GAO
U.S. GOVERNMENT
ACCOUNTABILITY OFFICE

2023

APPROPRIATIONS LAW FORUM

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

2023 Appropriations Law Forum

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Cover image: The United States Capitol Dome in the Fall
Source: Architect of the Capitol

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

AGENDA

9:00 a.m. **Opening Remarks**

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

9:05 a.m. **Appropriations Law: A Year in Review**

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

9:25 a.m. **The Debt Ceiling**

Edda Emmanuelli Perez, General Counsel
Government Accountability Office

9:40 a.m. **Interagency Agreements**

Part I—Recent GAO Decisions on Interagency Agreements

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

Kristine Hassinger, Senior Attorney
Government Accountability Office

Laura Wait, Senior Attorney
Government Accountability Office

Crystal Wesco, Senior Attorney
Government Accountability Office

Part II–Executive Branch Counsel Panel on Interagency Agreements

Julie Matta, Deputy General Counsel
Government Accountability Office

Laura Wait, Senior Attorney
Government Accountability Office

Claudia Nadig, Deputy Associate General Counsel
General Services Administration

Lisa Spears, Senior Counsel
Bureau of the Fiscal Service

Naomi Taransky, Assistant General Counsel
Office of Management and Budget

10:55 a.m. Break

11:15 a.m. A Closer Look: Miscellaneous Decisions of Interest I

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

Dan Rathbun, Senior Attorney
Government Accountability Office

Jeffery Haywood, Senior Staff Attorney
Government Accountability Office

Aimee Aceto, Senior Attorney
Government Accountability Office

11:45 a.m. A Closer Look: Miscellaneous Decisions of Interest II

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

Holly Firlein, Senior Attorney
Government Accountability Office

Daniella Royer, Staff Attorney
Government Accountability Office

12:05 p.m. Closing Remarks

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

List of GAO Appropriations Law Decisions
June 2022 to August 2023

1. **U.S. Department of Energy—Uranium Down-Blending Services**

   B-329605, June 2, 2022

   The Department of Energy (DOE) procured services to "down-blend" highly enriched uranium to low-enriched uranium. The recording statute required DOE to record against available appropriations an obligation for the contract price of about $334 million. 31 U.S.C. § 1501. The contract permitted DOE to satisfy its obligation to the contractor either through cash payment or by transferring specified amounts of low-enriched uranium to the contractor. Under the USEC Privatization Act, Congress authorized DOE to "transfer" uranium "for national security purposes, as determined by the Secretary." Because the Secretary of Energy determined that transferring low-enriched uranium to the contractor was in the interest of national security, the uranium transfers were permissible. As DOE made the uranium transfers to the contractor, the recording statute required DOE to reduce its recorded obligation to properly reflect its remaining liability.

2. **Office of Personnel Management—Application of Section 608 of the Financial Services and General Government Appropriations Act, 2020, to the Office of Personnel Management's Restructuring and Reorganization**

   B-332704, June 30, 2022

   The Office of Personnel Management (OPM) eliminated an office, reorganized functions, realigned personnel and funds, and restructured one of its internal organizations without consulting with the House and Senate Committees on Appropriations beforehand. Section 608 of the Financial Services and General Government Appropriations Act, 2020, requires agencies to consult with these Committees before carrying out any significant reorganization, restructuring, or closing of offices. OPM violated section 608 when it failed to consult with the Committees in advance of its significant restructuring and reorganization.

3. **Office of Management and Budget/General Services Administration—Reimbursement Requirement for the Technology Modernization Fund**

   B-333396, July 14, 2022

   The Office of Management and Budget (OMB) and the General Services Administration (GSA) permit agencies to provide GSA less than full reimbursement for amounts that GSA transfers to agencies from the government-wide Technology Modernization Fund (TMF). While interagency fund transfers are generally prohibited absent statutory authority, the National Defense Authorization Act for Fiscal Year 2018 provides such authority by establishing TMF for GSA to provide funds to agencies to

improve information technology and to enhance cybersecurity across the federal government. TMF authorizing legislation directs agencies to reimburse TMF at rates set by OMB and GSA at a level to ensure TMF's solvency, which leaves OMB and GSA the discretion to set rates at less than full reimbursement. While minimum payments are not defined by law, the statute does not provide the discretion to totally waive reimbursement by an agency.

4. U.S. Department of the Treasury—Reimbursable Agreements

B-330046, Sept. 12, 2022

During fiscal year 2015, the Office of the Assistant Secretary for Management (Management) in the U.S. Department of the Treasury (Treasury) incurred obligations to provide services to other Treasury offices before the corresponding Economy Act agreements were executed. Also, during fiscal year 2015, Management provided services to the Consumer Financial Protection Bureau (CFPB) and charged these obligations against appropriations available for fiscal year 2016.

Treasury had authority under 31 U.S.C. § 1534, the account adjustment statute, to initially obligate Management's appropriation to provide services to other Treasury offices and then adjust the accounts of each benefiting appropriation based on the value each appropriation received. Sufficient amounts were available in Management's appropriation and the benefiting appropriations to cover the obligations, and Management's appropriation was reimbursed. Further, Management had sufficient amounts in its 2015 account to cover the costs of providing services to CFPB and has already adjusted its accounts to record the obligations against the 2015 account. As Treasury had appropriations properly available for all its obligations, Treasury's actions do not violate the Antideficiency Act.

5. Office of Congressional Workplace Rights—Availability of a Permanent Indefinite Appropriation for Agency Expenses Incident to Back Pay Awards

B-332003.1, Oct. 5, 2022

Under authority vested in it by the Congressional Accountability Act of 1995 (CAA), the Office of Congressional Workplace Rights awarded back pay against the United States Capitol Police (USCP) in two employment disputes. CAA Section 415(a) established a permanent indefinite appropriation that is available for certain payments under CAA, including back pay awards.

Under the employment disputes at issue here, the Section 415(a) appropriation is available only for amounts that constitute back pay. USCP's employer tax payments under the Federal Insurance Contributions Act, and its employer contributions under the Federal Employees' Retirement System Act of 1986, are not back pay and thus not proper parts of the awards. Therefore, the Section 415(a) appropriation is unavailable for such expenses and should be paid from the employing agency's appropriations for such employer contributions.

6. Federal Energy Regulatory Commission—Use of Appropriated Funds to Indemnify Parties Who Negligently Harm FERC Inspectors

B-332444, Dec. 14, 2022

The Federal Energy Regulatory Commission (FERC) asks whether its appropriated funds are available to indemnify certain parties for liability incurred if the parties negligently harm FERC inspectors performing official duties. The Federal Employees' Compensation Act (FECA) establishes a statutory framework through which federal employees can receive compensation from the federal government if they are injured or die in the performance of their official duties. The compensation provided by FECA is federal employees' exclusive remedy against the United States for injury or death suffered in the performance of their official duties. If FERC instead assumes liability for the death or injuries of its inspectors, it would circumvent the process established by FECA and provide an alternative remedy for its inspectors to recover against the United States. Because FERC does not have any specific statutory authority to circumvent FECA or provide such an alternative remedy, it may not use its appropriated funds to indemnify these parties.

7. U.S. Consumer Product Safety Commission—Use of American Rescue Plan Act Appropriation for Activities of the Inspector General

B-334321, Feb. 8, 2023

Congress annually makes an appropriation to the U.S. Consumer Product Safety Commission (CPSC) for the agency's salaries and expenses. CPSC ordinarily obligates this appropriation for the expenses of its Office of Inspector General (OIG). In 2021, the American Rescue Plan Act (ARPA) made an appropriation to CPSC for particular purposes related to the COVID-19 pandemic. CPSC asks whether this ARPA appropriation is available for OIG's activities necessary to monitor the agency's use of the ARPA funds, even though CPSC ordinarily obligates its annual salaries and expenses appropriation for OIG's activities. We find that there is a reasonable and logical relationship between the purpose of the ARPA appropriation and OIG's activities to monitor CPSC's use of the ARPA

appropriation and, therefore, that the ARPA appropriation is available for expenses arising from such OIG activities. Further, specific language in the ARPA appropriation permits CPSC to obligate these OIG expenses against the ARPA appropriation, its annual salaries and expenses appropriation, or both.

8. Department of the Interior, National Park Service—Availability of Appropriations for Nonmonetary Awards to Private Individuals

B-334711, June 5, 2023

The Department of the Interior (Interior) asks whether it may obligate funds appropriated in the Department of the Interior, Environment, and Related Agencies Appropriations act to purchase a nonmonetary award, such as a plaque, to give to a state government employee who contributed to National Park Service programs. Generally, appropriated funds are not available for gifts. While the Government Employees' Incentives Awards Act authorizes agencies to purchase awards for federal employees who contribute significantly to agency programs, it does not cover nonfederal employees. Interior, however, retains specific authority under section 115 of the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1992 to purchase nonmonetary awards for private individuals who contribute to Interior's programs. We conclude that section 115's language applies to future fiscal years and encompasses state employees; thus, Interior may obligate funds to purchase this award.

9. Pension Benefit Guaranty Corporation—Use of Appropriations Provided in the American Rescue Plan Act of 2021 for Special Financial Assistance

B-334541, Aug. 9, 2023

The Pension Benefit Guaranty Corporation (PBGC) made certain determinations regarding the interest rate that multiemployer pension plans should use to calculate eligibility for and amounts of special financial assistance (SFA) established by the American Rescue Plan of 2021 (ARPA).

Congress provided PBGC with an appropriation in ARPA for the costs of SFA. Under the purpose statute, appropriations are only available for the purposes for which Congress made them. PBGC used this appropriation for the purpose of SFA. PBGC's actions do not violate either the purpose statute or the Antideficiency Act, notwithstanding questions about PBGC's interest-rate calculations under provisions of the Employee Retirement Income Security Act of 1974 added by ARPA.

10. U.S. Chemical Safety and Hazard Investigation Board—Application of the Antideficiency Act, Bona Fide Needs Statute, and Recording Statute to Real-Property Lease and to Occupancy Agreement with the U.S. General Services Administration

B-332205, Aug. 9, 2023

The U.S. Chemical Safety and Hazard Investigation Board (CSB) lacked the statutory authority to lease real property situated in the District of Columbia and, therefore, violated 40 U.S.C. § 8141 when it entered into a real-property lease for space in a privately-owned building there. The lease also was inconsistent with the Antideficiency Act, the bona fide needs statute, and the recording statute.

In contrast, CSB's agreement to a proposed extension of an occupancy agreement with the U.S. General Services Administration (GSA) to facilitate its continued occupancy of GSA-controlled space would not violate the Antideficiency Act or the bona fide needs statute. This is because CSB would not accrue a fiscal liability to GSA when it agrees to the extension, as the occupancy agreement, standing alone, is a budgeting tool that GSA uses to summarize the expected financial impacts of CSB's occupancy of the space. Instead, CSB would accrue a fiscal liability to GSA as it occupies the GSA-controlled space, and must record this liability against properly-available appropriations as it arises, consistent with the recording statute, 31 U.S.C. § 1501(a)(9).

11. Department of Agriculture—Application of Statutory Notification Requirement

B-334306, Aug. 15, 2023

After announcing that it would relocate most of the employees of both the National Institute of Food and Agriculture (NIFA) and the Economic Research Service (ERS), the United States Department of Agriculture (USDA) transferred amounts appropriated to each of these agencies to satisfy an obligation to a contractor for relocation planning assistance.

By notifying the Appropriations Committees before transferring the amount appropriated to NIFA under a fiscal year 2018 appropriations act, USDA complied with a notification requirement in the same act. Although USDA made the notification during the fiscal year preceding that in which it made the transfer, the amount transferred from NIFA's appropriation was available without fiscal year limitation and, therefore, the notification for this amount remained operative during the succeeding fiscal year.

In contrast, the amounts USDA transferred from ERS were appropriated under a fiscal year 2019 continuing resolution. Although these amounts

were subject to the same notification requirement, USDA did not submit a notification to the Appropriations Committees for this amount. The notification that USDA submitted to the Appropriations Committees pertained only to amounts appropriated in the fiscal year 2018 appropriations act and not to amounts appropriated under the fiscal year 2019 continuing resolution. Therefore, USDA violated both the notification requirement and the Antideficiency Act.

12. United States Department of Agriculture and General Services Administration—Consistency of Lease Incentives with the Miscellaneous Receipts Statute

B-334307, Aug. 15, 2023

The U.S. Department of Agriculture (USDA) relocated the National Institute of Food and Agriculture (NIFA) and the Economic Research Service (ERS) to Kansas City, Missouri. As part of the relocation, the General Services Administration (GSA) executed a lease whose price included "free rent" for the first 24 months of the lease. Under the miscellaneous receipts statute, agencies are required to deposit money received for the government in the general fund of the Treasury, unless otherwise authorized by statute. Neither USDA nor GSA received any funds because of the relocation or because of the lease containing the "free rent." Rather, the "free rent" is a part of the lease's fixed price which GSA considered in determining which lessor to select. As a result, neither agency violated the miscellaneous receipts statute.

Appropriations Law: A Year-in-Review

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

Decision

Matter of: U.S. Consumer Product Safety Commission—Use of American Rescue Plan Act Appropriation for Activities of the Inspector General

File: B-334321

Date: February 8, 2023

DIGEST

Congress annually makes an appropriation to the U.S. Consumer Product Safety Commission (CPSC) for the agency's salaries and expenses. CPSC ordinarily obligates this appropriation for the expenses of its Office of Inspector General (OIG). In 2021, the American Rescue Plan Act (ARPA) made an appropriation to CPSC for particular purposes related to the COVID-19 pandemic. CPSC asks whether this ARPA appropriation is available for OIG's activities necessary to monitor the agency's use of the ARPA funds, even though CPSC ordinarily obligates its annual salaries and expenses appropriation for OIG's activities. We find that there is a reasonable and logical relationship between the purpose of the ARPA appropriation and OIG's activities to monitor CPSC's use of the ARPA appropriation and, therefore, that the ARPA appropriation is available for expenses arising from such OIG activities. Further, specific language in the ARPA appropriation permits CPSC to obligate these OIG expenses against the ARPA appropriation, its annual salaries and expenses appropriation, or both.

DECISION

Congress appropriated to the U.S. Consumer Product Safety Commission (CPSC) amounts available for particular purposes related to the COVID-19 pandemic. CPSC requested our decision on whether the appropriation is available for the activities necessary for CPSC's Office of the Inspector General (CPSC OIG) to monitor its use.[1] As explained below, we conclude that it is. This appropriation is

[1] Letter from General Counsel, CPSC, to General Counsel, GAO (May 11, 2022) (Request Letter).

available in addition to other appropriations that may be available to CPSC for such OIG activities, such as CPSC's salaries and expenses appropriation.

Our regular practice when rendering decisions is to obtain facts and legal views from the relevant agencies.[2] CPSC provided the necessary information and its legal views in its Request Letter.

BACKGROUND

The Inspector General Act of 1978, as amended, established CPSC OIG as an independent unit within CPSC.[3] The Inspector General Act authorizes CPSC OIG to "conduct, supervise, and coordinate audits and investigations relating to the operations" of CPSC.[4] This includes the authority to make recommendations regarding CPSC policies "for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, [CPSC's] programs and operations."[5] Generally, CPSC receives an appropriation for salaries and expenses each fiscal year.[6] CPSC OIG is ordinarily funded through this salaries and expenses appropriation.[7]

In fiscal year 2021, section 7401 of the American Rescue Plan Act (ARPA) appropriated to CPSC $50,000,000, to remain available until September 30, 2026, for specified purposes related to the COVID-19 pandemic.[8] CPSC has several initiatives designed to achieve the purposes set out by the ARPA appropriation.[9] CPSC reported that it will need to "develo[p] or modif[y] new procedures for product, website, and port surveillance; see[k] new vendors or vendor services for information

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[2] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/GAO-06-1064SP.

[3] Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978), *as amended by* Pub. L. No. 100-504, 102 Stat. 2515 (Oct. 18, 1988), 5 U.S.C. app. § 3 (Inspector General Act).

[4] Inspector General Act, § 4(a)(1).

[5] Inspector General Act, § 4(a)(3).

[6] *See*, *e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, title V, 136 Stat. 49, 267 (Mar. 15, 2022).

[7] Request Letter, at 2; U.S. Consumer Product Safety Commission, *Fiscal Year 2022 Operating Plan*, Sept. 24, 2021, at 5, *available at* https://www.cpsc.gov/content/FY-2022-Operating-Plan (last visited Nov. 28, 2022) (CPSC FY22 Operating Plan).

[8] American Rescue Plan Act of 2021, Pub. L. No. 117-2, title VII, subtitle D, § 7401, 135 Stat. 4, 108 (Mar. 11, 2021).

[9] Request Letter, at 2.

technology for data collection and analysis; and communicat[e] with the public directly through partner entities."[10] CPSC will conduct these activities pursuant to ARPA, CPSC's organic statute, and other applicable laws.[11]

According to CPSC, "ARPA funds represent high-risk areas for CPSC because of the magnitude of the funds relative to the agency budget" and CPSC anticipates that CPSC OIG will take on additional work to monitor those programs and initiatives related to those funds.[12]

DISCUSSION

CPSC requested our decision on whether funds ARPA appropriated to it are available for CPSC OIG's activities to monitor their use.[13] As explained below, because CPSC OIG activities bear a reasonable and logical relationship to the appropriation and the funds were made "in addition" to amounts otherwise available for these purposes, we find that ARPA funds are available for this purpose.

Appropriated funds are available only for authorized purposes. 31 U.S.C. § 1301(a). The ARPA appropriation does not specifically state that it is available for the expenses of CPSC OIG. Accordingly, we apply a three-part test to determine whether the appropriation is so available. *See, e.g.*, B-331419, July 1, 2021; B-330984, May 27, 2020. An appropriation is available for a particular purpose if the obligation or expenditure (1) bears a logical relationship to the appropriation charged, (2) is not otherwise prohibited by law, and (3) is not otherwise provided for. B-332530, Feb. 18, 2021. With respect to step two, we are unaware of any statutory provision that specifically prohibits the use of CPSC's appropriations for its OIG's activities. Accordingly, at issue here are steps one and three of this analysis.

Step 1: reasonable, logical relationship to the appropriation

To determine whether a reasonable, logical relationship exists between the appropriation and the expenses, the starting point is the text of the appropriation. *See, e.g.*, B-330984, May 27, 2020; B-330776, Sept. 5, 2019. Section 7401 of ARPA appropriated $50,000,000 for CPSC to perform a list of specified purposes primarily related to the COVID-19 pandemic and COVID-19 consumer products. This includes activities related to enhancing targeting, surveillance, and screening of consumer products; enhancing the monitoring of internet websites for the sale of violative consumer products; increasing awareness and communication of COVID-19 product related risks; and improving CPSC's data collection and analysis systems with a focus on COVID-19 consumer product risks to vulnerable populations. Pub.

[10] *Request Letter* at 4.

[11] *Id*.

[12] *Id*.

[13] *Id*.

L. No. 117-2, § 7401. The funds were also made available to carry out certain CPSC COVID-19 related requirements found in the Consolidated Appropriations Act, 2021. *Id.*; *See also,* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. FF, title XX, § 2001, 134 Stat. 1182, 3301 (Dec. 27, 2020).

In addition to the text of the appropriation, other laws may also be relevant to an appropriation's purpose availability, such as the laws that establish an agency and govern its activities. Under well-established rules of statutory interpretation, Congress intends to achieve a consistent body of law, and agencies must give full force to all applicable laws as they carry out their activities. *See Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Thus, an appropriation available for a specific purpose may also be available for expenses necessary for the agency to ensure that it carries out that purpose in a manner consistent with all applicable law.

For example, we have concluded that agency appropriations were available for expenses an agency may incur incident to compliance with the Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1970, and the Federal Employees Clean Air Incentives Act, among other laws. *See* B-324588, June 7, 2013; B-318325, Aug. 12, 2009; 67 Comp. Gen. 104 (1987). Here, the Inspector General Act established CPSC OIG and vested it with the duty to review CPSC programs, activities, and operations. Inspector General Act, § 4. Among CPSC OIG's many statutory duties are conducting audits and investigations of CPSC activities; promoting economy and efficiency; preventing fraud and abuse in the administration of CPSC programs; and keeping CPSC and Congress informed on fraud and other serious problems relating to the administration of CPSC programs. *Id*.

Therefore, we conclude that amounts appropriated to CPSC under ARPA are available for expenses CPSC OIG incurs as it monitors CPSC's use of the ARPA appropriations. Such expenses bear a reasonable, logical relationship to the purpose of the appropriation ARPA makes, not only because CPSC OIG's expenses are a necessary incident to CPSC's compliance with the Inspector General Act, but also because such expenses contribute to the agency's proper and effective use of the funds.

Step 3: expense is not otherwise provided for

CPSC typically funds CPSC OIG from CPSC's annual salaries and expenses appropriation. Request Letter, at 2 n.3; CPSC FY22 Operating Plan, at 5. Under the third step of the purpose analysis, we consider whether CPSC must use its annual salaries and expenses appropriation, rather than the ARPA appropriation, for the expenses OIG incurs as it monitors CPSC's use of the ARPA amounts. An appropriation is not available for an expenditure where another appropriation is more specifically available for the expenditure. B-330984, May 27, 2020; B-307382, Sept. 5, 2006. Where two appropriations are equally available for a particular object, the agency generally must elect to charge a single appropriation for such an object

and must continue to use that same single appropriation. B-330984, May 27, 2020; B-307382, Sept. 5, 2006. Although rare, there are some occasions in which Congress makes an appropriation that is available in addition to other appropriations available for the same object. B-330984, May 27, 2020; B-322062, Dec. 5, 2011. On such occasions, an agency may elect to use both the additional appropriation and the other appropriations for the particular expense. B-330984, May 27, 2020; B-322062, Dec. 5, 2011.

For example, we once considered whether an appropriation made "in addition to amounts otherwise made available" to the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) was available to fund certain oversight investigation activities, notwithstanding a second appropriation equally available to SIGTARP for the proposed activities. B-330984, May 27, 2020. There, we found that the language of the statute clearly provided that the amounts in the appropriation at issue were made available *in addition to*, and not exclusive of, other funding sources available to SIGTARP. *Id*. at 5. This language made clear that the appropriation at issue and other appropriations were both available for SIGTARP to carry out its oversight activities. *Id*.

Conversely, we also considered whether funds from the Deposit Insurance Fund (DIF) were available to the Federal Deposit Insurance Corporation's (FDIC) OIG where FDIC OIG was affected by a lapse in appropriations when it did not receive its annual appropriation for fiscal year 2019. B-330693, Oct. 8, 2019. In that case we found that although the FDIC has general authority to obligate funds from the DIF, Congress had annually provided FDIC OIG with a separate and more specific appropriation for its activities. *Id* at 5. As FDIC OIG historically received a specific annual appropriation for its activities and no language in FDIC OIG's annual appropriations or the DIF organic legislation indicated Congress intended both funding sources to be available for the activities, we found that the DIF was not available to FDIC OIG to fund its activities during the lapse in appropriations. *Id*.

ARPA section 7401 states that the amounts appropriated to CPSC are available "[i]n addition to amounts otherwise available. . . ." to CPSC. Pub. L. No. 117-2, § 7401(a). The phrase "in addition to" clearly provides that the funds appropriated by section 7401 were made available to CPSC, and by extension CPSC OIG, in addition to funds otherwise available to CPSC. This includes CPSC's salaries and expenses appropriation from which CPSC has historically funded CPSC OIG. In light of that clear statutory language, CPSC has the option to obligate OIG expenses for monitoring the use of the ARPA appropriation against the ARPA appropriation, its annual salaries and expenses appropriation, or both.

CONCLUSION

Funds appropriated to CPSC under ARPA section 7401 are available for CPSC OIG's activities to monitor the agency's use of the ARPA funds. The ARPA funds

are available in addition to other appropriations that are available for CPSC OIG's activities.

Edda Emmanuelli Perez
General Counsel

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

Decision

Matter of: Office of Congressional Workplace Rights—Availability of a Permanent Indefinite Appropriation for Agency Expenses Incident to Back Pay Awards

File: B-332003.1

Date: October 5, 2022

DIGEST

Under authority vested in it by the Congressional Accountability Act of 1995 (CAA), the Office of Congressional Workplace Rights awarded back pay against the United States Capitol Police (USCP) in two employment disputes. CAA Section 415(a) established a permanent indefinite appropriation that is available for certain payments under CAA, including back pay awards.

Under the employment disputes at issue here, the Section 415(a) appropriation is available only for amounts that constitute back pay. USCP's employer tax payments under the Federal Insurance Contributions Act, and its employer contributions under the Federal Employees' Retirement System Act of 1986, are not back pay and thus not proper parts of the awards. Therefore, the Section 415(a) appropriation is unavailable for such expenses and should be paid from the employing agency's appropriations for such employer contributions.

DECISION

The Office of Congressional Workplace Rights (OCWR) asks whether a permanent indefinite appropriation for paying legislative branch awards and settlements is also available for paying certain award-related employing agency expenses of the United States Capitol Police (USCP).[1] USCP is the employing agency in two employment

[1] Letter from General Counsel, OCWR, to General Counsel, GAO (Mar. 16, 2020) (Request Letter), at 1–2; *see* 2 U.S.C. § 1415(a). A "permanent indefinite" appropriation is one that both (1) remains available for specified purposes, with no fiscal-year limitations and with no need for additional congressional action to authorize its use; and (2) is for an unspecified amount of money. In this case, Section 415 appropriates "such sums as may be necessary."

disputes.[2]

We conclude below that the permanent indefinite appropriation is unavailable for paying USCP's award-related tax payments under the Federal Insurance Contributions Act (FICA)[3] and contributions under the Federal Employees' Retirement System Act of 1986 (FERSA).[4] The appropriation is available only if the amounts in question constitute back pay. However, the expenses at issue are neither "pay" nor "back pay" and, therefore, they are not part of the awards for which the appropriation is available.

Our regular practice when rendering decisions is to obtain facts and legal views from the relevant agencies.[5] OCWR provided information and its views in its request letter and through follow-up communications.[6] USCP also provided information and its views at our request.[7]

BACKGROUND

The Congressional Accountability Act of 1995 (CAA)[8] provides workplace protections to covered legislative branch employees by incorporating by reference 13 civil rights, labor, and workplace safety laws.[9] OCWR provides a means of dispute resolution for legislative branch employees alleging CAA violations, and

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[2] Request Letter, at 4.

[3] 26 U.S.C. §§ 3101–3134.

[4] 5 U.S.C. §§ 8351 and 8401–8480.

[5] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP.

[6] Request Letter; Email from General Counsel, OCWR, to Senior Attorney, GAO, *Subject: RE: Letter of acknowledgment and request for additional information* (Aug. 10, 2020) (attaching relevant back pay awards and orders) (OCWR 2020 Email); Telephone Conversation with General Counsel, OCWR, Assistant General Counsel for Appropriations Law, GAO, and Senior Attorney, GAO (June 25, 2021); Email from General Counsel, OCWR, to Assistant General Counsel for Appropriations Law, GAO, and Senior Attorney, GAO, *Subject: RE: OCWR -- Your GAO legal decision request* (July 27, 2021) (OCWR 2021 Email).

[7] Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USCP (Aug. 11, 2020) (requesting information); Letter from Employment Counsel, USCP, to Assistant General Counsel for Appropriations Law, GAO (Aug. 25, 2020) (Response Letter).

[8] Pub. L. No. 104-1, 109 Stat. 3 (Jan. 23, 1995), 2 U.S.C. §§ 1301–1438.

[9] 2 U.S.C. § 1302.

those determinations may result in an employee (the prevailing employee) of an agency (the employing agency) being entitled to back pay. CAA Section 415(a) created a permanent indefinite appropriation (the Section 415(a) appropriation) to make payments under the Act.[10] OCWR administers this appropriation, and asks whether it is available for paying certain award-related expenses of USCP.

This request arises from two separate employment disputes that resulted in awards of back pay. In brief, USCP fired two officers for their off-duty conduct.[11] But arbitrators ordered their reinstatement with back pay, among other things.[12] USCP did not implement the orders.[13] The matters reached the United States Court of Appeals for the Federal Circuit, which granted OCWR's enforcement applications in

[10] 2 U.S.C. § 1415(a). As noted above, *supra* note 1, the Section 415(a) appropriation is a permanent, indefinite appropriation. CAA provides that, with certain exceptions, "only funds which are appropriated to an account of the Office in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements," and that "[t]here are appropriated for such account such sums as may be necessary to pay such awards and settlements." *Id.*

[11] *See generally* OCWR 2020 Email, Attachments titled "Arbitration Award, Bd Decision Denying Exceptions, Arbitrator's Order" (Case 1 Arbitration Awards) and "Aribitrator's [*sic*] Award, Bd Decision Denying Exceptions, Arbitrator's Order" (Case 2 Arbitration Awards).

[12] OCWR 2020 Email, Case 1 Arbitration Awards, at 28, 41; Case 2 Arbitration Awards, at 1, 37. In the first case, the arbitration award directed that, among other things, the prevailing employee "be made whole for lost wages and benefits, less other payroll-related earnings from the time of his termination to the present." OCWR 2020 Email, Case 1 Arbitration Awards, at 28. A later order found that USCP owed the prevailing employee "$340,487.70 in back pay, less offsets, plus interest," and directed payment of that amount. *Id.* at 41. In the second case, an arbitrator awarded back pay, and later ordered USCP to pay "$380,095.41 in total back pay and interest owed to" the prevailing employee. OCWR 2020 Email, Case 2 Arbitration Awards, at 1, 37. We find no clear indication in the record as to whether these amounts included FICA or FERSA expenses.

[13] *United States Capitol Police v. Office of Compliance*, 913 F.3d 1361, 1364–65 (Fed. Cir. 2019) (Case 1 Court Decision); *United States Capitol Police & Fraternal Order of Police, D.C. Lodge No. 1 U.S. Capitol Police Labor Comm.*, No. 15-LMR-02 (CA), 2017 WL 4335143, at *12 (C.A.O.C. Sept. 25, 2017).

both.[14] OCWR ordered payment of the amounts specified in the arbitration awards from the Section 415(a) appropriation.[15]

OCWR now seeks our decision on the scope of the availability of the Section 415(a) appropriation.[16] OCWR maintains the appropriation is unavailable for USCP's award-related expenses.[17] USCP disagrees, saying the appropriation must pay such costs under OCWR precedent.[18]

DISCUSSION

At issue here is whether the Section 415(a) appropriation is available for paying certain award-related employer taxes and fringe benefits. More specifically, OCWR asks whether, in the context of the two employment disputes discussed above, the appropriation is available for paying USCP's share of FICA taxes and its contributions toward the employees' Federal Employees' Retirement System (FERS) benefits, including their Thrift Savings Plan (TSP) benefits.[19]

As an initial matter, we note that the purpose availability of an appropriation depends on the relevant statutory framework governing the appropriation itself. In this case, the Section 415(a) appropriation is available to make the payments at issue only if the appropriation itself, read in concert with other applicable laws, makes amounts available for this purpose. The Section 415(a) appropriation does not become

[14] Case 1 Court Decision, 913 F.3d at 1371; *United States Capitol Police v. Office of Compliance*, 916 F.3d 1023, 1028 (Fed. Cir. 2019) (Case 2 Court Decision). The court also upheld findings that USCP committed unfair labor practices in both cases. Case 1 Court Decision, 913 F.3d at 1371; Case 2 Court Decision, 916 F.3d at 1028.

[15] *United States Capitol Police & Fraternal Order of Police, D.C. Lodge No. 1 U.S. Capitol Police Labor Comm.*, No. 15-LMR-02 (CA) (O.C.W.R. Nov. 18, 2019), slip op. at 5; *United States Capitol Police & Fraternal Order of Police, D.C. Lodge No. 1 U.S. Capitol Police Labor Comm.*, No. 16-LMR-01 (CA), 2020 WL 5880185, at *3 (C.A.O.C. Feb. 6, 2020).

[16] Request Letter, at 1–2. In a decision arising from the same request letter, we addressed OCWR's authority to transfer amounts from the Section 415(a) appropriation to the appropriations of other agencies. B-332003, Oct. 5, 2021.

[17] Request Letter, at 7.

[18] Response Letter, at 1–2.

[19] OCWR 2021 Email. Because TSP is part of the FERS statutory scheme, *see* Chapter 84 of Title 5 of the United States Code, we treat them together.

available for a particular purpose solely because an arbitrator's award makes brief mention of the payment of employee "benefits."[20]

We further note that the awards here are in none of the categories for which the permanent indefinite appropriation known as the Judgment Fund, 31 U.S.C. § 1304, is available. They are not, for example, judgments of a court or compromise settlements made or authorized by the Attorney General. *See* 31 U.S.C. § 1304(a)(3); 28 U.S.C. § 2414.[21]

Therefore, we turn first to the text of the Section 415(a) appropriation. It makes amounts available "for the payment of awards and settlements under" CAA. CAA incorporates parts of the Federal Service Labor-Management Relations Statute (FSLMRS), which governs labor relations between federal agencies and their employees.[22] In turn, FSLMRS requires covered agencies to "take the actions required by an arbitrator's final award," including paying back pay under the Back Pay Act of 1966.[23]

Both final awards at issue here awarded back pay to the prevailing employee.[24] Furthermore, back pay is the only form of payment an arbitrator can order under this statutory framework.[25] Therefore, as we determine whether the Section 415(a) appropriation is available for payment of the tax and benefit amounts at issue, the

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[20] In particular, in the two cases at issue here, one arbitrator's decision mentioned "benefits" but the other did not. OCWR 2020 Email, Case 1 Arbitration Awards, at 28; Case 2 Arbitration Awards, at 39.

[21] In a prior decision that bears some factual similarities to those at issue here, we considered the availability of the Judgment Fund for payment of agency contributions to the Civil Service Retirement Fund. 58 Comp. Gen. 115 (1978). Key to our analysis in that decision was whether the judgment directed the government to make the contribution. We concluded that if the judgment ordered the government to make the contribution, then the Judgment Fund was available to make the payment, but if the judgment was silent on the matter, the contribution was payable only from the agency's appropriations and not from the Judgment Fund. We are not applying that holding in this decision, however, because it concerned the Judgment Fund rather than the statutory framework at issue here.

[22] 2 U.S.C. § 1302(a)(7); *see also Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 91 (1983) ("[FSLMRS] contains the first statutory scheme governing labor relations between federal agencies and their employees."); 5 U.S.C. §§ 7101–7135 (codifying FSLMRS).

[23] 5 U.S.C. § 7122(b); *see also* 5 U.S.C. § 5596 (codifying the Back Pay Act).

[24] OCWR 2020 Email, Case 1 Arbitration Awards, at 28, 41; Case 2 Arbitration Awards, at 1, 37.

[25] *See also* 5 U.S.C. § 7118(a)(7).

central question is whether these amounts are indeed back pay. As explained below, USCP's FICA and FERS expenses are not back pay and thus not part of the awards. Therefore, the Section 415(a) appropriation is unavailable for their payment.

USCP's FICA Payments

Two arbitration awards required USCP, as the employing agency, to make back pay. As a result of the payments of back pay, USCP owes associated FICA taxes.[26] We find that USCP's FICA tax contributions are not "pay" to an employee, and therefore they are neither "back pay" nor part of the awards for purposes of CAA.

We interpret terms that Congress has not defined in statute according to their ordinary meaning, which may be ascertained by consulting dictionaries. *See Sebelius v. Cloer,* 569 U.S. 369, 376 (2013); *Carcieri v. Salazar,* 555 U.S. 379, 388 (2009) (referring to dictionaries to determine the ordinary meaning of the term "now"); B-329605, June 2, 2022. The ordinary meaning of "pay" is money for services rendered. *See, e.g., The American Heritage Dictionary of the English Language* (5th ed. 2018) (defining "pay" in part as "[m]oney given in return for work done; salary; wages"); *Merriam-Webster's Collegiate Dictionary* (defining "pay" in part as "something paid for a purpose and especially as a salary or wage: REMUNERATION"), *available at* https://merriam-webster.com/dictionary/pay (last visited Sept. 27, 2022). As these dictionary definitions reflect, "pay," in common parlance, refers to the remuneration an employer provides to an employee as compensation.

FICA imposes an "excise tax" on "every employer," including federal agencies. 26 U.S.C. §§ 3111(a)–(b), 3122. When the federal government is the employer, the agency head or designee is responsible for the "return and payment" of FICA taxes. *Id.* § 3122. FICA levies this tax on the employer, not on the employee. Accordingly, an employing agency bears the cost of paying its FICA expenses from its own appropriation, both in addition to and separate from the cost of paying its employees. This cost arises from the agency's legal obligation to pay its share of FICA taxes directly to the Internal Revenue Service (IRS).[27]

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[26] USCP's share of FICA taxes at issue "amounts to 6.2% of the first $137,700 paid in back pay (OASDI) plus 1.45% of the total back pay amount (HI)." OCWR 2021 Email.

[27] By statute, the Treasury Secretary "collect[s]" FICA taxes and pays them into the United States Treasury as internal revenue collections. 26 U.S.C. § 3501(a). The IRS, within the Treasury Department, is the agency that collects FICA taxes. *See* GAO, *Social Security: Coverage for Medical Residents*, HEHS/GGD-00-184R (Aug. 31, 2000). An employer generally pays its FICA taxes by making electronic deposits monthly or semi-weekly. *See* 26 U.S.C. § 6302(h); 26 C.F.R. § 31.6302-1(a) (2021). The IRS collects these amounts from federal (continued)

As a result, the employer's share of FICA taxes are not deducted from the employee's pay. That is so because they are not remuneration for the services provided. Rather, they are the employer's share of the tax on that remuneration. Accordingly, the plain meaning of "pay" does not encompass an employing agency's FICA contributions and, therefore, these contributions are not "back pay" for which the Section 415(a) appropriation is available.

FICA also imposes "on the income of every individual a tax." 26 U.S.C. § 3101. Only FICA tax that USCP owes as an employing agency, and not the tax that FICA imposes directly on employees, is at issue in this decision. Nevertheless, FICA's tax on individuals provides an illustrative contrast: FICA requires the employer to "collect" the tax from the employee "by deducting the amount of the tax from the wages as and when paid." *Id*. § 3102. Though the employee tax is deducted from the employee's pay, the employer tax is not, precisely because while FICA imposes the employee tax on the individual's income, it imposes the employer tax on the employer itself.

Regulations that implement the Back Pay Act are consistent with the statutory provisions of FICA. The regulations require employing agencies to deduct an employee's FICA taxes from a gross back pay award. 5 C.F.R. § 550.805(e)(3)(ii) (2021). The regulations do not, however, permit the agency to deduct the cost of its own FICA tax payment from the gross back pay award. *See id.* (allowing only "authorized deductions of the type that would have been made from the employee's pay" to be deducted from the back pay award). Permitting such a deduction would impermissibly shift to the employee the cost of the employer's FICA tax, a cost that FICA assigns to the employing agency.

An agency does not deduct the cost of the employer's FICA tax either from an employee's regular pay or from a back pay award because the employer's FICA tax is an expense the employer, not the employee, must bear. Thus, the employing agency's FICA tax is not part of an employee's pay or back pay. Therefore, this expense is not part of the arbitration awards here and cannot be paid from the Section 415(a) appropriation.

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agencies in a manner similar to that which it uses for private employers. U.S. Department of the Treasury, Internal Revenue Service, Publication No. 15 (Circular E), *Employer's Tax Guide* (Dec. 16, 2021), at 5, 11, *available at* https://www.irs.gov/pub/irs-pdf/p15.pdf (last visited Sept. 27, 2022) ("[t]he information in this publication, including the rules for making federal tax deposits, applies to federal agencies").

USCP's FERS Contributions

USCP's FERS contributions similarly are not payable from the Section 415(a) appropriation because they are not back pay and thus not part of the awards.

FERSA created FERS, a retirement system for federal employees. FERSA requires each agency with covered employees to make "[g]overnment contributions" to the Civil Service Retirement and Disability Fund (CSRDF). 5 U.S.C. § 8423(a). FERSA also created the TSP and requires an employing agency to make two different categories of contributions to the Thrift Savings Fund. First, each pay period, "the employing agency shall contribute to the Thrift Savings Fund for the benefit of" the employee the amount equal to one percent of the employee's basic pay. *Id*. § 8432(c)(1)(A). Second, where the employee chooses to make contributions, the agency must also "make a contribution to the Thrift Savings Fund for the benefit of" the employee, in an amount specified by law. *Id*. § 8432(c)(2). Here, USCP must make both CSRDF and Thrift Savings Fund contributions incident to the two arbitration awards at issue.[28]

As with the FICA employer tax contributions, FERSA imposes directly upon the employing agency, and not upon the employee, a legal duty to make the specified contributions to the Thrift Savings Fund and to the CSRDF. The employing agency bears this expense from its own appropriation, both in addition to and separate from the cost of paying its employees. 5 U.S.C. § 8432(e) (employing agency contributions shall be paid from the appropriation or fund available to the agency for payment of the employee's salary). As with the FICA employer tax contributions, the amount of the employing agency's payments to the Thrift Savings Fund and to the CSRDF are not deducted from the employee's pay, because these amounts are not remuneration for services the employee provided. Rather, the payments are the employing agency's share of legally required contributions to the CSRDF and to the Thrift Savings Fund. Accordingly, the plain meaning of "pay" does not encompass these employing agency contributions and, therefore, these contributions are not "back pay" for which the Section 415(a) appropriation is available.[29]

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[28] USCP's share of FERS contributions to the CSRDF "is 10.7% of pay for each year that each employee was terminated." OCWR 2021 Email. Its share of TSP contributions "would include the automatic 1% of pay as a contribution as well as up to an additional 3% of matching payments should the employees decide to divert some of their back pay to their TSPs." *Id*.

[29] The regulations implementing the Back Pay Act support this interpretation. The employing agency cannot deduct the employing agency's retirement contributions from the employee's gross back pay award. Instead, the employing agency must deduct only "authorized deductions of the type that would have been made from the employee's pay," including "mandatory *employee* retirement contributions." 5 C.F.R. § 550.805(e)(3)(i) (emphasis added).

FERSA also permits employees to make contributions to the Thrift Savings Fund. *Id*. § 8432(a)(1). Only the employing agency contributions to the Thrift Savings Fund and to the CSRDF, and not the employee's contributions, are the subject of this decision. Nevertheless, the contributions that employees may make provide an illustrative contrast: by law, the employee, rather than the employing agency, makes these contributions. *Id*. Employee contributions are deducted from an employee's pay.[30] In contrast, the employing agency uses its appropriations to bear the additional, separate cost of employer contributions. *See* 5 U.S.C. § 8432(e) (employing agency contributions "shall be paid from the appropriation or fund available to such agency for payment of" the employee's salary). An agency does not deduct the cost of employing agency contributions from the employee's pay because such a deduction would impermissibly shift to the employee the cost of the employer's contributions, a cost that FERSA assigns to the employing agency.

Accordingly, just as an employing agency's FICA tax payments are not part of an employee's pay or back pay, so too are an employing agency's legally required contributions to the CSRDF and Thrift Savings Fund also not part of an employee's pay or back pay. *Accord* 5 C.F.R. § 550.803 (explaining that "[a]gency and employee contributions to a retirement investment fund, such as the Thrift Savings Plan, are not covered" by the definition of "[p]ay, allowances, and differentials"). Therefore, all these expenses cannot be paid from the Section 415(a) appropriation.

Availability of USCP Annual Appropriations

In light of the unavailability of the Section 415(a) appropriation, we next consider whether USCP's annual appropriations are available for payment of FICA taxes and FERS contributions at issue.[31] Congress generally appropriates amounts annually

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[30] *See* 5 C.F.R. § 1690.1 (2021) (describing "employee contributions" as "deducted from compensation paid to the employee"); *see also* Federal Retirement Thrift Investment Board, Form TSP-1, *available at* www.tsp.gov/forms/tsp-1.pdf (last visited Sept. 27, 2022) (employee contributions "come out of" the employee's pay).

[31] In its request to us, OCWR relied on Section 415(b) of CAA to argue that the payroll taxes and fringe benefits at issue here are payable only from USCP's annual appropriations. Request Letter, at 7. Section 415(b) authorizes, with certain exceptions, the appropriation of sums necessary for the "administrative, personnel, and similar expenses" of employing offices needed to comply with CAA. 2 U.S.C. § 1415(b). In OCWR's view, Section 415(b) indicates not only that the Section 415(a) appropriation is not available for the payments at issue here, but also that USCP's appropriation is the only one properly available for these payments. Request Letter, at 7. But subsection (b), captioned "Compliance," concerns expenses that are the "costs of adhering to the act, but not costs of complying with adjudicative decisions remediating violations, which are addressed in section 415," per a section-by-section analysis of CAA entered into the (continued)

for salaries of USCP employees, "including . . . [g]overnment contributions for health, retirement, social security, professional liability insurance, and other applicable employee benefits. . . ." *See, e.g.,* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. I, title I, 134 Stat. 1182, 1642 (Dec. 27, 2020).

The Back Pay Act deems an aggrieved employee for all purposes to have performed service during the period of the unjustified or unwarranted personnel action, absent certain exceptions. 5 U.S.C. § 5596(b)(1)(B). In this respect, the law considers the action to have never happened. *See* B-209349, Apr. 9, 1984 (Army employees' separations "are regarded as never having occurred and they are deemed for all purposes to have rendered service during the period covered by the corrective personnel action").

Accordingly, USCP should pay FICA taxes and FERS contributions from the same appropriation it would have used if the contested personnel actions had never occurred—that is, from the same appropriation that would have been properly available to pay these expenses at the time the employees would have performed the service for which they were awarded back pay.[32]

CONCLUSION

The Section 415(a) appropriation is unavailable for the purpose of paying either USCP's share of the Federal Insurance Contributions Act taxes or its contributions

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Congressional Record. 141 Cong. Rec. S622, S631 (daily ed. Jan. 9, 1995). Funding management-side labor negotiations under CAA, for instance, would be a valid Section 415(b) expense. *Id*. at S631. We therefore read Section 415(b) as referring to an agency's general CAA compliance costs, not to costs arising from settlements or awards.

[32] USCP must pay these amounts using appropriations with proper availability as to time. Because some of the service at issue may have been performed some time ago, USCP must properly apply the account closing statute, which establishes rules concerning the availability of prior-year balances. 31 U.S.C. §§ 1551–1553; *see generally* GAO, *Principles of Federal Appropriations Law*, 3rd ed., GAO-04-261SP (Washington, D.C.: Jan. 2004), Ch. 5, § D (discussing disposition of appropriation balances).

under the Federal Employees' Retirement System Act that are associated with two back pay awards.

Edda Emmanuelli Perez
General Counsel

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

Decision

Matter of: U.S. Department of Energy—Uranium Down-Blending Services

File: B-329605

Date: June 2, 2022

DIGEST

The Department of Energy (DOE) procured services to "down-blend" highly enriched uranium to low-enriched uranium. The recording statute required DOE to record against available appropriations an obligation for the contract price of about $334 million. 31 U.S.C. § 1501. The contract permitted DOE to satisfy its obligation to the contractor either through cash payment or by transferring specified amounts of low-enriched uranium to the contractor. Under the USEC Privatization Act, Congress authorized DOE to "transfer" uranium "for national security purposes, as determined by the Secretary." Because the Secretary of Energy determined that transferring low-enriched uranium to the contractor was in the interest of national security, the uranium transfers were permissible. As DOE made the uranium transfers to the contractor, the recording statute required DOE to reduce its recorded obligation to properly reflect its remaining liability.

DECISION

This responds to a request for our decision concerning whether a Department of Energy (DOE) contract was consistent with appropriations law.[1]

[1] Letter from Senator John Barrasso, M.D., then-Chairman, Senate Committee on Environment and Public Works, to General Counsel, GAO (Nov. 17, 2017). This letter also requested our decision on whether DOE properly filed its returns reporting any income that its contractors received as compensation for down-blending services, as required under the Internal Revenue Code. In its response letter, DOE acknowledged that while it had correctly reported the value of cash paid to the contractor, it had not reported the value of uranium paid to the contractor, as it was required to do. Letter from Deputy General Counsel, DOE, to Assistant General Counsel, GAO, at 1 (July 18, 2018) (Response Letter). The agency stated that it would work expeditiously to correct the situation, and as agreed upon with our requestor this decision is limited to the appropriations law issues.

Under this contract, DOE procured down-blending services in order to convert highly enriched uranium to low-enriched uranium. The contract permitted DOE to satisfy its obligation to the contractor through cash payment or by transferring low-enriched uranium to the contractor. The USEC Privatization Act granted DOE authority to "transfer" uranium "for national security purposes, as determined by the Secretary." Pub. L. No. 104-134, title III, § 3112, 110 Stat. 1321-344 (Apr. 26, 1996), *as amended*, 42 U.S.C. § 2297h-10(e)(2) (USEC Privatization Act). We conclude that (1) under the recording statute, 31 U.S.C. § 1501, DOE was required to record an obligation for the contract price of nearly $334 million against appropriations available at the time; and (2) because the Secretary of Energy determined that transferring low-enriched uranium to the contractor was in the interest of national security, the uranium transfers were permissible. As DOE made the uranium transfers to the contractor, the recording statute required DOE to reduce its recorded obligation to properly reflect its remaining liability.

In accordance with our regular practice, we contacted DOE to seek factual information and its legal views on this matter.[2] In response, DOE provided a copy of the contract, a brief explanation of the pertinent facts, and references to prior DOE legal analysis on its authority to transfer uranium.[3]

BACKGROUND

The USEC Privatization Act authorizes DOE to "transfer or sell enriched uranium . . . to any person for national security purposes, as determined by the Secretary." USEC Privatization Act, § 3112(e)(2). Pursuant to this statute, on December 2, 2016, the Secretary of Energy determined that down-blending highly enriched uranium to low-enriched uranium would promote national security by ensuring that the highly enriched uranium could never again be used in a nuclear weapon.[4] Because the transfer of low-enriched uranium was to be used to fund the down-blending services, the Secretary also determined that the prospective transfer was also justified.[5]

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[2] GAO, Procedures and Practices for Legal Decisions and Opinions, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to Acting General Counsel, DOE (May 29, 2018).

[3] Response Letter. *See also* GAO, *Excess Uranium Inventories: Clarifying DOE's Disposition Options Could Help Avoid Further Legal Violations*, GAO-11-846, Sept. 26, 2011, at 51–56.

[4] DOE, *Secretarial Determination of a National Security Purpose for the Sale or Transfer of Enriched Uranium* (Dec. 2, 2016) (Secretarial Determination).

[5] *Id*.

On December 3, 2015, DOE awarded a contract for the down-blending of highly enriched uranium to low-enriched uranium.[6] The contract was a firm fixed-price contract for nearly $334 million.[7] As compensation for the down-blending services, the contractor agreed to accept either cash, low-enriched uranium, or a combination thereof.[8] The contract reserved to DOE the right to determine the method of compensation.[9] If DOE elected to compensate the contractor using low-enriched uranium, the contract set out a formula to determine the appropriate amount of low-enriched uranium based on its spot-market value at the time of the billing.[10]

DISCUSSION

In this decision we address three issues: first, the proper recording of an obligation when DOE entered into a contract for down-blending services; second, DOE's authority to transfer low-enriched uranium to the contractor; and third, the proper obligational adjustments DOE was required to make as its outstanding liability changed. We also address the applicability of the miscellaneous receipts statute.

Recording the Obligation

As a threshold matter for determining the proper recording of DOE's obligations under the contract, we first consider whether DOE had legal authority to enter into the down-blending services contract. Here, DOE has specific statutory responsibility to manage its uranium stockpile and promote international nuclear safety and nonproliferation. *See generally* Atomic Energy Act of 1954, Pub. L. No. 83-703, title I, §1, 68 Stat. 919 (Aug. 30, 1954), *as amended*, 42 U.S.C. § 2011; Department of Energy Organization Act, Pub. L. No. 95-91, title I, § 102, 91 Stat. 567 (Aug. 4, 1977), *as amended*, 42 U.S.C. § 7112; Energy Policy Act of 1992, Pub. L. No. 102-486, title X, § 1012, 106 Stat. 2948 (Oct. 24, 1992), *as amended*, 42 U.S.C. § 2296b-1; National Nuclear Security Administration Act, Pub. L. No. 106-65, div. C, title XXXII, § 3211, 113 Stat. 957 (Oct. 5, 1999), *as amended*, 50 U.S.C.A. § 2401. Through this contract, DOE managed its stock of uranium in support of its nonproliferation goals as the down-blending services resulted in a reduction in the existence of weapons-grade nuclear material. Accordingly, DOE had authority to enter into this contract.

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[6] DOE Contract No. DE-NA0003094, Dec. 3, 2015 (Contract).

[7] The total contract price was $333,814,716. Contract, at 6.

[8] Contract, at 16–17.

[9] *Id*.

[10] Contract, at 16. The contract also stated that the appropriate amount of low-enriched uranium to transfer would vary based on a recalculation of this formula for every invoice with invoice frequency at a maximum of once per month. *Id*.

The recording statute requires an agency to record the entire amount of the government's liability against funds available at the time the contract is executed. 31 U.S.C. § 1501(a)(1); B-327242, Feb. 4, 2016; B-322160, Oct. 3, 2011. For a firm fixed-price contract, the agency must record the total amount of its possible liability. B-328450, Mar. 6, 2018.

Even if intervening events or future agency action mean the agency may not ultimately pay out the full amount, the agency must still record its total liability at the time it is incurred. For instance, the Air Force entered into an operations contract under which it obligated limited amounts to fund performance for specific time increments. B-238581, Oct. 31, 1990. If it decided not to further fund the contract, the Air Force was liable to the contractor for "special termination" costs. *Id.* Even though the choice between funding and terminating the contract remained with the government, the Air Force was still required to record the full amount of the "special termination" costs because it was liable for those costs until the contract was fully funded. *Id.*, *see also* B-328450, Mar. 6, 2018; B-320091, July 23, 2010.

Here, the contract plainly states the government's liability at nearly $334 million.[11] The contract notes the "value of the ordered services" are "fixed at the time of award."[12] Accordingly, DOE should have recorded this amount. Like the Air Force, DOE maintained some control over the amount of its ultimate liability. However, even though DOE retained the right to satisfy its obligation through the transfer of low-enriched uranium rather than by a cash payment, it continued to be liable to the full extent of the $334 million until such transfers were made. Thus, DOE was required to record an obligation of the contract price of nearly $334 million against funds that were properly available as to purpose, time, and amount.

DOE's Authority to Transfer Uranium

Section 3112(e) of the USEC Privatization Act grants DOE authority to "transfer or sell" enriched uranium "to any person for national security purposes, as determined by the Secretary." Key to the interpretation and application of DOE's authorities under section 3112(e) is an understanding of the phrase "transfer or sell."

Generally, when we interpret a statute, we read the statute as a whole. *See* 2A Sutherland, *Statutes and Statutory Construction* § 46:5 (7th ed. 2014); *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120,132 (2000) (the meaning "of certain words or phrases may only become evident when placed in context"). We presume that Congress uses words and phrases to have consistent meaning throughout the statute. 29 Comp. Gen. 143, 145 (1949). Conversely, where Congress uses a different word, it intends a different meaning. *See* B-329603, Apr. 16, 2018. We also interpret words and phrases so that each of them has operative meaning. *See*

[11] The exact contract price was $333,814,716. Contract, at 6.

[12] Contract, at 16.

Sutherland § 46:6 (“Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally”).

In accordance with these principles, we note that Congress intended for the terms “transfer” and “sell” to each have distinct operative effect. Not only did Congress choose to include separate terms, but in using “or” to separate them, Congress created a disjunctive list. *See Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975) (“[a]s a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately”). Here the “or” establishes two separate authorities under which DOE can convey uranium upon the Secretary’s determination that doing so is in the interest of national security. Thus, DOE’s authority to “transfer” is distinct from DOE’s authority to “sell” uranium under section 3112.

In addition to presuming that each word has meaning, we also presume Congress was aware of such meaning when it included each term in the legislation. B-331888, June 11, 2020, and cases cited therein. And, we interpret terms that are not otherwise defined in statute according to their ordinary meaning. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); B-330776, Sept. 5, 2019.

The ordinary meaning of the verb “sell” is “to transfer (property) by sale.” *Black’s Law Dictionary* (11th ed. 2019) (definition of “sell”). In turn, the noun “sale” refers to “the transfer of property or title for a price.” *Id*. (definition of “sale”). In light of these definitions, Congress’s use of the term “sell” in section 3112(e) granted DOE authority to convey uranium in exchange for money. This interpretation is consistent with the use of the term “sell” in other sections of the USEC Privatization Act. *See* USEC Privatization Act, § 3112(b)(2) (“the Secretary shall *sell, and receive payment for*, the uranium hexafluoride”) (emphasis added).

In contrast, the ordinary meaning of the verb “transfer” is “to change over the possession or control of.” *Black’s Law Dictionary* (11th ed. 2019) (definition of “transfer”). Unlike the term “sell”, there is no requirement that a “transfer” involve the exchange or payment of money. The term “transfer” instead grants DOE a separate conveyance authority in which DOE need not receive money in exchange for the uranium. The only prerequisite to utilizing this transfer authority is that the Secretary make the requisite determination that the transfer is in the interest of national security. USEC Privatization Act, § 3112(e)(2).

Here, DOE did indeed transfer uranium following the Secretary’s determination that the transfer furthered national security. We acknowledge that the Secretary followed multistep logic to make this determination: the transfer of low-enriched uranium to the contractor was necessary to “fund” the down-blending of highly enriched

uranium, and the down-blending then resulted in the reduction of weapons-grade nuclear material, thereby benefiting national security.[13]

Given the statute's broad language vesting the Secretary with authority to make this determination and the lack of any other specific statutory constraints over the use of the transfer authority, we see no basis to disagree with the Secretary's determination or with DOE's authority to transfer uranium pursuant to the determination. Thus, DOE's transfer of low-enriched uranium to the contractor was permissible under the USEC Privatization Act.[14]

Adjusting the Obligation

As an agency's liability becomes clear in the course of contract performance, the agency should adjust the amount of its obligation. B-328450, Mar. 6, 2018; B-300480, Apr. 9, 2003. For instance, the Commodity Futures Trading Commission (CFTC) entered into lease agreements in which the definite sum of CFTC's liability was unknown, but for which there was a fixed maximum ascertainable in the agreements. B-328450, Mar. 6, 2018. Under the recording statute, CFTC was required to record the maximum amount of the government's liability. *Id*. As the actual amount of the obligation became clear over the course of the lease, CFTC was required to adjust the amount of the obligation to reflect the amount for which the agency was ultimately liable. *Id*.

In another decision, the Corporation for National and Community Service (Corporation) made grant awards to state corporations to fund education benefits for participants of the AmeriCorps Program. B-300480, Apr. 9, 2003. The Corporation initially committed to fund a specified number of participants and therefore had to record an obligation for the corresponding amount. *Id*. As the number of actual participants became known, the Corporation was required to adjust its obligation to either increase the obligation or deobligate funds as necessary. *Id*.

Here, the contractor agreed to accept either low-enriched uranium or cash, at the government's option, to satisfy the government's liability. As DOE transferred low-enriched uranium to the contractor, the government's outstanding total legal liability was reduced. Thus, with each uranium transfer, DOE was required to deobligate a corresponding amount from its appropriated balance.

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[13] *See* Secretarial Determination.

[14] The Secretary made the requisite national security determination on December 2, 2016, nearly one year after DOE awarded the contract for down-blending services. Under section 3112 of the USEC Privatization Act, the Secretary's determination was a necessary predicate to the transfer's permissibility. We presume that the Secretary's determination became effective before DOE carried out any uranium transfers.

Applicability of the Miscellaneous Receipts Statute

The miscellaneous receipts statute requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). This requirement advances the primary purpose of the statute, which is to ensure that Congress retains control of the public purse, thereby protecting Congress's constitutional power to appropriate public money. B-327830, Feb. 8, 2017; B-325396, Feb. 23, 2015; B-322531, Mar. 30, 2012. Funds constitute "money for the Government" if they are to be used to bear the expenses of the government or to pay its obligations. B-321729, Nov. 2, 2011.

Where an agency structures a transaction so that a third party instead of the government receives the money, this can violate the miscellaneous receipts statute. For example, CFTC entered into lease contracts in which its landlords agreed to satisfy CFTC obligations. B-327830, Feb. 8, 2017. In one lease, the landlord agreed to pay CFTC's existing rent owed to a previous landlord. In another lease, the landlord agreed to make payments to third-party contractors in satisfaction of CFTC's liabilities for building construction. Although CFTC did not receive money directly from the landlord, the landlord's use of funds to satisfy CFTC obligations made those funds "money for the Government." *Id*.

In a similar decision, the Small Business Administration (SBA) used a contractor to assist in the performance of statutorily-required oversight of private lenders. B-300248, Jan. 15, 2004. Rather than paying the contractor from its appropriations, SBA arranged for private lenders to pay a fee to the contractor. *Id*. SBA maintained that the fee proceeds did not constitute "money for the Government" since they were paid directly to the contractor as compensation for the contractor's work. *Id.* We disagreed and noted that a "government official or agent is deemed to receive money for the government under the Miscellaneous Receipts Statute if the money is to be used to bear the expenses of the government or pay government obligations." *Id*. at 7. *See also* B-265727, July 19, 1996 (concluding that the sublessee's payment to the landlord was money for the government and, therefore, must be deposited in the Treasury as miscellaneous receipts).

We have also considered the miscellaneous receipts statute in the context of previous DOE uranium transfers. In 2006, we concluded that DOE violated the miscellaneous receipts statute when it transferred low-enriched uranium to a contractor in exchange for uranium decontamination services. B-307137, July 12, 2006. DOE had created a principal/agent relationship with the contractor by instructing it to sell the transferred uranium. *Id*. Because proceeds from the sale were then used to compensate the contractor for expenses it incurred on behalf of DOE, we concluded that DOE violated the miscellaneous receipts statute. *Id*. Similarly, in 2011, we concluded that DOE "constructively received money for the government" when it authorized and partially controlled a contractor's sale of DOE uranium in partial payment for services rendered. GAO, *Excess Uranium Inventories: Clarifying DOE's Disposition Options Could Help Avoid Further Legal*

Violations, GAO-11-846, Sept. 26, 2011. Again, DOE's agreement violated the miscellaneous receipts statute because it directed the contractor to sell uranium and retain the proceeds to pay for services rendered to DOE. *Id.*

The critical factor in these decisions is that the government arranged for a third party to make payments in satisfaction of the government's liability. CFTC arranged for landlords to make payment to CFTC's third-party contractors; SBA arranged for lenders to make payment to SBA contractors; and DOE, in our prior decisions, arranged for its contractor to sell uranium and then use the proceeds to satisfy DOE liabilities. In the present case, DOE did not make such an arrangement. DOE did not have a third party make payment to the contractor in satisfaction of DOE's outstanding liability, nor did DOE orchestrate the sale of uranium through its contractor in order to use the proceeds to satisfy DOE's liability. Instead, DOE satisfied its own liability through the transfer of low-enriched uranium to the contactor. Because DOE did not receive "money for the Government" or structure the transaction to have a third party satisfy its liability, the miscellaneous receipts statute is not at issue here.

CONCLUSION

DOE permissibly entered into a contract to obtain down-blending services for its uranium stockpile. Upon entering into the contract, DOE was required to record against available appropriations an obligation for the contract price of about $334 million. Consistent with a determination by the Secretary of Energy, DOE permissibly transferred low-enriched uranium to the contractor. Because the contractor agreed to accept low-enriched uranium as compensation, with each uranium transfer DOE was required to deobligate amounts to properly reflect its remaining liability.

Edda Emmanuelli Perez

Edda Emmanuelli Perez
General Counsel

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

Decision

Matter of: Department of Agriculture—Application of Statutory Notification Requirement

File: B-334306

Date: August 15, 2023

DIGEST

After announcing that it would relocate most of the employees of both the National Institute of Food and Agriculture (NIFA) and the Economic Research Service (ERS), the United States Department of Agriculture (USDA) transferred amounts appropriated to each of these agencies to satisfy an obligation to a contractor for relocation planning assistance.

By notifying the Appropriations Committees before transferring the amount appropriated to NIFA under a fiscal year 2018 appropriations act, USDA complied with a notification requirement in the same act. Although USDA made the notification during the fiscal year preceding that in which it made the transfer, the amount transferred from NIFA's appropriation was available without fiscal year limitation and, therefore, the notification for this amount remained operative during the succeeding fiscal year.

In contrast, the amounts USDA transferred from ERS were appropriated under a fiscal year 2019 continuing resolution. Although these amounts were subject to the same notification requirement, USDA did not submit a notification to the Appropriations Committees for this amount. The notification that USDA submitted to the Appropriations Committees pertained only to amounts appropriated in the fiscal year 2018 appropriations act and not to amounts appropriated under the fiscal year 2019 continuing resolution. Therefore, USDA violated both the notification requirement and the Antideficiency Act.

DECISION

This responds to a request for our decision concerning whether USDA complied with a statutory notification requirement when it transferred amounts to satisfy an

obligation to a contractor for relocation planning assistance.[1] In accordance with our regular practice, we contacted USDA to seek factual information and its legal views on this matter.[2] USDA provided information and its legal views in its response and follow-up communications.[3]

BACKGROUND

On August 9, 2018, USDA announced its plan to move most employees of two research agencies—the Economic Research Service (ERS) and the National Institute of Food and Agriculture (NIFA)—out of the Washington, D.C. area.[4] The same day, USDA sent letters informing the House and Senate Agriculture appropriations subcommittees of its proposal.[5] USDA wrote that NIFA and ERS "will engage private sector assistance in our search" for potential headquarters sites

[1] Letter from Representative Jennifer Wexton, Representative Gerald E. Connolly, and Representative Donald S. Beyer, Jr., to Comptroller General (May 6, 2022).

[2] GAO, *Procedures and Practices for Legal Decisions and Opinions,* GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USDA (June 29, 2022); Email from Assistant General Counsel for Appropriations Law, GAO, to Associate General Counsel, General Law and Research Division, USDA (Feb. 14, 2023); Telephone Conversation with Associate General Counsel and Senior Counsel, General Law and Research Division, USDA, with Assistant General Counsel for Appropriations Law and Senior Attorney, GAO (Apr. 25, 2023) (Telephone Conversation).

[3] Letter from Associate General Counsel, General Law and Research Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Nov. 4, 2022) (USDA Response); Letter from Associate General Counsel, General Law and Research Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Mar. 27, 2023) (USDA Supplemental Response); Telephone Conversation.

[4] USDA, *USDA to Realign ERS with Chief Economist, Relocate ERS & NIFA Outside DC*, Release No. 0162.18 (Aug. 9, 2018) (Release No. 0162.18), *available at* https://www.usda.gov/media/press-releases/2018/08/09/usda-realign-ers-chief-economist-relocate-ers-nifa-outside-dc (last visited Aug. 10, 2023).

[5] USDA Response, Attachment D.

using funds "appropriated in the 2018 Omnibus Appropriations Act, including the funding provided specifically to NIFA for relocation and renovation costs."[6]

On October 22, 2018, USDA obligated $339,310.60 of its Office of the Secretary appropriation on a contract with a private vendor for relocation planning assistance.[7] ERS and NIFA each transferred half that cost ($169,655.30) to the Office of the Secretary appropriation.[8] On June 13, 2019, USDA announced ERS and NIFA would relocate to the Kansas City region.[9]

DISCUSSION

At issue here is (1) whether USDA was required by law to notify the Appropriations Committees before it transferred amounts to the Office of the Secretary appropriation to satisfy the obligation for a contract for relocation planning assistance; and (2) if so, whether USDA made the required notification. We first consider these issues for amounts appropriated to NIFA and then for amounts appropriated to ERS.

NIFA amounts

On October 22, 2018, USDA transferred about $170,000 from an appropriation for NIFA's relocation expenses to the appropriation for the USDA Office of the

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[6] USDA Response, Attachment D, at 1, 3, 5, and 7.

[7] *See* USDA Office of Inspector General, *USDA's Proposal to Reorganize and Relocate the Economic Research Service and National Institute of Food and Agriculture*, Inspection Report No. 91801-0001-23, at 1 n.8 (Aug. 2019) (USDA OIG Report). According to the documentation provided, ERS and NIFA transferred funds to Departmental Administration (DA) for it to award a contract on their behalf. USDA Response, at 4. DA is part of the Office of the Secretary and has a line-item appropriation in the "Processing, Research, and Marketing, Office of the Secretary" account in the President's Budget. *Appendix*, *Budget of the United States Government for Fiscal Year 2024*, at 61, 63, *available at* https://www.govinfo.gov/content/pkg/BUDGET-2024-APP/pdf/BUDGET-2024-APP.pdf (President's Budget) (last visited Aug. 10, 2023).

[8] USDA Response, at 4 and Attachment C, at 4, 8, 13, 17; USDA Supplemental Response, Attachment 2, at 5–7, 10–11; USDA OIG Report, at 1 n.8.

[9] USDA, *Secretary Perdue Announces Kansas City Region as Location for ERS and NIFA*, Release No. 0091.19 (June 13, 2019), *available at* https://www.usda.gov/media/press-releases/2019/06/13/secretary-perdue-announces-kansas-city-region-location-ers-and-nifa (last visited Aug. 10, 2023).

Secretary, which used the amount to satisfy an obligation to a contractor for relocation planning assistance.[10] We first consider whether USDA was required by law to notify the Appropriations Committees before it made this transfer.

The amount USDA transferred from NIFA was appropriated in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2018, Pub. L. No. 115-141, div. A, title VII, 132 Stat. 351, 394 (Mar. 23, 2018) (2018 Agriculture Appropriations Act). Section 753 of the 2018 Agriculture Appropriations Act provided $6 million specifically to NIFA for relocation and renovation costs.[11] All amounts appropriated under the 2018 Agriculture Appropriations Act, including the amount for NIFA's relocation and renovation costs, were subject to Section 717(a) of the Act. Pub. L. No. 115-141, 132 Stat. at 385. It states:

> None of the funds provided by this Act . . . shall be available for obligation or expenditure through a reprogramming, transfer of funds, or reimbursements as authorized by the Economy Act, or in the case of the Department of Agriculture, through use of the authority provided by section 702(b) of the Department of Agriculture Organic Act of 1944 (7 U.S.C. 2257) or section 8 of Public Law 89-106 (7 U.S.C. 2263), that—
>
> > . . . (4) relocates an office or employees; . . .
>
> unless the Secretary of Agriculture . . . notifies in writing and receives approval from the Committees on Appropriations of both Houses of Congress at least 30 days in advance of the reprogramming of such funds or the use of such authority.

Pub. L. No. 115-141, 132 Stat. at 385. Section 717(a) thus provides, in relevant part, that an agency must notify the Senate and House Appropriations Committees if it (1) uses transferred amounts (2) to relocate an office or employees. *Id*.

USDA's action here met both of these elements. Pursuant to 7 U.S.C. § 2263, which permits USDA to transfer amounts between appropriations available to it,

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[10] *See* USDA Supplemental Response, Attachment 2, at 6, 11; USDA OIG Report, at 1. NIFA's interagency agreement was signed on October 22, 2018, but lists October 1, 2018, as the start of the performance period. USDA Supplemental Response, Attachment 2, at 4, 5, 8–9.

[11] Pub. L. No. 115–141, § 753, 132 Stat. at 394. This "General Provisions" section appropriated these funds for the "National Institute of Food and Agriculture—Research and Education Activities" account, *id*., in addition to the $887,171,000 this account received under the Act. *Id*., 132 Stat. at 355.

USDA transferred amounts from an appropriation for NIFA's relocation and renovation costs to an appropriation for the Office of the Secretary.[12] USDA also transferred the amounts to relocate an office or employees within the meaning of Section 717(a). USDA had already announced its intention to relocate NIFA and ERS and solicited expressions of interest from potential sites at the time of this transfer.[13] Additionally, it made the transfer to satisfy an obligation under the contract, which was for consulting services to advise USDA on where to relocate the agencies.[14] Thus, this planning contract was part of a relocation process that was already underway and, therefore, USDA was required to notify the Appropriations Committees of the transfer.

We next consider whether USDA made the required notification. We conclude that it did. As noted, in an August 9, 2018, letter to the House and Senate Agriculture appropriations subcommittees, USDA stated that it would "engage private sector assistance in our search" for potential headquarters sites using funds "appropriated in the 2018 Omnibus Appropriations Act, including the funding provided specifically to NIFA for relocation and renovation costs."[15] Consistent with its letters to the Appropriations Committees, USDA transferred from the NIFA appropriation to the appropriation for the Office of the Secretary $169,655.30 to satisfy an obligation to a contractor that provided relocation planning assistance.[16]

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[12] More specifically, USDA transferred $169,655.30 of the $6,000,000 appropriated for NIFA's relocation and renovation costs to the heading "Agricultural Programs, Processing, Research and Marketing, Office of the Secretary." Pub. L. No. 115-141, 132 Stat. at 351, 394. *See* USDA Supplemental Response, Attachment 3, at 1; USDA Supplemental Response, Attachment 2, at 6, 11 (reflecting the transfer of $169,655.30 and servicing agency funding information corresponding to the "Processing, Research and Marketing, Office of the Secretary, Agriculture" Treasury account); *Department of the Treasury, Federal Account Symbols and Titles*, Part II (Apr. 2023), at row 320, *available at* https://fiscal.treasury.gov/files/fast-book/fastbook-Apr-2023-part2.xlsx (last visited Aug. 10, 2023).

[13] USDA, Release No. 0162.18; USDA Response, Attachment D, at 1, 3, 5, 7, and Attachment E.

[14] USDA Response, at 4, Attachment C, at 4, 8, 13, 17, and Attachment D, at 1, 3, 5, 7.

[15] USDA Response, Attachment D, at 1, 3, 5, and 7.

[16] USDA Supplemental Response, Attachment 2, at 5–7, 10–11, *and see* Attachment 3, at 1.

USDA notified the Appropriations Committees during fiscal year 2018 yet it did not transfer the funds until fiscal year 2019.[17] However, the amounts USDA transferred were available without fiscal year limitation and, therefore, remained available for obligation when USDA made the transfer. Accordingly, the notification that USDA made in fiscal year 2018 permitted it to transfer in fiscal year 2019 the no-year amounts appropriated to NIFA.

ERS amounts

On or around October 22, 2018, USDA transferred about $170,000 from an appropriation for ERS to the appropriation for the USDA Office of the Secretary which, as it did for the amounts it received from NIFA, used the funds to satisfy an obligation to a contractor for relocation planning assistance.[18] We next consider whether USDA was required by law to notify the Appropriations Committees before it made this transfer.

At the close of fiscal year 2018, Congress enacted a continuing resolution appropriating funds to USDA for fiscal year 2019. Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. C, §§ 101(1), 105(3), 132 Stat. 2981, 3123–24 (Sept. 28, 2018) (2019 Continuing Resolution). Accordingly, this measure appropriated amounts to ERS available under the same terms and conditions as in fiscal year 2018. *See id.*, 132 Stat. at 3123 (appropriating "[s]uch amounts as may be necessary . . . under the authority and conditions provided" in fiscal year 2018 appropriations acts). This amount was available for obligation in fiscal year 2019 for the needs of that year, and hence the 2019 Continuing Resolution provided the amount that ERS transferred.

The purpose of the 2019 Continuing Resolution, as with any continuing resolution, was "to maintain the previous year's *status quo* with regard to government funding and operations." B-328325, Sept. 12, 2016. *See* Pub. L. No. 115-245, 132 Stat. at 3123 (appropriating amounts at a "rate for operations" as provided in fiscal year

[17] USDA Supplemental Response, Attachment 2, at 4, 8–9.

[18] USDA Response, at 4. It is unclear from the documentation provided precisely when USDA transferred the ERS amounts. For example, the interagency agreement USDA provided was unsigned and undated. USDA Response, Attachment C at 3, 6, 10–11, 12, 15, 16, 19–20. However, the documents indicate that the transfer likely occurred on or around the October 22, 2018, contract award date. The interagency agreement USDA provided listed "2019" as the period of availability for ERS's funds, and said ERS "will reimburse" DA for its share of a "contract generated by" DA. USDA Response, Attachment C at 4, 8, 13, 17. USDA said ERS obligated funds to DA "for it to award" a contract, USDA Response, at 4, but the USDA OIG Report said ERS "reimbursed" USDA for its share. USDA OIG Report, at 1 n.8.

2018 appropriations acts, and "under the authority and conditions" in those acts, to continue projects or activities "conducted in fiscal year 2018"); *id.* (stating no funds provided under the 2019 Continuing Resolution shall be used "to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2018"); *id.* (making appropriations available to the "extent" and "manner" provided by the pertinent fiscal year 2018 appropriations act); *id.*, 132 Stat. at 3124 (providing that "only the most limited funding action" authorized by the 2019 Continuing Resolution "shall be taken in order to provide for continuation of projects and activities"); *id*. (continuing entitlements and other mandatory payments whose budget authority was provided in fiscal year 2018 appropriations acts "at the rate to maintain program levels" under current law).

To this end, the 2019 Continuing Resolution carried forward the terms and conditions of the prior full-year appropriation. *See, e.g.,* B-325350, Apr. 30, 2014 (observing that a continuing resolution carried forward a proviso from the previous year); B-324481, Mar. 21, 2013 (concluding that the fiscal year 2013 continuing resolution extended all of the authorities and conditions provided in a fiscal year 2012 appropriations act, and finding no language to indicate Congress did not expect a certain directive to apply during the continuing resolution).

Therefore, the 2019 Continuing Resolution carried forward Section 717(a), making its amounts subject to the notification provision. *See* Pub. L. No. 115-245, 132 Stat. at 3123. Just as Section 717(a) required USDA to notify the Appropriations Committees for particular transfers of the no-year amounts appropriated to NIFA for fiscal year 2018, so too did Section 717(a) require USDA to notify the Appropriations Committees for particular transfers of the fiscal year amounts appropriated under the 2019 Continuing Resolution.

And just as USDA's transfer of the amount appropriated to NIFA under the 2018 Agriculture Appropriations Act triggered the Section 717(a) requirement to notify the Appropriations Committees, so too did USDA's transfer of the amount appropriated to ERS under the 2019 Continuing Resolution trigger the notification requirement. In particular, using its authority under the Economy Act, 31 U.S.C. § 1535, USDA transferred amounts from an appropriation for ERS to an appropriation for the Office of the Secretary.[19] Additionally, USDA used the amount transferred to relocate an

[19] More specifically, USDA transferred $169,655.30 of the $86,757,000 appropriated to ERS under the "Economic Research Service" heading in the 2018 Agriculture Appropriations Act, Pub. L. No. 115-141, 132 Stat. at 354, to the heading "Agricultural Programs, Processing, Research and Marketing, Office of the Secretary." *Id*., 132 Stat. at 351. *See* USDA Response, Attachment C, at 4, 8, 13, 17 (reflecting the transfer of $169,655.30 and servicing agency funding information corresponding to the "Processing, Research and Marketing, Office of the Secretary, Agriculture" Treasury account); *Department of the Treasury, Federal Account Symbols and Titles*, Part II (Apr. 2023), at row 320, *available at* (continued)

office or employees.[20] As explained above regarding NIFA, at the time of this transfer, USDA had already announced it would move the two agencies, and the planning assistance contract was to help USDA find their new headquarters sites.[21] This contract was thus part of an already-underway relocation process and, therefore, USDA had to notify the Appropriations Committees of the transfer.

We next consider whether USDA made the required notification when it transferred to the Office of the Secretary the amounts appropriated to ERS under the 2019 Continuing Resolution. We conclude that it did not. USDA did not notify the Appropriations Committees that it would transfer amounts appropriated under the 2019 Continuing Resolution. The only written notification that USDA provided was in its August 9, 2018, letter to the Appropriations Committees, approximately 50 days prior to the enactment of the 2019 Continuing Resolution.[22] This notification referred only to amounts appropriated in the 2018 Agriculture Appropriations Act and made no mention of the 2019 Continuing Resolution.

USDA, however, asserts that its August 9, 2018, letter sufficiently notified the Appropriations Committees. We disagree. On September 28, Congress enacted a continuing resolution for fiscal year 2019. Two days later, on September 30, USDA's fiscal year 2018 appropriations expired, making them unavailable to incur new obligations. 31 U.S.C. §§ 1502(a), 1551(a)(3), 1553. And the next day, fiscal year 2019 began. These events—the enactment of the continuing resolution, expiration of budget authority, and change in fiscal years—rendered USDA's August 9, 2018, letter insufficient for the purpose of notifying the Appropriations Committees of a transfer of amounts appropriated under the 2019 Continuing Resolution. Instead, USDA's notice concerned since-expired funding appropriated under a prior law: the 2018 Agriculture Appropriations Act.

USDA asserts that because Congress has enacted Section 717 in some form for 23 years, it relies "on the assumption that at a minimum it will be included every year in the form it was in the prior year" and, therefore, that if it notifies the Appropriations Committees during the prior fiscal year, then the enactment of a continuing resolution requires no further notification.[23] We disagree. A "blanket" notification

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(continued) https://fiscal.treasury.gov/files/fast-book/fastbook-Apr-2023-part2.xlsx (last visited Aug. 10, 2023).

[20] USDA Response, Attachment C, at 4, 13.

[21] USDA, Release No. 0162.18; USDA Response, Attachment D, at 1, 3, 5, 7, and Attachment E.

[22] USDA Response, Attachment D, at 1, 3, 5, 7.

[23] USDA Response, at 1, 3.

that remains valid under subsequent appropriations would not only be inconsistent with the simple fact that a subsequent appropriation stands apart from a prior one, but would also frustrate Congress's ability to oversee how agencies spend the funds it appropriates.

One of the ways that Congress exercises its power of the purse is by placing time limits on agency funding, such as through one-year appropriations, and requiring agencies to give advance notice before taking some actions. *See* GAO, *Testimony before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations*, GAO-19-372T (Washington, D.C.: Feb. 6, 2019) ("Advance notification requirements . . . provide a mechanism by which Congress may exercise its constitutional power of the purse"); B-327432, June 30, 2016 ("Congress has the right to predicate the availability of appropriations on compliance with specified notification requirements."). As the holder of the purse strings, Congress has a clear interest in being informed of how agencies will obligate the amounts Congress appropriates. Congress furthered that interest when it required USDA to make particular notifications to the Appropriations Committees. Changed circumstances—such as the expiration of the budget authority for which an agency provided notification, and a subsequent appropriation of funds for a new fiscal year like the continuing resolution—require agencies to provide an updated notification consistent with the changed circumstances.

Requirement for approval from the Appropriations Committees

Section 717(a) requires USDA not only to notify the Appropriations Committees before taking particular actions but also to receive their "approval . . . at least 30 days in advance" of taking the action. Pub. L. No. 115-141, 132 Stat. at 385. This provision reserves within the Appropriations Committees the power to approve executive action made pursuant to authority Congress has already delegated to the executive branch—in this case, the authority to transfer amounts when authorized by law. The Supreme Court held in *Immigration & Naturalization Service v. Chadha* that such provisions are inconsistent with the Constitution's procedures of bicameralism and presentment of legislation. 462 U.S. 919, 951–959 (1983).

We have previously considered the effect of approval requirements in the context of appropriations provisions. *Id*.; *see* B-332704, June 30, 2022 (though it is not GAO's role or practice to opine on the constitutionality of duly enacted statutes, we must consider and apply relevant Supreme Court precedent). In B-332704, we discussed the value and purpose of the notification and approval process with respect to congressional oversight. We cautioned that agencies ignore such expressions of intent at the peril of strained congressional relations. Recognizing Congress' appropriations and oversight authority, we also noted agencies may abide by informal limitations, and some even incorporate them into regulations or internal guidance. Additionally, we observed that agencies have developed mechanisms for engaging with congressional committees on these types of actions. The Executive

Branch, for example, has concluded that approval provisions will be construed as requiring agencies to provide notice. B-332704, June 30, 2022.

Here Section 717(a) is such a provision and, consistent with precedent, we conclude that its requirement for the approval of the Appropriations Committees is not legally binding and without effect; however, its requirement that the Appropriations Committees be notified of such transfers remains in effect.[24] As we explained in B-332704, where Congress enacted an impermissible requirement for committee approval of executive action, the remaining provisions were "fully operative laws that employ workable Congressional oversight mechanisms within Congress' power." B-332704, June 30, 2022, at 8 n.38.

We reach the same result here. After excising the approval proviso from Section 717(a), its remaining provisions are fully operative laws. And their restrictions and conditions, such as the requirement for advance written notice from the Secretary of Agriculture, are oversight mechanisms that are well within Congress's power to employ. Section 717(a)'s notification requirement, then, is a valid oversight provision that is fully operative and binding on USDA. Therefore, USDA was required to notify the Appropriations Committees before making the transfers at issue, but not to obtain their approval.

Antideficiency Act's application

Having determined USDA violated the notification provision as to ERS, we lastly consider the consequence of this violation. The Antideficiency Act prohibits making or authorizing an expenditure or obligation that exceeds or is in advance of an appropriation. 31 U.S.C. § 1341. It extends to all provisions of law implicating the availability of agency appropriations, and agencies must consider the effect of all laws addressing the availability of appropriations. B-319009, Apr. 27, 2010 (citation and quotations omitted). Additionally, "[w]here Congress conditions the availability of funding on advance notice to the appropriate congressional committees, such funding is not available until the agency provides the required notification." GAO, *Testimony before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations*, GAO-19-372T (Washington, D.C.: Feb. 6, 2019).

For example, the Department of Homeland Security (DHS) violated the Antideficiency Act when the United States Secret Service reprogrammed funds before DHS had given statutorily required advance notice to the Appropriations

[24] If the removal of an inoperative provision leaves other provisions that remain fully operative, the inoperative provision is said to be "severable," and the other legally permissible provisions remain in effect while the inoperative provision is stricken. *See Chadha*, 462 U.S. at 931–935.

Committees. B-319009, Apr. 27, 2010. Absent this notice, the funds were not legally available for reprogramming. *Id.* This violation of the notice requirement constituted a violation of the Antideficiency Act. *Id.; see also* B-329603, Apr. 16, 2018; B-327432, June 30, 2016; B-326013, Aug. 21, 2014.

This case is analogous. USDA transferred amounts from ERS without providing the statutorily required advance notice to the Appropriations Committees. Section 717(a) conditions the availability of funds for relocations in part on USDA's compliance with its notification requirement. But because USDA did not satisfy this provision, the amounts appropriated to ERS in the 2019 Continuing Resolution were not legally available at the time of transfer. Therefore, by violating the notice requirement, transferring funds that were unavailable for obligation or expenditure, and using those amounts to satisfy an obligation to a contractor, USDA violated the Antideficiency Act. It should report its violation as 31 U.S.C. § 1351 requires.

CONCLUSION

USDA complied with a notification requirement in Section 717(a) when it transferred to the Office of the Secretary amounts appropriated to NIFA. USDA never made the requisite notification under Section 717(a) when it transferred amounts appropriated to ERS. USDA thus violated the notification provision and, as a result, the Antideficiency Act, and it should report its violation as required by 31 U.S.C. § 1351.

Edda Emmanuelli Perez
General Counsel

Interagency Agreements

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

Decision

Matter of: U.S. Department of the Treasury—Reimbursable Agreements

File: B-330046

Date: September 12, 2022

DIGEST

During fiscal year 2015, the Office of the Assistant Secretary for Management (Management) in the U.S. Department of the Treasury (Treasury) incurred obligations to provide services to other Treasury offices before the corresponding Economy Act agreements were executed. Also, during fiscal year 2015, Management provided services to the Consumer Financial Protection Bureau (CFPB) and charged these obligations against appropriations available for fiscal year 2016.

Treasury had authority under 31 U.S.C. § 1534, the account adjustment statute, to initially obligate Management's appropriation to provide services to other Treasury offices and then adjust the accounts of each benefiting appropriation based on the value each appropriation received. Sufficient amounts were available in Management's appropriation and the benefiting appropriations to cover the obligations, and Management's appropriation was reimbursed. Further, Management had sufficient amounts in its 2015 account to cover the costs of providing services to CFPB and has already adjusted its accounts to record the obligations against the 2015 account. As Treasury had appropriations properly available for all its obligations, Treasury's actions do not violate the Antideficiency Act.

DECISION

The U.S. Department of the Treasury (Treasury) requested our decision on whether it violated the Antideficiency Act when it incurred obligations before intra-agency agreements were executed and when it charged fiscal year 2016 appropriations for

services provided in fiscal year 2015 under an interagency agreement.[1] As discussed below, we conclude that Treasury did not violate the Antideficiency Act.

The Request Letter set forth the relevant factual information and Treasury's legal views on this matter. The *OIG Report* also provided pertinent facts. In addition to these materials, we asked and received responses to follow-up questions from Treasury.[2]

BACKGROUND

Treasury's Office of the Assistant Secretary for Management (Management) is funded by an annual appropriation for the salaries and expenses of departmental offices (S&E Appropriation).[3] Management obligates its S&E Appropriation for,

[1] Letter from Assistant General Counsel, General Law, Ethics and Regulation, Treasury, to General Counsel, GAO, Feb. 1, 2018 (Request Letter). The Request Letter referred to a report issued by Treasury's Office of Inspector General (OIG) which found that Treasury potentially violated the Antideficiency Act, and recommended that Treasury seek our decision. Request Letter, at 1; Treasury OIG, *Treasury's Office of Budget and Travel Potentially Violated the Antideficiency Act and Needs to Improve Its Reimbursable Agreement Process*, OIG-18-024 (Dec. 8, 2017) (*OIG Report*).

[2] E-mail from Senior Attorney, GAO, to Senior Counsel, Treasury, *Subject: Questions re: Treasury Request for GAO Decision on Reimbursable Agreements (B-330046)* (Dec. 22, 2020); E-mail from Senior Counsel, Treasury, to Senior Attorney, GAO, *Subject: RE: Questions re: Treasury Request for GAO Decision on Reimbursable Agreements (B-330046)* (Jan. 28, 2021) (Follow-up Response).

[3] *See, e.g.*, Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-235, div. E, title I, 128 Stat. 2130, 2332 (Dec. 16, 2014); Request Letter, at 1. The lump-sum appropriation is available for one fiscal year. Management is the principal policy advisor to Treasury leadership on the budget and internal management of Treasury and its bureaus. Treasury, *Management*, *available at* home.treasury.gov/about/offices/management (last accessed Aug. 16, 2022).

among other things, its administrative support, such as information technology services.[4]

Other Treasury offices, which are funded separately from Management,[5] do not have their own administrative support.[6] Therefore, Management enters into intra-agency agreements under the Economy Act to provide these services to other Treasury offices.[7] Management also enters into interagency agreements under the Economy Act to provide administrative support services to the Consumer Financial Protection Bureau (CFPB).[8] Management obligates its S&E Appropriation to provide services under intra- and interagency agreements, and is reimbursed by the requesting entities.[9]

In fiscal year 2015, Management incurred obligations to provide services to other Treasury offices before the agreements were executed by both parties.[10] In addition, in fiscal year 2015, Management provided administrative support services to CFPB under an interagency agreement and charged fiscal year 2016 appropriations for the costs.[11]

DISCUSSION

At issue here is whether Treasury violated the Antideficiency Act when Management (1) incurred obligations in fiscal year 2015, before intra-agency agreements were executed, and (2) charged fiscal year 2016 appropriations for services provided in

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[4] Follow-up Response; Request Letter, at 1.

[5] For example, the Office of Financial Stability and Office of Financial Research are funded with permanent appropriations and the Office of Terrorism and Financial Intelligence receives an annual appropriation for its salaries and expenses. Request Letter, at 1; Pub. L. No. 113-235, 128 Stat. at 2333.

[6] Request Letter, at 1.

[7] *Id*. These agreements are negotiated on an annual basis. *OIG Report*, Appendix 2, at 43.

[8] Request Letter, at 1.

[9] *See* Follow-up Response; *see also OIG Report*, at 6–10 (setting forth the process through which Management is reimbursed by requesting entities).

[10] Request Letter, at 1; *OIG Report*, at 13. Of the agreements that were not executed prior to the start of fiscal year 2015, the parties executed the agreements during fiscal year 2015, in the majority of cases. Follow-up Response, Attachment. One agreement was signed in fiscal year 2016, and in another case Treasury could not locate a signed agreement, but confirmed that Management was reimbursed for the services provided. *Id*.

[11] Request Letter, at 3–4; Follow-up Response.

fiscal year 2015 under an interagency agreement. The Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation unless otherwise authorized by law.[12]

Obligations Incurred Before Execution of Intra-Agency Agreements

Agencies must have statutory authority, such as the Economy Act, to enter into intra- or interagency agreements, in order to avoid running afoul of federal fiscal laws.[13] The Economy Act provides that "[t]he head of an agency or major organization unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if . . . amounts are available," among other requirements.[14] A fully completed and executed Economy Act agreement is a key tool to establish terms and responsibilities and to evidence the order.[15] For example, the U.S. Department of Agriculture (USDA) used the Economy Act to support reimbursable agreements between its separately funded offices under which personnel would be detailed from one office to another office.[16]

In contrast, another statutory authority can be used by an agency to fund the provision of resources that are to be shared across its separately funded offices that does not require a written agreement. Under 31 U.S.C. § 1534, known as the account adjustment statute, an agency may temporarily charge one of its appropriations for an expenditure benefiting other appropriations of the agency, as long as amounts are available in the charging and benefiting appropriations at the

[12] 31 U.S.C. § 1341.

[13] Indeed, the purpose statute, 31 U.S.C. § 1301(a), provides that appropriations shall only be used for the objects for which they were made; transfers between appropriation accounts are prohibited, 31 U.S.C. § 1532; and, finally, the miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that amounts received by an agency from any source be deposited in the Treasury.

[14] 31 U.S.C. § 1535(a). "Congress enacted the Economy Act to permit the utilization of the materials, supplies, facilities, and personnel belonging to one department by another department . . . ." B-331739, Mar. 18, 2021, at 2 (internal quotation and punctuation omitted).

[15] GAO, *Principles of Federal Appropriations Law*, 3rd ed., Vol. III, ch. 12, § B.1.a.(5), GAO-08-978SP (Washington, D.C.: Sept. 2008). In addition, under the recording statute, 31 U.S.C. § 1501(a), an amount shall be recorded as an obligation only when supported by documentary evidence of a binding agreement between an agency and another person, including an agency.

[16] B-328477, Sept. 26, 2017. We ultimately concluded that USDA violated the purpose statute because personnel were not actually detailed to the requesting office, even though the requesting office had obligated its appropriations to cover the salaries and expense of those personnel.

time of the initial charge and the accounts are adjusted to reimburse the appropriation initially charged during, or by the end of, the same fiscal year.[17] "An agency generally has the discretion to use either the Economy Act or the account adjustment statute to share resources across appropriations."[18]

For example, the Department of Homeland Security (DHS) had authority under the account adjustment statute to charge one appropriation for certain shared services and adjust the accounts of benefiting appropriations before the end of the fiscal year based on use of the services.[19] We determined, however, that DHS failed to adjust the benefiting appropriation accounts.[20] We concluded that DHS should adjust its accounts, and if balances were not available to cover the adjustments, it should report an Antideficiency Act violation.[21] We determined further that DHS did not enter into valid Economy Act agreements and thus could not rely on the Economy Act to justify the shared services transactions.[22]

Here, Management had authority pursuant to the account adjustment statute to initially obligate its S&E Appropriation to provide administrative services to other Treasury offices and then adjust the accounts of each benefiting appropriation based on the value each appropriation received. At the time that Management incurred obligations for the services provided, there was sufficient budget authority in the 2015 S&E Appropriation to cover Management's obligations.[23] Further, there is nothing to suggest that benefiting appropriations lacked sufficient budget authority to cover the services received. Rather, these were standard administrative services provided to Treasury offices on an annual basis.[24] In accordance with Treasury's standard process, Treasury offices reimbursed Management's S&E Appropriation for the services in appropriate amounts by the close of fiscal year 2015.[25]

Therefore, we conclude that the account adjustment statute provided authority for Management to incur obligations to provide administrative support services to other

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[17] 31 U.S.C. § 1534.

[18] B-308762, Sept. 17, 2007, at 9.

[19] B-308762.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] Request Letter, at 3; Follow-up Response.

[24] *See* Request Letter, at 1–2.

[25] *See OIG Report*, at 9–10 (describing the process for collecting reimbursements from Treasury customers). The information before us does not indicate that there were any issues with charging the benefiting appropriations or reimbursing Management's S&E Appropriation.

Treasury offices, notwithstanding the absence of executed Economy Act agreements. Amounts were available in Management's S&E Appropriation and the benefiting appropriations, and the accounts were adjusted to reimburse the S&E Appropriation. Therefore, there were no obligations in excess or in advance of appropriations and Treasury did not violate the Antideficiency Act

Treasury asserts that there was no violation of the Antideficiency Act because the circumstances support that intra-agency agreements were implied.[26] In support of its position, Treasury points to a number of decisions and cases in which GAO concluded that one entity was required to reimburse another entity even in the absence of a written agreement. For example, in A-85201, Apr. 15, 1937, we concluded that it was permissible for the U.S. Tariff Commission, now the U.S. International Trade Commission (Commission), to reimburse the Department of Commerce (Commerce) for services that Commerce provided to the Commission, even in the absence of a written agreement, because an agreement had been in place for several prior years, and there was evidence that the agencies intended to continue the agreement. Also, courts have held that in the absence of a written agreement, a recipient of services was required to pay for the services under certain conditions, including where the recipient benefitted from the services.[27] We do not need to reach any conclusions on Treasury's assertions regarding implied Economy Act agreements. Management had authority to provide administrative services to other offices under the account adjustment statute, which does not require an agreement.

Use of 2016 Appropriations for Services Provided in 2015

Under 31 U.S.C. § 1502(a), "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." In other words, an appropriation made for a specific fiscal year is only available to fulfill a genuine or "bona fide" need of the fiscal year for which the appropriation was made.[28] Management's fiscal year 2015 S&E Appropriation was

[26] Request Letter, at 2–3.

[27] *Bloomgarden v. Coyaer*, 479 F.2d 201, 208–209 (1973).

[28] B-332430, Sept. 28, 2021.

available for the *bona fide* needs of fiscal year 2015, and its fiscal year 2016 S&E Appropriation was available for the *bona fide* needs of fiscal year 2016.[29]

Services are generally considered a *bona fide* need of the fiscal year in which they are performed.[30] The conference support services that Management provided to CFPB during fiscal year 2015 were a *bona fide* need of fiscal year 2015. Therefore, Management's obligations should have been charged to the fiscal year 2015 S&E Appropriation, not the fiscal year 2016 S&E Appropriation. [31]

In our prior decisions, we have stated that agencies should adjust their accounts when they obligate the incorrect account for a particular expenditure, and if an agency lacks sufficient budget authority to make the adjustment, then it should report a violation of the Antideficiency Act.[32] For example, in B-331888, Customs and Border Protection (CBP) obligated the wrong appropriation. We stated that CBP should adjust its accounts to obligate the correct account, and if CBP lacked sufficient funds for the adjustment, then it should report a violation of the Antideficiency Act. In another case, B-308969, the Department of the Interior (Interior) incorrectly obligated its fiscal year 2004 appropriation for contract costs when it should have obligated its fiscal year 2003 appropriation. We stated that Interior should deobligate amounts from the 2004 appropriation, and charge the obligations to its 2003 appropriation. If 2003 appropriations were insufficient to cover the adjustment, then Interior should report a violation of the Antideficiency Act.

Here, sufficient amounts existed in the 2015 S&E Appropriation to cover the conference support services that Management provided to CFPB.[33] In addition, Management has already deobligated the costs from the 2016 appropriation and recorded them against the 2015 S&E Appropriation.[34] Therefore, there were no

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[29] Pub. L. No. 113-235, 128 Stat. at 2332; Pub. L. No. 114-113, div. E, title I, 129 Stat. 2242, 2423 (Dec. 18, 2015).

[30] GAO, *Principles of Federal Appropriations Law*, 3rd ed., Vol. I, ch. 5, § B.5, GAO-04-261SP (Washington, D.C.: Jan. 2004).

[31] Management and CFPB did not initially include the conference support services in their 2015 Economy Act agreement. Request Letter, at 3–4. However, they subsequently amended the 2015 agreement to include the services. *Id*. We note that without statutory authority, such as the Economy Act, Treasury had no authority to use its appropriations for the expenses of CFPB, and CFPB had no authority to transfer its appropriations to reimburse Treasury. 31 U.S.C. § 1301(a); 31 U.S.C. § 1532.

[32] B-333281, Oct. 19, 2021; B-331888, June 11, 2020; B-328477, Sept. 26, 2017; B-308969, May 31, 2007.

[33] Request Letter, at 4; Follow-up Response.

[34] Request Letter, at 4.

obligations in excess or in advance of appropriations and we conclude that Treasury did not violate the Antideficiency Act.

CONCLUSION

Management did not violate the Antideficiency Act when it incurred obligations to provide services before corresponding intra-agency agreements were executed because Management had authority under 31 U.S.C. § 1534, the account adjustment statute, to incur the obligations, the affected accounts have been adjusted, and there were no obligations in excess or in advance of appropriations. Management did not violate the Antideficiency Act when it charged fiscal year 2016 appropriations for services provided in fiscal year 2015 under an interagency agreement because once the accounts were adjusted, obligations recorded against the 2015 account did not exceed available appropriations.

Edda Emmanuelli Perez
General Counsel

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

Decision

Matter of: Office of Management and Budget/General Services Administration—Reimbursement Requirement for the Technology Modernization Fund

File: B-333396

Date: July 14, 2022

DIGEST

The Office of Management and Budget (OMB) and the General Services Administration (GSA) permit agencies to provide GSA less than full reimbursement for amounts that GSA transfers to agencies from the government-wide Technology Modernization Fund (TMF). While interagency fund transfers are generally prohibited absent statutory authority, the National Defense Authorization Act for Fiscal Year 2018 provides such authority by establishing TMF for GSA to provide funds to agencies to improve information technology and to enhance cybersecurity across the federal government. TMF authorizing legislation directs agencies to reimburse TMF at rates set by OMB and GSA at a level to ensure TMF's solvency, which leaves OMB and GSA the discretion to set rates at less than full reimbursement. While minimum payments are not defined by law, the statute does not provide the discretion to totally waive reimbursement by an agency.

DECISION

This responds to a request for our decision regarding whether agencies receiving amounts from the Technology Modernization Fund (TMF) are required by TMF's authorizing statute to fully reimburse TMF for all funds received.[1] We conclude that the Office of Management and Budget (OMB) and the General Services Administration (GSA) may require less than full reimbursement, provided the reimbursement rates are sufficient to satisfy the statute's solvency requirement, and are not inconsistent with other statutory objectives. While minimum payments are not defined by law, the statute does not provide the discretion to totally waive reimbursement by an agency.

[1] Letter from Senators Portman and Hyde-Smith to Comptroller General (June 15, 2021).

Our practice when rendering decisions is to contact the relevant agencies to obtain factual information and their legal views on the subject of the request.[2] Accordingly, we reached out to OMB and GSA.[3] In response, GSA and OMB provided factual information and their legal views on this matter.[4]

BACKGROUND

In December 2017, Congress created TMF "to improve information technology [and] to enhance cybersecurity across the [f]ederal [g]overnment . . . ."[5] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, div. A, title X, subtitle G, § 1078(b)(1), 131 Stat. 1283, 1589 (2017) (Section 1078). Agencies can apply to TMF to fund IT projects that meet criteria outlined by OMB. *Technology Modernization Fund: OMB and GSA Need to Improve Fee Collection and Clarify Cost Estimating Guidance for Awarded Projects*, GAO-20-3, at 10–13 (2019) (GAO-20-3). Project proposals are reviewed by the Technology Modernization Board. *Id.* The Board then makes recommendations to GSA on which projects should be funded, and GSA then makes TMF awards and transfers amounts in line with the recommendations and budgetary resources of TMF. *Id.* All awardees are required to reimburse TMF. Section 1078(b)(5)(A)(i).

Initially, OMB and GSA sought full reimbursement of both the amounts transferred from TMF to agencies and TMF's operating expenses. *See* GSA Response Letter, at 1–2; GAO-20-3, at 10. GAO reported in 2019, however that while GSA had obligated about $1.2 million to cover TMF operating expenses, it had recovered only about 3 percent of those expenses through fee payments. GAO-20-3, at 19. Consistent with their practice at the time, GAO recommended that OMB and GSA develop a plan that outlined the actions needed to fully recover the operating expenses through fee collection in a timely manner. GAO-20-3, at 36.

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[2] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/gao-06-1064sp.

[3] Letter from Managing Associate General Counsel, GAO, to General Counsel, OMB (Sept. 15, 2021); Letter from Managing Associate General Counsel, GAO, to General Counsel, GSA (Sept. 15, 2021).

[4] Letter from General Counsel, GSA, to Managing Associate General Counsel, GAO (Oct. 14, 2021) (GSA Response Letter); Letter from General Counsel, OMB, to Managing Associate General Counsel, GAO (Jan. 5, 2022) (OMB Response Letter).

[5] TMF is set to sunset two years following the date on which GAO issues its third report on the fund. Section 1078(f).

In 2021, new Technology Modernization Board guidelines included partial or minimal reimbursement to TMF as potential repayment arrangements, along with full reimbursement. Technology Modernization Board, *Guidelines on the American Rescue Plan Funding*, *available at* tmf.cio.gov/arp/ (last visited July 11, 2022); *see also* GAO, *Technology Modernization Fund: Implementation of Recommendations Can Improve Fee Collection and Proposal Cost Estimates*, GAO-22-105117, at 23–24 (2021) (GAO-22-105117). Partial reimbursement permits agencies to reimburse TMF less than they received, and minimal reimbursement would only require minimal necessary payments to TMF. *See* GAO-22-105117, at 23. GSA would decide at which level an agency would reimburse TMF—minimal, partial, or full—in its written agreement setting forth the terms of repayment. *Id.* at 12–13; OMB Response Letter, at 2. OMB and GSA told us they began to permit partial or minimal reimbursement to allow for a more diverse set of projects to be funded, as the full reimbursement requirement prevented many agencies from applying for funds.[6] OMB Response Letter, at 5; GSA Response Letter, at 2. OMB and GSA both explained in their responses that the statute would not permit, and they were not contending, that they could totally waive repayment by agencies.

DISCUSSION

At issue in this decision is the interpretation of the requirements for agencies to reimburse the TMF under Section 1078, specifically whether this section requires agencies to fully reimburse TMF. Section 1078 states, "[t]he head of an agency shall reimburse [TMF] for any transfer made . . . including any services or work performed in support of the transfer . . . in accordance with the terms established in a written agreement . . . ." Section 1078(b)(5)(A)(i). The statute goes on to provide that, "[b]efore the transfer of funds to an agency . . . , [GSA], in consultation with [OMB] and the head of the agency[,] shall enter into a written agreement—documenting the purpose for which the funds will be used and the terms of repayment, which may not exceed 5 years unless approved by [OMB]." Section 1078(b)(6)(A)(i).

In order to draw up the repayment terms, "[GSA], in consultation with [OMB], shall establish amounts to be paid by an agency under . . . the terms of repayment for activities funded . . . , including any services or work performed in support of that development . . . , at levels sufficient to ensure the solvency of [TMF], including operating expenses." Section 1078(b)(5)(B)(i). As described above, OMB and GSA

[6] In their responses to us, OMB and GSA both assert that while this is a change in TMF's operations, it has been their longstanding interpretation of Section 1078 that full reimbursement is not required. OMB Response Letter, at 2–5; GSA Response Letter, at 1, 4. OMB pointed us to conversations and statements it has made to the Senate Homeland Security and Governmental Affairs Committee on this same question as well as other statements by the agency that asserted this position. OMB Response Letter, at 2–4.

have interpreted this statute to permit minimal, partial or full reimbursement by agencies to TMF, although not full waivers of repayments.

The question of agency reimbursements to other agencies and their appropriations accounts involves several fundamental questions of fiscal law, including transfers, the purpose statute, 31 U.S.C. § 1301(a), and the miscellaneous receipts statute, 31 U.S.C. § 3302(b).

Transfers of appropriated funds from one account to another are prohibited unless specifically authorized by law. 31 U.S.C. § 1532. Even when transferred, appropriated funds are still required to be used for the purposes originally appropriated, unless otherwise provided. 31 U.S.C. § 1532; 31 U.S.C. § 1301(a). These statutes were enacted to facilitate congressional control over appropriated funds and agency programs. They do so by keeping agency programs at levels approved by Congress and preventing agencies from circumventing congressional decisions about the use of appropriations. Agencies are also prohibited by the miscellaneous receipts statute from retaining funds from outside sources, thus preventing them from accepting reimbursements, unless specifically authorized by law. 31 U.S.C. § 3302(b). However, Congress has provided numerous statutory authorities permitting transfers on a government-wide and agency-specific basis, and each authority has unique applications and restrictions. *See, e.g.*, B-331739, Mar. 18, 2021 (determining whether the U.S. Chemical Safety and Hazard Investigation Board had agency specific transfer authority); B-330862, Sep. 5, 2019 (discussing transfer authority of the Department of Defense). Prior decisions of our office provide examples of how we have interpreted such statutory authorities.

One significant statutory authority that permits payments between agencies for the provision of services or goods is the Economy Act. The Economy Act specifies that payment for interagency agreements authorized under the Act may be made in advance or by reimbursement and "shall be on the basis of the actual cost of goods or services provided." 31 U.S.C. § 1535(b). In interpreting the meaning of "actual cost", we have sought to apply the concept in a manner consistent with the statutory objectives and legislative history, recognizing that agencies may not augment one another's appropriations. 57 Comp. Gen. 674, at 681 (1978) (finding the only elements of cost required to be included under the Act are those that accomplish the identified congressional goals). Accordingly, we found the interpretation and application of "actual cost" to be flexible, consisting of both generally required costs— that is, direct costs borne by the performing entity—and certain indirect costs that, based on the particular situation, are determined to be permissible. For example, a component of the Federal Aviation Administration (FAA) could include depreciation and interest in fees collected from other FAA components renting airport space in view of Congress's goal that the airports be self-sustaining. *Id.* at 683 (noting the Economy Act does not require a blanket rule for recovering costs throughout the government). Significantly, the term "actual cost" is interpreted and applied in a flexible manner and recognizes distinctions or differences in the nature

of the performing agency and the purpose or goals intended to be accomplished. *Id.* at 685.

Where a statute provides for reimbursement in more general terms, we have looked to this analytical framework for guidance, recognizing that where a transaction is governed by another statutory authority, the Economy Act's actual cost basis does not control, but rather, the starting point is the text of the particular statute. For example, the Nuclear Regulatory Commission (NRC) entered into an agreement with the Department of Energy (DOE) under statutory authority that required DOE to provide services on a reimbursable basis. We concluded that DOE's interpretation that it could assess an "added factor" comprised of certain administrative and overhead costs was a permissible construction of the statute. 72 Comp. Gen. 159, at 163 (1993) (noting that neither the statute nor legislative history appeared to require the exclusion of these otherwise appropriate costs). In another case, we did not object to the Tennessee Valley Authority's (TVA) determination of the appropriate rate to charge where the relevant statute specified TVA was to charge rates to produce revenue "sufficient to provide funds for operation, maintenance, and administration of its power system . . . ." among other things. The statute in that case provided that, "subject only to the provisions of [the Act]", TVA was to enter into arrangements "upon such terms and conditions . . . as it may deem necessary." Based on this language, we concluded that TVA had discretion to set rates consistent with the statute's requirement to charge sufficient amounts to produce revenue to cover the various items delineated. 44 Comp. Gen. 683 (1965) (finding TVA was to set rates in accordance with the statute without regard to the actual cost principles of the Economy Act).

Here, Section 1078 states that TMF was established "for technology-related activities, to improve information technology, to enhance cybersecurity across the [f]ederal [g]overnment, and to be administered in accordance with guidance issued by [OMB]." Section 1078(b)(1). Of particular relevance, the provision provides that agencies "shall reimburse [TMF] for any transfer . . . in accordance with the terms established in a written agreement," which the agency must enter into with GSA, in consultation with OMB. Section 1078(b)(5)(A)(i), (b)(6)(A). With respect to reimbursement, the provision goes on to provide that GSA and OMB "shall establish amounts to be paid by an agency . . . and the terms of repayment," and must at a minimum, designate repayment terms at a level that ensures the solvency of TMF, including operating expenses. Section 1078(b)(5)(B)(i). This language in the statute guides the discretion that is afforded to OMB and GSA.

Similar to our determination of the meaning of actual costs under the Economy Act, we conclude there is flexibility here with respect to the amounts to be paid under Section 1078's reimbursement requirement. The statute's direction with respect to repayment identifies OMB and GSA as the agencies that have the discretion to determine and implement the repayment terms, including the amounts. There is a mandate for agencies to make repayments in the language stating" [t]he head of an agency shall reimburse [TMF] for any transfer made…" Section 1078(b)(5)(A)(i).

With that mandate, OMB and GSA cannot totally waive amounts to be repaid by agencies, as they have recognized. The statute does not further define what the amounts to be repaid must be, only that they must at a minimum, designate repayment terms at a level that ensures the solvency of TMF, including operating expenses. Section 1078(b)(5)(B)(i).

Notably, the Antideficiency Act requires GSA and OMB to ensure that transfers from the fund do not exceed amounts available in the fund, and that the balance of the fund is sufficient to cover its obligations. *See* 31 U.S.C. § 1341 (prohibiting obligations and expenditures in excess or in advance of amounts available). Thus, the solvency of the fund is already required under fiscal law. Nevertheless, Section 1078 provides that OMB and GSA are to establish the terms of repayment and the amounts to be paid, and that these terms must be such that they ensure the solvency of the fund. To give meaning to the solvency requirement as well as the direction to establish both repayment terms *and* amounts, we read Section 1078 to permit OMB and GSA to establish amounts to be paid that are less than the full amount of a transfer and operating expenses, otherwise both the amount language and solvency requirement are unnecessary. *See TRW, Inc. v. Andrews*, 534 U.S. 19, at 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted)).

OMB and GSA's discretion to establish the amounts to be paid by an agency and the terms of the repayment is not unbounded, as they recognize. The statute does not permit them to entirely waive repayment by an agency, but there is a range of discretion they can determine and implement. OMB and GSA have explained that they have exercised this discretion to permit minimal, partial or full reimbursement by agencies to TMF, although not full waivers of repayments. With full reimbursements, the continued solvency of the fund would not be at issue, because, under the Antideficiency Act, transfers would be required to be limited to available amounts, and under the full reimbursement model, all transfers and operating expenses would be recouped. Whereas, with partial or minimal reimbursements, without specifying that OMB and GSA must set reimbursement at levels to ensure the solvency of the fund, including operating expenses, transfers could, while still complying with the Antideficiency Act, potentially diminish TMF's operating capacity. When Congress appropriates additional amounts to the fund, as it did in the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 80 (Mar. 11, 2021), this concern is eliminated, as long as TMF retains sufficient amounts to continue operating. The amounts to be reimbursed to TMF will affect the amounts that will be available for future projects, unless Congress appropriates additional funding or agencies repay additional amounts. But, as additional appropriations cannot be assured, OMB and GSA have to manage the fund as though no future appropriations will be forthcoming. Thus, the solvency requirement serves to limit the degree to which OMB and GSA may waive repayment in establishing the amounts to be paid. That

is, whatever the amounts required, they must be sufficient to ensure the solvency and continued operation of the fund.

This construction is consistent with the stated objectives of TMF. Namely, there is no indication that requiring less than full reimbursement will prevent the use of the fund to improve information technology and enhance cybersecurity. To the contrary, according to the Technology Modernization Board guidelines, the aim of the flexibility was to allow for proposals addressing the most urgent cybersecurity and modernization issues, which may not have easily-realized cost-savings for the proposing agency. Technology Modernization Board*, Guidelines on the American Rescue Plan Funding*, *available at* tmf.cio.gov/arp/ (last visited July 11, 2022). Congress recently, in the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 4011, 135 Stat. at 80, appropriated an additional $1,000,000,000 to GSA to carry out the purposes of the fund, which the Board guidelines contend were intended to "address urgent IT modernization challenges, bolster cybersecurity . . . and improve the delivery of COVID-19 relief," and the various levels of repayment risk and payment flexibilities were introduced with these goals in mind. Technology Modernization Board*, Guidelines on the American Rescue Plan Funding*, *available at* tmf.cio.gov/arp/ (last visited July 11, 2022).

There is also support for this interpretation in legislative history related to the statute. The committee report accompanying H.R. 2227, a bill for the Modernizing Government Technology Act of 2017,[7] noted the purposes of the bill were to "(1) assist the federal government in modernizing federal IT to mitigate current operational and security risks; (2) incentivize cost-savings in federal IT through modernization; and (3) accelerate the acquisition and deployment of modernized IT solutions, such as cloud computing, by addressing impediments in the area of funding, development, and acquisition practices." H.R. Rep. No. 115-129, pt.1, at 11 (2015). According to the committee report, this was to be accomplished through the creation of both TMF and individual agency working capital funds authorized to be established for IT modernization purposes. While agency IT working capital funds are available for reimbursing TMF, they are also available for other purposes, and agency IT working capital funds are only to be used to reimburse TMF with certain approval. Pub. L. No. 115-91, § 1077(b)(3). Notably, the committee report also describes the authorization of appropriations in the bill for TMF for fiscal years 2018 and 2019 as "seed money to kick-start modernization efforts at agencies," noting the committee expected "to see results in terms of savings and increased security before authorizing more funding." H.R. Rep. No. 115-129, pt.1, at 8.

OMB and GSA's determination to allow partial or minimal reimbursement to facilitate funding a more diverse set of projects, for which agencies would otherwise not apply for funding if full repayment was required, is not incompatible with the purposes underlying TMF. Several factors underlie this conclusion. IT modernization may be

[7] H.R. 2227 was not enacted, but its provisions regarding TMF are similar to those in Section 1078 establishing TMF.

accomplished through TMF, as well as through agency working capital funds, coupled with the legislative history indicating the possibility of future appropriations to TMF; indeed, Congress did appropriate additional amounts in fiscal year 2021. Thus, we conclude it is reasonable to construe Section 1078 as allowing OMB and GSA to require less than full reimbursement. As with the statutes authorizing reimbursement in the NRC and TVA decisions, the language in Section 1078 affords OMB and GSA discretion. Namely, under Section 1078, we agree that OMB and GSA may establish amounts to be paid and terms of repayment requiring less than full reimbursement, but not a total waiver of reimbursement by agencies, as long as the terms and amounts are consistent with the other statutory parameters.[8]

CONCLUSION

Section 1078 gives OMB and GSA discretion to set reimbursement terms and amounts to be paid subject to other statutory requirements, which may include allowing less than full reimbursement.[9] However, as they have recognized, OMB and GSA may not totally waive reimbursement by agencies. In setting the reimbursement amounts and terms, OMB and GSA must ensure the solvency of TMF, including operating expenses.

Edda Emmanuelli Perez

Edda Emmanuelli Perez
General Counsel

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[8] OMB and GSA informed us of the steps they take to ensure TMF remains solvent. According to the agencies, first TMF maintains a positive cash balance within the Treasury. Second, TMF maintains positive budgetary resources at all times. *See generally* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 1, § 20.3 (Aug. 2021) (budgetary resources are amounts available to incur obligations in a given year). Third, TMF maintains budgetary resources sufficient to pay for existing and anticipated obligations through the fund's existence as set by statute. Fourth, operational expenses are set aside (*i.e.*, not available for transfer to agencies) for the current fiscal year and the next fiscal year to ensure adequate funding. Finally, repayments from agencies are not made available for transfer until the year following the year when the repayment is recorded to ensure that plans are not made for resources that are not yet realized. OMB Response Letter, at 6; GSA Response Letter, at 3. We note that under fiscal statues such as the recording statute, 31 U.S.C. § 1501, and provisions of the Antideficiency Act, *e.g.*, 31 U.S.C. § 1514, agencies are responsible for tracking and recording obligations and generally carrying out a system of funds control to ensure they are operating within the levels set by Congress and uniformly recording their obligations.

[9] It is important to note, however, that our legal conclusion here does not negate the concerns raised in our 2021 GAO report stating that TMF operating expenses continue to outpace offsetting fee collections. GAO-20-3, at 36.

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

Decision

Matter of: U.S. Chemical Safety and Hazard Investigation Board—Application of the Antideficiency Act, *Bona Fide* Needs Statute, and Recording Statute to Real-Property Lease and to Occupancy Agreement with the U.S. General Services Administration

File: B-332205

Date: August 9, 2023

DIGEST

The U.S. Chemical Safety and Hazard Investigation Board (CSB) lacked the statutory authority to lease real property situated in the District of Columbia and, therefore, violated 40 U.S.C. § 8141 when it entered into a real-property lease for space in a privately-owned building there. The lease also was inconsistent with the Antideficiency Act, the *bona fide* needs statute, and the recording statute.

In contrast, CSB's agreement to a proposed extension of an occupancy agreement with the U.S. General Services Administration (GSA) to facilitate its continued occupancy of GSA-controlled space would not violate the Antideficiency Act or the *bona fide* needs statute. This is because CSB would not accrue a fiscal liability to GSA when it agrees to the extension, as the occupancy agreement, standing alone, is a budgeting tool that GSA uses to summarize the expected financial impacts of CSB's occupancy of the space. Instead, CSB would accrue a fiscal liability to GSA as it occupies the GSA-controlled space, and must record this liability against properly-available appropriations as it arises, consistent with the recording statute, 31 U.S.C. § 1501(a)(9).

DECISION

The General Counsel of the U.S. Chemical Safety and Hazard Investigation Board (CSB) requests our decision under 31 U.S.C. § 3529 on the consistency of its real-property activities with provisions of appropriations law.[1] We address (1) whether CSB's lease of privately-owned office space in Washington, D.C., along with the steps it took to record its obligations under that lease, were consistent with the Antideficiency Act, *bona fide* needs statute, and the recording statute; and (2) whether CSB's acceptance of a proposed extension of an agreement with the U.S. General Services Administration (GSA) to facilitate its continued occupancy of GSA-controlled space is consistent with those same statutes.

Our practice when rendering decisions is to contact the relevant agencies to seek factual information and their legal views.[2] Both CSB[3] and GSA[4] provided factual information and their legal views.

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[1] Letter from General Counsel, CSB, to General Counsel, GAO (Sept. 30, 2019) (HQ Request Letter); Letter from General Counsel, CSB, to General Counsel, GAO (Apr. 1, 2020) (Request Letter).

[2] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, GSA (Aug. 12, 2020).

[3] HQ Request Letter; Request Letter; Email from Deputy General Counsel, CSB, to Assistant General Counsel, GAO, *Subject: confidential-Opinion Request of Chemical Safety and Hazard Investigation Board* (Sept. 30, 2019); Telephone Conversation with General Attorney, CSB; Assistant General Counsel, GAO; and Senior Attorney, GAO (Feb. 3, 2022) (February Conversation).

[4] Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, GSA (Aug. 12, 2020); Letter from Associate General Counsel, GSA, to Senior Attorney, GAO (Sept. 21, 2020) (Response Letter); Letter from Acting Associate General Counsel, GSA, to Senior Attorney, GAO (Apr. 15, 2021) (April Letter); Telephone Conversation with Senior Assistant General Counsel, GSA; Senior Assistant Regional Counsel, GSA; Assistant General Counsel, GAO; and Senior Attorney, GAO (July 7, 2022) (GSA Counsel Conversation); Email from Senior Assistant General Counsel, GSA, to Assistant General Counsel, GAO, and Senior Attorney, GAO, *Subject: Chemical Safety and Hazard Investigation Board -- Occupancy Agreement with the U.S. General Services Administration, B-332205* (July 20, 2022) (July Email).

BACKGROUND

CSB is an independent federal agency charged with, among other things, investigating chemical accidents and issuing reports regarding the safety of chemical production, processing, handling, and storage.[5] Here, we examine two written real property arrangements that CSB entered into and sought to execute to discharge its responsibilities.

Washington, D.C. headquarters lease

On September 18, 2014, CSB entered into a lease for new headquarters space in a privately-owned building situated in Washington, D.C.[6] The lease set out an initial term of 10 years beginning October 1, 2015 and provided for annual rent payable in monthly installments.[7] When CSB entered into the lease, it had been appropriated $11 million in fiscal year (FY) 2014 funds available for the agency's necessary expenses.[8] CSB accepted the premises and began occupying the headquarters space and, on October 28, 2015, it recorded an obligation against its FY 2016 appropriation in an amount sufficient to meet anticipated rental payments during the first lease year.[9] Similarly, during each of FYs 2017 and 2018, CSB recorded obligations against then-available appropriations in amounts sufficient to pay the amount due to the lessor during that fiscal year.[10]

Denver Federal Center occupancy agreement

Beginning in December 2014, CSB occupied space in a federally-owned building on a campus known as the Denver Federal Center.[11] Where an agency occupies federally-owned space under the custody and control of GSA, as it was here, GSA

[5] Request Letter, at 2; Response Letter, at 1; 42 U.S.C. § 7412(r)(6)(C).

[6] HQ Request Letter, at 2; Lease Between Landlord and CSB (Sept. 18, 2014) (CSB Lease).

[7] CSB Lease. Specifically, the annual rent was for a total of $655,196.90, and the monthly rent was $54,599.74, less 14 months of abated rent.

[8] Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. G, title III, 128 Stat. 5, 332 (Jan. 17, 2014); *see also* Pub. L. No. 113-76, § 403, 128 Stat. 337 (appropriations are not available for obligation beyond FY 2014 unless expressly so provided); Pub. L. No. 113-76, § 5, 128 Stat. 7 (amounts are available "for the fiscal year ending September 30, 2014").

[9] CSB Lease, at 123; HQ Request Letter, at 2.

[10] HQ Request Letter, at 43.

[11] Response Letter, at 4. According to CSB, it has occupied space in Building 21B at the Denver Federal Center since 2009. Request Letter, at 5.

assigns and furnishes the space to the agency.[12] GSA memorializes the parties' understanding of the business terms that govern the parties' relationship through the execution of an occupancy agreement.[13]

In February 2020, shortly before the expiration of the occupancy agreement, GSA presented an occupancy agreement extension to CSB that, subject to CSB's approval, memorialized CSB's continued occupancy of space at the Denver Federal Center for an additional 57 months.[14] CSB ultimately declined to agree to the extension and vacated the space.[15]

DISCUSSION

I. Washington, D.C. lease of privately-owned property

We first consider whether CSB's lease of privately-owned office space in Washington, D.C., along with the steps it took to record its obligations under that lease, were consistent with the Antideficiency Act, *bona fide* needs statute, and the recording statute. We must first address as a preliminary matter whether CSB had authority to enter into the lease.

By law, federal agencies may not enter into leases "for the rent of a building, or part of a building, to be used for the purposes of the Federal Government in the District of Columbia until Congress enacts an appropriation for the rent." 40 U.S.C. § 8141. We have interpreted this provision as authorizing an agency to rent space in the District of Columbia if Congress has permitted the agency to do so through specific statutory authority. For example, we concluded that the Federal Emergency Management Agency (FEMA) had authority to lease buildings in the District of Columbia because it was authorized to lease real property "wherever situated," which included the District of Columbia. B-195260, July 11, 1979; *see also* B-327242, Feb. 4, 2016, at 6 (law authorizing the Commodity Futures Trading Commission to enter into leases for the "rental of necessary space at the seat of

[12] Response Letter, at 1, 4; 40 U.S.C. § 584.

[13] *See* 41 C.F.R. § 102-85.65; Response Letter, at 5; July Email.

[14] Signed Agreement and Financial Summary: Occupancy Agreement Between Chemical Safety Board (9550) and General Services Administration (GSA Proposed Draft No. 19, Feb. 11, 2020) (Occupancy Agreement).

[15] Request Letter. While CSB ultimately declined the occupancy agreement for the Denver Federal Center and vacated the space, it nonetheless remains interested in a decision on this matter. Email from Attorney, CSB, to Senior Attorney, GAO, *Subject: touching base* (May 24, 2021); Email from Attorney, CSB, to Senior Attorney, GAO, *Subject: touching base* (Apr. 20, 2021).

Government and elsewhere") (citation omitted); 38 Comp. Gen. 588 (1959) (Administrator of the then-Federal Aviation Agency authorized to make expenditures for rent "at the seat of the government and elsewhere").

Here, CSB has not identified, nor are we aware of, any statutory authority that authorizes it to rent space in the District of Columbia. CSB's enabling legislation, which authorizes it to enter into leases with private parties, does not authorize CSB to lease space specifically in the District of Columbia.[16] 42 U.S.C. § 7412(r)(6)(N). Nor does CSB's enabling language include broader references such as "wherever situated" as was the case in the FEMA decision. Moreover, CSB's appropriations similarly do not include language authorizing it to lease space in the District of Columbia. *See, e.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. G, title III, 136 Stat. 4459, 4813–14 (Dec. 29, 2022). Therefore, CSB was not authorized to lease headquarters space in the District of Columbia.[17]

Application of the Antideficiency Act, *bona fide* needs statute, and the recording statute to the Washington, D.C. lease

Despite its lack of authority to lease real property in the District of Columbia, CSB nevertheless entered into such a lease. We next consider whether the lease, and the actions CSB took to record the obligations arising therefrom, were consistent with the Antideficiency Act, the *bona fide* needs statute, and the recording statute. For the reasons discussed below, we conclude that the lease and CSB's actions were inconsistent with those statutes.

The recording statute, 31 U.S.C. § 1501(a)(1), requires an agency to record the full amount of its contractual obligation against funds available at the time the contract was executed. *See*, *e.g.*, B-327242, Feb. 4, 2016; B-322160, Oct. 3, 2011. Any authorization to record an obligation for an amount less than the full amount of the government's contractual obligation must be explicit. *Id.* Here, we are not aware of, and CSB has not identified, any authority for it to record less than its full liability

[16] The legislative history of this provision similarly does not mention that CSB can enter into leases in the District of Columbia. Pub. L. No. 101-549, title III, § 301, 104 Stat. 2399, 2565 (Nov. 15, 1990); *see, e.g.,* H.R. Conf. Rep. No. 101-952 (1990); S. Rep. No. 101-228 (1989).

[17] We note that GSA is authorized to lease space in the District of Columbia, and may delegate its leasing authority to federal agencies. B-327242, Feb. 4, 2016, at 7 n.7 (delegation authority); *see, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. E, title V, 128 Stat. 2360 (Dec. 16, 2014) (authority to lease in District of Columbia). However, it is our understanding that CSB has neither requested nor received a delegation of authority from GSA. *See* February Conversation.

when it enters into a real-property lease with a private party.[18] Therefore, when CSB entered into its ten-year real-property lease on September 18, 2014, the recording statute required it to record its total obligation for the duration of the lease.

CSB did not do this. Instead, the obligational data CSB provided demonstrates a practice of obligating funds at various times and in various amounts so that each fiscal year CSB recorded a total obligation corresponding to its lease payments for the fiscal year.[19] Because CSB did not record the full cost of its headquarters lease against funds available when it signed the lease in FY 2014, CSB violated the recording statute.

In addition, CSB lacked sufficient available appropriations against which it could have properly recorded this obligation. When CSB entered into the lease, Congress had appropriated to it $11 million for its necessary expenses for FY 2014. *See* Consolidated Appropriations, Act, 2014, Pub. L. No. 113-76, div. G, title III, 128 Stat. 5, 332 (Jan. 17, 2014). Under the *bona fide* needs statute, appropriations made available for a specific fiscal year are available only to fulfill a *bona fide* (that is, genuine) need of the fiscal year for which the funds are appropriated. 31 U.S.C. § 1502(a); B-332430, Sept. 28, 2021; *see also* B-317139, June 1, 2009; 73 Comp. Gen. 77 (1994). We have long held that an agency's *bona fide* need for office space arises at the time it occupies the space. B-327242, Feb. 4, 2016; B-207215, Mar. 1, 1983. Therefore, unless it has statutory authority to do otherwise,[20] an agency may only use an annual appropriation to cover its office space needs of the current fiscal year.[21] *Id*.

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[18] CSB's original lease contained a clause stating that rent payments were contingent on funds availability and that the lease would terminate if CSB had no available funds to pay its rent. CSB Lease, at 6. CSB and the landlord subsequently modified the lease to provide that no legal liability for payment in a new lease year would arise until, among other things, CSB notified the landlord that funds were available. Lease Amendment 5 Between Landlord and CSB (July 15, 2019). However, such contractual provisions are ineffective and do not override the Antideficiency Act's requirements. *See Leiter v. United States*, 271 U.S. 204 (1926) (the Supreme Court rejected an attempt to limit future liability based on the availability of appropriations where an agency entered into leases providing that each term of occupancy was "contingent upon" available appropriations and that a lease would terminate if appropriations were not available for any year); *see also* B-327242. Feb. 4, 2016.

[19] HQ Request Letter, at 43.

[20] Congress vests some agencies with specific authority to obligate fiscal year appropriations for the space needs of future years. *See* B-327242, Feb. 4, 2016 (describing such authority for the Commodity Futures Trading Commission).

[21] The Federal Acquisition Streamlining Act of 1994 (FASA) permits agencies to enter into a multiyear contract for up to five years for the acquisition of property or

CSB has not identified, nor are we aware of, any authority permitting it to use its annual appropriations for the future year needs it satisfied in this lease. Therefore, the $11 million appropriated to CSB for FY 2014 was not available for any of the lease costs beyond fiscal year 2014. Because the lease term ran from FYs 2016 through 2025, CSB's FY 2014 appropriation was not available for any of the lease costs. Aside from the appropriation for its FY 2014 salaries and expenses, CSB has not identified any other appropriation that was available to it when it signed the lease. Therefore, CSB lacked sufficient available appropriations against which to record the obligation that arose when it signed the lease. CSB thus violated the Antideficiency Act, which prohibits an agency from incurring obligations in excess of or in advance of available appropriations. 31 U.S.C. § 1341(a)(1). Consequently, CSB must report an Antideficiency Act violation for the obligation it incurred when it signed the lease. *Id*. § 1351. Under the ADA, an agency "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." *Id*.[22]

II. CSB's liability for occupancy of GSA-controlled space

Next, we consider a proposed extension of an agreement with GSA that contemplates CSB's continued occupancy of GSA-controlled space, and whether agreeing to it would be consistent with the Antideficiency Act, the *bona fide* needs statute, and the recording statute. As discussed below, we conclude that the proposed occupancy agreement extension is a budgeting and planning tool as opposed to a lease. Therefore, the proposed occupancy agreement extension, standing alone, would not violate the Antideficiency Act or the *bona fide* needs statute.

Fiscal liabilities arising from agency occupancy of GSA-controlled space

For the Washington, D.C. headquarters office space that we considered above, CSB entered into a lease with a private party. In contrast, like the office space at the Denver Federal Center, the federal government sometimes owns or manages the

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services. Agencies that elect to use FASA must record either an amount equal to the full cost of the contract or an amount equal to the cost of the first fiscal year of the contract plus estimated termination costs. 41 U.S.C. § 3903. Because the CSB lease was for a term exceeding five years, such authority was not available here.

[22] This report must include, among other things, the amount involved for each violation, the date the violation occurred, the positions of the officer(s) or employee(s) responsible for the violation, all facts pertaining to the violation, any administrative discipline imposed, and all actions taken to safeguard against the same type of violation. Office of Management and Budget (OMB) Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, § 145.7 (Aug. 2022) (OMB A-11).

space occupied by federal agencies. Unless specified otherwise, federally-owned space is under the jurisdiction and control of GSA.

GSA has authority to construct and manage federal buildings, to lease real property, and to assign space to federal agencies for their use. *See* B-327242, Feb. 4, 2016 (agencies may enter into real-property leases only if they have authority to do so); 40 U.S.C. § 585; 40 U.S.C. §§ 584, 585 (GSA authority to assign space); 40 U.S.C. §§ 581, 583 (GSA authority to purchase and construct buildings). Where GSA assigns federally-owned or -leased space to tenant agencies, it must charge them for the space and services provided. *Id.* § 586. GSA levies these charges on a monthly basis based on an assessment that "approximate[s] commercial charges for comparable space and services"; however, the Administrator is authorized to exempt tenant agencies from any federal charges that the Administrator determines are "infeasible or impractical." *Id.*

GSA uses occupancy agreements to detail the financial terms and conditions of a tenant agency's use of assigned space, but, according to GSA, it is not a legally enforceable agreement.[23] An occupancy agreement contains estimates of charges for the use of assigned space, and a tenant agency can use these estimates to budget for future payments to GSA for space and services. The occupancy agreement also states that the tenant agency's financial obligations for future years for the use of space do not mature until the later years are reached, and the tenant agency is not required to certify future year funds are available when the agreement is executed. Occupancy Agreement, at 2. Generally, GSA requires tenant agencies to execute an occupancy agreement before it will assign space to the tenant agency and permit occupancy of such space. *See* 41 C.F.R. § 102-85.45.

There are some similarities between a real-property lease and an occupancy agreement. Both are written arrangements that document real-property arrangements between two parties. Both contemplate that an agency will obligate amounts to pay for its use of the space: for a lease, to a private landlord for rent; or for an occupancy agreement, to GSA for charges for space and services. However, despite these similarities, there are critical differences in the legal underpinnings of these two kinds of documents. A lease arises where a federal agency enters into a binding contractual agreement with a private party. In contrast, an occupancy agreement is not between the federal government and a private party but, rather, documents a relationship between two federal agencies: GSA and the tenant

[23] Response Letter, at 6. GSA also asserts that guidance in OMB A-11 suggests the occupancy agreement should be viewed as a budgeting tool. July Email. GSA points to language in OMB A-11 that instructs agencies to record obligations for rental payments to GSA in the year the premises are occupied, whether or not a bill has been rendered. July Email; April Letter, at 7 n.3; *see* OMB A-11, pt. 1, at § 20.5(d).

agency.[24] A lease is a contract that creates legal rights in, and liabilities against, both parties. Should a dispute arise under a lease, either party may file a lawsuit and seek damages or other judicial remedies. In contrast, should a dispute arise between GSA and a tenant agency, no lawsuit may result: two federal agencies are part of the single United States government and may not bring suit against each other.

As a result, the fiscal consequences of leases and occupancy agreements differ substantially. A lease obligates the federal government to make payments from the Treasury to satisfy liabilities to the lessor. In contrast, the tenant agency under an occupancy agreement pays GSA for space and services. GSA deposits these charges into the Federal Buildings Fund. 40 U.S.C. § 592(b)(1); *see also* Pub. L. No. 117-103, 136 Stat. 49, 271 (Mar. 15, 2022). Such charges are the Fund's primary financing source, and the Fund is the primary means of financing the operating and capital costs associated with federal space.[25]

An examination of the differing natures of occupancy agreements and leases, as well as the different legal and fiscal consequences of occupancy agreements as compared to leases, reveal that our prior decisions applicable to leasing do not also apply to an occupancy agreement.[26] Nevertheless, a tenant agency occupying GSA-controlled space must still comply with the Antideficiency Act, the *bona fide*

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[24] We note that our case law on interagency agreements does not apply here. We have repeatedly held that interagency agreements are similar to contracts, and funding should be obligated in the same manner as if they were contracts. *See* 31 U.S.C. § 1501(a)(1); B-323940, Jan. 7, 2015; B-318425, Dec. 8, 2009; B-286929, Apr. 25, 2001. However, an occupancy agreement is not an interagency agreement; instead, it serves as a budgeting and planning tool for tenant agencies.

[25] Since revenues and collections deposited in the Federal Buildings Fund are only available to the extent provided in annual appropriations acts, the amounts deposited into the Fund are not immediately available to pay private contractors or other GSA services. 40 U.S.C. § 592(c)(1); Response Letter, at 2.

[26] In B-327242, Feb. 4, 2016, we examined whether the Commodity Futures Trading Commission (CFTC) violated the recording statute when it entered into multiple year lease contracts for real property. We found that even though CFTC had authority to enter into multiple-year leases, it failed to record an obligation equal to the government's total liability when it entered into the leases, in violation of the statute. 7 U.S.C. § 16(b)(3); B-327242, Feb. 4, 2016, at 6-7. Similarly, we examined a multiple year lease executed by the Securities and Exchange Commission (SEC) in B-322160, Oct. 3, 2011. Although SEC had the authority to enter into multiple-year leases, we found that SEC lacked statutory authority to obligate an amount less than the government's total liability under the lease at issue. Accordingly, SEC should have recorded its total obligation for the duration of the lease at the time it signed the lease agreement.

needs statute, and the recording statute, just as it must whenever it obligates its appropriations. Therefore, we next consider the application of these statutes where an agency occupies GSA-controlled space.

As noted, the Antideficiency Act bars agencies from incurring obligations in advance of or in excess of available appropriations. 31 U.S.C. § 1341(a)(1). The *bona fide* needs statute permits agencies to incur obligations only for the legitimate needs of the fiscal year for which the funds were appropriated. *Id.* § 1502(a); B-332430, Sept. 28, 2021. And the recording statute requires agencies to record their obligations against appropriations properly available as to purpose, time, and amount. 31 U.S.C. § 1501(a)(1). Critically important to the application of all these statutes is whether an agency has incurred an obligation, which occurs when it makes a definite commitment for the payment of goods or services ordered or received, or takes an action that could mature into a legal liability by virtue of actions beyond the control of the federal government.[27] Thus, we must consider whether CSB will make such a commitment if it agrees to the extension of the agreement.

By law GSA must charge tenant agencies when it provides "space, services, quarters, maintenance, repair and other facilities." 40 U.S.C. § 586. As noted, GSA levies these charges on a monthly basis based on an assessment that "approximate[s] commercial charges for comparable space and services." *Id.* Therefore, as an agency occupies GSA-controlled space and as GSA provides that space and associated services to the agency, GSA must levy an appropriate charge, and the agency must pay that charge. In annual appropriations acts, Congress typically provides that agency appropriations available for necessary expenses are also available for payment to GSA for charges for space and services. *See*, *e.g.*, Pub. L. No. 117-328, div. E, title VII, § 705, 136 Stat. 4650, 4650, 4705.

GSA's authorizing statutes do not state that GSA and the tenant agency must make an agreement prior to agency occupancy of space. Nor do the statutes provide that an agreement will determine the charge GSA imposes; instead, the law provides that GSA shall "determine" and "prescribe regulations providing for the rates." 40 U.S.C. § 586(b)(2). Indeed, GSA previously did not use occupancy agreements, and adopted their use in the mid-1990s to resolve several issues, including to correct many tenant agencies' erroneous belief that they could occupy particular space in perpetuity.[28] GSA states that the use of occupancy agreements in its program did not materially alter the prior framework under which GSA and tenant agencies

[27] *See, e.g.,* B-325526, July 16, 2014 (concluding that the Department of Defense incurs an obligation for the full amount of recruitment and retention bonuses when it executes agreements with individuals providing for these bonuses in exchange for terms of military service).

[28] April Letter, at 5.

operated with no written agreements.[29] Furthermore, under some circumstances, GSA does not require a tenant agency to sign an occupancy agreement.[30]

Therefore, a federal agency's legal liability to pay GSA for space and services does not arise from an occupancy agreement. Instead, this legal liability arises from GSA's statutory authority to levy charges for space and services, coupled with a tenant agency's occupancy of the space and its duty to pay GSA the charges. 40 U.S.C. § 586. A tenant agency accrues liability for charges for space and services only as the agency actually occupies GSA space and uses GSA services. An occupancy agreement, therefore, imposes no legal liability on a tenant agency, and no fiscal obligation arises from it.

Even though an occupancy agreement imposes no fiscal liability on a tenant agency, it still performs valuable functions. As GSA states, an occupancy agreement is "a complete, concise statement of the terms governing the relationship between GSA and the occupant agency for a specific space assignment, and serves as the document upon which occupant agencies are expected to base their budgets for rent payments to GSA."[31] GSA practice also aids agencies in their use of occupancy agreements as a budget planning tool: GSA typically provides tenant agencies with updated estimates for charges for space and services over two years in advance so that agencies may submit accurate budgets to the Office of Management and Budget.[32]

Application of the Antideficiency Act

The proposed occupancy agreement extension between CSB and GSA has a term of 57 months.[33] CSB asks whether execution of the occupancy agreement extension would trigger for CSB a liability to make payments for years for which Congress has not yet appropriated it any funds and, therefore, cause CSB to violate the Antideficiency Act. The occupancy agreement, however, imposes no legal liability upon CSB. In fact, the agreement states that the tenant's financial obligations for future years do not mature until those years and that tenants are not certifying current year funds be available for future years.[34] Therefore, execution of the agreement, standing alone, would not violate the Antideficiency Act. Instead, legal liability arises only as CSB occupies space and uses GSA services.

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[29] April Letter, at 9.

[30] *See* GSA, *Pricing Desk Guide, 5th Edition*, at § 33 (effective Nov., 16, 2019).

[31] April Letter, at 2.

[32] Response Letter, at 3; OMB A-11, pt. 2, at § 31.8(e) (stating that occupancy agreements are not leases).

[33] Occupancy Agreement, at 1.

[34] Occupancy Agreement, at 2.

Similarly, CSB asks whether provisions of the occupancy agreement that would authorize GSA to impose additional operational charges on CSB,[35] and make CSB solely liable for potential claims resulting from CSB's use of the property,[36] constitute open-ended indemnification provisions in violation of the Antideficiency Act.[37] *See Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996). Since the occupancy agreement does not impose any financial liabilities on CSB, none of these provisions would impose an indefinite or other liability on CSB were it to execute the agreement or occupy the space.

CSB also asks whether a termination provision of the occupancy agreement that permits it to vacate the space early in exchange for four months' notice and rent (plus any associated charges) would cause CSB to violate the Antideficiency Act if it chose to vacate the space over a period that crosses fiscal years.[38] As the occupancy agreement is a budget planning tool and imposes no fiscal liabilities on CSB, liabilities accrue to CSB only for the periods during which it occupies space and consumes services. Of course, should CSB give GSA the agreed four months' notice and continue to occupy the space during the four-month period, it would owe amounts for space and services for that period as it would for any other. If CSB vacates and the federal government has a continuing liability for the space, GSA advises that the Federal Buildings Fund would cover such liability until GSA is able to assign the space to another tenant.[39] While the occupancy agreement imposes no fiscal liabilities, GSA states that it will abide by the terms of the occupancy agreement, and expects CSB to do the same.[40]

Application of the recording statute and *bona fide* needs statute

As previously discussed, the occupancy agreement alone does not impose a liability on CSB. However, because GSA is statutorily required to charge for space and services and the tenant agency is statutorily required to pay such charges, CSB

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[35] Specifically, the occupancy agreement contains an escalation clause authorizing GSA to levy "additional charges for operating expenses, security, joint use, parking, and other space items such as antennas." Occupancy Agreement, at 2; Request Letter, at 7.

[36] Occupancy Agreement, at 6.

[37] Request Letter, at 12–13.

[38] Request Letter, at 2, 11. Specifically, the termination provision states that the tenants' obligation can be "reduced to four (4) months of rent, plus the unamortized balance of any tenant improvements financed" by GSA. Occupancy Agreement, at 2.

[39] GSA Counsel Conversation.

[40] Response Letter, at 5.

incurs a liability as it occupies GSA-controlled space. The recording statute, in pertinent part, requires agencies to record an obligation where there is documentary evidence of a "legal liability of the Government against an available appropriation or fund." 31 U.S.C. § 1501(a)(9). GSA's authority to assign to and charge CSB for the assigned space, the documentary evidence of the amounts due as outlined in the occupancy agreement and monthly billing invoice, and CSB's occupancy of the space itself are sufficient to create a recordable legal liability pursuant to the recording statute. *See id*. Further, CSB must follow the *bona fide* needs statute: office space is a *bona fide* need of the fiscal year in which an agency occupies the space, so CSB must record the liability arising from its occupancy against an appropriation properly available for that time period. B-327242, Feb. 4, 2016, at 9 (citing B-207215, Mar. 1, 1983). In particular, it must ensure that it does not use its fiscal-year appropriations to fund its future year office space needs.

Upon executing the real-property lease for its Washington, D.C. headquarters space, CSB incurred a legal liability to its landlord for the entire amount due under the lease. Therefore, CSB's signing of the lease constituted a single obligating event that compelled CSB to record an obligation for the total amount due. In contrast, no single event obligated CSB to pay for its occupancy of the federally-owned, GSA-controlled space in the Denver Federal Center. Instead, CSB's obligations for the Denver Federal Center space arose continuously, incident not only to the documentary evidence of the obligation (such as the occupancy agreement and the monthly billing invoice) but also incident to CSB's continuing occupancy of the space. We therefore consider how CSB must record obligations for this continuously arising liability.

Accurate records of the obligations that an agency has actually incurred are essential to an agency's compliance with the Antideficiency Act: only through such records can an agency ensure that it incurs new obligations only when sufficient appropriations are available. Therefore, an agency must record its obligations under an occupancy agreement in a manner sufficient to ensure it does not over-obligate its appropriation and has sufficient proper funds available to liquidate those obligations to pay GSA for space and services.[41]

[41] Agency obligational records also form the basis for agency reports that are required by law. For example, agencies must submit appropriation requests to OMB and certify that obligations they report in their requests are consistent with the requirements of the recording statute. 31 U.S.C. § 1108(c). An agency also must ensure that any statement of obligations it submits to Congress or to any congressional committee contains only amounts recorded consistent with the recording statute. *Id*. § 1501(b). An agency must ensure that any report of obligations for an elapsed time period reflects the amounts arising from its occupancy of GSA-controlled space.

Several factors may be relevant to an agency's determination of when it records these obligations and the amount to record on each occasion. Key factors include the amount due under each monthly billing invoice from GSA for space and services and the amount estimated in the occupancy agreement. Agencies must record obligations, including those arising from occupancy of GSA-controlled space, consistent with their apportionment, which, at the discretion of the appropriate official,[42] may limit how much can be obligated at various points of a fiscal year. 31 U.S.C. § 1512(a) (permitting reapportionment).[43] Other relevant factors an agency would need to consider could change while an agency is operating under a continuing resolution. This decision does not limit an agency's flexibility to record obligations for its continued occupancy of GSA space on a periodic basis, such as monthly based on its receipt of the GSA invoice or annually based on the estimates in the occupancy agreement, as long as such amounts are recorded against an appropriation available for the time period in question.[44]

CONCLUSION

CSB violated 40 U.S.C. § 8141 when it entered into a lease for space in the District of Columbia without statutory authority to do so. In addition, CSB violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1), when it entered into a ten-year real-property lease without sufficient available appropriations. It should report this violation as required by 31 U.S.C. § 1351.

CSB would not, however, violate the Antideficiency Act or other appropriations laws if it were to execute an extension of an occupancy agreement with GSA to facilitate its occupancy of space in the Denver Federal Center because the occupancy agreement is a budgeting tool that imposes no fiscal liability on CSB. Instead, GSA's statutory authority to charge CSB for the space and associated services, the documentary evidence of the amounts due in the form of the occupancy agreement and monthly billing invoice, and CSB's occupancy of the space itself are sufficient to create a recordable legal liability pursuant to the recording statute, 31 U.S.C. §

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[42] In the executive branch, OMB apportions most appropriations. *See* 31 U.S.C. § 1513(b); Exec. Order No. 6166, § 16 (June 10, 1933). The official with administrative control of budgetary resources available to the legislative branch, the judicial branch, or the United States International Trade Commission apportions for that entity. 31 U.S.C. § 1513(a).

[43] The Antideficiency Act also bars agencies from incurring obligations that exceed an apportionment or allotment. 31 U.S.C. § 1517. An apportionment may subdivide an appropriation by time period, by activity, or by some combination thereof. *Id.* § 1512. An agency will need to consider similar factors as it determines how to record its obligations in a manner sufficient to prevent exceeding apportionments and allotments.

[44] We note that a multiple-year or no-year appropriation affords an agency more flexibility in this regard than a one-year appropriation.

1501(a)(9). Those considerations are the determining factors in recording obligations for this liability, which did not arise because CSB ultimately vacated the space.

Edda Emmanuelli Perez
General Counsel

Executive Branch Counsel Panelist Biographies

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

Lisa Spears (Bureau of the Fiscal Service)
Lisa Spears serves as Senior Counsel in the Office of the Chief Counsel, Bureau of the Fiscal Service, Department of the Treasury. Lisa has worked in Fiscal Service since 2012 when the bureau was created through the consolidation of the Financial Management Service and the Bureau of the Public Debt. She specializes in fiscal law and shared services. Prior to joining Fiscal Service, Lisa worked for Public Debt and clerked for the Honorable Peggy E. Patterson, Magistrate Judge, United States District Court for the Eastern District of Kentucky. She holds a B.A. and a J.D. from the University of Kentucky.

Naomi Taransky (Office of Management and Budget)
Naomi Taransky serves as an Assistant General Counsel in the Office of Management and Budget's (OMB) Office of General Counsel. Naomi provides fiscal law advice on OMB's internal operations and advises and represents OMB clients in employment law and federal workforce matters. Naomi led OMB's federal appropriations law practice from 2014-2018. Prior to joining OMB in 2011, Naomi served as Counsel to the House Budget Committee. From 2003-2007, she worked for the National Homelessness Law Center, and from 2002-2003, she clerked for the Honorable Brook Hedge at D.C. Superior Court, then-Presiding Judge of the Domestic Violence Unit. She holds an A.B. from Harvard-Radcliffe College and a J.D. from Georgetown University Law Center.

A Closer Look: Miscellaneous Decisions of Interest I

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

Decision

Matter of: Pension Benefit Guaranty Corporation—Use of Appropriations Provided in the American Rescue Plan Act of 2021 for Special Financial Assistance

File: B-334541

Date: August 9, 2023

DIGEST

The Pension Benefit Guaranty Corporation (PBGC) made certain determinations regarding the interest rate that multiemployer pension plans should use to calculate eligibility for and amounts of special financial assistance (SFA) established by the American Rescue Plan of 2021 (ARPA).

Congress provided PBGC with an appropriation in ARPA for the costs of SFA. Under the purpose statute, appropriations are only available for the purposes for which Congress made them. PBGC used this appropriation for the purpose of SFA. PBGC's actions do not violate either the purpose statute or the Antideficiency Act, notwithstanding questions about PBGC's interest-rate calculations under provisions of the Employee Retirement Income Security Act of 1974 added by ARPA.

DECISION

The American Rescue Plan Act of 2021 (ARPA) allowed financially distressed multiemployer pension plans to apply to the Pension Benefit Guaranty Corporation (PBGC) for special financial assistance (SFA). Pub. L. No. 117-2, title IX, subtitle H, § 9704, 135 Stat. 4, 190 (Mar. 11, 2021) (amending the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974) (ERISA) to include new section 4262). ARPA specified an interest rate for plans to use in determining their SFA eligibility and amounts. *Id.* In its Final Rule implementing ARPA's SFA provisions, PBGC instructed SFA applicants to use ARPA's specified interest rate for eligibility and amount calculations applicable to "non-SFA assets," while using a separate interest rate for calculations applicable to "SFA assets." *Special Financial Assistance by PBGC*, 87 Fed. Reg. 40968, 41007-41008 (July 8, 2022) (codified at 29 C.F.R. part 4262) (hereafter Final Rule). We received a request from PBGC's Inspector General as to whether PBGC's

determinations regarding these interest rates exceeded PBGC's "appropriations authority" under ARPA. Letter from Inspector General, PBGC to General Counsel, GAO (Aug. 10, 2022) (Request Letter). As discussed below, we conclude that PBGC used its ARPA appropriation for its stated purpose and as such, neither the purpose statute nor the Antideficiency Act are violated by PBGC's interest rate determinations.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/gao-06-1064sp. Accordingly, we reached out to PBGC to obtain the agency's legal views. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, PBGC (Sept. 21, 2022). We received PBGC's response on November 4, 2022. Letter from General Counsel, PBGC, to Assistant General Counsel for Appropriations Law, GAO (Nov. 4, 2022) (Response Letter).

BACKGROUND

ERISA created PBGC to "encourage the continuation and maintenance of" private sector defined benefit pension plans and "provide for the timely and uninterrupted payment of pension benefits." 29 U.S.C. § 1302(a). To this end, PBGC administers multiple insurance programs. *See id.* §§ 1302, 1305 (establishing multiple funds for PBGC to use with respect to retirement benefits guaranteed in ERISA). PBGC also provides financial assistance to distressed multiemployer pension plans that participate in its Multiemployer Insurance Program. *See id.* § 1431.

ARPA amended ERISA to establish an additional fund for PBGC to provide "special financial assistance" to certain multiemployer pension plans. *See* Pub. L. No. 117-2, § 9704, 135 Stat. at 190; 29 U.S.C. § 1305(i). Additionally, ARPA describes eligibility for SFA and application requirements through newly created section 4262(e) of ERISA. Pub. L. No. 117-2, 135 Stat. at 190, 191, 192.

ARPA provided PBGC with an indefinite appropriation to carry out these SFA provisions:

> There is appropriated from the general fund such amounts as are necessary for the costs of providing financial assistance under section 4262 and necessary and administrative and operating expenses of the corporation. The [SFA] fund established under this subsection shall be credited with amounts from time to time as the Secretary of the Treasury, in conjunction with the Director of the Pension Benefit Guaranty Corporation, determines appropriate, from the general fund of the Treasury, but in no case shall such transfers occur after September 30, 2030.

Pub. L. No. 117-2, § 9704(a).[1]

ARPA directed PBGC to "issue regulations or guidance setting forth requirements for [SFA] applications" within 120 days of the ARPA's passage. Pub. L. No. 117-2, § 9704, 135 Stat. at 191; 29 U.S.C. § 1432(c). In its Interim Final Rule implementing this provision, PBGC indicated that multiemployer pension plans could not use interest rates other than the rate specified in section 4262(e). *Special Financial Assistance by PBGC*, 86 Fed. Reg. 36598, 36602 (July 12, 2021) (Interim Final Rule). In its Final Rule dated July 8, 2022, however, PBGC instructed plans to use separate interest rates depending on whether their eligibility and amount calculations involved "non-SFA assets" or "SFA assets." Final Rule, at 41007–41008.

PBGC acknowledged that its separate rate for SFA assets was different from the rate specified in section 4262(e). Response Letter, at 4. However, PBGC explained its determination that directing plans to use a separate rate for SFA assets was necessary to harmonize section 4262(e) with the provisions in sections 4262(j) and (*l*) requiring the payment of SFA in amounts sufficient to "pay all benefits due" and the segregation of SFA and non-SFA assets. Final Rule, at 40973. According to PBGC, its use of separate rates, along with other changes specified in the Final Rule, will result in an estimated $4.4 billion increase in SFA payments above what its Interim Final Rule would have allowed. Response Letter, at 8.

DISCUSSION

At issue here is whether PBGC used the ARPA appropriation for its provided purpose notwithstanding questions about PBGC's interest rate determinations.

Under the purpose statute, appropriations may be used only to achieve the purposes for which they were appropriated. 31 U.S.C. § 1301. When interpreting an appropriation's purpose, we begin by looking to the language of the statute. B-325630, Sept. 30, 2014. However, we do not read the purpose statute to require that every item of expenditure be specified in an appropriation. *Id.*; *see also* B-285066.2, Aug. 9, 2000 (finding that the Inspector General of the Department of Housing and Urban Development (HUD) had authority to fund a gun-buyback program given general appropriation authorizing activities to combat violent crime). Rather, when an appropriation does not specifically identify the expense in question, we apply a three-part necessary expense rule to determine whether the appropriation is available. Under this rule, an appropriation is available for an expense that (1) bears a reasonable, logical relationship to the purpose of the appropriation; (2) is not prohibited by law; and (3) is not otherwise provided for. B-333826, Apr. 27, 2022.

[1] An "indefinite" appropriation is one for an unspecified amount of money. B-332003.1, Oct. 5, 2022. In this case, section 9704 of ARPA appropriated "such amounts as are necessary." Pub. L. No. 117-2, § 9704.

Here, steps two and three of the necessary expense rule are not at issue, as Congress did not prohibit PBGC payments relative to SFA, nor did it provide other appropriations that are arguably available for the SFA expenses at issue. Accordingly, our analysis focuses on step one.

Under step one of the necessary expense rule, agencies generally have discretion to determine whether expenditures are reasonably related to the purposes of their appropriations. B-329373, July 26, 2018. "[T]he question is whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range." B-333826. Thus, in one recent case, we found that the Election Assistance Commission (EAC) could permit the use of grant funds under the Help America Vote Act of 2002[2] to provide security and threat-monitoring services to local election officials. *Id.* As we found, EAC's appropriation broadly authorized activities "to improve the administration of elections," and EAC "could reasonably conclude" that providing security and threat-monitoring services would yield such improvements. *Id.* at 2, 6.

Additionally, under step one of the necessary expense rule, the determination of an appropriation's authorized purpose is informed by relevant authorizing and program legislation. For instance, a Centers for Medicare and Medicaid Services (CMS) annual appropriation provided funds and authorized the collection of fees for use in carrying out a list of enumerated statutes and "other responsibilities of the [CMS]". B-325630. After Congress separately required CMS to establish a "risk corridors" program to stabilize insurance markets pursuant to the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18062, we found that CMS's appropriation and fee-collection authority were available to cover expenses of this new program. B-325630. As we explained, "existing agency appropriations that generally cover the type of expenditure involved are available for expenses of new or additional duties imposed by proper legal authority." *Id.* (citing B-290011, Mar. 25, 2002, 15 Comp. Gen. 167 (1935)). The ACA, as a new legal authority, informed the scope and availability of HHS's appropriation, including by making that appropriation available for ACA-mandated programs.

GAO's determinations in a pair of cases implicating gun-buyback programs are also instructive. In the first case, we found that HUD lacked authority to fund a gun-buyback program as part of its Public Housing Drug Elimination Grants Program (PHDEG). B-285066, May 19, 2000. As we explained, the underlying PHDEG statute only addressed drug-use, not the reduction of drug-related crime, which was HUD's stated purpose for initiating the gun-buyback program. *Id.* Thus, HUD could not use the lump-sum appropriation that Congress provided for the PHDEG program for expenses associated with gun-buyback. *Id.* ("While HUD relie[d] upon evidence

[2] Pub. L. No. 107-252, §§ 101, 102, and 251, 116 Stat. 1666, 1668-72 and 1692-93 (Oct. 29, 2002) *codified at* 52 U.S.C. §§ 20901, 20902, 21001.

of a relationship between guns and violence and guns and drug dealing," this was not sufficient to establish a necessary expense under the purpose statute.). *Id.* In the second case, we found that HUD's Office of Inspector General (OIG) *did* have authority to fund a gun-buyback pursuant to its Operation Safe Home program. B-285066.2. Congress had set aside certain funds for the purpose of enabling OIG "to combat violent crime in public and assisted housing under the Operation Safe Home program." *Id.* at 2. The Operation Safe Home program did not have a separate authorizing statute, so operation of the program and use of the funds was governed by the language of the appropriation set-aside itself, which we determined was broad. *Id*. at 4. OIG's use of funds for gun-buyback was consistent with the authority provided to OIG in the appropriation set-aside, which was broader than HUD's authority under the PHDEG statute. *Id.* at 5 n.5.

A somewhat different situation arose in B-334146, June 5, 2023. There, the U.S. Department of Agriculture (USDA) implemented new agency rules without following the Congressional Review Act (CRA) requirement for agencies to submit a report to Congress and the Comptroller General before covered rules can take effect. 5 U.S.C. § 801(a)(1)(A). GAO was asked to consider whether USDA's use of appropriated funds toward the implementation of these rules was impermissible as to purpose (and therefore violated the Antideficiency Act) considering that USDA had not followed CRA. *See* B-334146. We found no appropriations law violation. As we explained, USDA's ability to obligate appropriations was not "contingent on [its] compliance with the requirements of the CRA." *Id.* at 15. Congress had not "restricted" USDA's use of funds "to a specific outcome in applying the CRA." *Id.*

Here, by reference to the above cases, we find no violation of the purpose statute. Congress provided PBGC with a broad and indefinite appropriation for "such amounts as are necessary for the costs of providing financial assistance under section 4262," as well as "necessary administrative and operating expenses." Pub. L. No. 117-2, § 9704(a). PBGC's expenses at issue, regardless of the interest rate used to calculate them, are for the purpose of "providing financial assistance under section 4262." *Id.*; Response Letter, at 11, 13. This is not a situation comparable to HUD's use of PHDEG funds to reduce crime instead of their intended purpose to reduce drug use. Similar to HHS in B-325630, the new ERISA provision informed the purpose availability of PBGC's ARPA appropriation for costs associated with providing SFA, however, the appropriation did not specifically condition the availability of funds on the manner in which PBGC applied the provisions of section 4262 to calculate the amounts necessary. *See* B-334146. Like the EAC in B-333826, and like HUD's OIG in B-285066.2, PBGC's determination that its appropriation was available for the costs of SFA as determined by PBGC through applying section 4262 (understanding that different interest rates may result in different amounts of SFA), was a reasonable exercise of its discretion.

Even where an expenditure is permissible from a purpose standpoint, the Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an appropriation unless otherwise authorized by law. 31 U.S.C. §

1341(a)(1). However, for agencies with an indefinite appropriation, it is not possible to spend excess amounts on an authorized purpose. *See* B-328450, Mar. 6, 2018. *But see* B-326013, Aug. 21, 2014 (explaining that no amount is available for an unauthorized purpose).

Here, considering that PBGC's expenses were for an authorized purpose and that Congress provided an indefinite appropriation, we find no violation of the Antideficiency Act. PBGC's appropriation did not specify any maximum amount for the necessary "costs of providing financial assistance under section 4262." Pub. L. No. 117-2, § 9704(a). Thus, even accepting PBGC's projection that its use of separate interest rates and related changes will create a $4.4 billion increase in SFA payments, this would not exceed any amount specified in PBGC's appropriation.

We do not reach the issue of whether PBGC's actions were consistent with ERISA or any other non-appropriations provision by directing plans to use an interest rate other than the one specified in that Act. As explained above, we hold only that PBGC's interest rate determinations did not cause any violation of the purpose statute or the Antideficiency Act. Any possible inconsistency of PBGC's actions with non-appropriations provisions does not upset our holding. *See* B-334146 (noting that the Antideficiency Act does not "require agencies to report violations of other laws, nor does it require agencies to report improper practices that do not result in violations of the Antideficiency Act").

Given the above considerations, we also do not reach PBCG's arguments that separate interest rates are necessary to harmonize ARPA's new ERISA provisions, or that PBGC's interpretation of ERISA is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and other Supreme Court decisions. Response Letter, at 5, 11–12. For present purposes, Congress's broad and indefinite appropriation to PBGC in ARPA is sufficient to resolve any questions of appropriations law.

CONCLUSION

Congress provided PBGC with a broad and indefinite appropriation for the costs of SFA. Notwithstanding questions about its calculation of interest rates, PBGC used its appropriation for SFA. Thus, we find no violation of the purpose statute or the Antideficiency Act.

Edda Emmanuelli Perez
General Counsel

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

Decision

Matter of: Office of Personnel Management—Application of Section 608 of the Financial Services and General Government Appropriations Act, 2020, to the Office of Personnel Management's Restructuring and Reorganization

File: B-332704

Date: June 30, 2022

DIGEST

The Office of Personnel Management (OPM) eliminated an office, reorganized functions, realigned personnel and funds, and restructured one of its internal organizations without consulting with the House and Senate Committees on Appropriations beforehand. Section 608 of the Financial Services and General Government Appropriations Act, 2020, requires agencies to consult with these Committees before carrying out any significant reorganization, restructuring, or closing of offices. OPM violated section 608 when it failed to consult with the Committees in advance of its significant restructuring and reorganization.

DECISION

This responds to a request for a decision concerning whether the Office of Personnel Management (OPM) violated section 608 of the Financial Services and General Government Appropriations Act, 2020 (FSGGA Act), when it eliminated an office, reorganized functions, realigned personnel and funds, and restructured one of its internal organizations (collectively, restructuring and reorganization).[1] Section 608 requires agencies to consult with the House and Senate Committees on Appropriations (Committees on Appropriations) before undertaking any significant reorganization, restructuring, relocation, or closing of offices, programs, or activities.[2] Section 608 also requires agencies to obtain the approval of the Committees on

[1] Letter from Chairman, House of Representatives, Subcommittee on Financial Services and General Government, to Comptroller General, GAO (Oct. 28, 2020); Financial Services and General Government Appropriations Act, 2020, Pub. L. No. 116-93, div. C, title VI, 133 Stat. 2434, 2478–2479 (Dec. 20, 2019).

[2] Pub. L. No. 116-93, § 608.

Appropriations before reprogramming funds to, among other actions, reorganize offices, programs, or activities, and provides that no funds are available for such reprogramming unless prior approval is received.

As explained below, we conclude that OPM violated section 608 when it failed to consult with the Committees on Appropriations before it undertook its significant restructuring and reorganization during fiscal year 2020. OPM also reprogrammed amounts to institute its restructuring and reorganization without obtaining prior approval from the Committees on Appropriations; however, as explained below we conclude that section 608's approval requirement is not legally binding.[3]

In accordance with our regular practice, we contacted OPM to seek factual information and its legal views on this matter.[4] In response, OPM provided its explanation of the pertinent facts and its legal analysis.[5]

BACKGROUND

OPM eliminated its Office of Strategy and Innovation (OSI) in May 2020.[6] OPM reorganized most of the functions, personnel, and funding of OSI, as well as its Office of the Chief Information Officer's (OCIO) Federal Data Solutions (FDS) component, to its Human Resources Line of Business (HRLOB).[7] OSI's Survey Analysis Group was reorganized under its Employee Services (ES) program office.[8] OPM subsequently restructured HRLOB and changed its name to Human Capital Data Management and Modernization (HCDMM). HCDMM is the result of the "[consolidation] of human and financial resources that were previously part of Federal Data Solutions (within the Office of the Chief Information Officer), the Office

[3] *See Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 953–959 (1983)(addressing the constitutionality of legislative veto provisions); B-196854.3, Mar. 19, 1984.

[4] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, OPM (Feb. 16, 2021).

[5] Letter from General Counsel, OPM, to Assistant General Counsel for Appropriations Law, GAO (Apr. 15, 2021)(OPM Response).

[6] OPM Response, at 3.

[7] OPM Response, at 1.

[8] OPM Response, at 1.

of Strategy and Innovation Data Analysis Group, and the Human Resources Line of Business." [9] This decision refers to these actions collectively as OPM's restructuring and reorganization.

For fiscal year 2020, Congress provided a lump-sum appropriation for "necessary expenses to carry out functions of [OPM]."[10] OPM submitted a financial operating plan to Congress that shows how the agency subdivided its funds within this appropriation. [11] Specifically, OPM subdivided its funds by internal organization, and then further subdivided amounts by object class within each internal organization.

DISCUSSION

At issue here is whether OPM complied with the requirements of section 608. Section 608 states in relevant part:

> . . . none of the funds provided . . . shall be available for obligation or expenditure through a reprogramming of funds that: (1) creates a new program; (2) eliminates a program, project, or activity; (3) increases funds or personnel for any program, project, or activity for which funds have been denied or restricted by the Congress; (4) proposes to use funds directed for a specific activity by the Committee on Appropriations of either the House of Representatives or the Senate for a different purpose; (5) augments existing programs, projects, or activities in excess of $5,000,000 or 10 percent, whichever is less; (6) reduces existing programs, projects, or activities by $5,000,000 or 10 percent, whichever is less; or (7) creates or reorganizes offices, programs, or activities unless prior approval is received from the Committees on Appropriations of the House of Representatives and the Senate: *Provided*, That prior to any significant reorganization, restructuring, relocation, or closing of offices, programs, or activities, each agency or entity funded in this Act shall consult with the

[9] OPM, Press Release, *OPM Announces New Human Capital Modernization Directorate* (Aug. 4, 2020)(*Press Release*) *available at*, https://www.opm.gov/news/releases/2020/08/opm-announces-new-human-capital-modernization-directorate/ (last visited May 18, 2022); OPM Response, at 1.

[10] Pub. L. No. 116-93, 133 Stat. at 2471.

[11] OPM Response, at 2. Here, in addition to the approval and consultation requirements, section 608 provides procedures for reprogramming, including a requirement that agencies submit a report to the Committees on Appropriations to establish a baseline for reprogramming for the fiscal year covered by the Act. Pub. L. No. 116-93, 133 Stat. at 2478–2479.

> Committees on Appropriations of the House of Representatives and the Senate . . . .

First, we consider whether OPM's restructuring and reorganization triggered section 608's consultation provision, which requires agencies to consult with the Committees on Appropriations before undertaking "any significant reorganization, restructuring, relocation, or closing of offices, programs, or activities."[12] Second, this decision addresses whether OPM reprogrammed funds and section 608's direction to agencies to seek approval before doing so.

Significant Reorganization or Restructuring

We first consider whether OPM's actions constituted a significant reorganization or restructuring, as contemplated under section 608, such that consultation with the Committees on Appropriations was required. Section 608 does not define the term "significant".[13] Where, as here, the language of the statute is unambiguous, the ordinary meaning of the words in the statute controls.[14] And, when a term is not defined in the legislation itself, a court may turn to the dictionary definition for its common meaning.[15] Applying this rationale, the ordinary meaning of the term "significant" is "having or likely to have influence or effect" or "having meaning."[16]

OPM's reorganization efforts included the closing of one of the internal organizations reflected in its Operating Plan—OSI—and impacted others, such as HRLOB, OCIO and ES.[17] OPM reorganized most functions under HRLOB to create a new internal organization dubbed HCDMM.[18] Creating a new internal organization to perform functions previously assigned to other internal organizations is significant because it directly affects how OPM allocates its appropriation and other resources between its internal organizations and it has a direct impact on out-year funding needs of these

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[12] *Id.*

[13] Pub. L. No. 116-93, § 608.

[14] *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); B-329603, Apr. 16, 2018.

[15] *Salazar*, 555 U.S. at 387 (2009); B-329603, Apr. 16, 2018.

[16] *Merriam-Webster's Unabridged Dictionary, available at* https://unabridged.merriam-webster.com/unabridged/significant (s.v. Significant) (last visited May 18, 2022).

[17] OPM Response, at 1.

[18] OPM Response, at 1.

internal organizations. In its business case supporting its reorganization efforts, OPM set forth several planned effects, including integrating the reorganized functions with those of the receiving office, leveraging contractor support, consolidating technology needs of the reorganized functions, and changing the paradigm driving the execution of the reorganized functions.[19] Changes such as these are influential and meaningful by design and in their effect.

The elimination of an office, reorganization of functions, realignment of personnel and funds, and restructuring of an internal organization had influence, effect, and meaning within the agency, thus we conclude that OPM's actions constitute a significant restructuring and reorganization of its internal organizations. Accordingly, section 608 required OPM to consult with the Committees on Appropriations before taking on its significant restructuring and reorganization. OPM stated it did not consult with the Committees on Appropriations regarding its restructuring and reorganization efforts before it undertook them. OPM violated section 608's consultation requirement, which had the effect of preventing the Committees on Appropriations from exercising their right to oversee the use of appropriated funds as the provision was intended.

The legislative history reinforces this conclusion. The explanatory statement accompanying the FSGGA Act reiterates the consultation requirement regarding significant reorganizations, explaining that such activities "have the potential to impact funding needs in future years and may conflict with the rationale behind the appropriated levels in the current year; therefore, these actions, particularly those that entail out-year impacts, merit advanced engagement with the Committees."[20] Further, the explanatory statement directs that agencies are expected to confer with the Committees on Appropriations if they have questions about the applicability of the provisions of section 608 to a potential agency action or decision.[21]

In addition, a report of the House Committee on Appropriations accompanying the Financial Services and General Government Appropriations Bill, 2020, describes the

[19] OPM Response, Attachment 1.

[20] 165 Cong. Rec. at H10990. For example, OPM's fiscal year 2022 congressional budget justification reflected the organizational changes discussed here. Namely, HCDMM was identified as a separate internal organization with its own budget, and OSI was no longer included as an internal organization. OPM, *Fiscal Year 2022 Congressional Budget Justification and Annual Performance Plan* (May 2021), *available at* https://www.opm.gov/about-us/budget-performance/budgets/congressional-budget-justification-fy2022.pdf

[21] 165 Cong. Rec. at H10990.

Committee's expectations for prior consultation. [22] The report provides that prior consultation applies to:

> . . . significant reorganizations or restructurings of programs, projects, or activities, even if such a reorganization or restructuring does not involve reprogramming of funding [and] the term 'prior consultation' means a pre-decisional engagement between a relevant [f]ederal agency and the Committee during which the Committee is provided a meaningful opportunity to provide facts and opinions to inform: (1) the use of funds; (2) the development, content, or conduct of a program or activity; or (3) a decision to be taken.[23]

As further described in the legislative history accompanying section 608, the consultation requirement gives the Committees on Appropriations an opportunity to consider how changes might impact future funding needs and to share their views and perspectives before the agency executes a significant organizational change. OPM did not fulfill this requirement.

Reprogramming

The second question we address is whether OPM reprogrammed funds to institute its restructuring and reorganization. A reprogramming is the shifting of funds within an appropriation to purposes other than those contemplated at the time of appropriation.[24] More specifically, it is the application of appropriations within a particular account to purposes, or in amounts, other than those justified in budget submissions or otherwise considered or indicated by congressional committees in connection with the enactment of appropriations legislation.[25] To determine whether a reprogramming occurred, we must first establish Congress' understanding of how an agency would obligate its lump-sum appropriation.[26] To do this we look to the

[22] H.R. Rep. No. 116-122, at 5–6.

[23] H.R. Rep. No. 116-122, at 6.

[24] GAO, *A Glossary of Terms Used in the Federal Budget Process,* GAO-05-734SP (Washington, D.C.: Sept. 2005), at 85; *see* B-330108, Dec. 23, 2020; B-329964, Oct. 8, 2020; B-323792, Jan. 23, 2013.

[25] B-323792, Jan. 23, 2012; B-164912-O.M., Dec. 21, 1977.

[26] B-330108, Dec 23, 2020 at 3.

most relevant and authoritative budget documents to ascertain the subdivisions of a lump-sum appropriation among which funds might have been reprogrammed.[27]

Prior decisions of our office provide examples of how such documents and obligations are interpreted. For example, the Department of Commerce, Office of Inspector General (Commerce OIG) reorganized several functions in order to "more efficiently and effectively achieve" its oversight mission.[28] This reorganization included the creation of a Chief of Staff position, as well as the reorganization of the office's audit, evaluation, and administrative functions.[29] Commerce OIG subdivided its appropriation by program and object class. Using Commerce OIG's congressional budget justification (CBJ) as a baseline we found that Commerce OIG did not shift funds between object classes or the programs identified in its CBJ. Thus, we concluded that Commerce OIG did not reprogram funds.[30] By contrast, the U.S. Secret Service reprogrammed funds when it shifted funds from one program, project, or activity (PPA) identified in the explanatory statement accompanying the relevant appropriation act to another PPA.[31]

To determine whether OPM reprogrammed funds, we look to the documents that would inform Congress' understanding of how OPM would obligate its lump-sum appropriation.[32] In accordance with section 608, OPM submitted a financial operating plan to the Committees on Appropriations to establish a baseline for determining whether the agency has reprogrammed funds.[33] The financial operating plan shows that OPM allocated funds by internal organization, and it further

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[27] *See* B-319009, Apr. 27, 2010 (referring to an itemization in a joint explanatory statement); *see also* B-323792, Jan. 23, 2013 (referring to an agency's budget request and the President's budget).

[28] B-330108, Dec. 23, 2020 (citation omitted).

[29] B-330108, Dec. 23, 2020.

[30] B-330108, Dec. 23, 2020; *see also* B-323792, Jan. 23, 2013 (concluding that the Commodity Futures Trading Commission did not reprogram funds when it eliminated a position from one of its offices and contracted for the service previously rendered by the staff in that position. The office continued to perform the same functions and the agency did not reallocate the funds it saved by eliminating the position for a different purpose).

[31] B-319009, Apr. 27, 2010.

[32] *See e.g.*, B-323792, Jan. 23, 2013.

[33] Pub. L. No. 116-93, § 608.

subdivided funds within each internal organization by object class.[34] Here, a reprogramming would occur if OPM were to shift funds between its internal organizations or the object classes identified in the financial operating plan.

While OPM did not shift funds between object classes, OPM did shift funds between the internal organizations identified in its financial operating plan to institute its reorganization efforts.[35] Specifically, OPM shifted amounts from OSI to HCDMM and ES, and it shifted amounts from OCIO to HCDMM.[36] OPM did not seek approval or engage with the Committees on Appropriations in any manner about its reorganization efforts.[37] Accordingly, OPM's reprogramming did not comply with the approval requirement set forth in section 608.

While OPM's reprogramming did not comply with the approval requirement of section 608, we do recognize that the approval requirement raises issues with constitutional precedent.[38] We note that it is not our role or our practice to opine on the constitutionality of duly enacted statutes, and we will generally adopt a heavy

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[34] OPM Response, at 2.

[35] OPM Response, at 2–3. OPM explained that the purpose of the restructuring and reorganization, which took effect on August 2, 2020, was to "unite related programs, previously spread over several internal offices, into a more coherent set of activities, housed in a single program office." OPM Response, at 1. To do this, OPM stated that it shifted $1,146,556 between its internal organizations to follow realigned employees performing the same duties. OPM Response at 2–3.

[36] OPM Response, at 3.

[37] OPM Response, at 3.

[38] Notwithstanding the issue of the whether section 608's approval requirement can withstand constitutional scrutiny, a statutory provision is presumed severable if what remains after severance is fully operative as law. *Chadha*, 462 U.S. at 931–936. *See also Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987)("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.")(citation omitted); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984)(plurality opinion). The provisions that remain after the approval requirement is excised are fully operative laws that employ workable Congressional oversight mechanisms within Congress' power. *See Chadha*, 462 U.S. at 952 (*citing* S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897))(noting that only those actions of Congress that are legislative in their character and effect require bicameralism and presentment).

presumption in favor of constitutionality.[39] However, the Supreme Court has addressed this issue and as we have done in our prior case law, we must apply that precedent in considering whether section 608's approval requirement is binding.[40]

In *Immigration & Naturalization Service v. Chadha,* 462 U.S. 919, 953–959 (1983), the Supreme Court found a one-house legislative veto provision unconstitutional, determining that it was an exercise of legislative power that circumvented the procedures of bicameralism and presentment.[41] Applying this precedent, in B-196854.3, Mar. 19, 1984, we examined whether committee approval or veto over reprogramming of lump-sum appropriations would be permissible, and concluded that it would not. We explained that this sort of requirement would amount to an attempt to reserve to the Congress the authority to overturn a reprogramming decision made pursuant to the delegation of authority in the lump-sum appropriation without use of the constitutionally-mandated legislative procedure.[42]

We contrast this with reprogramming notification and consultation requirements. For example, section 514(a) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017[43] required the Social Security Administration (SSA) to notify and consult with the Committees on Appropriations if funds were reprogrammed for certain purposes.[44] We concluded that the Act required SSA to notify and consult with the Committees on Appropriations if SSA's reorganization resulted in a reprogramming of funds that resulted in certain outcomes.[45]

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[39] *See e.g.*, B-326013, Aug. 21, 2014; B-323449, Aug. 14, 2012.

[40] *See* GAO, *Procedures and Practices for Legal Decisions and Opinions*, at 5, 8–9, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/GAO-06-1064SP (noting GAO will question the constitutionality of an act of Congress where the Supreme Court has directly addressed the precise issue raised by the act of Congress at issue, and avoidance of the issue is not possible).

[41] *Chadha*, 462 U.S. at 953–959.

[42] *Id*.

[43] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017, Pub. L. No. 115-31, div. H, title V, § 514(a), 131 Stat. 502, 563–64 (May 5, 2017).

[44] B-329964, Oct. 8, 2020.

[45] *Id*.

Notification requirements embody a compromise between the agency flexibility that lump-sum appropriations afford and the congressional control of explicit statutory restrictions.[46] This allows agencies to adapt their budget execution to respond to changed circumstances, as long as resulting obligations remain consistent with law, while also requiring agencies to notify Congress if the resulting obligations will differ from Congress' understanding of how the agency would obligate its lump-sum appropriation.[47] Section 608 reserves power within the Committees on Appropriations to approve or veto executive action made pursuant to authority delegated in the lump-sum appropriation, as we reasoned is impermissible in B-196854.3, Mar. 19, 1984. As such, we conclude that the approval provision under section 608 is not legally binding here.[48]

Nevertheless, while section 608's approval requirement may not be binding as a matter of law, we have cautioned that agencies ignore such expressions of intent at the peril of strained relations with Congress.[49] In pertinent part, section 608 requires agencies to seek approval from the Committees on Appropriations prior to a

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[46] *Id*. at 4.

[47] *Id*.

[48] Under the Antideficiency Act, an agency may not obligate in excess of the amount available. 31 U.S.C. § 1341(a). We have concluded that where Congress conditions the availability of funds on an agency's compliance with a notification requirement, amounts are not legally available without such notification, and the agency violates the Antideficiency Act if it incurs an obligation before satisfying a notification requirement. *See e.g.*, B-329603, April 16, 2018; B-327432, June 30, 2016; B-319009, Apr. 27, 2010. For example, in B-329603, we concluded the Environmental Protection Agency (EPA) violated the Antideficiency Act when it reprogrammed funds without notifying the Committees on Appropriation as required by the Financial Services and General Government Appropriations Act, 2017. B-329603, April 16, 2018; *see* Pub. L. No. 115-31, div. E, title VII, § 710, 131 Stat. 135, 379 (May 5, 2017). Congress had conditioned the availability of funds on the agency's compliance with the notification requirement and, because EPA had failed to notify the Committees on Appropriations of its proposed obligation, its funds were not legally available for reprogramming. B-329603, April 16, 2018 at 7. Here, section 608 conditions the availability of funds for certain reprogrammings on an agency obtaining approval from the Committees on Appropriations, and OPM reprogrammed amounts to institute its restructuring and reorganization without obtaining this approval. While this would ostensibly result in an obligation in excess of amounts available, as explained infra, section 608's approval provision is not legally binding.

[49] B-330862, Sept. 5, 2019.

reprogramming that results in certain enumerated outcomes, to consult with the Committees on Appropriations prior to any significant reorganization or restructuring, and to submit a financial report to establish a baseline for reprogramming.[50] The explanatory statement provides that section 608, "authorizes the reprogramming of funds and specifies the reprogramming procedures for agencies funded by [the] Act."[51] The legislative history also notes that section 608 provides procedures or responsibilities agencies must carry out before they can reprogram funds.[52] In several places throughout the legislative history the House reiterates that section 608 provides notification, consultation, or approval requirements.[53] It also explains that these requirements are to ensure appropriate congressional oversight of funds.[54] And the legislative history further explains that the purpose of the financial report required under section 608 is to provide a baseline for reprogramming notification.[55] It is clear that the agency was expected to engage with the committees on these issues.

We note that the Executive Branch has developed mechanisms for engaging in meaningful communications with committees on these types of actions. Specifically, the Executive Branch has opined on the effect of approval provisions and concluded that approval provisions will be construed as requiring agencies to provide notice.[56] Also, based on the procedures outlined in section 608 and the reiteration of their significance in the corresponding explanatory statement and legislative history, the Committees on Appropriations expressed their intent to provide oversight mechanisms over reprogrammings by requiring agencies to engage with them and to follow reprogramming procedures.[57] Recognizing Congress' appropriations and oversight authority, agencies may abide by informal (i.e., non-statutory) limitations

[50] Pub. L. No. 116-93, § 608.

[51] 165 Cong. Rec. H10613, H10990 (daily ed. Dec. 17, 2019).

[52] S. Rep. No. 116-122, at 5–6; H.R. Rep. No. 116-122, at 5–7, 38, 93, 129.

[53] H.R. Rep. No. 116-122, at 5–7, 38, 93, 129.

[54] H.R. Rep. No. 116-122, at 38.

[55] H.R. Rep. No. 116-122, at 5–6.

[56] 31 U.S. Op. Off. Legal Counsel 23, 25 (2007).

[57] Pub. L. No. 116-93, § 608; 165 Cong. Rec. H10613, H10990 (daily ed. Dec. 17, 2019); S. Rep. No. 116-111, at 5–6 (2019); H.R. Rep. No. 116-122, at 5–7 (2019).

and some even incorporate them into regulations or internal guidance.[58] OPM's failure to engage with the Committees on Appropriations in any manner represents a departure from this type of practice.

CONCLUSION

OPM violated section 608 of the FSGGA Act when it failed to consult with the Committees on Appropriations before it engaged in a significant restructuring and reorganization of its internal organizations. We also conclude that OPM reprogrammed funds between its internal organizations, but do not apply section 608's approval requirement to OPM's reprogramming.

Edda Emmanuelli Perez
General Counsel

[58] For example, the Department of Defense (DoD) has incorporated informal agreements regarding reprogramming in its regulations. DOD Financial Management Regulation 7000.14-R, vol. 3, ch. 6, *Reprogramming of DOD Appropriated Funds* (Sept. 2015). In another example, Department of Energy (DOE) internal guidance provides that "for changes in program execution or unforeseen events that do not warrant formal or internal/limited reprogramming procedures and for areas known to be of interest or concern to Congress, DOE intends to notify congressional committees promptly to ensure they are fully informed . . . ." DOE, Office of the Chief Financial Officer, *Budget Execution—Funds Distribution and Control Manual* (January 1, 2006) at V-1, *available at*, https://www.directives.doe.gov/directives-documents/100-series/0135.1-DManual-1a (last visited June 16, 2022).

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

Decision

Matter of: Federal Energy Regulatory Commission—Use of Appropriated Funds to Indemnify Parties Who Negligently Harm FERC Inspectors

File: B-332444

Date: December 14, 2022

DIGEST

The Federal Energy Regulatory Commission (FERC) asks whether its appropriated funds are available to indemnify certain parties for liability incurred if the parties negligently harm FERC inspectors performing official duties. The Federal Employees' Compensation Act (FECA) establishes a statutory framework through which federal employees can receive compensation from the federal government if they are injured or die in the performance of their official duties. The compensation provided by FECA is federal employees' exclusive remedy against the United States for injury or death suffered in the performance of their official duties. If FERC instead assumes liability for the death or injuries of its inspectors, it would circumvent the process established by FECA and provide an alternative remedy for its inspectors to recover against the United States. Because FERC does not have any specific statutory authority to circumvent FECA or provide such an alternative remedy, it may not use its appropriated funds to indemnify these parties.

DECISION

The Federal Energy Regulatory Commission (FERC) requests our decision on the availability of its appropriated funds to indemnify certain parties for liability they may incur if they negligently harm FERC inspectors performing official duties.[1] In accordance with our regular practice, we contacted FERC to obtain more information and its views on this matter.[2] FERC provided us with information and its legal

[1] Letter from Acting General Counsel, FERC, to General Counsel, GAO (Aug. 14, 2020) (Request Letter).

[2] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-

views.[3] Because the United States Department of Labor, Office of the Solicitor, Division of Federal Employees' and Energy Workers' Compensation (FEEWC), provides legal services in connection with the workers' compensation program under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193, we also contacted the FEEWC attorneys to obtain their views.[4] We conclude that FERC's appropriated funds are not available for the proposed indemnity.

BACKGROUND

FERC regulates jurisdictional hydropower and natural gas facilities, which are located on private land, to ensure that these facilities are safely constructed, operated, and maintained.[5] As part of its responsibilities, FERC issues licenses to program participants to authorize them to safely construct and operate these facilities.[6] According to FERC, it also conducts periodic inspections of these facilities, and program participants arrange for third parties to transport FERC inspectors to these inspections.[7]

FERC states that its inspectors "may face potential hazards" when inspecting facilities.[8] Because of these potential hazards, some private landowners and transportation providers ask FERC inspectors to waive owner or provider liability for

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06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, FERC (Apr. 7, 2021).

[3] Letter from General Counsel, FERC, to Assistant General Counsel for Appropriations Law, GAO (May 7, 2021) (Response Letter); Request Letter.

[4] Telephone Conversation with Counsel for FECA, Office of the Solicitor, Assistant General Counsel for Appropriations Law, GAO, and Senior Attorney, GAO (June 21, 2022).

[5] 42 U.S.C. §§ 7171, 7172; Request Letter, at 1.

[6] 42 U.S.C. §§ 7171, 7172; Request Letter, at 1. For ease of reference here, we refer to preliminary permits, exemptions, licenses, and relicenses as licenses. *See* Request Letter, at 1 (stating that FERC uses inspections "to issue preliminary permits, exemptions, licenses, and relicenses"). We also refer to applicants for, and recipients of, licenses as program participants.

[7] Response Letter, at 5; Request Letter, at 1.

[8] Request Letter, at 1. FERC states its inspectors encounter hazards such as "steep grades, unguarded edges, uneven walking surfaces, open water, confined spaces, trenches, wet/slippery/icy surfaces, high elevations, active construction sites, electrical hazards, and wildlife including snakes, ticks, and alligators." *Id*. Between 2000 and 2020, FERC states one employee sprained an ankle after tripping in a parking lot and another employee sustained recoverable injuries by a transportation provider. *Id*. at 2.

injuries sustained by inspectors.[9] Some private landowners even condition access to their land "upon an assurance of no liability" if the FERC inspector is injured.[10]

In light of these parties' concerns about their liability risk, FERC is considering entering into agreements to indemnify these parties for injuries or damages sustained by FERC inspectors in the course of inspecting jurisdictional hydropower and natural gas facilities.[11] Before providing such an indemnity, FERC requests a decision on its authority to use its appropriated funds to enter into these types of agreements.[12]

DISCUSSION

At issue here is the availability of FERC's appropriated funds to indemnify program participants, private landowners, or transportation providers for liability they incur if they negligently harm FERC inspectors performing official duties. For the reasons explained below, we conclude FERC's appropriated funds are not available for this purpose.

FERC states that, as a government agency, it has sovereign immunity.[13] Sovereign immunity shields the United States from suit unless Congress enacts a statute that unequivocally and expressly waives immunity.[14] Such a statute may prescribe the terms and conditions of the waiver, and any such terms and conditions must be strictly observed.[15] Without an act of Congress, agencies do not have the authority to waive sovereign immunity.[16]

The Federal Employees Compensation Act (FECA) waives sovereign immunity for any government employees who are injured or die in the performance of their official duties.[17] FECA compensation is the exclusive remedy against the United States for covered employees' injury or death while in the performance of their official duties,

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[9] Request Letter, at 1. FERC is not aware of any authority to require its employees to waive their rights and advises against waiver. *Id*.

[10] Response Letter, at 2; Request Letter, at 1.

[11] Request Letter at 2.

[12] Request Letter, at 1.

[13] Response Letter, at 3.

[14] *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

[15] *Sherwood*, 312 U.S. at 590–591; *Beers v. Arkansas*, 61 U.S. 527, 529 (1857).

[16] *Wagstaff v. United States Department of Education*, 509 F.3d 661, 664 (5th Cir. 2007), *cert. denied*, 554 U.S. 904 (2008).

[17] Response Letter, at 3, n. 4.

and employees are not entitled to sue the United States or recover damages for such injury or death under any other statute.[18] If a third party is liable for a covered employee's injury or death for which the employee or the employee's beneficiary receives FECA compensation, FECA allows the Department of Labor (DOL) to recover damages from the third party.[19] Specifically, FECA provides the right to require the employee or the employee's beneficiary (1) to sue the third party tortfeasor to recover, or (2) to assign to the United States their right of action so that the United States is in a position to sue the tortfeasor who injured the employee.[20]

To fund FECA benefits, Congress established the Employees' Compensation Fund, which is managed by DOL.[21] This Fund is financed by both congressional appropriations and any monies the Fund receives from tortfeasors sued by DOL, federal agencies, or covered employees.[22] Where DOL pays out FECA compensation to a covered employee, FECA requires that DOL recoup the compensation from the covered employee's agency.[23] Further, where such employee sues and recovers damages from a tortfeasor, the employee is required to refund DOL for a portion of their FECA compensation.[24] Any refunded amounts are credited to the Employees' Compensation Fund.[25]

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[18] 5 U.S.C. § 8116(c) ("The liability of the United States . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States."); Response Letter, at 3 n.4 ("FECA is an exclusive remedy for federal employees as a result of an injury or death, and they lose the right to sue the government for the same.").

[19] 5 U.S.C. § 8131(a).

[20] 5 U.S.C. § 8131(a).

[21] 5 U.S.C. § 8147.

[22] 5 U.S.C. §§ 8131(c), 8132, 8147.

[23] *See* 5 U.S.C. § 8147(b) (requiring DOL to provide to all agencies with employees receiving FECA benefits an estimated cost of these benefits before August 15th of each year, and requiring such agencies to include in their budget requests an appropriation to cover FECA costs for the prior year).

[24] 5 U.S.C. § 8132 (requiring a FECA claimant who recovers from a third party to refund DOL for the amount of any compensation received by the claimant and credit DOL any surplus on future payments of compensation payable to the claimant, but authorizing the claimant to retain a minimum of twenty percent of the award and reasonable attorney's fees proportionate to the refund to DOL).

[25] 5 U.S.C. § 8132.

The FERC inspectors at issue here are government employees who are covered by FECA. If they are injured or die while inspecting jurisdictional hydropower and natural gas facilities, they or their beneficiaries will be entitled to FECA benefits, which will be paid to them from the Employees' Compensation Fund. Further, FERC will be responsible for refunding the Fund for any compensation provided to the inspectors or their beneficiaries. The covered employees or their beneficiaries may also be required by DOL to sue the program participants, private landowners, or transportation providers for their damages, and were they to recover, they would be required to refund DOL for a portion of any FECA compensation they received. If FERC were instead to assume liability for the inspectors' harm with its appropriated funds, it would circumvent this statutorily established process.

We have long recognized that an agency may not use the device of a contract or agreement to circumvent or do indirectly what it is not permitted to do directly.[26] Through FECA, Congress enacted a statutory framework that allows federal employees who suffer harm in the course of their employment to receive compensation from the Employees' Compensation Fund and further permits DOL to recoup compensation from liable third parties. In this act, Congress also specifically articulated that the compensation provided by FECA is federal employees' exclusive remedy against the United States for injury or death suffered in the performance of their official duties. The proposed indemnity would circumvent the statutory framework established by FECA and authorize an alternative remedy through which covered employees could seek redress from the government for their harm. Congress has not authorized FERC to establish such an alternative remedy for injuries to its inspectors, and, therefore, FERC's appropriated funds may not be used for this purpose.

CONCLUSION

FERC's appropriated funds are not available to indemnify licensees, private landowners, or transportation providers for liability they incur when they negligently cause FERC inspectors to sustain injuries or damages while the inspectors are performing official duties.

Edda Emmanuelli Perez
General Counsel

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[26] B-331090, June 8, 2020 (stating that an agency "may not craft agreements to circumvent legislatively enacted restrictions on its authority"); 55 Comp. Gen. 1059, 1061 (1976) ("It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly."). *Cf. Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'") (citation omitted).

A Closer Look: Miscellaneous Decisions of Interest II

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

Decision

Matter of: United States Department of Agriculture and General Services Administration—Consistency of Lease Incentives with the Miscellaneous Receipts Statute

File: B-334307

Date: August 15, 2023

DIGEST

The U.S. Department of Agriculture (USDA) relocated the National Institute of Food and Agriculture (NIFA) and the Economic Research Service (ERS) to Kansas City, Missouri. As part of the relocation, the General Services Administration (GSA) executed a lease whose price included "free rent" for the first 24 months of the lease. Under the miscellaneous receipts statute, agencies are required to deposit money received for the government in the general fund of the Treasury, unless otherwise authorized by statute. Neither USDA nor GSA received any funds because of the relocation or because of the lease containing the "free rent." Rather, the "free rent" is a part of the lease's fixed price which GSA considered in determining which lessor to select. As a result, neither agency violated the miscellaneous receipts statute.

DECISION

This responds to a request for our decision regarding whether the U.S. Department of Agriculture (USDA) violated the miscellaneous receipts statute when it relocated the National Institute of Food and Agriculture (NIFA) and the Economic Research Service (ERS) to Kansas City, Missouri.[1]

[1] Letter from Representative Jennifer Wexton, Representative Gerald E. Connolly, and Representative Donald S. Beyer, Jr., to Comptroller General (May 6, 2022).

In accordance with our regular practice, we contacted USDA and the General Services Administration (GSA) to seek factual information and the agencies' legal views on this matter.[2] Both USDA and GSA provided responses to our inquiries.[3]

BACKGROUND

In August 2018, the Secretary of Agriculture announced USDA's intention to relocate NIFA and ERS outside of the Washington, D.C. area.[4] On August 15, 2018, USDA requested Expressions of Interest from potential sites for the new ERS and NIFA headquarters location.[5] The request noted that USDA would consider "[l]ower costs and the potential of incentives to offset costs" when reviewing submissions.[6] USDA received 139 expressions of interest across 35 states.[7] In June 2019, USDA announced the selection of Kansas City as the new location for ERS and NIFA.[8] In

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[2] GAO, *Procedures and Practices for Legal Decisions and Opinions,* GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USDA (June 29, 2022); Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting General Counsel, GSA (June 29, 2022).

[3] Email from Associate General Counsel, Research and Law Division, USDA, to Managing Associate General Counsel, GAO (Apr. 3, 2023) (USDA April Response); Email from Associate General Counsel, Research and Law Division, USDA, to Managing Associate General Counsel, GAO (Mar. 27, 2023) (USDA March Response); Letter from Associate General Counsel, Research and Law Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Nov. 4, 2022) (USDA November Response); Letter from Associate General Counsel, Real Property Division, GSA, to Assistant General Counsel for Appropriations Law, GAO (Aug. 12, 2022) (GSA Response).

[4] USDA, *USDA to Realign ERS with Chief Economist, Relocate ERS & NIFA Outside DC* (Aug. 9, 2018), *available at* https://www.usda.gov/media/press-releases/2018/08/09/usda-realign-ers-chief-economist-relocate-ers-nifa-outside-dc.

[5] *Notice of Request for Expression of Interest for Potential Sites for Headquarters Office Locations,* 83 Fed. Reg. 40499 (Aug. 15, 2018).

[6] *Id.*

[7] GAO, *Evidence-Based Policy Making: USDA's Decision to Relocate Research Agencies to Kansas City Was Not Fully Consistent with an Evidence-Based Approach,* GAO-22-104540, at 1 (Washington, D.C.: Apr. 19, 2022).

[8] USDA, *Secretary Perdue Announces Kansas City Region as Location for ERS and NIFA* (June 13, 2019), *available at* https://www.usda.gov/media/press-

its announcement, USDA highlighted $26 million in incentives that state and local entities offered.[9]

To support the relocation, GSA sought to lease office space for USDA's use and issued a Request for Lease Proposals that closed August 7, 2019.[10] The advertisement stated:

> The U.S. General Services Administration is not involved with, or a party to, any concessions or other incentives offered by state or local municipalities. Offerors shall coordinate any such concessions or other incentives with the local jurisdiction(s), as applicable, and price their rental rates accordingly in order for the Government to benefit from all economic incentives offered by state and/or local municipalities.[11]

The Request for Lease Proposals also directed offerors to include rent concessions in their offers and explained that the gross annual price would be adjusted to reflect "free rent."[12]

On October 31, 2019, GSA signed a contract for the lease of office space.[13] The lease provided "free rent" for the first twenty-four months of the lease, resulting in no

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releases/2019/06/13/secretary-perdue-announces-kansas-city-region-location-ers-and-nifa (hereinafter USDA Announcement). For more information regarding the process USDA used to select the Kansas City region for the relocation, see GAO-22-104540, at 1.

[9] USDA Announcement.

[10] GSA Response, at 3; GSA, *Lease of Office Space within Region 6 RLP #19-REG06 – OFFICE SPACE* (GSA Ad).

[11] GSA Response, at 3; GSA Ad.

[12] GSA Response, at 3; GSA, *Request for Lease Proposals No. 19-REG06 Heartland Region,* at 3.04 (GSA RLP). GSA notes that under "well-known commercial practice . . . lessors offer 'free' rent at the beginning of a lease term to attract potential tenants" and that, in its letter to us, it "referred to the lease's provision that GSA need not pay rent for the first 24 months of the lease as 'free' rent. However, 'free' rent is more appropriately viewed as one of a number of various incentives that a landlord may offer to prospective tenants." GSA Response, at 6. We make similar references to "free" rent throughout this decision.

[13] GSA, Lease No. GS-06P-LMO00314 (Oct. 31, 2019) (GSA Lease).

cost to the government for two years.[14] GSA subsequently signed occupancy agreements with NIFA and ERS for use of the leased space.[15]

On November 13, 2019, a USDA official signed a Memorandum of Agreement (MOA) with the State of Missouri and other state and local entities, memorializing the incentives that state and local entities offered to support the relocation.[16] The MOA notes that the incentives "are based on an assumed 253 employees for [ERS] . . . and 315 employees for [NIFA]."[17] The incentives generally fell into three categories: benefits accruing to USDA; benefits accruing to USDA employees; and benefits that would accrue to the lessor of space leased for USDA's use.[18]

Regarding the first category of incentives, according to USDA, the agency has not accepted any funds under the MOA.[19] Nor has GSA accepted any incentives.[20] For benefits accruing to USDA employees, USDA employees were instructed not to accept any incentives unless the incentives were available to all federal employees, and USDA is unaware of any employees accepting incentives in contravention of that advice.[21] As a result, this decision does not address whether incentives offered to USDA employees would violate the miscellaneous receipts statute.

DISCUSSION

At issue here is whether USDA and GSA violated the miscellaneous receipts statute. We first consider whether either agency received funds, as such funds may be miscellaneous receipts. We then consider whether the lease and the MOA require a

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[14] *Id.* at 1.03(C).

[15] GSA, *Occupancy Agreement #AMO06191* (Mar. 9, 2021) (NIFA Occupancy Agreement); GSA, *Occupancy Agreement #AMO06190* (Oct. 10, 2019) (ERS Occupancy Agreement).

[16] Memorandum of Agreement between United States Department of Agriculture and the State of Missouri (Nov. 13, 2019) (hereinafter USDA MOA).

[17] USDA MOA, Art. II(A).

[18] USDA Response, at 2; USDA MOA, Art. II(B).

[19] USDA April Response.

[20] GSA Response, at 4.

[21] USDA April Response.

third party to bear the government's legal liabilities in contravention of the miscellaneous receipts statute.

Under the miscellaneous receipts statute, an official receiving "money for the Government" must deposit the money in the Treasury. 31 U.S.C. § 3302(b). This requirement advances the primary purpose of the statute, which is to ensure that Congress retains control of the public purse, thereby protecting Congress's constitutional power to appropriate public money. B-327830, Feb. 8, 2017; B-325396, Feb. 23, 2015. Funds constitute "money for the Government" if they are to be used to bear the expenses of the government or to pay its obligations. B-325396, Feb. 23, 2015. Here, neither USDA nor GSA has received any funds as a result of the relocation.[22]

However, agencies cannot circumvent the miscellaneous receipts statute's requirements by structuring a transaction so that no agency employee ever receives the money. B-327830, Feb. 8, 2017 (A third-party could not pay an agency's legal liabilities.); *Motor Coach Industries v. Dole,* 725 F.2d 958 (4th Cir. 1984) (fee receipts were "money for the Government" even where no agency employee received the fees). The key factor in determining whether a third party's receipt of funds implicates the miscellaneous receipts statute is whether those funds reduce or eliminate a legal liability that would otherwise be borne by the agency.

We have addressed this issue in numerous cases, including ones involving contracts where an agency is legally obligated to make payments but has another party make the payments directly to the contractor. For example, among the functions of the

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[22] USDA April Response; GSA Response, at 4. In its response to us, USDA asserted that it is authorized to accept incentives under the MOA pursuant to its gift acceptance authority, even though it has not done so. USDA's gift acceptance authority provides that the Secretary of Agriculture may accept gifts of real and personal property for the benefit of the United States Department of Agriculture or for the carrying out of any of its functions. 7 U.S.C. § 2269. Gifts are "gratuitous conveyances or transfers of ownership in property without any consideration." B-286182, Jan. 11, 2001.

A receipt that does not meet this definition does not become a gift merely because the agency characterizes it as one. *See, e.g.,* 25 Comp. Gen. 637 (1946). The MOA offers incentives "based on an assumed 253 employees for [ERS] with an average wage of $120,000, and 315 employees for [NIFA] with an average wage of $116,000." USDA MOA, Art. II(A). In addition, USDA agreed to complete applications and contracts, submit reports, and pay applicable application fees to receive some of the incentives offered under the MOA. USDA should consider whether these promises, and the very fact of UDSA's relocation, constitute consideration offered in exchange for the incentives before turning to its gift acceptance authority.

Small Business Administration (SBA) was oversight of lenders who made SBA-guaranteed loans. B-300248, Jan. 15, 2004. SBA used a contractor to assist with this oversight function. *Id*. Rather than paying the contractor from its appropriations, SBA required the lenders to pay a fee directly to the contractor. *Id*. Because these fees satisfied a government obligation arising from a contract, funds used to pay these contractors were "money for the Government" under the miscellaneous receipts statute. *Id*.

In another example, the Commodity Futures Trading Commission (CFTC) violated the miscellaneous receipts statute when it arranged for its landlords to pay CTFC's legal liabilities. B-327830, Feb. 8, 2017. CFTC incurred obligations to make payments to third-party contractors, representing legal liabilities for the government. CFTC's lease agreements required the landlords, rather than CFTC, to make the payments to the third-parties. *Id.* As a result, the landlords would discharge a legal liability of the government, and CFTC would avoid using its own appropriations to make the payments. These arrangements violated the miscellaneous receipts statute. *See also* B-265727, July 19, 1996 (Securities and Exchange Commission (SEC) violated the miscellaneous receipts statute when it arranged for a sub-lessee to make payments to satisfy SEC's obligation to pay rent.).

In contrast, the receipt of services for a discounted price does not implicate the miscellaneous receipts statute, so long as the discount is not the result of a third party making payments the government would otherwise be legally required to make. For example, GSA entered into a no-cost contract for real estate brokerage services that did not violate the miscellaneous receipts statute. B-302811, July 12, 2004; B-291947, Aug. 15, 2003. Under the proposed contract, brokers would provide lease acquisition and related services to federal agencies without cost to the government, with the brokers' compensation taking the form of commissions paid by lessors. The distinguishing feature of this arrangement was that GSA would have no financial liability to brokers, and the brokers would have no expectation of payment from GSA. B-302811, July 12, 2004. If a lessor failed to pay a broker, the broker would have no claim against GSA. *Id. See also* B-327830, Feb. 08, 2017 (negotiated reductions in monthly rent were legally permissible); 48 Comp. Gen. 497 (1969) (a rental contract with monthly rental credits applied during the final months of the rental period is acceptable).

Here, the incentives the lessor may receive as a result of USDA's relocation do not violate the miscellaneous receipts statute. As a threshold matter, the federal government would not receive any incentive payments that a state or local entity may make to the lessor. Even so, we must consider whether these incentive payments reduce or eliminate a legal liability of the government.

To determine the extent of the government's legal liability here, we look to the terms of the lease. The lease constitutes the entire agreement of the parties, so we need not consult other agreements to determine the amount of the government's legal

liability. [23] The lease requires the government to pay rent at a fixed price.[24] The lease does not incorporate the MOA between USDA and state and local entities or the incentives themselves.[25] The extent of the government's legal liability, then, is the fixed price outlined in the lease.

Next, we consider whether the lessor incentives reduce or eliminate the government's legal liability. Importantly, the lease does not make the fixed price contingent upon the lessor's receipt of incentives from state and local entities and provides no concessions if such incentives fail to materialize.[26] This arrangement is akin to GSA's real estate brokerage agreement, where GSA bore no financial responsibility if a lessor failed to pay a commission. B-302811, July 12, 2004; B-291947, Aug. 15, 2003. Similarly, here, the lessor bears the risk, and the government's legal liability does not change, if the offered incentives do not materialize. Therefore, incentives paid to the lessor are not a third-party payment made to reduce or eliminate the government's legal liability.

Nor does the lease contemplate or require any third-party payments on GSA's behalf. Similarly, we are unaware of any other agreements between GSA and third parties that would require the third party to make GSA's rental payments. This distinguishes GSA's lease from the agreements entered into by SBA and CFTC, which required third parties to bear costs that the government would otherwise have borne. *See* B-300248, Jan. 15, 2004; B-327830, Feb. 8, 2017.

Instead, the finalized lease provides for 24 months of "free rent," resulting in no cost to the government for the first two years of the lease.[27] This "free rent" is a part of the lease's fixed price which GSA considered in determining which lessor to select. GSA accounted for offers of "free rent" in its assessment of bids by adjusting the gross annual price and selected a lessor based on these adjusted prices.[28] In this way, the "free rent" is similar to other concessions or discounts an offeror might

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[23] GSA Lease, at Ex. C.

[24] GSA Lease, at 4.

[25] In fact, GSA made clear that it was not a party to any incentives offered by state and local entities. GSA Response, at 3; GSA Ad.

[26] *See* GSA Lease; GSA Response, at n.17. In their responses to us, USDA and GSA both explained they had no knowledge of whether the lessor has actually received any incentives. USDA April Response; GSA Response, at 1.

[27] GSA Lease, at 4, 5.

[28] GSA Response, at 6.

propose to win a government contract.[29] GSA and the lessor incorporated the "free rent" into their agreement, and the "free rent" does not represent an amount that a third party will pay to the lessor to reduce the government's legal liability. Therefore, GSA's lease does not violate the miscellaneous receipts statute.

CONCLUSION

Neither USDA nor GSA violated the miscellaneous receipts statute when USDA relocated NIFA and ERS to the Kansas City region. Neither agency received any funds due to the relocation, and no third party is making payments to reduce or eliminate the government's legal liabilities.

Edda Emmanuelli Perez

Edda Emmanuelli Perez
General Counsel

[29] *See, e.g.,* B-327830, Feb. 08, 2017 (negotiated reductions in monthly rent were legally permissible); 48 Comp. Gen. 497 (a rental contract with monthly rental credits applied during the final months of the rental period is acceptable).

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Decision

Matter of: Department of the Interior, National Park Service—Availability of Appropriations for Nonmonetary Awards to Private Individuals

File: B-334711

Date: June 5, 2023

DIGEST

The Department of the Interior (Interior) asks whether it may obligate funds appropriated in the Department of the Interior, Environment, and Related Agencies Appropriations act to purchase a nonmonetary award, such as a plaque, to give to a state government employee who contributed to National Park Service programs. Generally, appropriated funds are not available for gifts. While the Government Employees' Incentives Awards Act authorizes agencies to purchase awards for federal employees who contribute significantly to agency programs, it does not cover nonfederal employees. Interior, however, retains specific authority under section 115 of the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1992 to purchase nonmonetary awards for private individuals who contribute to Interior's programs. We conclude that section 115's language applies to future fiscal years and encompasses state employees; thus, Interior may obligate funds to purchase this award.

DECISION

A certifying officer in the Department of the Interior (Interior), National Park Service (Park Service), requested our decision under 31 U.S.C. § 3529 on whether the Park Service retains authority to purchase a nonmonetary award for a state government employee who contributed to Park Service programs.[1] Appropriated funds are generally unavailable for personal gifts such as a plaque unless the purchase is specifically authorized by law. *See* B-223447, Oct. 10, 1986; 45 Comp. Gen. 199 (1965); 5 Comp. Gen. 344 (1925). While the Government Employees' Incentives Awards Act provides broad authority for agencies to purchase awards for federal employees who contribute significantly to agency programs, the Act does not apply

[1] Letter from Comptroller, Interior Region 11, National Park Service, to General Counsel, GAO (October 4, 2022) (Request Letter).

where the recipient is not a federal employee.[2] Interior, however, retains specific authority to purchase nonmonetary awards for private individuals who significantly contribute to Interior programs under section 115 of the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1992.[3] As discussed below, we conclude that this provision applies to current fiscal year appropriations and encompasses state employees. Therefore, Interior may obligate funds for the purchase of such an award.

In accordance with our regular practice, we contacted the Department of the Interior (Interior) to seek additional factual information and its legal views on this matter.[4] Interior responded with its explanation of the pertinent facts and legal analysis.[5]

BACKGROUND

Section 115 of the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1992 provides:

> "Notwithstanding any other provision of law, in fiscal year 1992 and thereafter, any appropriations or funds available to the Department of the Interior in this Act may be used to provide nonmonetary awards of nominal value to private individuals and organizations that make contributions to Department of the Interior programs."

Pub. L. No. 102-154, title I, § 115, 105 Stat. 990, 1012 (Nov. 13, 1991), 43 U.S.C. § 1473b.

The Park Service seeks to award a plaque or other nonmonetary award to a state government employee who significantly contributed to regional efforts. Request Letter. The Park Service will obligate funds appropriated to it under the heading "Operation of the National Park System." *See, e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. G, title I, 136 Stat. 49, 353 (2022).

DISCUSSION

At issue here is whether section 115's language permits the Park Service to obligate an amount against future fiscal year appropriations to purchase a nonmonetary

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[2] 5 U.S.C. § 4501.

[3] 43 U.S.C. § 1473b.

[4] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/GAO-06-1064SP.

[5] Letter from Senior Counselor, Office of the Solicitor, Interior, to Assistant General Counsel for Appropriations Law, GAO (December 15, 2022) (Response Letter).

award for a state government employee. This issue raises two questions: (1) whether section 115's authority in Interior's fiscal year 1992 appropriations act extends to Interior's future appropriations and (2) whether the authority to purchase awards for private individuals encompasses state government employees. For the reasons explained below, we conclude that section 115 permits the Park Service to obligate its current Operation of the National Park System appropriation for this purpose.

We first examine whether the language of the fiscal year 1992 appropriation permits the Park Service to obligate amounts appropriated in its current appropriation. Generally, a provision in an annual appropriations act is only effective for that fiscal year because appropriations are by nature nonpermanent legislation. B-319414, June 9, 2010. However, this presumption of nonpermanence can be overcome. The most important factor in ascertaining congressional intent is the language of the statute itself. B-309704, Aug. 28, 2007. The clearest sign of congressional intent that a provision be permanent is the presence of words of futurity. *Id*.

Here, the plain meaning of the language applies authority to purchase these awards to "fiscal year 1992 and thereafter." These are words of futurity that expressly indicate permanent intent. *See Auburn Housing Authority v. Martinez*, 277 F.3d 138, 146 (2nd Cir. 2002); B-316510, July 15, 2008; B-287488, June 19, 2001.

A related consideration is whether section 115's reference to funds appropriated "*in this Act*" (emphasis added) constrains the reach of section 115 to amounts appropriated in the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1992 or if, instead, this authority remains available to Interior for amounts appropriated in later acts. If purchases of all nonmonetary awards must be obligated using only fiscal year 1992 funds, section 115's words of futurity could be rendered meaningless. Instead, we give effect to both the clear words of futurity and the limitation of "in this Act" by reading section 115 to apply to the fiscal year 1992 Department of the Interior and Related Agencies Appropriations Act as well as to successor acts enacted in subsequent years.[6] The current Department of the Interior, Environment, and Related Agencies Appropriations act is such a successor act, as it makes appropriations to substantially the same agencies and bureaus as did the 1992 act, including the National Park Service.[7] In the presence of

[6] We note section 115's reach extends only to acts that succeeded the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1992. For example, Interior receives several appropriations under the Energy and Water Development and Related Agencies Appropriations Act that fall outside of section 115's ambit. *See, e.g.*, Pub. L. No. 117-103, div. D, title II, 136 Stat. 49, 218 (Mar. 15, 2022).

[7] In fiscal year 2006, the name of the Act that funded these agencies and activities changed from the "Department of the Interior and Related Agencies Appropriations Act" to the "Department of the Interior, Environment, and Related Agencies

unambiguous words of futurity, section 115 applies to current year Operation of the National Park System funds as well as to those successor acts enacted since fiscal year 1992.

Second, we consider whether the current Operation of the National Park System appropriation is available for the purpose that the Park Service contemplates here. As an initial matter, we note that the plaque or other recognition item that the Park Service seeks to purchase falls within the purposes contemplated by section 115. Appropriated funds are unavailable for personal gifts such as plaques unless the purchase is specifically authorized by law. *See* B-223447, Oct. 10, 1986; 45 Comp. Gen. 199 (1965); 5 Comp. Gen. 344 (1925). Here, the language of the statute authorizes Interior to "provide nonmonetary awards of nominal value." Pub. L. No. 102-154, title I, § 115. A reasonable reading of "nonmonetary award" clearly encompasses a plaque or other visible, nonmonetary recognition display item.

Because section 115 authorizes Interior to make awards to "*private* individuals and organizations" (emphasis added), we must also consider whether the Park Service may obligate funds towards awarding an individual who is a state government employee. As in any exercise of statutory interpretation, we must read the words of the statute in the context of the overall statutory scheme. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); B-328016, Sept. 29, 2016, at 4. The Government Employees' Incentive Awards Act (GEIAA) authorizes agencies to obligate funds to purchase recognition awards for employees who contribute to the mission or improvement of the agency or who serve the public interest through notable work. 5 U.S.C. §§ 4501–4506. However, GEIAA permits agencies to make such awards only to federal employees. 5 U.S.C. § 4501; *see also* B-160419, July 28, 1967.

Here, section 115's authority to make awards to "private individuals" complements GEIAA's authority to make awards to federal employees. Section 115 vests Interior with limited authority to make nominal nonmonetary awards to nonfederal individuals who are outside GEIAA's ambit. Informed by this statutory scheme, we read "private individuals" to encompass nonfederal individuals, including state government employees who make a requisite contribution to Department of the Interior programs.

CONCLUSION

The Department of the Interior may obligate amounts appropriated in its current Department of the Interior, Environment, and Related Agencies Appropriations act to

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Appropriations Act." *See* Pub. L. No. 109-54, title I, 119 Stat. 499, 507 (Aug. 2, 2005).

purchase a plaque or other nonmonetary award of nominal value to recognize a state government employee's contributions to Interior programs.

Edda Emmanuelli Perez
General Counsel

Resources

https://www.gao.gov/legal/appropriations-law/forum
• Provides an overview of GAO's annual appropriations law forum, and includes copies of forum materials for this year, and prior years.

https://www.gao.gov/legal/appropriations-law/red-book
• Provides links to Chapters 1-3 of the 4th Edition and Chapters 5-15 of the 3rd Editions of the Red Book—GAO's multi-volume treatise concerning federal fiscal law. For questions about our case law, the Red Book, or federal fiscal law more generally, please e-mail redbook@gao.gov.

https://www.gao.gov/legal/appropriations-law/resources
• Provides an overview of the Antideficiency Act, agencies' reporting responsibilities, and information about how to submit reports to GAO; in addition, provides links to GAO's Antideficiency Act Reports Compilation through fiscal year 2022. For questions about the Antideficiency Act or to submit Antideficiency Act reports to GAO, please e-mail AntideficiencyActrep@gao.gov.

https://www.gao.gov/legal/appropriations-law/appropriations-law-training
• Provides an overview and registration for GAO's virtual and in-person Principles of Appropriations Law (PAL) course, which is taught by experienced GAO appropriations law attorneys. For questions about the PAL course, please e-mail PALCourse@gao.gov.

https://www.gao.gov/products/gao-05-734sp
• Copy of GAO's *A Glossary of Terms Used in the Federal Budget Process* (Budget Glossary), which provides standard terms, definitions, and classifications for the government's fiscal, budget, and program information. To provide feedback on the Budget Glossary, please e-mail budgetglossary@gao.gov.

https://www.gao.gov/legal/federal-vacancies-reform-act
• Provides an overview of the Federal Vacancies Reform Act of 1998, including a description of GAO's responsibilities under the act, and information about how agencies can report information required by the act. In addition, provides links to GAO decisions regarding compliance with the act and time violation letters, and a search tool to find information about federal vacancies for the current administration.

https://www.gao.gov/legal/other-legal-work/congressional-review-act
• Provides an overview of the Congressional Review Act, including a description of GAO's responsibilities under the act, and information about how agencies can report information required by the act. In addition, provides links to GAO's major rule reports and GAO decisions regarding compliance with the act as well as access to a search database of rules and major rule reports.

Contributors

The 2023 Appropriations Law Forum was organized by the Appropriations Law Group (AL) within GAO's Office of the General Counsel. AL attorneys write appropriations law decisions, provide legal support to internal GAO clients, teach the Principles of Appropriations Law course, and respond to requests for informal technical assistance from officials and staff in all three branches of the federal government. AL attorneys are also in the process of updating the *Principles of Federal Appropriations Law* treatise and *A Glossary of Terms Used in the Federal Budget Process.* AL also maintains a repository for Antideficiency Act violations reported by executive branch agencies and issues an annual summary report. Lastly, the group also carries out statutory responsibilities under the Congressional Review Act, the Davis-Bacon Act, and the Federal Vacancies Reform Act.

The group is led by Shirley A. Jones, Managing Associate General Counsel, Omari Norman, Assistant General Counsel for Appropriations Law, Shari Brewster, Assistant General Counsel for Appropriations Law, and Charlie McKiver, Assistant General Counsel for Appropriations Law. The team includes Aimee Aceto, Gary Allen, Christina Chan, Ann Marie Cortez, Holly Firlein, Juan Garay, Corey Garlick, Kristine Hassinger, Jeffery Haywood, Andrew Howard, Dana Ledger, Karly Newcomb, Daniel Rathbun, Daniella Royer, Doug Sahmel, Will Shakely, Heather Stryder, Laura Wait, and Nicole Willems. The team receives support from the Appropriations Law Support Branch (ALSB). ALSB is led by Barbara Galimore-Williams, Manager, and includes three paralegals, Naarah Jackson, Lydia Koeller, and Aisha Patel-Smith, one clerk, Beth Sodee, and one intern, Miranda Fair.