C.: October 2010)

  In this report, GAO stressed that appropriated amounts advanced into an agency's working capital funds retain their fiscal year characteristic until "earned" by the working capital fund, at which time the earned amount becomes part of the working capital fund's corpus. Funds advanced are available to cover performance costs during the appropriation's period of availability plus five fiscal years. After that time, advanced amounts are canceled by operation of law and are no longer available to cover performance costs. Thus, agencies accepting advances should monitor the availability of funds advanced to ensure they are legally available when the performing agency bills against the amount.

  GAO examined the National Institute of Standards and Technology's (NIST) growing carryover balance in its working capital fund. The working capital fund is largely comprised of amounts advanced to NIST from other federal agencies to pay for technical services. While some carryover in the working capital fund is expected given that the majority of NIST's interagency agreements have a period of performance crossing fiscal years, GAO found that NIST was not monitoring the period of availability of advances; rather NIST treated advances as no-year money as soon as the amounts were deposited into the working capital fund. Because NIST was not tracking availability of the advances and treated the amounts as no-year money, the agency ran the risk of using canceled amounts. GAO recommended that NIST improve internal monitoring and reporting.

- *Consumer Product Safety Commission—Period of Availability and Permissible Uses of Grant Program Appropriations*, B-319734, July 26, 2010

  This decision addresses a conflict between an authorization act and language in an appropriations act. In this case, GAO explained that notwithstanding authorizing language, appropriations are understood to be available for one fiscal year unless Congress specifies otherwise in the appropriations, not the authorizing, act.

  The Virginia Graeme Baker Pool and Spa Safety Act of 2007 (Safety Act) directed the Consumer Product Safety Commission (CPSC) to establish a grant program to provide financial assistance to states for pool and spa safety improvements. For each of fiscal years 2009 and 2010, the Safety Act authorized an appropriation of $2 million for the grant program. In authorizing the appropriations, the authorization act stated that the amounts were to remain available until expended, and that CPSC could retain any unexpended

and unobligated amounts remaining at the end of fiscal year 2010 and credit them to the appropriation funding CPSC enforcement activities. In 2009, Congress enacted a $2 million appropriation for the grant program as part of CPSC's fiscal year 2009 Salaries and Expenses appropriation. The appropriations act specified that the $2 million was available for two fiscal years.

Appropriations in annual appropriations acts, such as the fiscal year 2009 CPSC Salaries and Expenses appropriation, are construed to be available for obligation only during the fiscal year for which they were appropriated, unless the act expressly provides otherwise. Indeed, CPSC's appropriations act stated: "None of the funds appropriated in this Act shall remain available for obligation beyond the current fiscal year [2009], nor may any be transferred to other appropriations, unless expressly so provided herein." In this case, the appropriations act expressly provided that the $2 million appropriated for the Safety Act grant program be available for obligation for two fiscal years—2009 and 2010. It was the appropriations act language, not the no-year language of the authorization act, that governed the appropriations time period of availability.

IV. OBLIGATIONS

Termination Liability

- *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*, B-320091, July 23, 2010

  In addition to this case's significance with regard to statutory construction, GAO also noted that a subsequent agreement to pay termination costs in excess of the total amount allotted to a cost reimbursement contract is an obligating event, and sufficient funds must be available to pay termination costs at the time of obligation, or an agency is at risk of violating the Antideficiency Act.

  NASA entered into several cost-reimbursement contracts, under which the government reimburses the contractor for allowable costs incurred in performing the contract, up to a ceiling set in the contract. As required by the Federal Acquisition Regulation, the NASA contracts included a provision stating that the government is not obligated to reimburse the contractor for costs incurred in excess of the ceiling specified in the contract. This limitation on liability includes the contractor's termination costs. NASA recorded obligations for the entire amount allotted to the various contracts.

  Some contractors asserted that NASA stated in written and oral communications that it would reimburse all contract termination costs, even if they exceeded the amount allotted to the contract. Though GAO took no position on whether NASA ever stated that it would reimburse such costs,

GAO noted that any agreement to pay termination costs in excess of the agreed-upon ceiling already specified in the contract would constitute a new obligating event. NASA would need to have sufficient funds available at that time to cover the additional amounts; otherwise, NASA would risk violating the Antideficiency Act.

V. IMPOUNDMENT CONTROL ACT

- *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*, B-320091, July 23, 2010

  Addressing another question in *NASA, Part II*, GAO concluded that NASA did not incur a *de facto* impoundment when work under cost-reimbursement contracts associated with the Constellation program slowed. The President proposed a cancellation of the Constellation program in his fiscal year 2011 budget. Contractors were concerned about potential termination costs.

  Under the Impoundment Control Act, agencies may withhold budget authority from obligation only if the President has first transmitted a rescission or deferral proposal in a special message to Congress. The President submitted no special message pertaining to NASA or the Exploration account. In the past, GAO has found instances where an agency violated the Impoundment Control Act when it withheld funds from obligation pending congressional action on a legislative proposal appearing in the President's budget request. In this case, though, NASA had not withheld any appropriations from obligation and, in fact, had obligated 83 percent of the Exploration funds by June 30, 2010. At that rate of obligation, it was likely NASA would obligate all funds by the end of fiscal year 2010. Thus, GAO saw no evidence that NASA withheld funds from obligation or violated the Impoundment Control Act.

VI. CONTINUING RESOLUTIONS

- *Election Assistance Commission—Obligation of Requirements Payments Under Continuing Resolutions in Fiscal Years 2009 and 2005*, B-318835, May 14, 2010

  In this case, GAO highlighted some funding decisions a grantor agency may face during the pendency of a continuing resolution.

  Like many other agencies, the Election Assistance Commission (EAC) operated under a continuing resolution for parts of fiscal years 2009 and 2005. One of EAC's primary responsibilities is to make mandatory payments to the states once a year for activities that improve the administration of federal elections. These payments are called "requirements payments." EAC calculates the amount of a payment to each state using a statutory formula, which depends in part on EAC's fiscal year appropriation for requirements payments. During the periods of the continuing resolutions in fiscal years 2009

and 2005, EAC delayed obligating funds for requirements payments until its full-year appropriation was enacted.

At issue here was whether EAC should have obligated amounts for requirements payments while operating under the continuing resolutions. Both continuing resolutions appropriated funds to EAC at a rate for operations provided in the previous fiscal year. Amounts appropriated by each continuing resolution, however, were also subject to the so-called "entitlements provision" included in the continuing resolutions, which required activities to continue at the rate necessary to maintain program levels under current law. Because states receive their entire requirements payments for a year in a single distribution, generally later in the fiscal year, GAO had no objection to the fact that in fiscal years 2009 and 2005, EAC waited to obligate funds until it had its regular appropriations for these years. This is consistent with other provisions in the continuing resolutions, such as implementing the most limited funding action.

Congressional Budget Office

United States Congress

What You Should Know About Congressional Budget Scoring

March 10, 2011

Prepared by Mark P. Hadley, General Counsel,
for presentation at the 2011 Appropriations Law Forum

CBO Basics

- Director appointed jointly by the Speaker and President pro tempore based on the recommendation of the Budget Committees
- Director appoints all CBO staff, based solely on professional competence, not political affiliation
- CBO does not make policy recommendations (strictly nonpartisan; no judgments about a legislative proposal's merits)

Scoring Basics

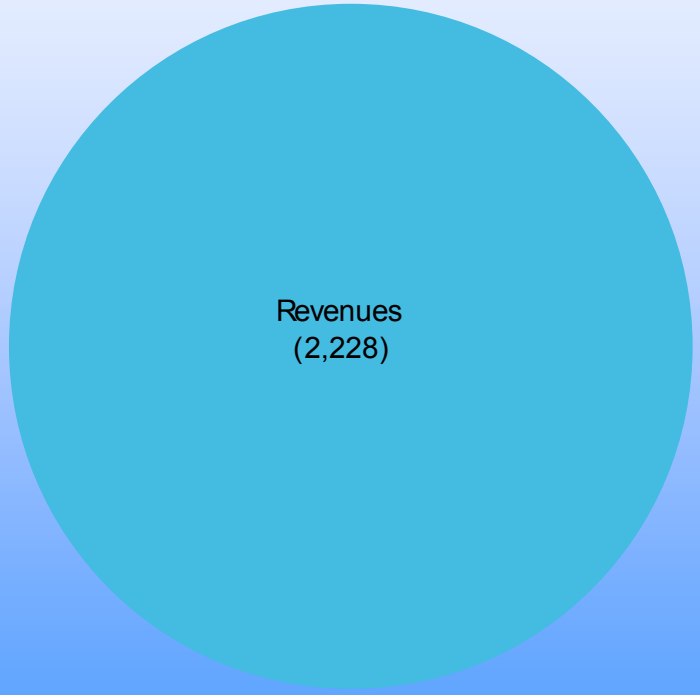
- What is “scoring”?
- What gets scored?
- Who does the scoring?

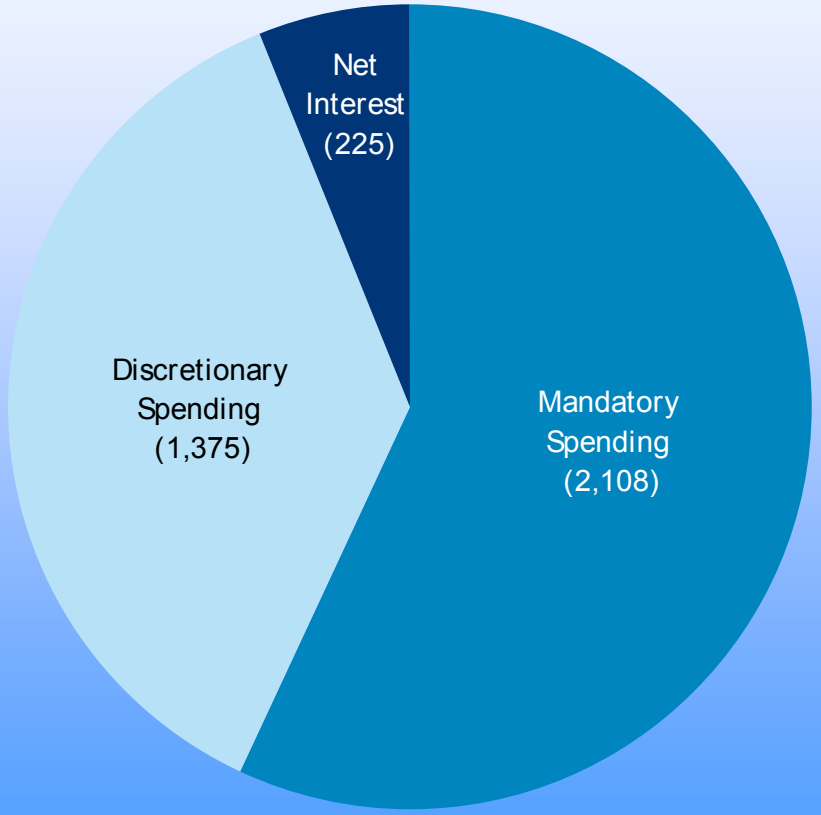
Helping Congress Develop a Budget Plan

- 10-year baseline prepared each winter to serve as a starting point
- CBO analyzes the President's budget request and compares it to the baseline

Baseline Budget Projections, 2011

Billions of Dollars





Helping Congress Stay Within Its Budget Plan

- CBO is required by law to prepare cost estimates for each bill approved by a committee
  - The Joint Committee on Taxation prepares revenue estimates for legislation that would amend the Internal Revenue Code
- CBO staff provide preliminary, informal estimates at other stages of the legislative process
- CBO's Scorekeeping system tracks pending legislation and helps the Budget Committees enforce the Budget Resolution

Sources of Authority

- Appropriations Law
- Congressional Budget and Impoundment Control Act of 1974
- Balanced Budget and Emergency Deficit Control Act of 1985
- Report of the President's Commission on Budget Concepts

Budget Practice

- Precedent
- OMB Circular A-11
- GAO Glossary of Terms Used in the Federal Budget Process
- Scorekeeping Guidelines and Precedents

The Statutory Pay-As-You-Go Act of 2010 (S-PAYGO)

- Reestablishes statutory sequestration mechanism to curb increases in the deficit
- The S-PAYGO Act allows the Congress to require OMB to use cost estimates used during Congressional consideration of legislation, provided that certain procedures are followed:
  - Legislation must include a statement incorporating the cost estimate by reference [Sec. 4(a)(1)]
  - Cost estimate must be printed in the Congressional Record prior to a vote on passage [Sec. 4(a)(2)]

Incorporating Congressional Estimates By Reference

"The budgetary effects of this Act, for purposes of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled 'Budgetary Effects of PAYGO Legislation' for this Act, submitted for printing in the Congressional Record by the Chairman of the [House/Senate] Budget Committee, provided that such statement has been submitted prior to the vote on passage."

[Sec. 4(a)(1)]

OMB's Role in S-PAYGO

- Produces cost estimates if the Congress does not follow the specified procedures
- Maintains 5- and 10-year scorecards [Sec. 4(d)]
- Orders a sequestration if either scorecard reflects a net cost in the budget year at the end of a Congressional session [Sec. 5(b)]
  - Section 11 of the Act lists the programs and activities that are exempt from sequestration–the vast majority of direct spending programs are exempt

Deficit Impacts vs. S-PAYGO Impacts

- **S-PAYGO effects may differ from net deficit impact because S-PAYGO effects:**
  - **Exclude off-budget impacts; [Sec. 3(4)(B)]**
  - **Exclude certain specified timing shifts; [Sec. 4(b)(1)]**
  - **Exclude impacts of provisions designated as emergency legislation; [Sec. 4(g)]**
  - **Are adjusted, for certain health and tax legislation, to reflect policies that are not in CBO's baseline. [Sec. 4(c)]**

Policy Adjustments

- **The law requires CBO to adjust S-PAYGO estimates to reflect policies that are not in CBO's baseline** [Sec. 7]
  - Medicare Payments to Physicians
  - Estate and Gift Taxes
  - Certain provisions of the Economic Growth Tax Relief Reconciliation Act and the Jobs and Growth Tax Relief Reconciliation Act
  - Alternative Minimum Tax
- **The law specifies a maximum adjustment for each policy; any excess will be recorded as a budgetary cost**
- **Will require CBO to maintain the information necessary to estimate the effects of proposed changes for those S-PAYGO policy exclusions**

Congressional Budget Office

Questions and Answers

For more information, visit:

www.cbo.gov

APPENDIX A—SCOREKEEPING GUIDELINES

These budget scorekeeping guidelines are used by the House and Senate Budget Committees, the Congressional Budget Office, and the Office of Management and Budget (the "scorekeepers") in measuring compliance with the Congressional Budget Act of 1974 (CBA), as amended, GRH, as amended, and the Statutory Pay-As-You-Go Act of 2010. The purpose of the guidelines is to ensure that the scorekeepers measure the effects of legislation on the deficit consistent with established scorekeeping conventions and with the specific requirements in those Acts regarding discretionary spending, direct spending, and receipts. These rules are reviewed annually by the scorekeepers and revised as necessary to adhere to the purpose. They cannot be changed unless all of the scorekeepers agree. New accounts or activities are classified only after consultation among the scorekeepers. Accounts and activities cannot be reclassified unless all of the scorekeepers agree. Even though the discretionary spending caps specified in the Budget Enforcement Act expired at the end of 2002, the scorekeepers continue to apply these scorekeeping principles. The scorekeeping guidelines have not been revised to reflect the impact of the Statutory Pay-As-You-Go Act of 2010, especially as it relates to rule 3.

1. Classification of appropriations

A list of appropriations that are normally enacted in appropriations acts is included in the conference report of the Balanced Budget Act of 1997, House Report 105–217, pp. 1014–1053. The list identifies appropriated entitlements and other mandatory spending in appropriations acts, and it identifies discretionary appropriations by category.

2. Outlays prior

Outlays from prior-year appropriations will be classified consistent with the discretionary/mandatory classification of the account from which the outlays occur.

3. Direct spending programs

Entitlements and other mandatory programs (including offsetting receipts) will be scored at current law levels, as defined in section 257 of GRH, unless congressional action modifies the authorizing legislation. Substantive changes to or restrictions on entitlement law or other mandatory spending law in appropriations laws will be scored against the Appropriations Committee's section 302(b) allocations in the House and the Senate. For the purpose of CBA scoring, direct spending savings that are included in both an appropriations bill and a reconciliation bill will be scored to the reconciliation bill and not to the appropriations bill. For scoring under sections 251 or 252 of GRH, such provisions will be scored to the first bill enacted.

4. Transfer of budget authority from a mandatory account to a discretionary account

The transfer of budget authority to a discretionary account will be scored as an increase in discretionary budget authority and outlays in the gaining account. The losing account will not show an offsetting reduction if the account is an entitlement or mandatory program.

5. Permissive transfer authority

Permissive transfers will be assumed to occur (in full or in part) unless sufficient evidence exists to the contrary. Outlays from such transfers will be estimated based on the best information available, primarily historical experience and, where applicable, indications of Executive or congressional intent.

This guideline will apply both to specific transfers (transfers where the gaining and losing accounts and the amounts subject to transfer can be ascertained) and general transfer authority.

6. Reappropriations

Reappropriations of expiring balances of budget authority will be scored as new budget authority in the fiscal year in which the balances become newly available.

7. Advance appropriations

Advance appropriations of budget authority will be scored as new budget authority in the fiscal year in which the funds become newly available for obligation, not when the appropriations are enacted.

8. Rescissions and transfers of unobligated balances

Rescissions of unobligated balances will be scored as reductions in current budget authority and outlays in the year the money is rescinded.

Transfers of unobligated balances will be scored as reductions in current budget authority and outlays in the account from which the funds are being transferred, and as increases in budget authority and outlays in the account to which these funds are being transferred.

In certain instances, these transactions will result in a net negative budget authority amount in the source accounts. For purposes of section 257 of GRH, such amounts of budget authority will be projected at zero. Outlay estimates for both the transferring and receiving accounts will be based on the spending patterns appropriate to the respective accounts.

9. Delay of obligations

Appropriations acts specify a date when funds will become available for obligation. It is this date that determines the year for which new budget authority is scored. In the absence of such a date, the act is assumed to be effective upon enactment.

If a new appropriation provides that a portion of the budget authority shall not be available for obligation until a future fiscal year, that portion shall be treated as an advance appropriation of budget authority. If a law defers existing budget authority (or unobligated balances) from a year in which it was available for obligation to a year in which it was not available for obligation, that law shall be scored as a rescission in the current year and a reappropriation in the year in which obligational authority is extended.

10. Contingent legislation

If the authority to obligate is contingent upon the enactment of a subsequent appropriation, new budget authority and outlays will be scored with the subsequent appropriation. If a discretionary appropriation is contingent on the enactment of a subsequent authorization, new budget authority and outlays will be scored with the appropriation. If a discretionary appropriation is contingent on the fulfillment of some action by the Executive branch or some other event normally estimated, new budget authority will be scored with the appropriation, and outlays will be estimated based on the best information about when (or if) the contingency will be met. If direct spending legislation is contingent on the fulfillment of some action by the Executive branch or some other event normally estimated, new budget authority and outlays will be scored based on the best information about when (or if) the contingency will be met. Non-lawmaking contingencies within the control of the Congress are not scoreable events.

11. Scoring purchases

When a law provides the authority for an agency to enter into a contract for the purchase, lease-purchase, capital lease, or operating lease of an asset, budget authority and outlays will be scored as follows:

For lease-purchases and capital leases, budget authority will be scored against the legislation in the year in which the budget authority is first made available in the amount of the estimated net present value of the Government's total estimated legal obligations over the life of the contract, except for imputed interest costs calculated at Treasury rates for marketable debt instruments of similar maturity to the lease period and identifiable annual operating expenses that would be paid by the Government as owner (such as utilities, maintenance, and insurance). Property taxes will not be considered to be an operating cost. Imputed interest costs will be classified as mandatory and will not be scored against the legislation or for current level but will count for other purposes.

For operating leases, budget authority will be scored against the legislation in the year in which the budget authority is first made available in the amount necessary to cover the Government's legal obligations. The amount scored will include the estimated total payments expected to arise under the full term of a lease contract or, if the contract will include a cancellation clause, an amount sufficient to cover the lease payments for the first fiscal year during which the contract is in effect, plus an amount sufficient to cover the costs associated with cancellation of the contract. For funds that are self-insuring under existing authority, only budget authority to cover the annual lease payment is required to be scored.

Outlays for a lease-purchase in which the Federal government assumes substantial risk (for example, through an explicit Government guarantee of third party financing) will be spread across the period during which the contractor constructs, manufactures, or purchases the asset. Outlays for an operating lease, a capital lease, or a lease-purchase in which the private sector retains substantial risk will be spread across the lease period. In all cases, the total amount of outlays scored over time against legislation will equal the amount of budget authority scored against that legislation.

No special rules apply to scoring purchases of assets (whether the asset is existing or is to be manufactured or constructed). Budget authority is scored in the year in which the authority to purchase is first made available in the amount of the Government's estimated legal obligations. Outlays scored will equal the estimated disbursements by the Government based on the particular purchase arrangement, and over time will equal the amount of budget authority scored against that legislation.

Existing contracts will not be rescored.

To distinguish lease purchases and capital leases from operating leases, the following criteria will be used for defining an operating lease:

- Ownership of the asset remains with the lessor during the term of the lease and is not transferred to the Government at or shortly after the end of the lease period.
- The lease does not contain a bargain-price purchase option.
- The lease term does not exceed 75 percent of the estimated economic lifetime of the asset.
- The present value of the minimum lease payments over the life of the lease does not exceed 90 percent of the fair market value of the asset at the inception of the lease.
- The asset is a general purpose asset rather than being for a special purpose of the Government and is not built to unique specification for the Government as lessee.
- There is a private-sector market for the asset.

Risks of ownership of the asset should remain with the lessor.

Risk is defined in terms of how governmental in nature the project is. If a project is less governmental in nature, the private-sector risk is considered to be higher. To evaluate the level of private-sector risk associated with a lease-purchase, legislation and lease-purchase contracts will be considered against the following type of illustrative criteria, which indicate ways in which the project is less governmental:

- There should be no provision of Government financing and no explicit Government guarantee of third party financing.
- Risks of ownership of the asset should remain with the lessor unless the Government was at fault for such losses.
- The asset should be a general purpose asset rather than for a special purpose of the Government and should not be built to unique specification for the Government as lessee.
- There should be a private-sector market for the asset.
- The project should not be constructed on Government land.

Language that attempts to waive the Anti-Deficiency Act, or to limit the amount or timing of obligations recorded, does not change the Government's obligations or obligational authority, and so will not affect the scoring of budget authority or outlays.

Unless language that authorizes a project clearly states that no obligations are allowed unless budget authority is provided specifically for that project in an appropriations bill in advance of the obligation, the legislation will be interpreted as providing obligation authority, in an amount to be estimated by the scorekeepers.

12. Write-offs of uncashed checks, unredeemed food stamps, and similar instruments

Exceptional write-offs of uncashed checks, unredeemed food stamps, and similar instruments (i.e., write-offs of cumulative balances that have built up over several years or have been on the books for several years) shall be scored as an adjustment to the means of financing the deficit rather than as an offset. An estimate of write-offs or similar adjustments that are part of a continuing routine process shall be netted against outlays in the year in which the write-off will occur. Such write-offs shall be recorded in the account in which the outlay was originally recorded.

13. Reclassification after an agreement

Except to the extent assumed in a budget agreement, a law that has the effect of altering the classification or scoring of spending and revenues (e.g., from discretionary to mandatory, special fund to revolving fund, on-budget to off-budget, revenue to offsetting receipt), will not be scored as reclassified for the purpose of enforcing a budget agreement.

14. Scoring of receipt increases or direct spending reductions for additional administrative program management expenses

No increase in receipts or decrease in direct spending will be scored as a result of provisions of a law that provides direct spending for administrative or program management activities.

15. Asset sales

If the net financial cost to the Government of an asset sale is zero or negative (a savings), the amount scored shall be the estimated change in receipts and mandatory outlays in each fiscal year on a cash basis. If the cost to the Government is positive (a loss), the proceeds from the sale shall not be scored for purposes of the CBA or GRH.

The net financial cost to the Federal government of an asset sale shall be the net present value of the cash flows from:

(1) Estimated proceeds from the asset sale;

(2) The net effect on Federal revenues, if any, based on special tax treatments specified in the legislation;

(3) The loss of future offsetting receipts that would otherwise be collected under continued Government ownership (using baseline levels for the projection period and estimated levels thereafter); and

(4) Changes in future spending, both discretionary and mandatory, from levels that would otherwise occur under continued Government ownership (using baseline levels for the projection period and at levels estimated to be necessary to operate and maintain the asset thereafter).

The discount rate used to estimate the net present value shall be the average interest rate on marketable Treasury securities of similar maturity to the expected remaining useful life of the asset for which the estimate is being made, plus 2 percentage points to reflect the economic effects of continued ownership by the Government.

16. Indefinite borrowing authority and limits on outstanding debt

If legislation imposes or changes a limit on outstanding debt for an account financed by indefinite budget authority in the form of borrowing authority, the legislation will be scored as changing budget authority only if and to the extent the imposition of a limit or the change in the existing limit alters the estimated amount of obligations that will be incurred.

Overview of the Development and Execution of the Federal Budget

The United States Constitution gives Congress the power to levy taxes, to finance government operations through appropriations, and to prescribe the conditions governing the use of those appropriations. This power is referred to as the congressional "power of the purse." The power derives from various provisions of the Constitution,[1] particularly article I, section 9, clause 7, which provides that

"No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

Thus an agency may not draw money out of the Treasury to fund agency operations unless Congress has appropriated the money to the agency. At its most basic level, this means that it is up to Congress to decide whether to provide funds for a particular program or activity and to fix the level of that funding. Although the Constitution does not provide detailed instructions on how Congress is to do so, Congress has and continues to implement its power of the purse in two ways: through the enactment of laws that raise revenue and appropriate funds, including annual appropriations acts, and through the enactment of "fiscal statutes" that control and manage federal revenue and appropriations (one such fiscal statute, the Antideficiency Act, is explained in detail in phase 3).[2]

A "budget," in customary usage, is a plan for managing funds, setting levels of spending, and financing that spending. For purposes of this overview, however, the "federal budget" is used more broadly to include not only the planning through the federal budget process, but also the end result of that plan after the fiscal effect of spending and revenue laws in effect for any given fiscal year are calculated. Those laws consist of permanent laws enacted in prior years, including any permanent appropriations, and the appropriations acts enacted for that fiscal year.

[1] Some examples of other provisions in the Constitution relating to the spending and control of funds are those to lay and collect taxes, duties, imposts, and excises; to borrow money on the credit of the United States; to "pay the Debts and provide for the common Defence and general Welfare of the United States;" and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [listed in art. I, § 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." These provisions are all found in article I, section 8, of the Constitution.

[2] The budget process and the financial management process (i.e., ensuring that federal financial management systems provide accurate, reliable, and timely financial management information to the government's managers, the President, and Congress) are closely related.

Beginning in 1921, Congress enacted laws that provide a framework of procedures for coordinating and planning for federal spending and revenues. The Budget and Accounting Act of 1921 requires the President to submit an annual budget proposal to Congress and established the Office of Management and Budget (OMB) and the Government Accountability Office (GAO) (formerly, the General Accounting Office). In 1974, Congress enacted the Congressional Budget and Impoundment Control Act, which provides for the adoption of a budget resolution and established the House and Senate Budget Committees and the Congressional Budget Office (CBO). These laws overlay the existing processes by which Congress enacts and the President signs into law spending and revenue measures and have come to be known, collectively, as the federal budget process.

The federal budget process provides the means for the federal government to make informed decisions between competing national needs and policies, to determine priorities, to allocate resources to those priorities, and to ensure the laws are executed according to those priorities. The federal budget process can be broken down into four phases: budget formulation, the congressional budget process (during which Congress adopts its budget and enacts laws appropriating funds for the fiscal year), budget execution and control, and audit and evaluation. The discussion that follows describes in detail the four phases of the federal budget process.

Phase 1: Executive Budget Formulation

The federal government begins to assemble an annual federal budget in a long administrative process of budget preparation and review. This process may well take place several years before the budget for a particular fiscal year is ready to be submitted to Congress. The primary participants in the process at this stage are the agencies and individual organizational units, which review current operations, program objectives, and future plans, and OMB, the office within the Executive Office of the President charged with broad oversight, supervision, and responsibility for coordinating and formulating a consolidated budget submission. (See fig. 1 in app. II.)

By the first Monday in February, the President submits a budget request to Congress for the fiscal year starting on the following October 1 (i.e., in February 2005 the President submitted the budget request for fiscal year 2006, which runs from October 1, 2005, through September 30, 2006). However, preparation of this particular budget request began about 10 months before it was submitted to Congress. For example, for the fiscal year 2006 budget request, transmitted to Congress in February

2005, the budget process began in the spring of 2004. Thus, federal agencies must deal concurrently with 3 fiscal years: (1) the current year, that is, the fiscal year in progress; (2) the coming fiscal year beginning October 1, for which they are seeking funds (for purposes of formulation of the President's budget request, this fiscal year is known as the budget year); and (3) the following fiscal year, for which they are preparing information and requests. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget* (revised annually), provides detailed guidance to executive departments and establishments on preparing budget submissions. The President's budget, which is the sole single document with budget information for the entire government, contains

- a record of actual receipts and spending levels for the fiscal year just completed;
- a record of current-year estimated receipts and spending; and
- estimated receipts and spending for the upcoming fiscal year and 9 years beyond, as proposed by the President.

Executive budget formulation, based upon proposals, evaluations, and policy decisions, begins in agencies' organizational units. During executive budget formulation, federal agencies receive revenue estimates and economic projections from the Department of the Treasury (Treasury), the Council of Economic Advisers (CEA), and OMB.

Executive Budget Formulation Timetable

Spring–Summer: OMB Establishes Policy for the Next Budget Request

During this period, OMB and the executive branch agencies discuss budget issues and options. OMB works with the agencies to identify major issues for the upcoming budget request; to develop and analyze options for the upcoming reviews of agency spending and program requests; and to plan for the analysis of issues that will need decisions in the future. OMB issues policy directions and planning guidance to the agencies for the upcoming budget request and detailed instructions for submitting budget data and materials for the upcoming fiscal year and following 9 fiscal years.

September–October: Agencies Submit Initial Budget Request Materials

By law, the President's budget request must include information on all agencies of all three branches of the federal government.[3] Executive branch departments, agencies that are subject to executive branch review, and the District of Columbia must submit their budget requests and other initial materials to OMB typically the first Monday after Labor Day of the year prior to the start of the year that the budget request covers (i.e., September 8, 2004, for fiscal year 2006, which started October 1, 2005). Agencies not subject to executive branch review (e.g., the Federal Reserve Board) and the legislative and judicial branches are required to submit their budget materials in fall of the year prior to the year that the budget requests cover (e.g., in October 2004 for fiscal year 2006).[4]

October–December: OMB Performs Review and Makes Passback Decisions

OMB staff representatives conduct the fall review. OMB has informal discussions with agencies about their budget proposals in light of presidential priorities, program performance, and any budget constraints. OMB examiners prepare issues for the Director's review. The Director briefs the President and senior advisors on proposed budget policies and recommends a complete set of budget proposals after a review of all agency requests. The President considers the estimates and makes his decisions on broad policies. In late November, OMB passes back budget decisions to the agencies on their budget requests, the so-called passback. These decisions may involve, among other things, funding levels, program policy changes, and personnel ceilings. The agencies may appeal decisions with which they disagree. If OMB and an agency cannot reach agreement, the issue may be taken to the President.

Final budget decisions will also reflect proposals for management and program-delivery improvements resulting from agency and OMB reviews during the executive budget formulation process. OMB not only assists in making individual budget decisions, it also tracks the result of these decisions. OMB calculates the effect of budget decisions on receipts, budget authority, and outlays. Once final decisions on the budget requests are reached, agencies revise their budget

[3] 31 U.S.C. § 1105.

[4] The budget requests for the legislative branch and the judicial branch and its related agencies must be submitted to OMB in late fall of each year and included in the President's budget request without change. The budget requests of several executive branch agencies are not subject to review by OMB. See OMB Circular No. A-11, sec. 25.1. Information on all three branches of government is included in the President's budget request so that Congress may review one submission that covers the entire government.

submissions to conform to these decisions. These final estimates are transmitted to Congress in the President's budget request.

By the First Monday in February: President Submits Budget Request

In accordance with current law, the President must transmit the budget request to Congress on or before the first Monday in February.[5]

By July 15: President Submits Mid-Session Review Document to Congress

The Budget and Accounting Act of 1921, as amended, requires the President to submit to Congress on or before July 15 a supplementary budget summary that provides data to aid in evaluation of the President's budget request.[6] This summary, referred to as the mid-session review, includes updated presidential policy budget estimates, summary updates to the information contained in the budget submission, and budget-year baseline estimates.

Phase 2: The Congressional Budget Process

Once the President submits his budget request, the congressional phase begins. Since the constitutional power of the purse is vested solely in Congress, the President's budget request is just that—a request. Congress, of course, may choose to adopt, modify, or ignore the President's budget proposals when adopting its budget resolution and when enacting appropriations and other laws. (See fig. 2 in app. II.)

The Congressional Budget Act establishes the following key steps in the congressional budget process.

January–February: CBO Submits Report to the Budget Committees and Congress Receives the President's Budget Request

Usually in late January, CBO submits to the Budget Committees its annual report, entitled *The Budget and Economic Outlook*. The report contains CBO's projection of federal revenue and spending for the next 10 years, based on its current economic

[5] 31 U.S.C. § 1105(a).

[6] 31 U.S.C. § 1106.

forecast and the general assumption that existing laws and policies remain unchanged.

Congress receives the President's budget request no later than the first Monday in February. At the same time, the President transmits current services estimates to Congress. The House and Senate Budget Committees, in preparation for drafting the concurrent resolution on the budget, hold hearings to examine the President's economic assumptions and spending priorities. At the request of the Senate Appropriations Committee, CBO prepares an analysis of the President's request.

Committees Transmit the Views and Estimates Reports to Budget Committees

While the Budget Committees examine aggregate budget levels and budget functions, the other committees of Congress with jurisdiction over federal programs transmit to the Budget Committees their views and estimates on spending and revenue levels for programs under their jurisdiction. The Budget Committees use these reports on views and estimates to develop the total revenue and spending estimates that they will propose in the concurrent budget resolution. In conjunction with these views and estimates reports, the Joint Economic Committee submits its recommendations concerning fiscal policy to the Budget Committees.

March–April: Congress Adopts a Budget Resolution

Typically, during March, the Budget Committees mark-up and report to their respective houses a budget plan in the form of a concurrent resolution on the budget. This budget resolution is drafted using the President's budget request, information from their own hearings, views and estimates reports from other committees, and CBO's reports. The budget resolution is required to set forth (for the upcoming fiscal year and for each of at least the next 4 years) the total level of new budget authority, outlays, revenues, the deficit or surplus, the public debt, and spending by functional category. The budget resolution may include reconciliation instructions to the extent necessary to meet the revenue or direct spending targets in the budget resolution.

The budget resolution is considered in each House under special procedures set forth in the Congressional Budget Act. When the Senate and House have both adopted their respective versions of the budget resolution, it is referred to a conference committee to resolve the differences between the two versions. Each chamber must then vote on the conference report. The Congressional Budget Act sets April 15 as the date by which Congress should complete action on the budget resolution; however, in

practice, Congress may not meet this date.[7] For example, in 2005 Congress adopted the budget resolution for fiscal year 2006 on April 28, 2005. In 1998 (for fiscal year 1999), in 2002 (for fiscal year 2003), and in 2004 (for fiscal year 2005) Congress did not complete action on budget resolutions.[8]

The joint explanatory statement accompanying a conference report on the budget resolution includes an allocation of budget authority and outlays to the Appropriations Committees (for discretionary spending) and to each authorizing committee (for direct spending) of the House and Senate. The Appropriations Committees subsequently subdivide their allocation among their subcommittees according to jurisdiction.

The concurrent resolution on the budget does not become law; it is not signed by the President. The aggregate levels of revenues, budget authority, and outlays and the committee allocations are guidelines and targets against which subsequent fiscal legislation—appropriation acts; authorizing legislation that provides budget authority; revenue acts; and, if necessary, reconciliation acts (see below)—is measured.

The Congressional Budget Act contains rules of the House and Senate that implement the priorities agreed to and set in the concurrent resolution on the budget. These rules generally prohibit the consideration of legislation that is not in compliance with the committee allocations or the revenue or spending totals in the resolution. Accordingly, if legislation is out of compliance, it is subject to a point of order and, if

[7] Article I, section 5, clause 2, of the Constitution reserves to each House of Congress the authority to determine the rules governing its procedures. The Budget Act contains several titles and sections that affect the internal procedures of the House and Senate enacted under this constitutional rule-making authority. Congress enacted the Budget Act with the full recognition that each House could change these rules at any time and in a manner consistent with past practice. Rule changes are usually accomplished upon adoption of either a simple resolution (for a change that affects one House) or a concurrent resolution (for changes that may affect both houses). S. Rep. No. 105-67 (revised December 1998).

[8] See Bill Heniff, Jr., *Congressional Budget Resolutions: Selected Statistics and Information Guide* (Washington, D.C.: Congressional Research Service, Jan. 25, 2005).

the point of order is sustained, Congress is precluded from further consideration of the legislation until it is brought into compliance.[9]

If changing economic circumstances or policy requirements dictate, Congress may revise its budget resolution during the fiscal year, thereby altering the spending and revenue totals.

May–September: Congress Addresses Fiscal Legislation

Reconciliation Measure

When the concurrent resolution on the budget contains reconciliation instructions, the committees must submit legislative language that changes laws in their jurisdiction to the Budget Committee of their house on the date specified in the instructions. The Budget Committees may make no substantive changes to the submissions, but must report the submissions to the House or Senate as a single reconciliation bill. If, however, a reconciled committee fails to meet the numerical targets included in its reconciliation instruction, procedures exist to modify the bill on the floor so that the targets are met. (If only one committee is instructed, that committee reports its recommendations directly to the House or Senate.)

The reconciliation legislation is a unique vehicle through which Congress enforces its budget plan for revenue and direct spending set forth in the budget resolution. Both the House of Representatives and the Senate consider the reconciliation legislation reported to them from their respective Budget Committees under special rules. (The Appropriations Committees are not subject to reconciliation instructions.) Generally, in the House, the legislation is considered under a special rule, a simple resolution adopted by the House prior to consideration of the reconciliation legislation that governs the debate and the amendments that are in order. In the Senate, reconciliation legislation is considered under special procedures set forth in the Congressional Budget Act, which limits the period of debate and the types of amendments that are in order and subjects the legislation and amendments to the Byrd Rule, which prohibits "extraneous material." (See Byrd Rule for more detail.)

[9] In fiscal year 1994, Congress began including overall limits on discretionary spending in the budget resolution, known as spending caps or discretionary caps. Congress established these caps to manage its internal budget process, while the Budget Enforcement Act (BEA) statutory caps continued to govern for sequestration purposes. The caps were enforceable in the Senate by a point of order that prohibited the consideration of a budget resolution that exceeded the limits for that fiscal year. While the BEA limits expired at the end of fiscal year 2002, Congress continues to use the budget resolution to establish and enforce overall discretionary spending limits.

The differences between the two houses are typically resolved in a conference committee and the resulting legislation is passed by both houses and must be signed by the President to become law.

Appropriations and Other Fiscal Legislation

Generally, throughout this period, Congress considers revenue legislation and legislation affecting spending, including the regular appropriations acts.[10] All legislation considered by Congress that affects revenue or spending must comply with the committee allocations and the total levels of revenues and spending in the concurrent resolution on the budget.[11]

Appropriations bills are developed by the House and Senate Appropriations Committees and their subcommittees. Each subcommittee has jurisdiction over specific federal agencies or programs and is responsible for one of the general appropriations bills.[12] The Constitution requires that all revenue (tax) bills originate in the House; by custom, the House also originates appropriations measures.

The Congressional Budget Act requires that the House and Senate Appropriations Committees subdivide the amounts allocated to them under the budget resolution

[10] Less than 40 percent of total budget authority is appropriated through the annual appropriations process. The remainder of the budgetary resources spent by the federal government are provided by law other than annual appropriations acts. (For further explanation, see the definitions of Backdoor Authority, Budget Authority, Direct Spending, Obligational Authority, and Outlay.)

[11] The rules of the House of Representatives also prohibit consideration of appropriations bills for expenditures not previously authorized by law. See Rule XXI, Rules of the House of Representatives. A similar, but more limited provision exists in Rule XVI, Standing Rules of the Senate. (See Point of Order.) (Some agency programs or functions are reauthorized every year, while others are authorized for several years or permanently.) The effect of such rules is that an appropriation bill is subject to a point of order if it is not preceded by an authorization of appropriation.

[12] As of March 2005, the House of Representatives has 10 appropriation subcommittees: Agriculture, Rural Development, Food and Drug Administration, and Related Agencies; Defense; Energy and Water Development, and Related Agencies; Foreign Operations, Export Financing and Related Programs; Homeland Security; Interior, Environment, and Related Agencies; Labor, Health and Human Services, Education, and Related Agencies; Military Quality of Life and Veterans Affairs and Related Agencies; Science, the Departments of State, Justice, and Commerce, and Related Agencies; and Transportation, Treasury, and Housing and Urban Development, the Judiciary, and the District of Columbia. The Senate has 12 appropriation subcommittees: Agriculture, Rural Development, and Related Agencies; Commerce, Justice, and Science; Defense; District of Columbia; Energy and Water; Homeland Security; Interior and Related Agencies; Labor, Health and Human Services, Education and Related Agencies; Legislative Branch; Military Construction and Veterans Affairs; State, Foreign Operations, and Related Programs; and Transportation, Treasury, the Judiciary, Housing and Urban Development, and Related Agencies.

among their subcommittees (Section 302(b) allocations).[13] Once the subcommittees receive their allocations, the subcommittees begin drafting their appropriations bills to fund discretionary spending programs. Proposed legislation that would cause the section 302(b) allocations to be exceeded is subject to a point of order.

CBO prepares a cost estimate on each appropriations bill, just as it provides cost estimates for any legislative measure reported by a committee of Congress. The Budget Committees use this information to determine whether the legislation complies with a committee's allocation, a subcommittee's suballocation, and the budget totals in the budget resolution.

Congress must enact these regular appropriations bills by October 1 of each year. If these regular bills are not enacted by the deadline (and they usually are not), Congress must pass a continuing resolution prior to the beginning of each fiscal year to fund government operations into the next fiscal year. When an agency does not receive its new appropriation before its current appropriation expires, it must cease ongoing, regular functions that are funded with annual appropriations, except for those related to emergencies involving the safety of human life or the protection of property.

Phase 3: Budget Execution and Control

The body of enacted laws providing appropriations for a fiscal year becomes the government's financial plan for that fiscal year. The execution and control phase refers generally to the period during which the budget authority made available by appropriations remains available for obligation. An agency's task during this phase is to spend the money Congress has given it to carry out the objectives of its program legislation in accordance with fiscal statutes and appropriations, while at the same time beginning phase 1 for the next budget.

The Antideficiency Act is one of these fiscal statutes. It is a funds control, financial management statute, and it achieves this funds control objective through a system of apportionments, allotments, suballotments, and allocation of funds. It requires that agency heads prescribe, by regulation, a system of administrative control of funds. The system is also called the funds control system, and the regulations are called funds control regulations.

[13] 2 U.S.C. § 633.

OMB is responsible for apportioning appropriated amounts to the executive branch agencies, thereby making funds in appropriation accounts (administered by Treasury) available for obligation. The apportionment is intended to achieve an effective and orderly use of available budget authority and ensure that obligations and expenditures are made at a controlled rate to reduce the need for supplemental appropriations, and prevent deficiencies from arising before the end of a fiscal year.

Once OMB apportions funds, it is the agency's responsibility to allocate the funds in accordance with its funds control system and regulations. The purpose of the funds control system and regulations is (1) to prevent overobligations and expenditures and (2) to fix accountability for obligations or expenditures. An obligation or expenditure that exceeds the amount of the appropriation, the apportionment, or the allotment violates the Antideficiency Act. For a more detailed explanation of these controls, see GAO/OGC-92-13, *Principles of Federal Appropriations Law*, volume II, second edition (available at www.gao.gov/legal.htm), and OMB Circular No. A-11, part 4, *Instructions on Budget Execution*.

Impoundment

At various times, the executive branch has refused to execute appropriations laws, that is, refused to spend money appropriated by Congress because the executive branch disagreed with the use of the funds. Under the Impoundment Control Act of 1974 whenever the President, the Director of OMB, or an agency or other federal government official does not make an appropriation or any part of an appropriation available for obligation, that official is impounding funds. The act permits the President, the Director of OMB, or an agency or other federal government official to impound funds only for certain reasons and under certain circumstances. The act also requires that impoundments be reported to Congress and the Comptroller General of the United States. The act requires the Comptroller General to monitor the performance of the executive branch in reporting proposed impoundments to Congress. For more information on impoundments, see section D.3 (Budget Execution and Control: Impoundment) in *Principles of Federal Appropriations Law*, volume I, third edition, GAO-04-261SP (available at www.gao.gov/special.pubs/redbook1.html).

Phase 4: Audit and Evaluation

Individual agencies are responsible—through their own review and control systems—for ensuring that the obligations they incur and the resulting outlays adhere

to the provisions in the authorizing and appropriations legislation as well as to other laws and regulations governing the obligation and expenditure of funds. OMB Circular No. A-11 provides extensive guidance to agencies on budget execution. In addition, a series of federal laws are aimed at controlling and improving agency financial management. The Inspector General Act of 1978, Pub. L. No. 95–452 as amended, established agency inspectors general to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to agency programs and operations. The Chief Financial Officers Act of 1990 established agency chief financial officers to oversee all financial management activities relating to agency programs and operations. The Government Management Reform Act of 1994 requires the audit of agency financial statements and the preparation and audit of a consolidated financial statement for the federal government. And the Federal Financial Management Improvement Act of 1996 directs auditors to report on whether agency financial statements comply with federal financial management systems requirements, federal accounting standards, and the *U.S. Standard General Ledger (SGL)*.

In 1993, Congress enacted the Government Performance and Results Act (GPRA) to improve congressional spending decisions and agency oversight through performance budgeting. GPRA holds federal agencies accountable for achieving program results and requires agencies to clarify their missions, set program goals, and measure performance toward achieving those goals. Among other things, the act requires each agency, on an annual basis, to submit a performance plan and performance report to OMB and Congress covering each program activity in the agency's budget. The agency plan must establish goals that define the level of performance to be achieved by a program activity and describe the operational processes and resources required to achieve goals. The program performance reports present the agency's performance in comparison to the plan for the previous fiscal year.

OMB reviews program and financial reports and monitors agencies' efforts to attain program objectives. Congress exercises oversight over executive branch agencies through the legislative process, formal hearings, and investigations. Congress uses oversight hearings, for example, to evaluate the effectiveness of a program and whether it is administered in a cost-effective manner, to determine whether the agency is carrying out congressional intent, and to identify fraud or abuse.

GAO regularly audits, examines, and evaluates government programs. Its findings and recommendations for corrective action are made to Congress, to OMB, and to the agencies concerned. GAO also has the authority to settle all accounts of the United

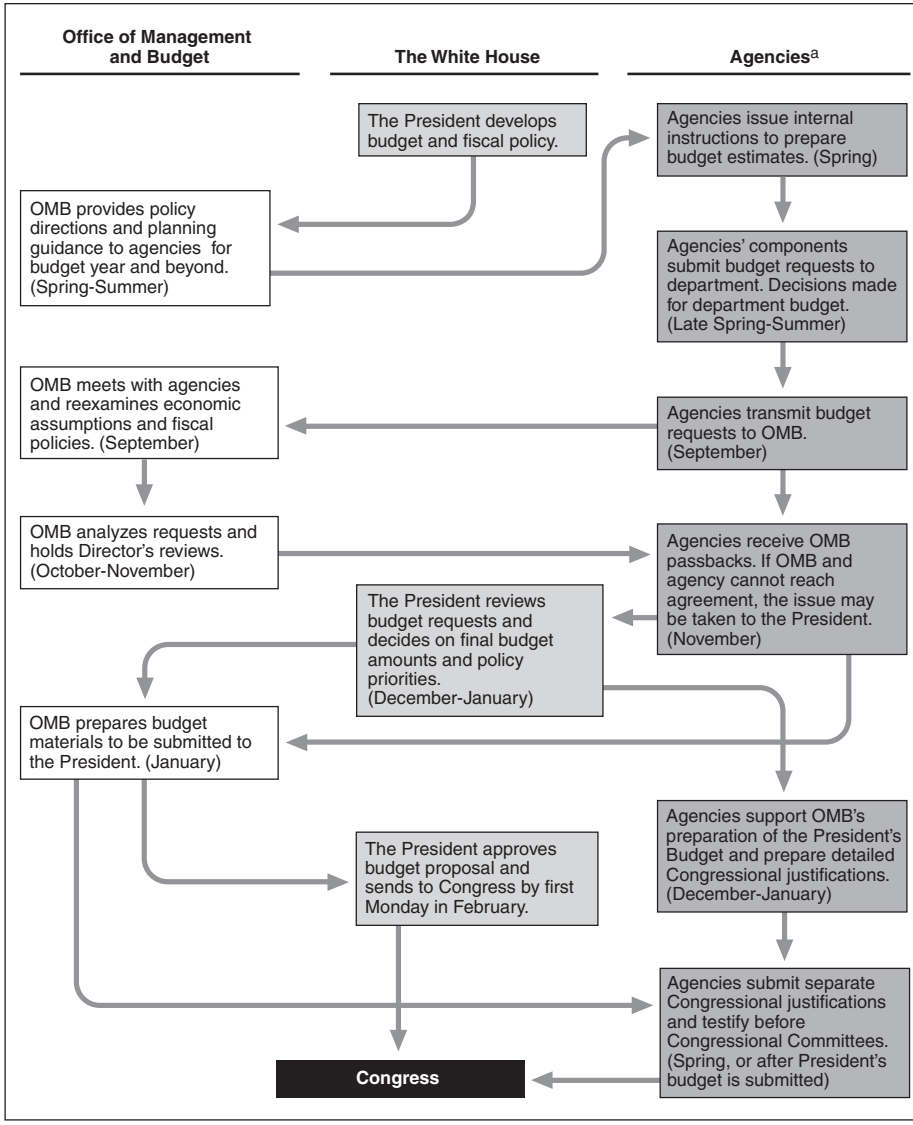
States government and to issue legal decisions and opinions concerning the availability and use of appropriated funds.[14] GAO develops government audit and internal control standards. *Government Auditing Standards* (the "Yellow Book") contains standards for audits of government organizations, programs, activities, and functions, and of government assistance received by contractors, nonprofit organizations, and other nongovernmental organizations. These standards, often referred to as U.S. generally accepted government auditing standards, are to be followed by auditors and audit organizations when required by law, regulation, agreement, contract, or policy. The internal control standards, *Standards for Internal Control in the Federal Government*, provide the overall framework for establishing and maintaining internal control and for identifying and addressing major performance and management challenges and areas at greatest risk for fraud and mismanagement. Also, as mentioned above, the Impoundment Control Act of 1974 requires the Comptroller General to monitor the performance of the executive branch in reporting proposed impoundments to Congress.

[14] 31 U.S.C. §§ 3526, 3529.

Federal Budget Formulation and Appropriation Processes

As described in appendix I, figure 1 shows the executive branch budget formulation process, which starts when the President develops budget and fiscal policy and concludes when the President sends the proposed budget to Congress by the first Monday in February. Congress then starts the budget and appropriations process illustrated in figure 2.

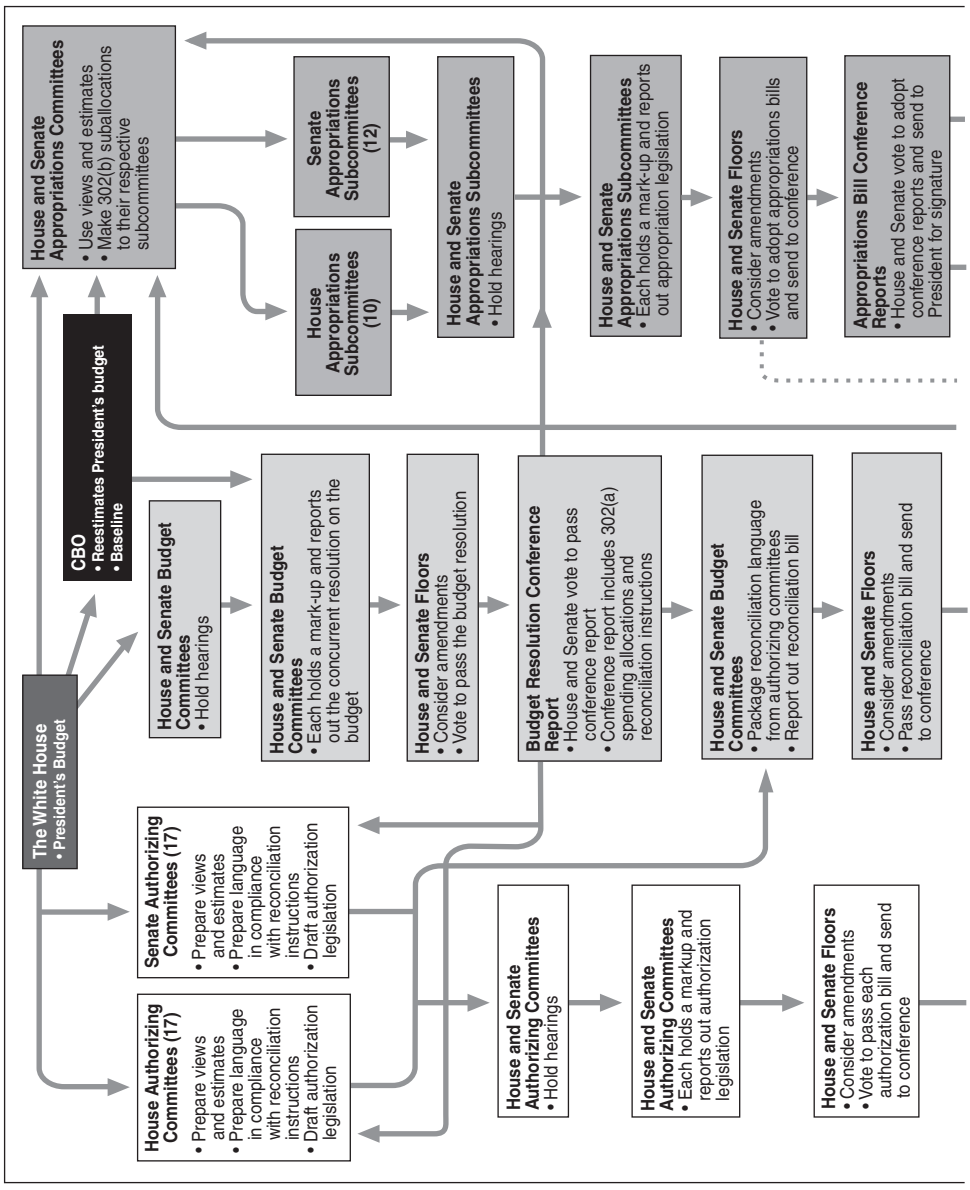
Figure 1: Federal Budget Formulation Process

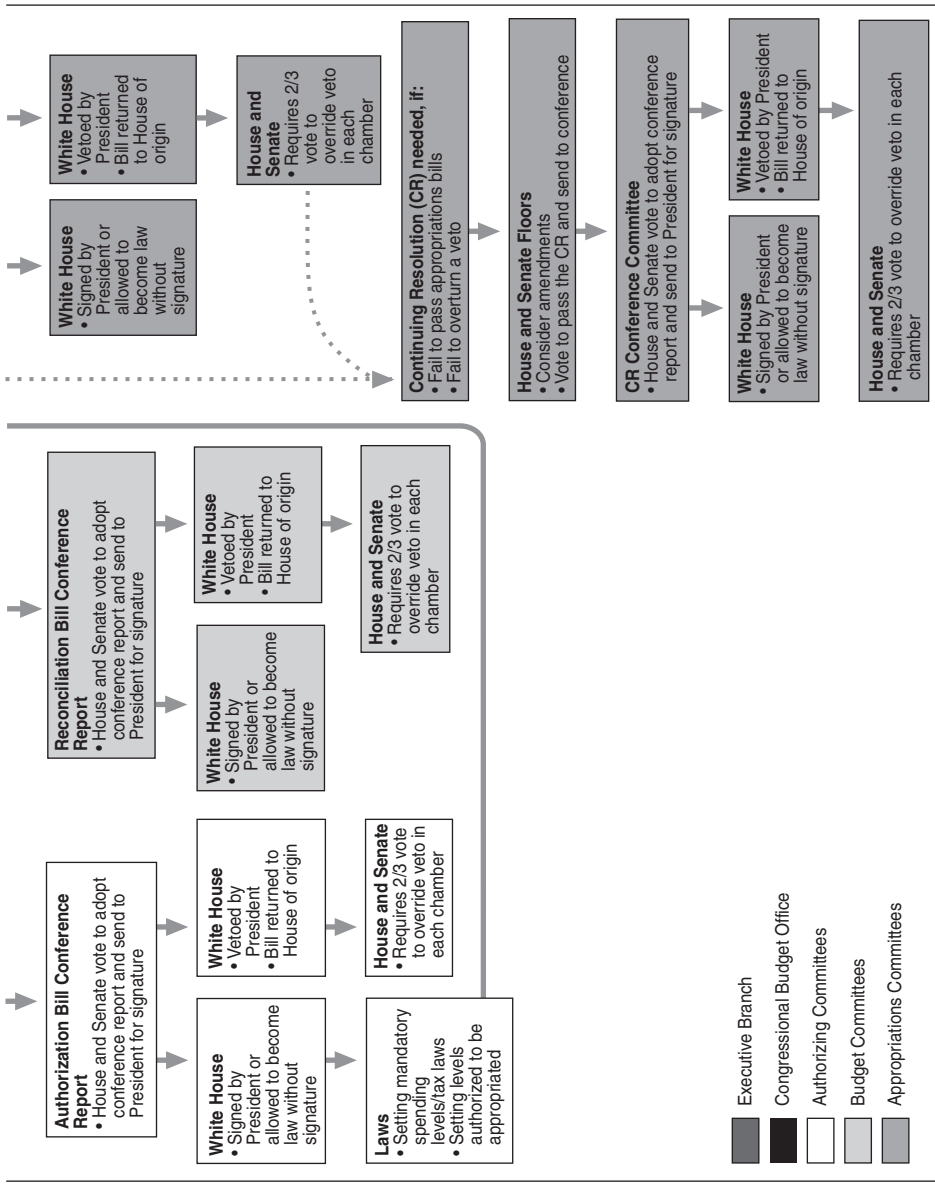


Source: Senate Budget Committee, December 1998, adapted by GAO.

[a]The term "agency" refers to either the department, agency, or lower component levels, depending on the level of decision being made. The budget submitted to OMB represents the budget decisions made at the department or the highest organizational level.

Figure 2: Federal Budget and Appropriation Process





Source: Office of the Majority Leader, March 2005, adapted by GAO.

GAO
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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Financial Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Services Contract

File: B-317139

Date: June 1, 2009

DIGEST

A nonseverable services contract that is not separated for performance by fiscal year may not be funded on an incremental basis without statutory authority. Failure to obligate the estimated cost (or ceiling) of a nonseverable cost-reimbursement contract at the time of award violated the *bona fide* needs rule.

Contract modifications to a cost-reimbursement contract increasing original ceiling are chargeable to appropriations available when the modifications were approved by the contracting officer. The actual date the agency records the obligation in its books is irrelevant to the determination of when the obligation arises and what fiscal year appropriation to charge.

A provision in an annual appropriations act designating that a portion of a lump-sum amount "shall be available for" a specific project does not preclude the use of other available appropriations for the project.

DECISION

The Office of Inspector General, Department of the Treasury (OIG), has requested a decision regarding the Financial Crimes Enforcement Network's (FinCEN) obligation, expenditure, and accounting of appropriated funds for its Bank Secrecy Act Direct Retrieval and Sharing System (BSA Direct) project. Letter from Marla A. Freedman, Assistant Inspector General for Audit, Department of the Treasury, to Gary L. Kepplinger, General Counsel, GAO, Aug. 29, 2008 (Request Letter). OIG states that FinCEN obligated about $17.7 million on the project during fiscal years 2004 through 2006, and questions FinCEN's use of funding in each of those three fiscal years, including whether FinCEN violated the Antideficiency Act. Request Letter, at 3. As discussed below, we conclude that FinCEN improperly charged obligations to its fiscal years 2005 and 2006 appropriations in violation of the *bona*

fide needs rule and will have to adjust its accounts to correct the violation. If, at that time, FinCEN finds that it has overobligated the proper appropriation, FinCEN must report an Antideficiency Act violation.

Our practice when issuing decisions or opinions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions,* GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this regard, we obtained the views of the Chief Counsel, FinCEN, regarding issues on the source of funding for the project, the nature of the contract, and the recording of obligations under the contract. Letter from Bill S. Bradley, Chief Counsel, FinCEN, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Nov. 7, 2008 (Response Letter). In addition, OIG provided us with copies of the contract document and modifications.

BACKGROUND

FinCEN is a Department of the Treasury bureau whose mission is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse by promoting transparency in the U.S. and international financial systems. FinCEN Web site, www.fincen.gov/about_fincen/wwd/mission.html (last visited May 28, 2009). In that regard, FinCEN is responsible for administering the Bank Secrecy Act (BSA) and supporting law enforcement, intelligence, and regulatory agencies through sharing and analysis of financial intelligence. *Id.*

Seeking to improve access to BSA data for authorized users, on June 30, 2004, FinCEN entered into a cost-plus-fixed-fee contract with Electronic Data Systems Corporation (EDS) for the design, development, and deployment of a BSA data retrieval system. Contract TPD-04-C-0063, at C.2. A cost-plus-fixed-fee contract is a form of cost-reimbursement contract. FAR § 16.306(a). The system, called BSA Direct, was to provide secure Web access to consolidated BSA data downloaded from the system with capabilities to allow end users to perform *ad hoc,* as well as pre-defined, queries and reporting. Contract TPD-04-C-0063, at C.1. BSA Direct was intended to provide law enforcement and regulatory agencies with easier, faster data access and enhanced ability to query and analyze BSA data. *Id.*

Pertinent Contract Clauses

Section B.4 of the contract, *ESTIMATED COST AND FIXED FEE (Design, Development, Deployment),* stated, "The Government's obligation, represented by the sum of the estimated cost plus fixed fee, is $8,982,985.01." *Id.* at B.4. The clause also provided, however, that "[t]otal funds currently available for payment and allotted to this contract are $2,000,000" and that "[i]t is estimated that the amount currently allotted will cover performance of the contract through October 31, 2004." *Id.*

Section B.7 of the contract, *INCREMENTAL FUNDING (MAR 2003),* stated, "This contract shall be subject to incremental funding with $2,000,000 presently made

available for performance under this contract," and "In accordance with the 'Limitation of Funds' clause (FAR 52.232-22) contained herein, no legal liability on the part of the Government for payment of money in excess of $2,000,000 shall arise, unless and until additional funds are made available by the Contracting Officer through a modification of this contract." *Id.* at B.7.

FinCEN's Incremental Funding

At the time the contract with EDS was signed, June 30, 2004 (fiscal year 2004), FinCEN obligated $2 million to the BSA Direct contract. Response Letter at 3. These funds were made available from the Treasury Forfeiture Fund through the Treasury Executive Office for Asset Forfeiture. *Id.*

In fiscal year 2005, FinCEN began modifying the contract in order to provide additional funding to the contract. Modification 1, dated October 7, 2004, increased the amount to $3.5 million, and Modification 2, dated January 6, 2005, increased the funding to the full estimated contract cost of $8,982,985.01. FinCEN modified the contract seven more times in fiscal year 2005, ultimately increasing the total estimated cost, including a fixed fee, to more than $15 million.

To support most of the contract modifications executed in fiscal year 2005, FinCEN obligated its fiscal years 2003, 2004, and 2005 salaries and expenses appropriations, each of which included funding that was to remain available for obligations incurred through fiscal year 2005. For example, FinCEN's fiscal year 2003 appropriation provided that of the amount appropriated for salaries and expenses, "$3,400,000 shall remain available until September 30, 2005." Pub. L. No. 108-7, div. I, title I, 117 Stat. 11, 430 (Feb. 20, 2003). Similarly, FinCEN's fiscal year 2004 appropriation provided that "$8,152,000 shall remain available until September 30, 2005." Pub. L. No. 108-199, div. F, title II, 118 Stat. 3, 316 (Jan. 23, 2004). While both appropriations were available for the BSA Direct contract, neither of them included a provision specifying a certain amount for the BSA Direct project.

Unlike the salaries and expenses appropriations for fiscal years 2003 and 2004, the appropriation for fiscal year 2005 contained a provision stating that $7,500,000 of the $72,502,000 appropriated "shall be available for BSA Direct." Pub. L. No. 108-447, div. H, title II, 118 Stat. 2809, 3238 (Dec. 8, 2004). FinCEN states that it understood the language in the fiscal year 2005 appropriation as a limitation on the maximum amount that could be obligated or expended from the fiscal year 2005 appropriation for BSA Direct. Response Letter, Attachment 3. FinCEN states that in fiscal year 2005, as a result of a number of modifications to the contract, it obligated a total of $10,823,312 for the BSA Direct project. *Id.* It states that of the amount obligated in fiscal year 2005, $7,435,500 was from the fiscal year 2005 salaries and expenses appropriation, $3,382,483, was from the fiscal year 2004 appropriation, and $5,329 was from the fiscal year 2003 appropriation. *Id.*

On September 12, 2005, and again on September 13, 2005, FinCEN modified the funding amount under the contract, increasing the total to $12,475,294.94 and

$15,146,289.01, respectively. Contract Modifications Nos. 7 and 9. Notwithstanding the September 2005 dates, these contract modifications were charged to fiscal year 2006 appropriations. *Id.* FinCEN states that "the amounts in question were not obligated until October 5, 2005" (fiscal year 2006). Response Letter at 4, Attachment 4.

DISCUSSION

At issue here is the application of the *bona fide* needs rule to the BSA Direct contract, both on June 30, 2004, when FinCEN entered into the contract and, later, when FinCEN modified the contract. The *bona fide* needs rule was developed by the accounting officers of the United States to implement one of the oldest fiscal statutes, now codified at 31 U.S.C. § 1502(a), which provides that "an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability." As this statute has been interpreted and applied, an appropriation is available only to fulfill a genuine or *bona fide* need of the time period of availability of the appropriation. 73 Comp. Gen. 77 (1994).

Proper Appropriation to Charge at Contract Award

On June 30, 2004, FinCEN entered into a cost-reimbursement contract, agreeing to pay EDS for the costs it incurred in the design, development and deployment of the BSA Direct system plus a negotiated fee. In determining what appropriation to charge for a service contract such as FinCEN's BSA Direct contract, it is important to distinguish between a nonseverable services contract and a severable services contract.

The general rule is that a nonseverable service is considered a *bona fide* need at the time the agency orders the service and, therefore, should be charged to an appropriation current at the time the agency enters into the contract. B-305484, June 2, 2006, at 6–7; 65 Comp. Gen. 741, 743 (1986). A nonseverable service is one that requires the contractor to complete and deliver a specified end product (for example, a final report of research). 65 Comp. Gen. at 743--744. Severable services, which are recurring in nature, are *bona fide* needs at the time the service is completed, and obligations for severable services should be charged to appropriations current at that time. B-287619, July 5, 2001, at 6. A severable service is a recurring service or one that is measured in terms of hours or level of effort rather than work objectives. B-277165, Jan. 10, 2000, at 5; 60 Comp. Gen. 219, 221--22 (1981). Whether a contract is for severable or nonseverable services affects how the agency may fund the contract; severable services contracts may be incrementally funded, while nonseverable services contracts must be fully funded at the time of the award of the contract. 73 Comp. Gen. 77; 71 Comp. Gen. 428 (1992).

The FinCEN contract at issue called for delivery of a defined end product (the design, development, and deployment of a data retrieval system), and as the contract was written, the work could not feasibly be subdivided (and, in fact, was not subdivided)

for separate performance by fiscal year. The contract required the contractor to provide a data retrieval system that will "be implemented by or before 9/30/05, a timeframe that will meet FinCEN's critical mission needs." Contract TPD-04-C-0063, at C.1. The contract stated further that "the Contractor is expected to employ a disciplined, incremental approach to analyze, design, develop, and deploy the BSA Direct System and to provide that the developed system meets FinCEN's technical and business requirements within a predictable schedule and budget . . ." *Id.* at C.2. It stipulated, "It is essential that the completed and tested system be provided as soon as possible . . ." *Id.* Accordingly, as a threshold matter, we conclude that the contract here was a nonseverable services contract.[1] Consequently, FinCEN should have recorded an obligation of $8,982,985.01 to its fiscal year 2004 appropriations for its estimated cost, including the fixed fee.

FinCEN, however, recorded an obligation of only $2 million at the time of award in fiscal year 2004. As we noted earlier, while an agency may incrementally fund a severable services contract, the agency must charge its obligation for a nonseverable service contract to appropriations available at time of contract award. This rule applies to cost-reimbursement contracts, like FinCEN's contract, just as it does to other contracts. 73 Comp. Gen. 77; 71 Comp. Gen. 428. The FAR requires that cost-reimbursement contracts "establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed . . ." FAR § 16.301-1. FinCEN did just that in section B.4 of the BSA Direct contract. It clearly set out that the "Government's obligation . . . is $8,982,985.01," thereby establishing a ceiling of $8,982,985.01. Contract TPD-04-C-0063, at B.4. By recording an obligation of only $2 million, FinCEN violated the *bona fide* needs rule, improperly charging the additional $6.9 million to its fiscal year 2005 appropriations.

FinCEN's inclusion of section B.7 (*Incremental Funding*), which limited the agency's liability to $2 million at the time it awarded the contract, did not remedy the *bona fide* needs problem that necessarily arose when FinCEN attempted to charge its fiscal year 2004 obligation to subsequent fiscal years. *See* 73 Comp. Gen. at 80; 71 Comp. Gen. at 431. Section B.7 apparently was an attempt to avoid an Antideficiency Act violation. *See* Section B.4 ("Total funds currently available for payment . . . are $2,000,000."). The difficulty, however, is that FinCEN in section B.4, consistent with FAR § 16.301--1, established its obligation as $8.9 million. As explained above, it was improper for the agency to shift to fiscal year 2005 most of the cost of a *bona fide* need of fiscal year 2004.

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[1] FinCEN Chief Counsel also concluded that the contract is a nonseverable service contract, more specifically, a cost-plus-fixed-fee completion contract. Response Letter, Attachment 1, at 1. Because the contract called for the delivery of a specified end product, rather than a level of effort, we agree that the contract, under the FAR, is a completion, rather than a term, contract. FAR § 16.306(d)(1), (2).

Because we conclude that FinCEN failed to properly charge its obligation to the correct fiscal year, we are recommending that the agency adjust its accounts by deobligating $6,982,985.01 from its fiscal year 2005 appropriations and charging that amount to its appropriations available for fiscal year 2004. If, in doing so, FinCEN determines that the obligation exceeds the amount available in fiscal year 2004, it should report an Antideficiency Act violation.

Proper Appropriation to Charge for Contract Modifications

The record shows that FinCEN, during fiscal year 2005, modified the contract a number of times to increase funding on the contract beyond the original ceiling of $8,982,985. FinCEN states that, with the exception of two modifications that it recorded against fiscal year 2006 appropriations, it charged the modifications to three separate appropriations: the fiscal year 2005 salaries and expenses appropriation, which included a provision making $7.5 million available for BSA Direct; the fiscal year 2004 salaries and expenses appropriation, of which $8,152,000 was to remain available until September 30, 2005; and the fiscal year 2003 salaries and expenses appropriation, of which $3,400,000 was to remain available until September 30, 2005.

With regard to a cost-reimbursement contract like FinCEN's BSA Direct contract, agencies should charge modifications that increase the original ceiling to an appropriation current at the time of the modification. 61 Comp. Gen. 609, 612 (1982).[2] Modifications increasing the ceiling are discretionary in nature and therefore are considered to reflect a new need. *Id.* As such, the modifications should be charged to funds available when the modification is signed by the contracting officer.[3]

For the contract modifications at issue here, the contracting officer approved increases beyond the initial $8.9 million ceiling established in the contract. Accordingly, the fiscal year 2005 modifications increasing the ceiling beyond

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[2] In 61 Comp. Gen. 609, the agency had properly obligated the contract ceiling at the time it entered into the contract; it did not, as FinCEN did here, violate the *bona fide* needs rule by attempting to incrementally fund the contract.

[3] For fixed-price contracts, the usual rule is that if the modification is within the contract's statement of work, the agency should charge the cost of the modification to the appropriation to which the agency had charged the contract since it is a part of the *bona fide* need established at time of contract award. 59 Comp. Gen. 518, 521 (1980). Modifications outside of the contract's statement of work (and, thus, outside of the scope of the contract) are considered to meet a new *bona fide* need, and the agency should charge obligations for such modifications to appropriations current at the time of modification. B-257617, Apr. 18, 1995. For cost-reimbursement contracts, because the agency, at time of contract award, cannot necessarily anticipate the need for and amount of increases in the contract ceiling, a modification that increases the ceiling is considered a *bona fide* need at the time of the modification. 61 Comp. Gen. at 612.

$8,982,985 were chargeable to appropriations available for fiscal year 2005. *See* 61 Comp. Gen. 609. In all but two instances, FinCEN, in fact, did charge the modifications to appropriations that were available for fiscal year 2005.

The record shows that FinCEN charged two fiscal year 2005 modifications to fiscal year 2006 appropriations, Contract Modifications Nos. 7 and 9. Both of these modifications were executed in fiscal year 2005; Modification 7 was signed by the contracting officer on September 12, 2005, and Modification 9 was signed on September 13, 2005. It appears that the agency confused the event of incurring an obligation with the act of recording the obligation. The agency points to spreadsheet entries indicating that on October 5, 2005, it recorded obligations for the BSA Direct contract against fiscal year 2006 appropriations. Response Letter, Attachment 4.

The Recording Statute, 31 U.S.C. § 1501, requires agencies to record an obligation at the time an authorized contracting officer signs a contract modification. *See* B-300480.2, June 6, 2003. The fact that the actual recording of the obligation is not made at that time is immaterial insofar as determining what fiscal year appropriation to charge. 38 Comp. Gen. 81 (1958). While it appears that FinCEN did not record the obligations until fiscal year 2006, it incurred the obligations in fiscal year 2005 when it signed the modifications.[4] FinCEN should have recorded the obligations against appropriations available for obligation in fiscal year 2005, not its fiscal year 2006 appropriations. Accordingly, FinCEN should adjust its accounts.

Antideficiency Act

Because of the $7.5 million provision in FinCEN's fiscal year 2005 appropriation, and the fact that FinCEN obligated more than that on the contract, OIG questions whether FinCEN violated the Antideficiency Act. FinCEN's fiscal year 2005 salaries and expenses appropriation provided FinCEN "$72,502,000, of which $7,500,000 shall be available for BSA Direct." Pub. L. No. 108-447, div. H, title II, 118 Stat. at 3238. FinCEN points out that while it obligated funds in fiscal year 2005 that exceeded $7.5 million, it did not obligate more than $7.5 million from its fiscal year 2005 salaries and expenses appropriation. Rather, it also obligated funds from its fiscal years 2003 and 2004 appropriations, each of which was available through fiscal year 2005.

We agree that FinCEN could legally draw on its fiscal years 2003 and 2004 appropriations, to the extent that they had sufficient unobligated balances, for costs related to the BSA Direct project. The $7.5 million provision did not preclude the

[4] This case differs from those cases where an agency, signing a contract near the end of the fiscal year, may properly obligate next fiscal year's appropriation because the agency has included clauses in the contract expressly requiring that, among other things, the contractor may not proceed under the contract unless and until an authorized contracting officer notifies the contractor that performance may commence. 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959).

agency's use of these appropriations. We see nothing in the language of the fiscal year 2005 appropriation or its legislative history to suggest that Congress intended to restrict the availability of these appropriations for the project. The plain language of the $7.5 million provision addressed only the use of the fiscal year 2005 appropriation, affirmatively directing that a portion, $7.5 million, be used for the BSA project. The language makes $7.5 million available only for the BSA Direct project. *See* B-278121, Nov. 7, 1997. The fiscal years 2003 and 2004 appropriations contained lump sum amounts that were available for the necessary expenses of FinCEN for obligations incurred through September 30, 2005. We therefore conclude that use of the other appropriations to obligate funds in excess of $7.5 million did not violate the Antideficiency Act.[5]

CONCLUSION

We are recommending that FinCEN adjust its accounts in accordance with this decision. If there are not sufficient funds available in the proper appropriations, the agency should report an Antideficiency Act violation. These adjustments will involve obligating an additional $6,982,895.01 to appropriations available in fiscal year 2004 and deobligating that amount from the fiscal year 2005 appropriation. FinCEN should also deobligate amounts from fiscal year 2006 appropriations that were used for Modification Nos. 7 and 9 in fiscal year 2005 and obligate that amount against appropriations available in fiscal year 2005.

Daniel I. Gordon
Acting General Counsel

[5] We note that FinCEN interpreted the $7.5 million provision as a limitation on the amount of its fiscal year 2005 salaries and expenses appropriation that it could obligate for this purpose, and that it, therefore, could not draw from the reminder of the fiscal year 2005 lump sum for this purpose. Response Letter, Attachment 3. While FinCEN's interpretation is consistent with our case law, 36 Comp. Gen. 526, 528 (1957), we have not had occasion to consider this case law in over 50 years, and we are concerned that the case law may not reflect more recent congressional practice of using appropriations provisions to enact affirmative direction rather than a limitation. Because FinCEN, in fact, did not use (or propose to use) amounts from its lump sum appropriation for this purpose, we do not reconsider that case law in this decision.

GAO
Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-320091

July 23, 2010

Congressional Requesters

Subject: *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*

In a letter dated March 12, 2010, you requested information and our views on whether the National Aeronautics and Space Administration (NASA) complied with the Impoundment Control Act of 1974 and with restrictions in the fiscal year 2010 Exploration appropriation when NASA took certain actions pertaining to the Constellation program. Your letter asked us (1) for information regarding the planning activities of NASA staff after the President submitted his fiscal year 2011 budget request; (2) whether NASA complied with the provision in the Exploration appropriation which prohibits the use of the Exploration appropriation to "create or initiate a new program, project or activity;" (3) whether NASA has obligated Exploration appropriations in a manner consistent with the Impoundment Control Act; and (4) whether NASA complied with the provision in the Exploration appropriation which prohibits the use of the Exploration appropriation for "the termination or elimination of any program, project or activity of the architecture for the Constellation program."

We responded to your first two questions in a previous letter. B-319488, May 21, 2010. In that letter, we provided information on planning activities and determined that NASA had not violated the provision in the Exploration appropriation that bars NASA from using the Exploration appropriation to "create or initiate a new program, project or activity." *Id.* This letter responds to your third and fourth questions. In addition, we address questions raised by your staff subsequent to your letter regarding potential contract termination costs. As explained below, we conclude that, to date, NASA has not violated the Impoundment Control Act or the provision in the Exploration appropriation which bars NASA from using the Exploration appropriation for the "termination or elimination of any program, project or activity of the architecture for the Constellation program." NASA has not withheld Exploration funds from obligation and has obligated the funds at rates comparable to the rates of obligation in years in which NASA obligated nearly all available Exploration funds. In addition, NASA has obligated Exploration funds to carry out the various Constellation programs, projects, and activities.

Our practice when rendering decisions is to obtain the views of the relevant agency and to establish a factual record on the subject matter of the request. GAO,

Procedures and Practices for Legal Decisions and Opinions, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. By letter of April 26, 2010, the NASA General Counsel supplied NASA's legal views supporting its actions related to the Constellation program as well as relevant information. Letter from General Counsel, NASA, to Assistant General Counsel for Budget Issues, GAO (NASA Letter). We interviewed NASA officials from the Exploration Systems Mission Directorate, the Office of General Counsel, the Office of Procurement, Johnson Space Center, and Marshall Space Flight Center regarding NASA's obligation and contracting practices. We reviewed relevant financial data and contract documents and internal NASA correspondence as well as correspondence between NASA and its contractors. We also interviewed officials of firms operating under contracts with NASA.

BACKGROUND

The primary objective of the Constellation program is to develop capabilities to transport humans to Earth orbit, to the Moon, and back to Earth. The program also serves as a stepping-stone to future human exploration of Mars and other destinations.[1] On February 1, 2010, the President submitted his fiscal year 2011 budget request, which proposed the cancellation of Constellation in favor of the creation of a different approach to human space exploration.[2]

Prior to the submission of the President's fiscal year 2011 budget request, Congress enacted the fiscal year 2010 Exploration appropriation, which appropriated about $3.7 billion for "exploration research and development activities." The appropriation made the funds available until September 30, 2011, with the following limitation:

> "*Provided*, That notwithstanding section 505 of this Act, none of the funds provided herein and from prior years that remain available for obligation during fiscal year 2010 shall be available for the termination or elimination of any program, project or activity of the architecture for the Constellation program nor shall such funds be available to create or initiate a new program, project or activity, unless such program termination, elimination, creation, or initiation is provided in subsequent appropriations Acts."

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, div. B, title III, 123 Stat. 3034, 3113, 3143 (Dec. 16, 2009).

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[1] For a description of the objectives of the Constellation program, see NASA, *Fiscal Year 2010 Budget Estimates*, at EXP-3, *available at* www.nasa.gov/news/budget/FY2010.html (last visited July 14, 2010) (2010 Budget Estimates).

[2] *Budget of the United States Government for Fiscal Year 2011*, at 129-30, *available at* www.gpoaccess.gov/usbudget/fy11/index.html (last visited July 14, 2010).

On June 9, 2010, the NASA Administrator sent a letter to several members of Congress regarding the status of the Constellation program. Letter from Administrator, NASA, to the Honorable Pete Olson, June 9, 2010 (June 9 Letter). The letter stated that "[w]hile NASA has fully complied with the provisions of the FY 2010 Consolidated Appropriations Act, the pace of some contractual work to date has been affected by the constrained FY 2010 budget profile for the Constellation program." *Id.* at 1. The letter then stated:

> "Within this already constrained budget profile, funding for the Constellation program is further limited after taking into account estimated potential termination liability for Constellation contracts. Current estimates for potential termination liability under Constellation contracts total $994 million. Once these termination liability estimates are accounted for, the overall Constellation program is confronting a total estimated shortfall of $991 million for continued program effort for the balance of the year, compared with the revised FY 2010 plan. Given this estimated shortfall, the Constellation program cannot continue all of its planned FY 2010 program activities within the resources available. Under the Anti-Deficiency Act (ADA), NASA has no choice but to correct this situation. Consequently, the Constellation program has formulated an updated funding plan for the balance of FY 2010 . . . ."

Id. The letter stated that "NASA intends to pace, rather than terminate, activity on the Constellation contracts," prioritizing work to be completed in accordance with four stated principles. *Id* at 2. The four principles are to:

- Maximize retention of personnel/skills and capabilities that can contribute to future technology development,
- Protect advanced development work that could transfer to planned programs as reflected in the FY 2011 budget request,
- Enable a robust transition to work associated with an Orion Crew Escape Vehicle that the President announced in an April 15, 2010 speech, and
- Place a low priority on expenditures for hardware that can be used solely for the program of record and are not applicable to programs as reflected in the FY 2011 budget request.

DISCUSSION

We address three issues: first, whether NASA has complied with the Impoundment Control Act of 1974; second, whether NASA has complied with the provision in the fiscal year 2010 Exploration appropriation which bars NASA from using the Exploration appropriation for the termination or elimination of any program, project, or activity (PPA) of the architecture for the Constellation program; and third, potential contract termination costs.

Impoundment Control Act of 1974

Congress enacted the Impoundment Control Act of 1974 to tighten congressional control over presidential impoundments. Among other things, the act established a procedure under which Congress could consider the merits of impoundments proposed by the President. GAO, *Impoundment Control Act: Use and Impact of Rescission Procedures*, GAO-10-320T (Washington, D.C.: Dec. 2009), at 1. An impoundment is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 61 (Budget Glossary). There are two types of impoundments: deferrals and proposed rescissions. *Id.* Under the act, the President may propose a rescission when he wishes to withhold funds from obligation permanently or submit a deferral proposal when he wishes to withhold funds temporarily. Agencies may withhold budget authority from obligation only if the President has first transmitted a rescission or deferral proposal in a special message to Congress. 2 U.S.C. §§ 683(a), 684(a); *see also* B-308011, Aug. 4, 2006; B-307122, Mar. 2, 2006.

The President has not transmitted a rescission or deferral proposal to Congress pertaining to NASA or the Exploration appropriation. Therefore, NASA may not withhold funds in the Exploration account from obligation. Throughout this fiscal year, NASA has obligated amounts available in the Exploration appropriation at rates comparable to those in preceding years. According to NASA financial data, by June 30, 2010, NASA had obligated 83 percent of the Exploration funds that Congress appropriated for fiscal year 2010. By comparison, the corresponding figure in fiscal years 2009 and 2008 was 73 percent. If NASA continues to obligate funds at its current rate, it will obligate nearly all the funds available in the Exploration appropriation before the end of this fiscal year, just as NASA obligated nearly all the available funds by the end of fiscal years 2009 and 2008. Because the funds appropriated this fiscal year will be available until the end of fiscal year 2011, it is likely that NASA will obligate nearly all available amounts well before the funds expire.[3]

We previously found that an agency violated the Impoundment Control Act when it withheld funds from obligation in response to a legislative proposal that appeared in the President's budget request. B-308011, Aug. 4, 2006. In that case, the agency's apportionment schedule for the appropriation identified over $2 million set aside in reserve, unavailable for obligation, pending congressional action on the President's

[3] NASA's 2009 and 2008 appropriations also made the Exploration appropriation available for two fiscal years. Commerce, Justice, Science, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, div. B, title III, 123 Stat. 524, 560, 587–88 (Mar. 11, 2009); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2008, Pub. L. No. 110-161, div. B, title III, 121 Stat. 1844, 1884, 1917 (Dec. 26, 2007). In both years, NASA obligated nearly all available amounts by the end of the first fiscal year of availability.

budget request. In this case, however, we see no evidence that NASA has withheld funds from obligation. NASA has made Exploration appropriations available to program managers for obligation. Accordingly, the managers have obligated the funds at rates comparable to the rates of obligation in years in which NASA obligated nearly all the funds before the end of even the first year of availability. Therefore, we conclude that NASA has not violated the Impoundment Control Act of 1974.

Termination or Elimination of Any Program, Project, or Activity (PPA)

The next issue is whether NASA has complied with the provision in the fiscal year 2010 Exploration appropriation which bars NASA from using the Exploration appropriation "for the termination or elimination of any program, project or activity of the architecture for the Constellation program." To interpret this provision, we begin with the statutory language. *Carcieri v. Salazar*, 555 U.S. ___, 129 S. Ct. 1058 (2009); *BedRoc Limited, LLC v. United States,* 541 U.S. 176 (2004); B-302548, Aug. 20, 2004. In the absence of indications to the contrary, Congress is deemed to use words in their common, ordinary sense. B-308715, Apr. 20, 2007. To identify the common, ordinary meaning of words, courts look to a standard dictionary. *Mallard v. U.S. District Court*, 490 U.S. 296, 300–02 (1989); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 237 (1990); B-308715, Apr. 20, 2007; B-302973, Oct. 6, 2004. In this case, "terminate" means "bring to an end," while "eliminate" means "completely remove or get rid of (something)." *The New Oxford American Dictionary* 1741, 548 (2nd ed. 2005). Thus, the appropriations act prohibits NASA from using the Exploration appropriation to bring any Constellation PPA to an end, or to completely remove or get rid of any Constellation PPA.[4]

A "Program, Project or Activity (PPA)" is an "element within a budget account. For annually appropriated accounts, the Office of Management and Budget (OMB) and agencies identify PPAs by reference to committee reports and budget justifications."

[4] The conference report accompanying the fiscal year 2010 Exploration appropriation stated that "funds are also not provided herein to *cancel, terminate or significantly modify contracts* related to the spacecraft architecture of the current program, unless such changes or modifications have been considered in subsequent appropriations Acts." H.R. Rep. No. 111-366, at 756 (Dec. 8, 2009) (emphasis added). This language differs from that in the statute, which prohibits NASA from using Exploration funds for the "termination or elimination of any *program, project or activity* of the architecture for the Constellation program" (emphasis added). Language in a conference report is part of the statute's legislative history and is therefore not legally binding. Although courts sometimes turn to legislative history to resolve questions of statutory interpretation when the statutory text is unclear, courts do not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994); *see also*, *e.g.*, *14 Penn Plaza v. Pyett*, ___ U.S. ___, 129 S. Ct. 1456, 1465 (2009); *Shannon v. United States*, 512 U.S. 573, 583 (1994); 55 Comp. Gen. 307, 325 (1975). In this case, because the meaning of the language in the fiscal year 2010 Exploration appropriation is clear from the text of the statute, we do not refer to the statute's legislative history to aid our interpretation.

Budget Glossary, at 80. NASA's fiscal year 2010 budget request lists five PPAs within the "Constellation Systems" category:

- Program Integration and Operations,
- Orion Crew Exploration Vehicle,
- Ares I Crew Launch Vehicle,
- Ares V Cargo Launch Vehicle, and
- Commercial Crew and Cargo.

2010 Budget Estimates, at EXP-2.

As discussed above, NASA has continued to obligate Exploration appropriations to all five of these PPAs, notwithstanding the President's proposal in his fiscal year 2011 budget submission; in fact, NASA's current rate of obligation is comparable to or exceeds that of the previous two fiscal years. We found no evidence that NASA is withholding Exploration appropriations from obligation in anticipation of future programmatic changes or that NASA is taking any steps to terminate or end the Constellation program, any of the six large contracts for the hardware of the Constellation program, or any of the five PPAs.

NASA financial data show that NASA has allocated funds across the Constellation PPAs (such as the Ares I and Orion programs) in amounts consistent with the allocations given in congressional committee reports and NASA's public budget documents. In continuing to obligate funds for all the various Constellation PPAs, NASA has neither brought to an end nor completely eliminated any Constellation PPA. As we discussed in our previous opinion, NASA has engaged only in preliminary planning activities related to the proposals in the President's fiscal year 2011 budget submission. B-319488, May 21, 2010. Thus, we conclude that, at this time, NASA has not violated the restriction in the fiscal year 2010 Exploration appropriation.

The June 9 Letter informs Congress that NASA will place a priority on funding work that aligns with the programs planned in the President's fiscal year 2011 budget request and with a space vehicle the President proposed in an April 15, 2010 speech. Meanwhile, NASA will "place low priority on expenditures for hardware that can be used solely for" the current program. June 9 Letter, at 2. It is not clear what NASA specifically means by "low priority." However, such shifts in priority do not in themselves amount to the termination or elimination of a PPA. NASA must coordinate many employees and contractors and multiple undertakings in order to carry out each PPA. For example, NASA divides the Ares I PPA into five "project elements," such as the First Stage, the Upper Stage engine, and the Upper Stage. 2010 Budget Estimates, at EXP-14. NASA has discretion in how it carries out the Constellation program consistent with Congress's statutory direction. In making these choices, NASA continues to obligate funds to carry out all of the Constellation PPAs. It has not diverted the Exploration funds to create or initiate a new PPA. Therefore, this course of action also does not violate the language that bars NASA

from terminating or eliminating any PPA of the architecture of the Constellation program.

The June 9 letter stated that the Ares "program will generally provide no additional funding for the first stage contract, descope remaining contracts, and reduce support contractor levels." However, NASA has continued to obligate funds for the performance of the Ares program. There are two Ares PPAs: the Ares I Crew Launch Vehicle and the Ares V Cargo Launch Vehicle. In June of 2010, NASA obligated an additional $222 million for the Ares I PPA, and thus has obligated $1 billion for the PPA during this fiscal year. In addition, in June of 2010, NASA obligated an additional $9 million for the Ares V PPA, reaching a total of $60 million in obligations for Ares V during this fiscal year. We are also aware that NASA has decided not to proceed with some procurements and studies that had been planned but not yet awarded. NASA Letter, at 7. After making these decisions, NASA has continued to obligate funds to carry out all of the Constellation PPAs, and has not used Exploration funds to create or initiate a new PPA. Therefore, these actions do not violate the restriction in the fiscal year 2010 Exploration appropriation.

Termination Costs

Your staff has raised questions about which party bears responsibility for the contractors' potential termination costs under the Constellation contracts because of public statements that NASA has made concerning the requirements of the Antideficiency Act. The Antideficiency Act provides that agency officials may not authorize obligations exceeding the amount available in an appropriation or before the appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1). Generally, an obligation is a "legal duty on the part of the United States which constitutes a legal liability or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States." B-300480, Apr. 9, 2003, *quoting* 42 Comp. Gen. 733, 734 (1963).

To carry out the Constellation program, NASA has entered into a multitude of contracts and other procurement instruments. NASA refers to six large contracts for the hardware of the Constellation program as the program's prime contracts.[5] NASA states that it has not taken any steps to terminate any of the Constellation contracts. NASA Letter, at 8; *Hearing Before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, 111th Cong. (Mar. 23, 2010) (statement of NASA Administrator).

All of the prime contracts for the Constellation program are cost-reimbursement contracts. NASA Letter, at 10; *see also, e.g.*, NASA Contract No. NNM07AA75C, at 2 (ATK Launch Systems); NASA Contract No. NNJ06TA25C, schedule A, section B, at 2

[5] NASA entered into prime contracts with ATK Launch Systems, Lockheed Martin, Oceaneering, and Pratt & Whitney Rocketdyne. NASA entered into two separate prime contracts with Boeing.

(Lockheed Martin). In general, these types of contracts require the government to reimburse the contractor for allowable costs incurred in performing the contract, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer. Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.301-1.

Some contract termination costs are allowable under the FAR. Generally, termination costs are costs that would not have arisen had the contract not been terminated. FAR § 31.205-42. As required by the FAR, the prime contracts include a provision stating that the government is not obligated to reimburse the contractor for costs incurred in excess of the total allotment that is specified in the contract; this limitation on liability would include termination costs. FAR §§ 32.705-2(b), 52.232-22(f)(1), 52.232-22(h); *see, e.g.*, NASA Contract No. NNM07AA75C, at 33; NASA Contract No. NNJ06TA25C, schedule A, section I, at 3. This limitation on the government's liability is generally known as the "limitation of funds clause." NASA must record an obligation for the entire amount that is allotted to the contract, which represents NASA's legal liability, in order to comply with various fiscal statutes, including the Antideficiency Act.[6]

Under the limitation of funds clause, when the contractor expects that the costs it will incur in the next 60 days of performance will exceed 75 percent of the total amount allotted to the contract, the contractor must notify the agency. FAR § 52.232-22(c). Additionally, 60 days before the end of the period specified in the contract, the contractor must notify the agency of the estimated amount to continue performance under the contract or for any further period specified in the contract's schedule[7] or

[6] In January 2010, NASA and one of its contractors agreed to modify two of the six Constellation prime contracts to include clauses pertaining to "special termination costs." These clauses enumerated several categories of allowable termination costs and provided that "in the event of a termination for convenience, and subject to negotiation of a termination settlement, funds will be applied to cover Special Termination Costs from amounts available within the Exploration Systems Appropriation or from such other funds appropriated or to be appropriated by Congress for this purpose." NASA Contract No. NNM08AA16C, modification 34 (Boeing Avionics contract), NASA Contract No. NNM07AB03C, modification 57 (Boeing Upper Stage contract.) Further, "the Contractor agrees to perform this contract in such a manner that the Contractor's claim for special termination costs will not exceed" a particular amount ($29 million for the Avionics contract, $52 million for the Upper Stage contract.) *Id.* Although these two prime contracts also include the standard limitation of funds clause, the standard limitation of funds clause specifically allows the contractor and the government to agree to exceptions. FAR § 52.232-22(f). As required by law, NASA has recorded obligations corresponding to the amounts for each special termination cost clause. NASA Letter, at 12; B-238581, Oct. 31, 1990.

[7] The contents of the schedule are specified in the FAR, §§ 14.201-1 and 15.204-1.

otherwise agreed upon. FAR § 52.232-22(d). During this and previous fiscal years, the Constellation prime contractors have sent notifications to NASA in accordance with this provision. The contractor is not obligated to continue performance, including any actions related to contract termination, if such performance would cause the contractor to incur costs in excess of the amount allotted. FAR § 52.232-22(f)(2).

The limitation of funds clause creates an incentive for contractors to accurately track both the costs of performance and any termination costs that they may incur. Because the costs that contractors might incur in the event of a termination may be considerable, many contractors consider it prudent to track their estimated termination costs and to consider the possibility of termination in the course of performance. The contractor might believe that it must incur some costs—those related to the contractor's contractual obligations to third parties, for example—in the event of a termination. Consequently, contractors may take steps to limit their possible liability in the event of a termination. For example, an official of one NASA contractor told us that his company's standard practice on contracts with agencies other than NASA is to incur costs only up to an amount that would leave the government agency with enough funds available under the allotted amount to reimburse any allowable termination costs that might arise. *See also* B-238581, Oct. 31, 1990 ("Consequently, as dictated by good business practice, [the contractor] kept an accounting of the unliquidated funds which were obligated on the contract so as to guarantee that sufficient amounts remained to liquidate termination costs.").

Four of the five prime Constellation contractors told us that NASA's past practice has been to agree to reimburse all termination costs, even if such costs exceeded the amount currently allotted to the contract under the limitation of funds clause.[8] Some of the contractors assert NASA stated in various written and oral communications that NASA would reimburse such costs. The contractors further assert that NASA's behavior during contract performance also indicated that NASA would reimburse such costs. These four contractors did not take steps to ensure that the funds that NASA allotted to the contract would also be sufficient to reimburse any termination costs that may arise under the contract. Instead, these contractors told us that, in the past, they would incur performance costs up to the amount that NASA had allotted to the contract, without leaving any of the allotted amount available for termination costs.

In August 2009, NASA sent a letter to one contractor which cited the limitation of funds clause and stated that—

> "the Government is not obligated to reimburse [the contractor] for costs incurred in excess of the total amount allotted by the Government to this contract . . . Plainly stated, should [the contractor] expend funds

[8] The fifth Constellation prime contractor told us that the contractor, not NASA, bears the responsibility for accounting for potential termination liability that may arise.

over and above the funds allotted to the subject contract it does so at its own risk."

Letter from Contracting Officer, NASA, to ATK Launch Systems, Inc., *Subject: Contract NNM07AA75C, Continuing Resolution and Limitation of Funds*, Aug. 14, 2009, at 1. In response, the contractor stated that "NASA has the obligation to reimburse [the contractor] for any termination related costs incurred." Letter from Manager, Contracts, ATK, to Marshall Space Flight Center, NASA, *Subject: Contracts NAS8-97238 and NNM07AA75C Limitation of Funds*, Sept. 10, 2009, at 1. Stating that "[t]his is the course of conduct that has been in place for many years on NASA contracts," the contractor concluded that it "will continue to rely on NASA's long standing course of conduct under which NASA will continue to have the obligation to provide additional funding to [the contractor] for termination related costs." *Id.*

In March 2010, after the President submitted his fiscal year 2010 budget request, two prime contractors sent letters to NASA stating the contractors' understanding that NASA would reimburse termination costs even if such costs exceeded the amount NASA had allotted to the contract. Letter from Manager, Contracts, ATK, to Marshall Space Flight Center, NASA, *Subject: Contract NNM07AA75C Proposed Draft Termination Liability Clause*, Mar. 10, 2010; Letter from Contracts Management, Lockheed Martin Space Systems Company, to Contracting Officer, NASA, *Subject: Contract NNJ06TA25C—Notification of Funding Expenditure Limitation*, Mar. 22, 2010. In response letters sent in April 2010, NASA stated that the contractors' understanding "is inconsistent with written NASA Guidance[9] and, more importantly, the contract's Limitation of Funds clause." Letter from Procurement Officer, NASA, to Chief, Contracts Administration, Lockheed Martin Corp., *Subject: Contract NNJ06TA25C, Project Orion, Notification of Funding Expenditure Limitation*, Apr. 23, 2010, at 1; Letter from Procurement Officer, NASA, to ATK Launch Systems, Inc., *Subject: Contract NNM07AA75C Proposed Special Termination Clause*, Apr. 23, 2010, at 1. The letters NASA sent quoted language from the limitation of funds clause stating that "the Government is not obligated to reimburse the Contractor for any costs incurred in excess of the total amount allotted by the Government to this contract, whether incurred in the course of the contract or as a result of termination." *Id.*; FAR § 52.232-22(h).

[9] Internal NASA memoranda state NASA policy: "absent specific Congressional or regulatory authority, the Limitation of Funds clause clearly provides that termination costs are subject to the limitation of funds amount in the contract. The maximum amount NASA would be required to pay, as a result of a contract's termination, would be the funds obligated on the contract." Memorandum from Associate Administrator for Procurement and from Chief Financial Officer, NASA, *Subject: Procedures for Termination Liability*, Mar. 19, 1997. *See also* Memorandum from Comptroller and from Assistant Administrator for Procurement to Center Directors, NASA, *Subject: Funding for Termination Liability,* Apr. 22, 1992; Memorandum from Associate General Counsel (Contracts) to Director, Program Operations Division, NASA, *Subject: Request for Deviation Regarding Termination Liability,* July 28, 1989.

We take no position in this opinion regarding whether NASA ever promised contractors, explicitly or implicitly, that NASA would reimburse contract termination costs even if they exceeded the total amount allotted to the contract. However, we note that if NASA were to agree to pay termination costs that exceed the total amount allotted under FAR section 52.232-22, such an agreement would be an obligating event. NASA would need to have sufficient funds available to obligate the amount that it agreed to pay; otherwise, NASA would risk violating the Antideficiency Act. *See* B-238581, Oct. 31, 1990.

Current estimates provided to NASA by the prime contractors for potential termination costs total $994 million. June 9 Letter. NASA explained that it obligates amounts to the contracts and is not reserving these funds for termination costs; however, NASA is negotiating with the prime contractors to formulate appropriate work plans for the balance of this fiscal year. At the end of June 2010, NASA had obligated about $3.1 billion of the $3.7 billion that Congress appropriated for the Exploration appropriation this fiscal year. This leaves approximately $600 million in budget authority in the Exploration account for the remainder of the fiscal year.

We recognize that progress toward meeting key Constellation milestones has slowed and that job losses have occurred.[10] However, the evidence we have gathered to date indicates that NASA is adhering to its policy and the FAR terms incorporated into the Constellation prime contracts concerning allowable costs, including potential termination costs. NASA officials and financial data indicate that NASA continues to obligate funds to the prime contracts and that the obligation rates have not changed in response to either the President's budget request or to the Administrator's June 9 Letter. The agency's obligation of the amounts allotted to the Constellation prime contracts and its adherence to the terms of the FAR with regard to allowable costs help ensure NASA's compliance with the Antideficiency Act and do not constitute a violation of the provision in the fiscal year 2010 Exploration appropriation prohibiting

[10] Of the five Constellation prime contractors, three contractors state that they are implementing or planning reductions in the workforces assigned to their Constellation contracts. Contractors are reassigning some staff to non-Constellation projects and are laying off other staff. Of these three contractors, one states that the changes were necessary because NASA funded the contract at a lower level than the contractor had previously expected, while another asserts that the changes were necessary because NASA changed its practice with regard to the funding of termination liability. A third contractor states that a combination of these two factors made workforce reductions necessary. Two of these three contractors also have slowed or stopped some procurements from their subcontractors.

The two remaining Constellation prime contractors state that they have not changed staffing levels on their prime contracts. However, one of these contractors also performs work for other Constellation prime contractors as a subcontractor. This contractor states that it has reduced its workforce because of reduced funding from the prime contractor.

NASA from terminating or eliminating any PPAs of the architecture for the Constellation program.

CONCLUSION

NASA's actions to date with regard to the Constellation program have not violated either the Impoundment Control Act of 1974 or the provision in the fiscal year 2010 Exploration appropriation that bars NASA from terminating or eliminating any PPAs of the architecture for the Constellation program.

We hope the information provided in this opinion is helpful to you. If you have questions, please contact Assistant General Counsel Julia Matta at (202) 512-4023 or Managing Associate General Counsel Susan A. Poling at (202) 512-2667.

Sincerely yours,

Lynn H. Gibson
Acting General Counsel

List of Requesters

The Honorable Robert Aderholt
The Honorable Ralph Hall
The Honorable Gene Green
The Honorable Bill Posey
The Honorable Pete Olson
The Honorable John Culberson
The Honorable Jason Chaffetz
The Honorable Parker Griffith
The Honorable Michael D. Rogers
The Honorable Kevin Brady
The Honorable Jo Bonner
The Honorable Spencer Bachus
The Honorable Steve LaTourette
The Honorable Ken Calvert
The Honorable John Fleming
The Honorable Suzanne Kosmas
The Honorable Rob Bishop
House of Representatives

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Funding of Maintenance Contract Extending Beyond Fiscal Year

File: B-259274

Date: May 22, 1996

DIGEST

1. Section 2410a of title 10, U.S. Code, provides that funds appropriated to Department of Defense for a fiscal year are available for payments under maintenance contracts for 12 months beginning at any time during the fiscal year. Kelly Air Force Base may award two vehicle maintenance contracts charging fiscal year 1994 money for each contract so long as each contract is properly awarded in fiscal year 1994 and each contract does not exceed 12 months in duration.

2. Section 2410a of title 10, U.S. Code, is a statutory exception to the bona fide needs rule. The statute authorizes the Department of Defense to use current fiscal year budget authority to finance a severable service contract for equipment maintenance that continues into the next fiscal year.

3. Air Force decision to leave 8 months of a 12-month severable service contract unfunded at the time of award does not violate the Antideficiency Act because of Availability of Funds clause in the contract. Nor did the Air Force decision violate the bona fide needs rule, because severable services contracts are funded out of funds current at the time services are provided unless otherwise authorized by law.

DECISION

During the third option year of a fixed price contract for vehicle maintenance services, Kelly Air Force Base modified the contract period so that the contract would expire on August 31, 1994. Kelly Air Force Base exercised a fourth option to extend performance from September 1, 1994 to August 31, 1995. Because fiscal year 1994 budget authority was only available to finance performance through the first 4 months, that is, until December 31, 1995, the Air Force modified the contract

to provide that after that date, the government's obligation under the contract was contingent upon the contracting officer notifying the contractor in writing that funds were available for continued performance and that the contractor continue work.

A certifying officer at the Kelly Air Force Base asks whether the use of fiscal year 1994 budget authority to finance both the initial 11 months of orders covered by the third option period and the 4 months of orders covered by the fourth option period violates 10 U.S.C. § 2410a and the bona fide needs rule. There is also implicit in the facts and circumstances of this case a second question, namely, did the Air Force's failure to fund at the time of award the remaining 8 months of the contract violate the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B). For the reasons discussed below, we have no objection to the Air Force's financing of the contracts.

Background

According to the Air Force, in an effort to minimize the surge in workload at the end of the fiscal year, it has staggered contract periods for certain support service contracts, including this one, so that the contracts do not all expire simultaneously. The Air Force awarded the vehicle maintenance contract here, a fixed price contract with K&M Maintenance Services, Inc., in 1990 for fiscal year 1991, with four 1-year option periods. During the third option year, the Air Force modified the contract period, cutting it short by 1 month for that year, so that the contract would expire on August 31 instead of September 30. The Air Force correspondingly changed the fourth option period to run from September 1, 1994 to August 31, 1995.

At the time of exercise of the fourth 1-year option, the Air Force only had fiscal year 1994 budget authority available to finance the first 4 months of the new contract (September through December 1994). Accordingly, the Air Force modified the contract by adding a clause stating that the government's obligation beyond December 31, 1994, was contingent upon the availability of appropriations. The clause further provided that no legal liability on the part of the government would arise for contract performance beyond December 31, 1994, unless and until the contractor received notice in writing from the Air Force contracting officer that sufficient funds were available and that the contractor could continue work.

The Air Force cited section 2410a of title 10, U.S. Code, as authority for its action. Memorandum for SA-ALC/FM10 from SA-ALC/JAN, Sept. 22, 1994. Section 2410a authorizes the Air Force to use funds appropriated for a fiscal year for payments under contracts for the maintenance of tools, equipment, and facilities for 12 months beginning at any time during the fiscal year.

The certifying officer has questioned the legality of the Air Force's action. The certifying officer asserts that the Air Force used fiscal year 1994 funds to finance, effectively, a 15-month contract, i.e., the 11-month third option period (October 1, 1993 through August 31, 1994) and the first 4 months of the fourth option period (September 1, 1994 through December 31, 1994). The certifying officer believes that while section 2410(a) permits the Department of Defense (DOD) to convert an in-house function to a 12-month contract at any time during a fiscal year, it does not permit DOD to order more than 12 months worth of services using fiscal-year funds. The certifying officer reads section 2410a to permit the acquisition of only 12-month contract services using fiscal year funds, because the law refers to "payments under contracts . . . for 12 months beginning at any time during the fiscal year." Our review of the facts and circumstances identified a second issue concerning the Anti-Deficiency Act prohibition, 31 U.S.C. § 1341(a)(1)(B), against involving the government in a contract or an obligation in advance of the appropriation properly chargeable therefor.

10 U.S.C. § 2410a and the Bona Fide Needs Rule

The first issue is one of statutory construction. The statute at issue, 10 U.S.C. § 2410a, reads as follows:

> "Funds appropriated to the Department of Defense for a fiscal year shall be available for payments under contracts for any of the following purposes for 12 months beginning at any time during the fiscal year:
>
> "(1) The maintenance of tools, equipment, and facilities . . . ."[1]

The Air Force Staff Judge Advocate takes the position that the use of fiscal year 1994 funds to support 15 months of services "is consistent with both the letter and spirit of 10 U.S.C. § 2410a". He reasons that when in October 1993, the Air Force awarded the contract for the third option period, the Air Force properly charged fiscal year 1994 funds for the obligation incurred. By virtue of 10 U.S.C. § 2410a, when the Air Force on September 1, 1994, entered into a contract for the fourth option period, it necessarily charged fiscal year 1994 funds for the 4-month liability

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[1]Section 2410a is a codification of a freestanding, permanent authority contained in a continuing defense appropriation for fiscal year 1986. Pub. L. No. 99-190, § 8005(e), 99 Stat. 1202-1203 (1985). The language of section 8005(e) of Public Law 99-190 is not materially different from section 2410a and as relevant here simply made fiscal year DOD appropriations available for "payments under contracts for maintenance of tools and facilities for 12 months beginning at any time during the fiscal year."

it incurred. The only limitation in 10 U.S.C. § 2410a is that the contract may not exceed 12 months in duration. The fact that the Air Force could obligate fiscal year funds to cover a period in excess of 12 months is without "any legal significance."

We agree with the Air Force's reading of the statute. In our opinion, the phrase "for 12 months" modifies "contracts" and not "payments." Fiscal year appropriations have long been available to make payments for more than 12 months to liquidate valid obligations. We know of no reason for Congress to enact legislation to limit payments on valid obligations only to 12 months. If Congress had intended such a significant departure from settled law, we think it would have more clearly so indicated.

The purpose of 10 U.S.C. § 2410a is to overcome the bona fide needs rule of this Office. By making current fiscal year budget authority available in the next fiscal year when it would otherwise not be available, section 2410a is a statutory exception to the bona fide needs rule. The bona fide needs rule provides that a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made.[2] For service contracts, whether an expense was properly incurred or properly made during the period of availability depends upon whether the services are severable or nonseverable. A nonseverable contract is essentially a single undertaking that cannot be feasibly subdivided. B-240264, Feb. 7, 1994. It is considered a bona fide need of the fiscal year in which the agency entered into the contract. Consequently, agencies should record nonseverable service contracts as obligations at the time of award. Service contracts, where the services are continuing and recurring in nature, such as the vehicle maintenance contract here, are severable and are chargeable to the appropriation current at the time services are rendered. See 60 Comp. Gen. 219, 221 (1981). By definition, severable services address needs of the time the services are rendered. 71 Comp. Gen. 428, 430 (1992).

As a general rule, a severable service contract crossing fiscal years and financed exclusively from annual appropriations in the year of award requires specific statutory authority. 71 Comp. Gen. at 430. Section 2410a provides the requisite statutory authorization for DOD vehicle maintenance contracts. By making current year budget authority available for such contracts for a 12-month period "beginning at any time during a fiscal year," section 2410a clearly exempts DOD from the bona fide needs rule as it ordinarily applies to severable service contracts. It permits

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[2]The rule has its statutory basis in section 1502(a) of title 31, U.S. Code, which provides: "The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability."

DOD to obligate budget authority covering the entire, annual contract at the time it enters into the contract, similar to nonseverable service contracts, rather than budget authority available at the time the services are rendered. The fact that fiscal year funds may be used to make payments for more than 12 months of services is a consequence of the law that, in the words of the Air Force Staff Judge Advocate, has "no legal significance."

Antideficiency Act

The second issue in this case is application of the basic proscription of the Antideficiency Act contained in 31 U.S.C. § 1341(a)(1)(B). The Antideficiency Act prohibits an officer or employee of the United States from "involving [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). Here, the Air Force, as a result of its actions during the period questioned by the certifying officer, awarded two contracts: one covering the 11-month third option period and the other covering the 12-month fourth option period. With respect to the latter contract, the Air Force included an Availability of Funds clause in an attempt to limit its liability under the contract to the amount of fiscal year 1994 funds obligated to cover performance in the first 4 months, that period beginning September 1, 1994 and ending December 31, 1994, of the 12-month contract:

> "No legal liability on the part of the Government for any payment may arise for performance under this contract beyond 31 December 1994, until funds are made available to the Contracting Officer for performance and until the contractor receives notice of availability to be confirmed in writing by the Contracting Officer."

Under these circumstances, the issue is whether the Air Force involved the government in a contract for the payment of money in advance of the appropriation available for the remaining 8-month period of the contract without authority of law.

We think the resolution of this issue is controlled by our decision in A-60589, July 12, 1935. In order to even out the workload, the Procurement Division of the Treasury Department adopted the practice of staggering the award of contracts. To this end, the Treasury Department awarded a contract for gear oil, the contract term running from January 1, 1935 to March 31, 1936 (the then fiscal year ran from July 1 to June 30). The contract was for an indefinite quantity and imposed no financial liability on the government until the government placed an order; the only obligation under the contract was a negative one--not to procure from someone else. Even though the contract extended beyond the period of availability of the

annual appropriation involved, we did not object to the "contr actual obligation" as a violation of the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B).[3]

We have had occasion t o revisit our decision in A-60589, July 12, 1935, and expressly declined to overrule it. 48 Comp. Gen. 497, 500 (1969). In 48 Comp. Gen. 497, 500 (1969), we questioned whether the decision was "technically correct" in light of 42 Comp. Gen. 272 (1962). However, since we had per mitted 1-year requirements contracts under fiscal year appropriations to extend beyond the end of the fiscal year "for over 30 years apparently in reliance upon the July 12, 1935, decision [A-60589]," we did not object to the continuance of this practice. Id. at 500.

Today, as in 1969, we see no r eason to disturb the implicit holding of A-60589, July 2, 1935, namely, that a naked cont ractual obligation that carries with it no financial exposure to the gover nment does not violate the A ntideficiency Act.[4] Indeed, the criticism of the logic of A-60589 contained in 48 C omp. Gen. 497, 500, is arguably based on a m isreading of the facts and the rationale for our decision in 42 Comp. Gen. 272 (1962). (See, in this regard, our discussion of the effect of a Limitation of Funds clause in light of the A ntideficiency Act in 71 C omp. Gen. at 431.) However, we need not resolve that matter here since we ar e persuaded that the Availability of Funds clause included in the contr act converted the government's obligation for the remaining 8 months of the four th option period contract to no more than a "negative" obligation not to procure maintenance services elsewhere should such services be needed. Since section 2410a extended the availability of Air Force's budget authority beyond the end of the fis cal year, the critical point in time for Antideficiency Act purposes was the date on which the Air Force was to exhaust the amount of its fiscal year 1994 appropriations. At this point, the Air Force had a choice: either fund the r emaining term of the contr act with fiscal year 1995 funds or do without the maintenance s ervices. The effect of the A ir Force's

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[3]We did object in this case to the 15-month term of the contract. Title 41 U.S.C., Section 13, then Revised Statutes § 3735, limits the duration of contracts for stationery and other supplies to one year from the date of contract award.

[4]We do not view our conclusion here or our reliance on A-60589, July 12, 1935, as inconsistent with the Supr eme Court's decision in Leiter v. United States, 271 U.S. 204 (1925) or our decisions based t hereon. See 63 Comp. Gen. 129 (1983) (3-year Multiple Award Schedule agr eements do not violate Anti-Deficiency Act since there is no binding obligation to expend funds until agencies issue purchase orders against MAS agreements).

inclusion of the Availability of Funds clause, for fiscal law purposes, was to convert the government's financial obligation to only a contr actual obligation not to pr ocure elsewhere.

Accordingly, we do not object to the A ir Force's financing of its fourth option period, beginning September 1, 1994.

/s/Robert P. Murphy
for Comptroller General
of the United States

FREQUENTLY ASKED QUESTIONS

Q. Our agency has a break room where employees may store and prepare food for lunch. Can appropriated funds be used to equip the room with a stove, microwave, sink, and dishwasher? May we use our appropriated funds to purchase items for common use such as dish soap, paper towels, and hand sanitizer?

A. Red Book chapter 4, section C.5.b(4), discusses the provision of cafeterias and lunch facilities for federal employees, including a number of cases concerning the use of appropriated funds for microwave, refrigerator, and sink purchases. Of note, in B-302993, June 25, 2004, GAO approved the purchase of kitchen appliances for common use by employees in an agency facility but noted that appropriated funds are not available to furnish goods such as coffee and microwave frozen foods to be used in the kitchen area. As for the purchase of common use items such as paper towels, dish soap, or hand sanitizer, consider whether the items are to be used for maintaining a clean and safe workplace. Contact the appropriations law attorneys in your agency to discuss your particular facts in light of GAO case law and your agency's statutory authorities, regulations and policies.

Q. Can an agency provide refreshments (pastries, coffee, tea, water, juices) for employees who are required to arrive at work earlier than usual to prepare for a work-related event?

A. The general rule is that food is considered a personal expense for which appropriated funds are not available. Red Book chapter 4, section C.5.b has an extensive discussion of the purchase and provision of food in very limited, specific circumstances. Check out GAO's Food Tree, recently updated and available online, to help apply GAO's case law to your situation. Call your agency's appropriations law attorneys for assistance in determining the answer to your question in light of GAO case law and your agency's statutory authorities, regulations and policies.

Q. One of our agency employees wants to use candy as an aid to demonstrate to children the migratory patterns of local wildlife. The children, acting as migratory animals, will hunt for the candy "resource" in various places. Can we purchase the candy using appropriated funds?

A. Red Book chapter 4, section C.5.d, discusses the basic rule that appropriated funds are not available to furnish food or refreshments to nongovernment personnel. You may find useful the discussions in B-302745, July 19, 2004 (U.S. Forest Service appropriations are not available to provide food to local children as part of the Forest Service's "Kids Fishing Day") and B-310023, Apr. 17, 2008 (U.S. Forest Service appropriations are not available to provide refreshments for attendees of National Trails Day events). Two other interesting cases discussing the availability of appropriations for the purchase of food for

nongovernmental personnel include B-304718, Nov. 9, 2005 (Veterans Benefits Administration may use appropriated funds to offer refreshments and light meals as an incentive to maximize the participation by nonemployee veterans and their families in focus groups necessary to fulfill VBA's statutory requirement to "measure and evaluate" its programs to produce information) and B-318499, Nov. 19, 2009 (Navy command that did not identify a specific statutory objective may not use appropriated funds to pay for lunch for nonfederal participants of a focus group on readiness and quality of life issues). Of course, call your agency's appropriations lawyers for help applying GAO case law in light of your particular facts and your agency's statutory authorities, regulations, and policies.

Q. We are expanding our fitness center. We'd like to purchase exercise DVDs, exercise-related reading material, a TV, DVD player and a Wii game console for use by gym members. Can we use appropriated funds to make the purchases?

A. Federal agencies are authorized under 5 U.S.C. § 7901 to establish physical fitness programs as a preventive health program. Take a look at Red Book pages 4-247 and 4-248 for a discussion of the use of funds for fitness programs under the statute and the necessary expense rationale. In particular, take a look at both 70 Comp. Gen. 190 (1991), which invokes the statute to justify an agency's fitness program, and 63 Comp. Gen. 296 (1984), which applies a necessary expense analysis to the proposed purchase of exercise equipment by the Bureau of Reclamation. Finally, it's important to discuss with your agency counsel how your question fits into GAO case law and your agency's statutory authorities, regulations, and policies.

Q. How can my agency accept the services of volunteers? We're in the process of drafting a technical report detailing some cutting edge biomedical research. We'd like to have a number of experts assist the agency with drafting and review but these experts are private-sector employees. Can we accept their volunteered services without violating the prohibition against volunteers?

A. Under the Antideficiency Act, 31 U.S.C. § 1342, the government "may not accept voluntary services" without specific statutory authority. This is called the "voluntary services prohibition." This statute may seem simple but there are a number of factors that must be considered. Does the agency have other statutory authority permitting the use of voluntary services? Also, GAO case law draws a distinction between prohibited "voluntary services" and permitted "gratuitous services." There is an extensive discussion of the voluntary services prohibition in the Red Book starting on page 6-93. We also discussed this recently in a report concerning FDA. GAO, *Food and Drug Administration: Response to Heparin Contamination Helped Protect Public Health; Controls That Were Needed for Working with External Entities Were Recently Added*, GAO-11-95 (Washington, D.C.: 2010). Because the analysis is so fact-specific and because your agency might have additional policies on this matter, you should contact your agency counsel for further information.

Q. My agency operates out of fiscal year appropriations. Can we purchase a "lifetime" supply for 2 electronic components that will be obsolete very shortly? Since replacements will not be available, is it permissible for us to make a purchase sufficient to cover several years of requirements?

A. Under a principle called the "*bona fide* needs rule," an agency may use a fiscal year appropriation only to meet a legitimate need arising in the fiscal year for which the appropriation was made. A classic example is given on Red Book page 5-13: as the end of the fiscal year approaches, an agency buys a truckload of pencils when it's clear that, based on current usage, the agency already has years' worth of pencils in stock. However, the agency may maintain an inventory level so as to avoid the disruption of its operations. You should check with your agency counsel to see whether the purchase of the extra components is necessary to maintain a reasonable inventory level in your circumstances; in addition, your counsel may be aware of agency policies on this issue.

Q. Our agency is considering hosting a conference in the last week of October, which will be in fiscal year 2012. Can we enter into contracts and obligate funds for conference space in September using fiscal year 2011 money?

A. Under what we call the "*bona fide* needs rule," an agency may use a fiscal year appropriation only to meet a legitimate need of the fiscal year for which the appropriation was made. It appears your agency wants to contract for space in the fiscal year before the conference is given. The analysis will depend on several factors. For example, our Red Book has a discussion on the purchase of supplies and services that will be rendered beyond the current fiscal year. See chapter 5, sections B.4 and B.5. The general rule is that the cost of a service is chargeable to the year in which the service will be rendered, though there are exceptions. *See*, *e.g.*, B-238940, Feb. 25, 1991. You will want to contact your agency counsel for assistance on how to apply the law to the facts in your particular situation.

Q. I'm looking for guidance on paying for warranties covering more than one year. Our agency is purchasing computer equipment with four-year maintenance warranties. We're wondering how to fund the warranties. Are extended warranties considered an advance payment for services? The warranty period was not offered as separate years but as a four-year warranty, and the vendor has demanded that we pay for the four-year warranty at the same time we purchase the equipment.

A. Unless your agency has specific statutory authority otherwise, you cannot make advance payments for services or goods that the government has yet to receive. 31 U.S.C. § 3324. This is called the advance payment prohibition. The rule is discussed in the Red Book beginning on page 5-50. The agreement you're considering would have to be analyzed to determine whether the advance payment prohibition would apply here. One relevant decision is B-249006, Apr. 6, 1993. It states that some extended warranties may be purchased without violating the advance payment prohibition. One important criterion is whether the so-

called “warranty” is really a contract that contemplates periodic maintenance service, because advance payment for periodic maintenance does violate the advance payment prohibition. You will want to check with your agency counsel to see how to analyze this arrangement to see if it violates the prohibition. In addition, your counsel may be aware of additional agency-specific policies that apply in this situation.

Q. Can an agency, not an agency’s employee, accept rebates resulting from use of a government purchase card? I’m not talking about free miles for individuals earned from use of a travel card. I’m asking about rebate rewards earned in the agency’s name from use of the agency’s purchase card. Can the agency keep the rebate?

A. Generally when agencies receive money, they must deposit it into the miscellaneous receipts fund in the Treasury. This is required by the miscellaneous receipts statute, 33 U.S.C. § 3302(b). However, money received as a refund may be credited to the appropriation from which the original payment was made. The Red Book discusses this beginning on page 6-166. Some cases discussing similar issues include 65 Comp. Gen. 600 (1986) (rebates from Travel Management Centers do not need to be deposited into the Treasury as miscellaneous receipts because they are considered adjustments of previous amounts disbursed and therefore qualify as "refunds" under regulations permitting such refunds to be retained by the agency) and B-305402, Jan. 3, 2006 (NASA may not retain proceeds from the sale of demutualization compensation received from its contractor). It’s important to contact your agency counsel for guidance applying GAO case law in light of your agency’s statutory authorities and remember that the appropriate person can request a decision from us if necessary.

Q. Do you have any decisions on whether a government employee can pay for his own travel due to funding constraints?

A. We do not have any decisions or opinions that directly address this issue. It’s difficult to address this question hypothetically; it is important to know the facts that give rise to the question. Has the agency issued a travel authorization expecting the employee to travel, but is refusing to pay travel expenses? Or, is the employee traveling to attend a training course for which the agency has decided not to pay, notwithstanding that the agency may benefit from the employee’s training? The factual circumstances are important because the agency must ensure that its actions do not result in a de facto augmentation of agency appropriations. Congress established the limits of the agency’s operations when it appropriated funds for the agency, and the agency cannot find other sources of funds to defray agency expenses that would allow it to operate beyond those limits. The Red Book discusses this principle starting on page 6-162. It’s important to consult your agency counsel for more guidance and remember that the appropriate person can request a decision from us if necessary.

DIGESTS OF APPROPRIATIONS LAW DECISIONS AND OPINIONS

(January 1 to December 31, 2010)

List of Appropriations Law Decisions and Opinions

(January 1 to December 31, 2010)

B-319414
Amtrak—Permanence of the 2010 Consolidated Appropriations Act Provision on Firearm Storage and Carriage on Trains
June 9, 2010

B-318724
Department of the Army—The Fiscal Year 2008 Military Personnel, Army Appropriation and the Antideficiency Act
June 22, 2010

B-320091
National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II
July 23, 2010

B-319734
Consumer Product Safety Commission—Period of Availability and Permissible Uses of Grant Program Appropriations
July 26, 2010

B-319246
Denali Commission—Authority to Receive State Grants
September 1, 2010

B-319834
Department of Health and Human Services—Use of Appropriated Funds for Medicare Brochure
September 9, 2010

B-320116
Architect of the Capitol—Availability of Funds for Battery Recharging Stations for Privately Owned Vehicles
September 15, 2010

B-320329
NeighborWorks America—Availability for Grants to Affordable Housing Centers of America
September 29, 2010

B-319556
Use of Appropriated Funds to Pay for the D.C. Water Impervious Surface Area Fee
September 29, 2010

B-320795
Use of GAO's Appropriations to Pay the District of Columbia Stormwater Fee
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Matter of: Engineer Research and Development Center, USACE—Use of Plant Replacement and Improvement Program Account to Replace Headquarters Building

File: B-318897

Date: March 18, 2010

Funds in the U.S. Army Corps of Engineers' (USACE) Plant Replacement and Improvement Program account in the USACE Revolving Fund are not available to pay for the cost of replacing the existing Engineer Research and Development Center (ERDC) headquarters building without specific congressional authorization. Building a new ERDC headquarters building is a military construction project which must be accomplished in accordance with title 10 of the United States Code, which requires that military departments may only carry out such projects "as are authorized by law." 10 U.S.C. § 2801(a). Therefore, since the Revolving Fund provision in 33 U.S.C. § 576 does not provide the necessary authority, construction of a new ERDC headquarters using the revolving funds requires specific congressional authorization.

Matter of: Department of Health and Human Services—Use of Appropriated Funds for *HealthReform.gov* Web site and *State Your Support* Web page

File: B-319075

Date: April 23, 2010

Department of Health and Human Services (HHS) did not violate grassroots lobbying prohibitions when it used appropriated funds to create and operate a Web site and Web page that provided the public an opportunity to sign electronic form letters addressed to the President in support of health care reform. To constitute a violation, an agency communication must constitute a clear, direct appeal to the public to contact Members of Congress is support of the agency's position on

pending legislation. Because nothing in the Web site or Web page constituted a clear, direct appeal to the public, HHS did not violate the grassroots lobbying prohibitions.

Also, HHS did not violate the prohibitions on the use of appropriations for publicity or propaganda. GAO did not find any communication on the Web site or Web page that could be characterized as self-aggrandizement or covert propaganda. Although the Web site and Web page contained statements that may be characterized as having political content, GAO found no statements that were purely partisan.

Matter of: U.S. Secret Service—Statutory Restriction on Availability of Funds Involving Presidential Candidate Nominee Protection

File: B-319009

Date: April 27, 2010

The Department of Homeland Security (DHS) and the United States Secret Service (USSS) violated section 503(b) of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, and the Antideficiency Act when USSS obligated $5.1 million of reprogrammed funds for Presidential Candidate Nominee Protection expenses prior to notifying the House and Senate Appropriations Committees of the reprogramming. Section 503(b) provides that no funds are available through a reprogramming in excess of $5 million unless House and Senate Appropriations Committees are notified 15 days in advance of the reprogramming. USSS experienced a $5.1 million shortfall in Presidential Candidate Nominee Protection, a program, project or activity (PPA) in USSS's appropriation, prior to January 20, 2009, and used amounts from another PPA, National Security Events, to cover the shortfall. However, DHS did not notify Congress of the reprogramming until June 30, 2009, at least 5 months after the reprogrammed funds were obligated by USSS. Because the reprogrammed amounts were not legally available for obligation until DHS had notified the committees, USSS incurred

obligations in excess of available appropriations, violating the Antideficiency Act.

Matter of: Election Assistance Commission—Obligation of Fiscal Year 2004 Requirements Payments Appropriation

File: B-318831

Date: April 28, 2010

The Election Assistance Commission (EAC) violated the purpose statute, 31 U.S.C. § 1301(a), when it obligated certain grant programs to its fiscal year 2004 requirements payments appropriation. Under the Help America Vote Act of 2002, EAC is authorized to distribute payments to states for enumerated purposes (*i.e.*, "requirements payments"), for which EAC receives a specific appropriation. EAC used its requirements payments appropriation for items not on the statutory list of enumerated purposes because of language in a conference report and the Office of Management and Budget apportionment. The plain language of the appropriation, however, was clear that the appropriation was legally available only for requirements payments. To correct its purpose violation, EAC should adjust its accounts and charge its grant obligations to its salaries and expenses appropriation, which is available "for necessary expenses to carry out [HAVA]." Given the passage of time, however, EAC commissioners may wish to seek and obtain congressional ratification of its improper grant expenditures.

Matter of: Election Assistance Commission—Obligation of Requirements Payments under Continuing Resolutions in Fiscal Years 2009 and 2005

File: B-318835

Date: May 14, 2010

In determining amounts available for obligation under continuing resolutions, agencies must consider the operations of their programs and relevant provisions of the continuing resolutions. The U.S. Election Assistance Commission (EAC) makes payments to the states once a year for requirements payments. When EAC was operating under continuing resolutions at the beginning of fiscal years 2009 and 2005, it delayed obligations until it received its regular appropriation. Funds appropriated for requirements payments under both continuing resolutions were subject to the so-called "entitlements provision" enacted in those continuing resolutions, which required activities to continue at the rate to maintain program levels under current law. Since states receive their entire requirements payment for the year in a single distribution, generally late in the fiscal year, EAC could wait to obligate funds until it had its regular appropriations for the year and still maintain its program levels. This is consistent with other provisions of the continuing resolutions, such as implementing only the most limited funding action. Thus we do not object to EAC's actions.

Matter of: Updated Rescission Statistics, Fiscal Years 1974–2009

File: B-319084

Date: May 14, 2010

This letter transmits GAO's update of statistical data concerning rescissions proposed and enacted since the passage of the Impoundment Control Act of 1974. The attached statistics contain proposed and enacted rescissions through fiscal year 2009.

Matter of: National Aeronautics and Space Administration—Constellation Program and Appropriations Restriction, Part I

File: B-319488

Date: May 21, 2010

The National Aeronautics and Space Administration's (NASA) planning activities did not violate an appropriations provision barring it from using the appropriation to create or initiate a new program, project, or activity. NASA staff developed preliminary plans, budget levels, and prepared and delivered presentations to the Office of Management and Budget and the Office of Science and Technology Policy. Staff activities focused on planning and did not create any new programs, set up new program offices, or hire or permanently reassign any staff. Staff activities also did not award any contracts or bind NASA to taking any future course of action. Agencies must engage in various planning activities in order to provide timely, useful, and accurate information as part of the appropriations process. The appropriations provision did not preclude NASA's use of the funds to conduct planning activities.

Matter of: United States Capitol Police—Advances to Volpe Center Working Capital Fund

File: B-319349

Date: June 4, 2010

Amounts advanced in fiscal year 2007 by the United States Capitol Police (USCP) from its fiscal year 2003 appropriation were available to cover obligations incurred by the Department of Transportation's Volpe Center until September 30, 2008. At that point, USCP's fiscal year 2003 appropriation (both obligated and unobligated balances) was canceled by operation of law. 2 U.S.C. § 1907(d). The funds were not available to cover Volpe's November 2008 obligation for its interagency agreement with the Naval Air Systems Command (NAVAIR). USCP should adjust its accounts accordingly. To the extent USCP is unable to transfer fiscal year 2009 or no-year funds to Volpe to cover the obligation, it will have violated the

Antideficiency Act by obligating in excess of available appropriations. If insufficient balances are available, USCP may wish to seek legislative ratification of its use of the fiscal year 2003 appropriation.

Matter of: Amtrak—Permanence of the 2010 Consolidated Appropriations Act Provision on Firearm Storage and Carriage on Trains

File: B-319414

Date: June 9, 2010

A provision in the 2010 Consolidated Appropriations Act requiring Amtrak to develop and implement a checked firearms program for travelers on Amtrak trains is permanent law. Provisions in appropriations acts are presumed effective only for the covered fiscal year unless Congress makes clear that they are permanent. Here, the provision contained prospective language requiring an agency action "not later than one year" after enactment of the appropriations act, which would occur after the end of the fiscal year. This prospective language indicates that Congress intended the provision to be effective beyond the end of the fiscal year. Other factors indicating congressional intent that the provision be permanent include the fact that the provision is of a general nature, bearing no relation to the object of the appropriation; the provision is not a restriction on the use of appropriations but rather a substantive provision standing alone; considering the provision not permanent would render it ineffective and produce an absurd result; and the codifiers included the provision in the United States Code.

Matter of: Department of the Army—The Fiscal Year 2008 Military Personnel, Army Appropriation and the Antideficiency Act

File: B-318724

Date: June 22, 2010

The Army violated the Antideficiency Act in its fiscal year 2008 Military Personnel, Army appropriation by incurring obligations in excess of the total amount available. The Army records estimated obligations for certain expenses and then adjusts the estimates based on actual disbursement data that it receives weeks or months later. The Army identified a $200 million shortfall in its fiscal year 2008 Military Personnel, Army appropriation when the disbursement data exceeded the estimated obligations. The Army explained that it relied on estimated obligations, despite the availability of actual data from program managers that could be used to record the initial obligation or adjust the estimated obligations, because of inadequate financial management systems. The Army's decision to rely on estimated obligations, despite the availability of actual obligation data, does not relieve the Army of responsibility for complying with the Antideficiency Act.

Matter of: National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II

File: B-320091

Date: July 23, 2010

This opinion is GAO's second in response to a March 12, 2010 letter requesting GAO's views on several matters related to the National Aeronautics and Space Administration (NASA) and its Constellation program. GAO's earlier opinion, B-319488, May 21, 2010, found that NASA has not violated a restriction in NASA's fiscal year 2010 Exploration appropriation on the use of Exploration funds to "create or initiate a new program, project or activity." In this opinion, GAO responded to questions regarding whether NASA has obligated Exploration appropriations in a manner consistent with the Impoundment Control Act and whether NASA

complied with a restriction in the fiscal year 2010 Exploration appropriation that bars NASA from using the Exploration appropriation for the "termination or elimination of any program, project or activity" of the Constellation program. GAO found that NASA has not violated the Impoundment Control Act or the provision in the Exploration appropriation concerning termination or elimination of a Constellation program, project, or activity.

Under the Impoundment Control Act, government officers must make budget authority available for obligation and expenditure unless the President follows procedures set forth in the act. GAO found that, to date, NASA has not withheld Exploration funds from obligation and has obligated the funds at rates comparable to the rates of obligations in years in which NASA obligated nearly all available Exploration funds. GAO also found that NASA has not violated the provision in the Exploration appropriation that bars NASA from using the Exploration appropriation for the "termination or elimination of any program, project or activity" of the Constellation program. A "Program, Project, or Activity (PPA)" is an element within a budget account. For annually appropriated accounts, the Office of Management and Budget and agencies identify PPAs by reference to committee reports and budget justifications. NASA's fiscal year 2010 budget request lists five PPAs with the "Constellation Systems" category. NASA has continued to obligate Exploration funds to all five PPAs in amounts consistent with the allocations given in congressional committee reports and NASA's public budget documents.

Matter of: Consumer Product Safety Commission—Period of Availability and Permissible Uses of Grant Program Appropriations

File: B-319734

Date: July 26, 2010

The fiscal year 2009 salaries and expenses appropriation for the Consumer Product Safety Commission (CPSC) made $2 million available until the end of fiscal year 2010 specifically for a grant program established by the Virginia Graeme Baker Pool and Spa Safety Act (Safety Act). The Safety Act authorized appropriations for the program to remain available until expended. In this case, the appropriation act, enacted subsequent to the

Safety Act, expressly provided that the $2 million appropriation was available for obligation for the expenses of this program only "until September 30, 2010," so the funds do not remain available beyond that point despite the provision in the Safety Act. In addition, the appropriation act requires that these funds be used solely for the Safety Act grant program, and thus funds are not available for any other CPSC programs or activities.

Matter of: Denali Commission—Authority to Receive State Grants

File: B-319246

Date: September 1, 2010

The Denali Commission does not have authority to accept grant funds from the state of Alaska that the state has designated for use for a particular purpose. The state grant constitutes a conditional gift because, as a condition of receipt, the Commission was required to award the grant to a particular organization for a particular project and then monitor it, thereby placing an obligation or duty on the Commission. Federal agencies may not accept conditional gifts unless specifically authorized by statute to do so. While the Denali Commission has authority to accept gifts, its gift acceptance authority does not extend to conditional gifts.

Matter of: Department of Health and Human Services—Use of Appropriated Funds for Medicare Brochure

File: B-319834

Date: September 9, 2010

This opinion responds to a request for GAO's views on whether the Department of Health and Human Services' (HHS) use of funds to prepare and distribute a brochure to Medicare beneficiaries violated the publicity or propaganda prohibition in the Consolidated Appropriations Act, 2010. The brochure was intended to inform Medicare beneficiaries about

changes in Medicare resulting from the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (referred to jointly as PPACA). The appropriations act prohibition states that "[n]o part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." The prohibition bans the use of appropriations for communications that are covert, self-aggrandizing, or purely partisan in nature. GAO concluded that HHS did not violate the prohibition.

Although the HHS brochure contains instances in which HHS presented abbreviated information and a positive view of PPACA that is not universally shared, nothing in the brochure constitutes communications that are purely partisan, self-aggrandizing, or covert. In addition, GAO points out some overstatements in the brochure of PPACA's benefits, such as where the brochure suggests that PPACA increases the number of primary care providers, when PPACA only provides incentives for such increases. In this opinion, GAO does not examine nor express a view on the overall economy, efficiency, or effectiveness of the brochure.

Matter of: Architect of the Capitol—Availability of Funds for Battery Recharging Stations for Privately Owned Vehicles

File: B-320116

Date: September 15, 2010

Without statutory authority, the Architect of the Capitol (AOC) may not use appropriated funds to install battery recharging stations for the privately owned hybrid or electric vehicles of employees or Members of Congress on the Capitol grounds nor establish a program where such employees reimburse AOC for costs related to the use of recharging stations for employees' personal vehicles. Recharging stations would facilitate commuting between home and work, which is a personal expense. Personal expenses are not payable from appropriations without specific statutory authority. Also, the authority given to agencies in 5 U.S.C. § 7905 to establish certain programs to improve air quality and reduce traffic congestion does not permit an agency to install and operate recharging stations for employees' privately owned hybrid vehicles. The use of

appropriations for recharging personal vehicles of employees is a matter for Congress to address through legislation.

Matter of: NeighborWorks America—Availability for Grants to Affordable Housing Centers of America

File: B-320329

Date: September 29, 2010

NeighborWorks may use its appropriations to make grants to Affordable Housing Centers of America (AHCOA). Section 418 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010, prohibits the distribution of federal funds to "affiliates, subsidiaries, or allied organizations" of the Association of Community Organizations for Reform Now (ACORN). GAO concluded that AHCOA is not presently an affiliate, subsidiary, or allied organization of ACORN because the two entities are not currently financially or organizationally related. NeighborWorks should continue to monitor any changes that might implicate the prohibition or GAO's conclusion.

Matter of: Use of Appropriated Funds to Pay for the D.C. Water Impervious Surface Area Fee

File: B-319556

Date: September 29, 2010

The District of Columbia Water and Sewer Authority (D.C. Water), a public utility and independent municipal corporation, is responsible for the operation and maintenance of water distribution and sewage collection, treatment, and disposal systems within the District of Columbia. In April 2008, D.C. Water notified the U.S. Office of Management and Budget of a newly implemented impervious area billing program to be assessed against federal customers, including GAO's headquarters building, in October 2010. Under the program, D.C. Water reduced the metered sewer service rate and

added a "special charge for properties that include surfaces water can't penetrate," known as impervious surface areas (ISA). Funds collected under the impervious area billing program are used to "recover the costs of the . . . Combined Sewer Overflow Long-Term Control Plan." The purpose of the Control Plan is to reduce the number of combined sewer overflows that result in the discharge of untreated sewage directly into local waterways when D.C. Water's facilities are overwhelmed because of stormwater runoff during heavy rain events.

GAO determined that D.C. Water's ISA charge is a component of the utility rate a customer must pay to obtain water and sewer services. The Supremacy Clause of the U.S. Constitution establishes that the United States and its instrumentalities are immune from direct taxation by state and local governments. However, a state or political subdivision may charge for services rendered or conveniences provided, and such charge is not considered a tax. The computation of such charges must bear a relationship to the service rendered. The ISA charge is designed specifically to cover costs associated with the Control Plan, which is composed of construction projects such as the building of underground storage tunnels and the rehabilitation of aging pumping stations. The cost of Control Plan capital improvements is necessitated by stormwater runoff collected by the combined sewer system during heavy rain events which overburdens D.C. Water's treatment facility. The stormwater runoff from the GAO's impervious surface areas combines with wastewater from the GAO building, and is treated at D.C. Water's Blue Plains treatment facility before release into local waterways. D.C. Water's method for calculating the charge based on impervious surface area represents a reasonable approximation of GAO's fair share of the capital costs and a fair approximation of the sewer services provided to GAO. Therefore, GAO did not object to the use of GAO's appropriations to pay the ISA charge.

Matter of: Use of GAO's Appropriations to Pay the District of Columbia Stormwater Fee

File: B-320795

Date: September 29, 2010

Appropriated funds are not available to pay the District of Columbia's (District) stormwater fee. The stormwater fee is a tax for which Congress has not legislated a waiver of sovereign immunity. Pursuant to the Supremacy Clause of the U.S. Constitution, the United States and its instrumentalities are immune from direct taxation by state and local governments. U.S. Const. art VI, cl. 2.

The stormwater fee arises, not upon the provision of a service or the granting of a privilege, but as a result of property ownership in order to raise revenue to defray the costs of the District government in carrying out the District's stormwater management activities, such as efforts to encourage the use of low-impact development practices and functional landscaping, enhanced street cleaning, retrofitting catch basins, expanding the tree canopy within the District, installing green roofs on District-owned properties, installing cameras to record illegal dumping activities, and instituting public education and outreach programs. These activities do not provide a particularized benefit or service to the United States.

While section 313(a) of the Clean Water Act, 33 U.S.C. § 1323(a), waives sovereign immunity from many state and local environmental requirements, it does not waive the federal government's sovereign immunity from taxation by state and local governments. Such a waiver must clearly and expressly confer the privilege of taxing the federal government.

Matter of: Use of GAO's Appropriations to Pay D.C. Water's Impervious Surface Area Charge and the District of Columbia Stormwater Fee

File: B-320868

Date: September 29, 2010

GAO advised the Department of Treasury that GAO's appropriations are not available to pay the District of Columbia's stormwater fee. The stormwater fee is a tax for which Congress has not yet legislated a waiver of sovereign immunity. *See* B-320795, Sept. 29, 2010. GAO instructed Treasury not to make a payment from GAO's appropriations for the District's stormwater fee itemized on the District of Columbia Water and Sewer Authority's (D.C. Water) fiscal year 2011 water and sewer bill. GAO also advised Treasury that the impervious surface area charge assessed by D.C. Water is a valid sewer rate payable from GAO's appropriation. *See* B-319556, Sept. 29, 2010.

Matter of: Department of Health and Human Services—Use of Appropriated Funds for Technical Assistance and Television Advertisements

File: B-320482

Date: October 19, 2010

The Department of Health and Human Services (HHS) did not violate the statutory prohibition against using appropriated funds for publicity or propaganda when it awarded contracts for technical assistance and when it aired television advertisements. Prior to the enactment of the Patient Protection and Affordable Care Act (PPACA), HHS contracted with an economist to provide technical memorandums estimating various changes that would result from proposed health care legislation. Although the economist independently made public statements about health care policy and testified before Congress, these actions did not violate the publicity or

propaganda prohibition because HHS did not contract with the economist for this purpose.

After enactment of PPACA, HHS contracted for the production and airing of three television advertisements featuring a well-known actor. The advertisements did not violate the prohibition because they were not a purely partisan activity. The advertisements, though brief, provided beneficiaries with some information regarding changes resulting from PPACA, while directing beneficiaries to additional sources of information. However, two of the advertisements overstated one of PPACA's benefits when they stated that beneficiaries will "have [their] guaranteed benefits." Although beneficiaries who participate in Medicare Advantage are guaranteed original Medicare benefits, the other benefits offered by Medicare Advantage plans could change at a plan's discretion. In this legal opinion, GAO does not examine nor express a view on the overall economy, efficiency, or effectiveness of the advertisements.

Matter of: Denali Commission—Transfer of Funds Made Available through the Federal Transit Administration's Appropriations

File: B-319189

Date: November 12, 2010

Agencies are prohibited from transferring funds absent statutory authority. 31 U.S.C. § 1532. The Secretary of Transportation has specific statutory direction to transfer to the Denali Commission (Commission) funds appropriated to the Federal Transit Administration (FTA) for capital projects. These transfers should not be made using Economy Act agreements, which permit an agency to place an order for goods or services with another agency. Delays in the transfer of the funds from FTA to the Commission did not constitute deferrals under the Impoundment Control Act of 1974. Funds made available to the Commission from funds appropriated to FTA become available for obligation by the Commission when the Department of the Treasury transfers the funds to the Commission's appropriation account.

Matter of: Harry S. Truman Scholarship Foundation—Availability of Trust Fund's Interest and Earnings

File: B-320543

Date: November 12, 2010

The Harry S. Truman Scholarship Foundation may obligate and expend the accumulated interest and earnings in its Scholarship Trust Fund in fiscal years subsequent to the fiscal year in which earned. The Harry S. Truman Memorial Scholarship Act authorizes the Secretary of the Treasury to pay to the Foundation from the interest and earnings of the Fund such sums as the Foundation's Board of Trustees determines are necessary and appropriate to enable the Foundation to carry out its purposes. 20 U.S.C. § 2010(a). Nothing in the Act limits the availability of these funds to the fiscal year earned.

Matter of: Bureau of Land Management and General Services Administration—Selected Land Transactions

File: B-318274

Date: December 23, 2010

This opinion concerned the Bureau of Land Management's (BLM) use of its land exchange authority under the Federal Land Policy and Management Act of 1976 (FLPMA) and the California Desert Protection Act (CDPA). The opinion arose out of a GAO report, *Federal Land Management: BLM and the Forest Service Have Improved Oversight of the Land Exchange Process, but Additional Actions Are Needed*, GAO-09-611 (Washington, D.C.: June 12, 2009), which identified questionable land exchange practices by BLM.

BLM violated the Miscellaneous Receipts Statute when it sold and purchased land relying on the land exchange authority contained in the Federal Land Policy and Management Act of 1976 (FLPMA) and the California Desert Protection Act (CDPA). GAO concluded that transactions in which BLM sold and purchased land were not authorized

under the land exchange provisions of the applicable statutes. The General Services Administration (GSA) also violated the Miscellaneous Receipts Statute when it acted on BLM's behalf in certain transactions in the state of California under CDPA.

The proceeds of the land sales, under applicable statutes, are to be deposited into the appropriate funds in the Treasury, "without deduction for any charge or claim." 33 U.S.C. § 3302(b). This BLM and GSA did not do. Instead, after selling public lands and surplus federal real property, BLM and GSA, on BLM's behalf, used some of the proceeds to purchase land. These actions violated the Miscellaneous Receipts Statute. To rectify this situation, BLM should transfer funds from the augmented appropriations to the appropriate accounts in the Treasury. If BLM finds that it lacks sufficient budget authority to cover the adjustments, it should report a violation of the Antideficiency Act in accordance with 31 U.S.C. § 1351.

GSA improperly deposited the proceeds from surplus federal real property sales into a deposit fund account in the Treasury. These accounts are intended to hold amounts that do not belong to the government. The proceeds of the California sales are funds of the United States and, therefore, must be deposited into the appropriate fund in the Treasury. GSA should deposit the balance remaining in the deposit fund account into the appropriate fund in the Treasury.