

The logo for GAO@100, featuring the text "GAO@100" in a bold, blue, sans-serif font. The "@" symbol is stylized with a white swoosh that loops around the "100".

GAO@100

A Century of Non-Partisan Fact-Based Work



Images: Architects of the Capitol

2021 APPROPRIATIONS LAW FORUM

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

2021 Appropriations Law Forum

Summary of Materials

Page

1	Agenda
3	List of GAO Appropriations Law Decisions
7	Digests of Appropriations Law Decisions
37	Looking Back at the Impoundment Control Act of 1974: Examining Select Decisions
91	Year in Review: Earmarks and Reprogrammings
110	Perspectives: Testimony on the Power of the Purse Act
126	Year in Review: Interagency and Other Transactions Topics of Interest
145	Appropriations Law and Personal Expenses in the Time of COVID-19
167	Resources
168	Contributors

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



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

Agenda

9:00am Opening Remarks

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

9:05am Appropriations Law: A Year in Review

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

9:30am Perspectives: Our Shared Journey of Appropriations Law

Thomas H. Armstrong, General Counsel
Government Accountability Office

**9:55am Looking Back at the Impoundment Control Act of 1974:
Examining Select Decisions**

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

Kristine Hassinger, Senior Attorney
Government Accountability Office

Andrew Howard, Senior Staff Attorney
Government Accountability Office

10:25am Year in Review: Earmarks and Reprogrammings

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

Melissa Jamison, Senior Attorney
Government Accountability Office

Doug Sahmel, Senior Attorney
Government Accountability Office

10:55am Break

11:05am Perspectives: Testimony on the Power of the Purse Act

Edda Emmanuelli-Perez, Deputy General Counsel
Government Accountability Office

**11:25am Year in Review: Interagency and Other Transactions
Topics of Interest**

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

John Formica, Senior Attorney
Government Accountability Office

Nicole Willems, Senior Attorney
Government Accountability Office

Holly Firlein, Senior Staff Attorney
Government Accountability Office

11:55am Appropriations Law and Personal Expenses in the Time of COVID-19

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

Nihar Vora, Senior Attorney
Government Accountability Office

Paul Blenz, Senior Staff Attorney
Government Accountability Office

Heather Stryder, Staff Attorney
Government Accountability Office

12:25pm Closing Remarks

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

**List of GAO Appropriations Law Decisions
May 2020 to June 2021**

**Office of the Special Inspector General for the Troubled Asset Relief Program—
Use of Amounts for Oversight Activities**

B-330984, May 27, 2020

**U.S. Department of Transportation—Federal Aviation Administration
Reimbursable Work Agreement**

B-331090, June 8, 2020

**U.S. Customs and Border Protection—Obligations of Amounts Appropriated in
the 2019 Emergency Supplemental**

B-331888, June 11, 2020

**Executive Agencies—Communications about the 2019 Fourth of July Events on
the National Mall**

B-331262, June 17, 2020

U.S. Department of Agriculture—Early Payment of SNAP Benefits

B-331094, June 25, 2020

**U.S. Department of Agriculture—Operations of the Farm Service Agency during
the Fiscal Year 2019 Lapse in Appropriations**

B-331092, June 29, 2020

**U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year
2019 Lapse in Appropriations**

B-331093, June 30, 2020

Updated Rescission Statistics, Fiscal Years 1974–2020

B-330828, July 16, 2020

**National Archives and Records Administration—Publication of Federal
Register during the Fiscal Year 2019 Lapse in Appropriations**

B-331091, July 16, 2020

U.S. Department of Agriculture—Anti-Lobbying Provisions

B-330095, July 22, 2020

**Office of Management and Budget—Regulatory Review Activities during the
Fiscal Year 2019 Lapse in Appropriations**

B-331132, Aug. 6, 2020

**Office of Navajo and Hopi Indian Relocation—Compliance with the Purpose
Statute and the Miscellaneous Receipts Statute**

B-329446, Sept. 17, 2020

U.S. Department of the Interior—Operation of the Old Post Office Observation Tower during the Fiscal Year 2019 Lapse in Appropriations
B-330775.1, Oct. 1, 2020

Social Security Administration—Application of Reprogramming Notification Requirement
B-329964, Oct. 8, 2020

U.S. Commodity Futures Trading Commission—Obligation of Amounts for Whistleblower Awards
B-329712, Oct. 15, 2020

U.S. Election Assistance Commission—Application of Account Closing Law to Election Security Grants Awarded and Disbursed to States
B-331892, Nov. 19, 2020

U.S. Maritime Administration—Gift Funds for Food
B-330494, Nov. 24, 2020

U.S. Department of the Interior—Reimbursement of Transportation Expenses
B-329479, Dec. 22, 2020

Department of Commerce Office of Inspector General—Application of Reprogramming Notification Requirement
B-330108, Dec. 23, 2020

Department of Commerce—Application of the Impoundment Control Act to Appropriations Enacted in Fiscal Years 2018 and 2019
B-331298, Dec. 23, 2020

U.S. Commission on Civil Rights—Availability of Funds for the Commission on the Social Status of Black Men and Boys Act
B-332530, Feb. 18, 2021

Impoundment Control Act of 1974—Release of Withheld Amounts Due to Withdrawal of Rescission Proposals
B-332868, Feb. 24, 2021

Government of the District of Columbia—Application of an Appropriations Act Prohibition and the Antideficiency Act to a D.C. Bill
B-331312, Mar. 8, 2021

U.S. Chemical Safety and Hazard Investigation Board—Independent Statutory Authority to Enter into Interagency Agreements
B-331739, Mar. 18, 2021

Testimony before the House Committee on the Budget—Proposals to Reinforce Congress’s Constitutional Power of the Purse

B-333181, Apr. 29, 2021

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

B-332393, May 5, 2021

Update on Decision regarding Border Wall Pause and the Impoundment Control Act

B-333110, June 2, 2021

Privacy and Civil Liberties Oversight Board—Reimbursement for Employees’ Home-to-Work Travel via Taxi or Rideshare Service

B-332633, June 3, 2021

Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations

B-333110, June 15, 2021

**Digests of GAO Appropriations Law Decisions
May 2020 to June 2021**

Matter of: Office of the Special Inspector General for the Troubled Asset Relief Program—Use of Amounts for Oversight Activities

File: B-330984

Date: May 27, 2020

Amounts provided to the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) by the Public-Private Investment Program Improvement and Oversight Act of 2009 (PPIP Act) are available to SIGTARP to carry out its authorities under the Emergency Economic Stabilization Act of 2008 (EESA). Though the PPIP Act requires SIGTARP to “prioritize” particular activities when utilizing amounts provided by such act, it may still use these amounts for other authorized purposes, such as to carry out activities authorized by EESA. Because the amounts made available to SIGTARP in the PPIP Act are available as an additional amount to carry out activities authorized by EESA, SIGTARP may use these amounts and its other appropriations, including its annual salaries and expenses appropriation, to carry out such activities.

Matter of: U.S. Department of Transportation—Federal Aviation Administration
Reimbursable Work Agreement

File: B-331090

Date: June 8, 2020

In fiscal year 2019, the Federal Aviation Administration (FAA) entered into a reimbursable work agreement to perform aircraft certification services for an airline. We conclude that FAA obligated available budget authority to provide the services, and therefore did not violate the Antideficiency Act. FAA charged the airline a fee for the services FAA provided without authority to do so. As such, FAA must refund improperly collected amounts to the airline.

Matter of: U.S. Customs and Border Protection—Obligations of Amounts Appropriated in the 2019 Emergency Supplemental

File: B-331888

Date: June 11, 2020

Supplemental appropriations enacted in fiscal year 2019 for U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security included line item appropriations for “consumables and medical care” and “establishing and operating migrant care and processing facilities.” CBP obligated these line item appropriations for goods and services for which the line items were not available. Accordingly, we conclude that CBP violated the purpose statute. CBP should adjust its accounts to obligate the account available for the appropriate purpose. If CBP lacks sufficient budget authority to make the adjustments, then it should report a violation of the Antideficiency Act as required by law.

Matter of: Executive Agencies—Communications about the 2019 Fourth of July Events on the National Mall

File: B-331262

Date: June 17, 2020

Executive agencies' communications to the public about the 2019 Fourth of July events on the National Mall did not violate the prohibitions against grassroots lobbying or publicity or propaganda. The communications did not constitute grassroots lobbying because they did not appeal to the public to contact Members of Congress in support of or in opposition to pending legislation. The communications were not covert propaganda because they all clearly identified the authoring agency, nor were they purely partisan or self-aggrandizing. The communications were not purely partisan because they were not devoid of any connection to an official function. Finally, the communications were not self-aggrandizing because they did not engender praise for the agency itself but rather were an exercise of the agencies' legitimate informational function.

Matter of: U.S. Department of Agriculture—Early Payment of SNAP Benefits

File: B-331094

Date: June 25, 2020

GAO notified the President of the Senate and the Speaker of the House of Representatives that the U.S. Department of Agriculture (USDA) violated the Antideficiency Act when it obligated funds in a manner prohibited by law, and that USDA failed to report this violation despite the Act's reporting requirement under 31 U.S.C. § 1351. Under 31 U.S.C. § 1351, agencies must immediately report Antideficiency Act violations to the President and to Congress, while transmitting a copy of the report to the Comptroller General. The report must state all relevant facts and actions taken. On May 21, 2020, USDA notified GAO that it does not plan to report the Antideficiency Act violation identified by GAO in a decision that was issued on September 5, 2019.

Matter of: U.S. Department of Agriculture—Operations of the Farm Service Agency during the Fiscal Year 2019 Lapse in Appropriations

File: B-331092

Date: June 29, 2020

During the fiscal year 2019 lapse in appropriations, the Farm Service Agency (FSA) in the U.S. Department of Agriculture (USDA) incurred obligations to perform various activities and ultimately recalled employees in all county offices back to work. FSA lacked available budget authority for these activities.

USDA permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations to prevent imminent threat to the federal government's security interests. However, USDA violated the Antideficiency Act when it incurred obligations to operate FSA county offices for regular, ongoing functions through December 28, 2018, and, subsequently, to provide warehouse receipts, process payments, sign checks, and implement farm programs. USDA must report the violation as required by 31 U.S.C. § 1351, and describe actions taken to prevent recurring violations in the event of future funding lapses. With this decision, we will consider such violations in the future to be knowing and willful violations of the Act.

Matter of: U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year 2019 Lapse in Appropriations

File: B-331093

Date: June 30, 2020

GAO notified the President of the Senate and the Speaker of the House of Representatives that the U.S. Department of the Treasury (Treasury) violated the Antideficiency Act when it obligated funds in a manner prohibited by law, and that Treasury failed to report this violation despite the Act's reporting requirement under 31 U.S.C. § 1351. Under 31 U.S.C. § 1351, agencies must immediately report Antideficiency Act violations to the President and to Congress, while transmitting a copy of the report to the Comptroller General. The report must state all relevant facts and actions taken. On June 9, 2020, Treasury notified GAO that it does not plan to report the Antideficiency Act violation identified by GAO in a decision that was issued on October 22, 2019.

Matter of: Updated Rescission Statistics, Fiscal Years 1974–2020

File: B-330828

Date: July 16, 2020

GAO reviewed enacted rescissions from fiscal year 2018 through February 28, 2020 of fiscal year 2020. Congress enacted rescissions totaling \$28,610,434,837 of budget authority during the period of our review and a total of \$408,858,387,012 since the passage of the Impoundment Control Act of 1974 through February 28, 2020 of fiscal year 2020. Of the latter amount, \$25,006,704,717 comprises the dollar amount of Presidential proposals for rescissions that were enacted by Congress. The period of our review included the President's proposed rescissions in his special impoundment message of May 8, 2018. On May 8, 2018, pursuant to the Congressional Budget and Impoundment Control Act of 1974 (ICA), President Trump transmitted to Congress a special message proposing rescissions from 38 appropriation accounts, totaling \$15.349 billion. On June 5, 2018, the President transmitted a supplemental special message to Congress, amending his previous special message by withdrawing four and revising six rescission proposals. The President ultimately proposed rescissions to 34 appropriation accounts, totaling \$14.833 billion. Congress did not enact any of the President's 34 proposals.

Matter of: National Archives and Records Administration—Publication of Federal Register during the Fiscal Year 2019 Lapse in Appropriations

File: B-331091

Date: July 16, 2020

During the fiscal year 2019 lapse in appropriations, the National Archives and Records Administration (NARA) incurred obligations to publish documents in the *Federal Register*, including for regulatory actions by the National Oceanic and Atmospheric Administration, the Department of Labor, and the Centers for Disease Control and Prevention. We conclude here that NARA violated the Antideficiency Act, because NARA did not have specific statutory authority to incur obligations in the absence of available appropriations against which to record such obligations, and no exception to the Antideficiency Act applied. NARA must report the violation as required by 31 U.S.C. § 1351. With this decision, we will consider future obligations of this nature in similar circumstances to be a knowing and willful violation of the Act.

Matter of: U.S. Department of Agriculture—Anti-Lobbying Provisions

File: B-330095

Date: July 22, 2020

In September 2017, the U.S. Secretary of Agriculture made statements urging state foresters to contact Congress to support a “permanent fire funding fix,” and the U.S. Department of Agriculture (USDA) subsequently published a press release that included those statements. These communications constituted grassroots lobbying prohibited by two provisions in the Consolidated Appropriations Act, 2017. USDA violated these provisions when it obligated and expended funds appropriated by the act to prepare and deliver the Secretary’s statements and to develop and publish the associated press release. USDA’s obligation and expenditure of appropriated amounts for this prohibited purpose also violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A).

Matter of: Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations

File: B-331132

Date: Aug. 6, 2020

GAO notified the President of the Senate and the Speaker of the House of Representatives that the Office of Information and Regulatory Affairs in the Executive Office of the President's Office of Management and Budget (OMB) violated the Antideficiency Act when it obligated funds in a manner prohibited by law, and that OMB failed to report this violation despite the Act's reporting requirement under 31 U.S.C. § 1351. In a decision issued on December 19, 2019, GAO concluded that OMB violated the Antideficiency Act when, during a lapse in appropriations, it incurred obligations to review a Department of Labor final rule and notice of proposed rulemaking. Under 31 U.S.C. § 1351, agencies must immediately report Antideficiency Act violations to the President and to Congress, while transmitting a copy of the report to the Comptroller General. The report must state all relevant facts and actions taken. On June 8, 2020, OMB notified GAO that it does not plan to report the Antideficiency Act violation that GAO identified.

Matter of: Office of Navajo and Hopi Indian Relocation—Compliance with the Purpose Statute and the Miscellaneous Receipts Statute

File: B-329446

Date: Sept. 17, 2020

The Office of Navajo and Hopi Indian Relocation (ONHIR) has authority under section 27 of the Navajo-Hopi Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712 (Dec. 22, 1974) (Settlement Act), to obligate a portion of its lump-sum appropriation on expenditures that assist the Navajo and Hopi tribes in meeting the economic burdens imposed by relocations under the Settlement Act. Therefore, ONHIR appropriations were available for the construction of a travel center as well as for the purchase of cattle and other goods and services to establish a cattle demonstration ranch. By contrast, ONHIR lacks the statutory authority necessary to retain or obligate money from the sale of cattle, and violated the miscellaneous receipts statute, 31 U.S.C. § 3302(b), when it failed to deposit money received from the sale of cattle into the Treasury and instead used that money to offset the ranch's operating costs.

Matter of: U.S. Department of the Interior—Operation of the Old Post Office Observation Tower during the Fiscal Year 2019 Lapse in Appropriations

File: B-330775.1

Date: Oct. 1, 2020

The National Park Service (Park Service), U.S. Department of the Interior, incurred obligations related to the reopening and operation of the Old Post Office Building observation tower during the fiscal year 2019 lapse in appropriations.

The Park Service did not violate the Antideficiency Act when it incurred obligations for the salaries of the employees who operated the observation tower during the lapse in appropriations because the Park Service obligated available budget authority. In addition, the Park Service permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations for the salaries of two Park Service officials who signed interagency agreements related to the observation tower with the U.S. General Services Administration during the lapse in appropriations.

Matter of: Social Security Administration—Application of Reprogramming Notification Requirement

File: B-329964

Date: Oct. 8, 2020

The Social Security Administration (SSA) did not violate a reprogramming notification requirement when it established a new office within the agency. SSA established the Office of Analytics, Review and Oversight (OARO) by realigning the functions of six existing offices within the agency. Section 514(a) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017 required SSA to notify and consult with both the House and Senate Appropriations Committees when funds were reprogrammed for certain purposes.

We conclude that SSA did not reprogram funds when it created OARO. As a result, SSA was not required to follow the consultation and notification procedures prescribed by section 514(a).

Matter of: U.S. Commodity Futures Trading Commission—Obligation of Amounts for Whistleblower Awards

File: B-329712

Date: Oct. 15, 2020

The U.S. Commodity Futures Trading Commission (CFTC) has a nondiscretionary duty to pay awards to qualifying whistleblowers from the Customer Protection Fund (CPF), and thus, an award that exceeds the available balance of the fund would not trigger an Antideficiency Act violation. By contrast, in the event that the CPF has insufficient funds, CFTC may not fund the operation of the Whistleblower Office or the Office of Customer Education and Outreach without violating the Antideficiency Act. Neither CFTC's annual lump-sum appropriation, nor previously deposited miscellaneous receipts, would be available to fund their operation.

Matter of: U.S. Election Assistance Commission—Application of Account Closing Law to Election Security Grants Awarded and Disbursed to States

File: B-331892

Date: Nov. 19, 2020

The account closing law, in 31 U.S.C. § 1552, provides that five fiscal years after the period of availability of a fixed-period appropriation account ends, such account shall be closed and any remaining balance in the account shall be canceled. The U.S. Election Assistance Commission (EAC) has already awarded and disbursed to states amounts appropriated for election security grants for fiscal years (FY) 2018 and 2020, the years at issue here, and such amounts are not remaining balances for purposes of the account closing law. Therefore, the FY 2018 and 2020 election security grant funds that have already been disbursed to states remain available for state expenditure consistent with the terms of the underlying grant agreements.

Matter of: U.S. Maritime Administration—Gift Funds for Food

File: B-330494

Date: Nov. 24, 2020

An agency may use unrestricted gift funds held in a trust fund for personal expenses, such as food, if the agency can demonstrate that the expenses are incident to the purposes of the trust. Here, the U.S. Merchant Marine Academy's (Academy) unrestricted gift funds held in a trust fund are available for any activities that further the Academy's mission, including a summit of both federal and nonfederal participants to help the Academy develop a five-year strategic plan. We conclude that the Academy's unrestricted gift funds are available to purchase working lunches for attendees, so long as the lunches will facilitate participation and efficiency.

Matter of: U.S. Department of the Interior—Reimbursement of Transportation Expenses

File: B-329479

Date: Dec. 22, 2020

Absent specific statutory authority, appropriated funds generally are not available for the personal expenses of an employee. However, an agency may use appropriated funds for an expenditure that is ordinarily understood to be personal in nature where such expenditure primarily benefits the government. A Bureau of Ocean Energy Management (BOEM), U.S. Department of the Interior (Interior), employee's travel to a BOEM office in Sterling, Virginia, to perform official duties of his position does not constitute a personal commuting expense because such travel primarily benefits Interior. As such, Interior may reimburse the employee's local travel expenses so long as it does so consistent with its local travel policy.

Matter of: Department of Commerce Office of Inspector General—Application of Reprogramming Notification Requirement

File: B-330108

Date: Dec. 23, 2020

Section 505 of the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2018 requires agencies to notify both the House and Senate Appropriations Committees when funds are reprogrammed for certain purposes. We conclude that the Department of Commerce Office of Inspector General (Commerce OIG) did not reprogram funds when it reorganized its audit, evaluation, and administrative functions because it did not shift funds among the relevant subdivisions of its lump-sum appropriation. As a result, Commerce OIG was not required to follow the notification procedures prescribed by section 505.

Matter of: Department of Commerce—Application of the Impoundment Control Act to Appropriations Enacted in Fiscal Years 2018 and 2019

File: B-331298

Date: Dec. 23, 2020

In recent years, Congress has expressed concern with the number of vacant positions at the National Weather Service in the Department of Commerce, and in 2019, Members of Congress asked us whether the delay in filling vacant positions constituted an impoundment. We are unaware of any instruction from any official to withhold amounts from obligation. The Department of Commerce provided us with the rate of obligation for the appropriations that fund the National Weather Service's personnel costs. These data show that the Weather Service obligated amounts allotted to it at a robust yet measured pace that gives no indication that the agency withheld amounts from obligation. Based on this information, we conclude that the National Weather Service's execution of the relevant appropriations did not violate the Impoundment Control Act of 1974.

Matter of: U.S. Commission on Civil Rights—Availability of Funds for the Commission on the Social Status of Black Men and Boys Act

File: B-332530

Date: Feb. 18, 2021

Due to a recurring provision in the acts providing appropriations for the U.S. Commission on Civil Rights (USCCR), USCCR generally may not use its annual lump-sum appropriation for any activity or expense that is not explicitly authorized by 42 U.S.C. § 1975a. However, USCCR may obligate the earmarked amounts in USCCR's fiscal year 2021 appropriation, which constitute a minimum amount that USCCR may use to fund the recently established Commission on the Social Status of Black Men and Boys (Commission), for activities and expenses that are not explicitly authorized by § 1975a because such amounts are not subject to the limiting proviso. If USCCR also obligates amounts from its fiscal year 2021 lump-sum appropriation to fund the Commission, however, USCCR must determine that the use of funds in excess of the earmarked amount is consistent with the limiting proviso.

Matter of: Impoundment Control Act of 1974—Release of Withheld Amounts Due to Withdrawal of Rescission Proposals

File: B-332868

Date: Feb. 24, 2021

On January 14, 2021, pursuant to the Congressional Budget and Impoundment Control Act of 1974, then-President Trump transmitted to Congress a special message proposing rescissions from 73 appropriation accounts. Where the President properly transmits a special message, an agency may withhold corresponding amounts from obligation for up to 45 calendar days of continuous congressional session. If Congress, within the 45-day period, does not complete action on a bill rescinding the budget authority, then the budget authority proposed to be rescinded must be made available for obligation. On January 31, 2021, President Biden submitted a supplementary special message withdrawing the 73 rescission proposals. We have contacted the agencies whose budget authority was affected by the rescission proposals and have confirmed that they have made the budget authority available for obligation.

Matter of: Government of the District of Columbia—Application of an Appropriations Act Prohibition and the Antideficiency Act to a D.C. Bill

File: B-331312

Date: March 8, 2021

Section 809 of the Financial Services and General Government Appropriations Act, 2019 (section 809) prohibited the obligation or expenditure of funds in fiscal year 2019 “to enact” rules, regulations, or laws legalizing the sale, possession, or use of any schedule I substance. The Mayor and the Council of the District of Columbia obligated and expended funds to take various actions on a bill that would legalize the sale of marijuana in the District of Columbia for nonmedical use. These actions included introducing the bill to the Council and referring it to various Council committees. However, the D.C. government has not enacted the bill into law. The D.C. government officials’ actions did not constitute enactment of the measure, and therefore did not “enact” the legislation into law. As such, the officials did not violate section 809 or the Antideficiency Act.

Matter of: U.S. Chemical Safety and Hazard Investigation Board—Independent Statutory Authority to Enter into Interagency Agreements

File: B-331739

Date: March 18, 2021

This decision recognizes an exception to the general prohibition on transfers of funds between agencies, 31 U.S.C. § 1532. While the Economy Act, 31 U.S.C. § 1535, is one such exception, a provision in the U.S. Chemical Safety and Hazard Investigation Board's (CSB) enabling statute, 42 U.S.C. § 7412(r)(6)(N), is another. It provides CSB with authority to enter into contracts, leases, cooperative agreements or other transactions that are necessary to conduct its duties and functions, with any other agency, institution, or person. Based on the plain language of this provision, we conclude that it provides CSB with specific statutory authority to enter into agreements with other federal agencies, independent of the general Economy Act provisions in 31 U.S.C. § 1535.

Matter of: Testimony before the House Committee on the Budget—Proposals to Reinforce Congress’s Constitutional Power of the Purse

File: B-333181

Date: Apr. 29, 2021

The framers vested Congress with the power of the purse by providing in the Constitution that money may be drawn from the Treasury only as Congress permits through appropriations it makes by law. In 1921, Congress created GAO to assist it in the discharge of its core constitutional powers, including the power of the purse. As part of its exercise of the power of the purse, Congress has vested GAO with statutory responsibilities to investigate and oversee the use of public money.

As we have carried out our responsibilities under the statutory framework governing the obligation and expenditure of appropriated funds, our experiences, for over 100 years now, have revealed some ways that Congress could enhance this legal framework. In this testimony before the House Committee on the Budget, we discuss legislative proposals that would provide more visibility, enhanced transparency, and greater oversight of agency activities. We propose amendments to two key statutes—the Antideficiency Act and the Impoundment Control Act—as well as to statutes pertaining to GAO’s authorities. These proposals would strengthen reporting requirements, reinforce the primacy of Congress’s constitutional appropriations power, and aid GAO as we assist the Congress in the discharge of its constitutional power of the purse.

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

File: B-332393

Date: May 5, 2021

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

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

Matter of: Update on Decision regarding Border Wall Pause and the Impoundment Control Act

File: B-333110

Date: June 2, 2021

Members of Congress requested a status update on GAO's legal decision on whether the border wall pause violates the Congressional Budget and Impoundment Control Act of 1974 (ICA). GAO has a longstanding, deliberative process by which we issue our legal decisions. We reach our conclusions after careful research and independent analysis of statutory and case law as well as consideration of analogous precedent and legal principles. We apply the law to specific and particular facts, which are unique to each case. Receiving input from relevant agencies is an important part of our process of developing facts and ensuring we understand the agency's legal justification for its actions. We solicited and received timely responses from the Office of Management and Budget (OMB) and the Department of Homeland Security (DHS) on this matter, consistent with the deadlines we established for OMB and DHS. Our decision on whether the pause violates the ICA is currently being developed in accordance with our longstanding, deliberative process.

Matter of: Privacy and Civil Liberties Oversight Board—Reimbursement for Employees' Home-to-Work Travel via Taxi or Rideshare Service

File: B-332633

Date: June 3, 2021

Absent specific statutory authority, appropriated funds generally are not available for the personal expenses of an employee such as commuting expenses. A Privacy and Civil Liberties Oversight Board (PCLOB) employee traveled from home to work via taxi or rideshare services. While transit subsidies are available to employees who use public transportation, we are aware of no statutory authority permitting PCLOB to pay for employee commutes via taxi or rideshare services. PCLOB, therefore, may not use appropriated funds to reimburse an employee for this home-to-work travel.

Matter of: Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations

File: B-333110

Date: June 15, 2021

Congress has appropriated funds to the Department of Homeland Security (DHS) specifically for constructing fencing or barrier system at the southern border of the United States, commonly referred to as the border wall. On January 20, 2021, the President issued a Proclamation directing a pause in the construction of the border wall and a pause in obligation of funds for the wall.

DHS has almost fully obligated funds appropriated in previous fiscal years for border fence or barrier construction projects, and suspended work on some projects. DHS has not yet obligated funds appropriated in fiscal year 2021.

We conclude that delays in the obligation and expenditure of DHS's appropriations are programmatic delays, not impoundments. DHS and the Office of Management and Budget (OMB) have shown that the use of funds is delayed in order to perform environmental reviews and consult with various stakeholders, as required by law, and determine project funding needs in light of changes that warrant using funds differently than initially planned. As explained below, because the delay here is precipitated by legal requirements, the delay is distinguishable from the withholding of Ukraine security assistance funds.

In order to facilitate Congress's oversight of executive spending and its Constitutional power of the purse, the congressional oversight and appropriations committees should consider requiring OMB and DHS to submit a timeline detailing the planned uses and timeframes for obligating DHS's fiscal year 2021 appropriation. A detailed timeline could serve as a tool for rigorous oversight to ensure the President does not substitute his own policies and priorities in place of those established through the legislative process.

Looking Back at the Impoundment Control Act of 1974: Examining Select Decisions



G A O

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

B-291241

October 8, 2002

The Honorable Herb Kohl
Chairman
The Honorable Thad Cochran
Ranking Minority Member
Subcommittee on Agriculture, Rural
Development, & Related Agencies
Committee on Appropriations
United States Senate

The Honorable Henry Bonilla
Chairman, Subcommittee on Agriculture,
Rural Development, FDA & Related Agencies
Committee on Appropriations
House of Representatives

Subject: Funding for Technical Assistance for Conservation Programs Enumerated in Section 2701 of the 2002 Farm Bill

This responds to your letters of August 30, 2002 (from Chairman Bonilla) and September 16, 2002 (from Chairman Kohl and Ranking Minority Member Cochran) requesting our opinion on several issues relating to funding technical assistance for the wetlands reserve program (WRP) and the farmland protection program (FPP). You asked for our views on the following issues:

- (1) Does the annual limit on fund transfers imposed by 15 U.S.C. § 714i (known as the section 11 cap) apply to Commodity Credit Corporation (CCC) funds used for technical assistance provided the WRP and FPP as authorized by the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill)?
- (2) Is the Department of Agriculture's Conservation Operations appropriation available for technical assistance for the WRP and the FPP? and

(3) Did the Office of Management and Budget's (OMB) July 18, 2002, decision not to apportion funds for technical assistance for the WRP and the FPP violate the Impoundment Control Act.¹

For the reasons given below, we conclude that:

(1) the section 11 cap does not apply to funds for technical assistance provided for the conservation programs enumerated in section 3841, title 16, U.S.C., as amended by section 2701 of the 2002 Farm Bill;

(2) the Conservation Operations appropriation is not an available funding source for the WRP and the FPP operations and associated technical assistance; and

(3) OMB's failure to initially apportion WRP and FPP funds was a programmatic delay and did not constitute an impoundment under the Impoundment Control Act. Further, since OMB has approved recently submitted apportionments for these two programs, and since budget authority for both the WRP and the FPP was made available for obligation, there was no impoundment of funds in fiscal year 2002.

BACKGROUND

Section 2701 of the 2002 Farm Bill, Pub. L. No. 107-171, 116 Stat. 278, 279 (enacted on May 13, 2002) (codified at 16 U.S.C. §§ 3841 and 3842) amended section 1241 of the Food Security Act of 1985, 16 U.S.C. § 3841, to provide that the Secretary of Agriculture (Secretary) shall use the funds of the CCC to carry out seven conservation programs, including the provision of technical assistance to, or on behalf of, producers. The WRP and the FPP are among the conservation programs named in the 2002 Farm Bill that are to be funded with CCC funds.

In its June 19, 2002, apportionment request, the Department of Agriculture (Agriculture) asked OMB to apportion a total of \$587,905,000 in CCC funds to the Natural Resources Conservation Service (NRCS) for both financial and technical assistance related to section 3841 conservation programs. SF 132, Apportionment and Reapportionment Schedule for Farms Security and Rural Investment Programs, Account No. 1221004, July 18, 2002. Of the amount requested, Agriculture designated

¹ In addition to the WRP and the FPP, Chairman Kohl and Senator Cochran asked about the Conservation Reserve Program (CRP) as one of the programs for which OMB had failed to apportion funds. The letter arrived after we had already received a response to a detailed set of inquiries sent to OMB and Agriculture regarding the WRP and the FPP. In the interest of time, we did not send a second letter asking OMB to address the CRP program. However, the CRP is covered by the same general authorities applicable to the WRP and the FPP. The CRP is also a program authorized by the Food Security Act of 1985, as amended. Therefore, to the extent funds were not apportioned for the CRP under the same circumstances as the FPP and the WRP, the same legal principles outlined herein should apply.

\$68.7 million for technical assistance to be provided under the conservation programs. In its July 18, 2002, apportionment, OMB apportioned all of the funds for financial and technical assistance requested for the conservation programs, except \$22.7 million designated for WRP and FPP technical assistance. *Id.* OMB reports that it did not apportion funds for WRP and FPP technical assistance at that time, because OMB believed that the section 11 cap, 15 U.S.C. § 714i, limited the amount of funds that could be transferred from CCC to other government agencies for technical assistance associated with the section 3841 conservation programs, and that CCC funding of WRP and FPP technical assistance would exceed the section 11 cap. Letter from Philip J. Perry, General Counsel, OMB, to Susan A. Poling, Managing Associate General Counsel, GAO, September 16, 2002. In discussions with Agriculture regarding the use of CCC funds in excess of the section 11 cap for section 3841 technical assistance, OMB indicated to Agriculture that either CCC funds subject to the section 11 cap or Agriculture's Conservation Operations appropriation could be used to fund this technical assistance. *Id.*²

OMB reports that Agriculture recently submitted a new apportionment request for \$5.95 million for WRP technical assistance (as well as the Conservation Reserve Program) which OMB approved on September 3, 2002. *Id.* OMB also reports that Agriculture submitted a new apportionment request for an additional \$2 million in FPP financial assistance, which OMB approved on September 11, 2002, bringing the total apportionment for the FPP to the \$50 million authorized by section 3841. *Id.*

DISCUSSION

1. Section 11 Cap

The question whether the section 11 cap (15 U.S.C. § 714i) applies to technical assistance provided through the conservation programs authorized by 16 U.S.C. §§ 3481, 3482, is one of statutory construction. It is a well-established rule of statutory construction that statutes should be construed harmoniously so as to give maximum effect to both whenever possible. B-259975, Sept. 18, 1995, 96-1 CPD ¶ 124; B-258163, Sept. 29, 1994. Based upon the language of the relevant statutes, we can read the statutes in a harmonious manner, and, in doing so, we conclude that the section 11 cap does not apply to technical assistance provided under the section 3841 conservation programs.

The section 11 cap is set forth in 15 U.S.C. § 714i, which states, in pertinent part:

“The Corporation may, with the consent of the agency concerned, accept and utilize, on a compensated or uncompensated basis, the officers, employees, services, facilities, and information of any agency of the Federal

² The Department of Agriculture concurred with OMB's responses to our substantive questions regarding these issues. Letter from Nancy Bryson, General Counsel, Department of Agriculture to Susan A. Poling, Managing Associate General Counsel, GAO, September 16, 2002.

Government, including any bureau, office, administration, or other agency of the Department of Agriculture
 The Corporation may allot to any bureau, office, administration, or other agency of the Department of Agriculture or transfer to such other agencies as it may request to assist it in the conduct of its business any of the funds available to it for administrative expenses. . . .
 After September 30, 1996, the total amount of all allotments and fund transfers from the Corporation under this section (including allotments and transfers for automated data processing or information resource management activities) for a fiscal year may not exceed the total amount of the allotments and transfers made under this section in fiscal year 1995.”

(Emphasis added.) We note that the section 11 funding limitation applies only to funds transferred by the CCC to other agencies under the authority of section 11.

The 2002 Farm Bill, which amended subsection (a) of section 3841, directs the Secretary to use CCC funds to carry out the WRP and the FPP and five other conservation programs, including the provision of technical assistance as part of these programs. As amended, 16 U.S.C. § 3841 provides, in pertinent part, as follows:

“For each of fiscal years 2002 through 2007, the Secretary shall use the funds, facilities, and authorities of the Commodity Credit Corporation to carry out the following programs under subtitle D (including the provision of technical assistance):

* * *

(2) The wetlands reserve program under subchapter C of chapter 1.

* * *

(4) The farmland protection program under subchapter B of chapter 2, using, to the maximum extent practicable—
 (A) \$50,000,000 in fiscal year 2002 * * * ”

16 U.S.C. § 3841(a) (emphasis added). Section 3841 provides independent authority for the provision of technical services to these programs.

The 2002 Farm Bill also added a new subsection (b) to section 3841. It is this provision that has generated the current dilemma: “Nothing in this section affects the limit on expenditures for technical assistance imposed by section 11 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714i).” 16 U.S.C. § 3841(b). When read in the context of section 11, section 3841(b) makes clear that the section 11 cap applies only to funds transferred under section 11. Section 11 specifically imposes the cap on “fund transfers . . . under this section.” Section 11 by its terms

clearly does not apply to amounts transferred under other authority, such as section 3841(a). And we read section 3841(b) to make plain that, while the section 11 cap continues to apply to amounts transferred under section 11, it does not apply to amounts transferred by section 3841(a)

Accordingly, reading the above provisions harmoniously, we conclude that: (1) the section 11 cap by its own terms applies only to CCC funds transferred to other agencies under section 11; (2) 16 U.S.C. § 3841(a) provides independent authority for the Secretary to fund the seven conservation programs named in that section out of CCC funds; and (3) 16 U.S.C. § 3841(b) makes it clear that, while the section 11 cap still applies to funds transferred by the CCC to other government agencies for work performed pursuant to the authority of section 11, the section 11 cap does not apply to the seven conservation programs that are funded with CCC funds under the authority of 16 U.S.C. § 3841(a).

Our conclusion that the section 11 cap does not apply to the seven conservation programs of section 3841(a) is confirmed by a review of the legislative history of the 2002 Farm Bill, which shows that the Congress was attempting to make clear that section 3841 technical assistance was not affected by the section 11 cap. The legislative history to the 2002 Farm Bill unambiguously supports the view that the Congress did not intend the section 11 cap to limit the funding for technical assistance provided under the section 3841 conservation programs. In discussing the cap, the Conference Committee stated: “The Managers understand the critical nature of providing adequate funding for technical assistance. For that reason, technical assistance should come from individual program funds.” H.R. Conf. Rep. No. 107-424 at 497 (May 1, 2002) (emphasis added). In discussing administration and funding of these conservation programs, the Conference Committee further explained that:

“The Managers provide that funds for technical assistance shall come directly from the mandatory money provided for conservation programs under Subtitle D. (Section 2701)

In order to ensure implementation, the Managers believe that technical assistance must be an integral part of all conservation programs authorized for mandatory funding. Accordingly, the Managers have provided for the payment of technical assistance from program accounts. The Managers expect technical assistance for all conservation programs to follow the model currently used for the EQIP whereby the Secretary determines, on an annual basis, the amount of funding for technical assistance. Furthermore, the Managers intend that the funding will cover costs associated with technical assistance, such as administrative and overhead costs.”

H.R. Conf. Rep. No. 107-424 at 498-499 (2002) (Emphasis added).

The “EQIP model” that the conferees referred to was established in the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, Subtitle E, § 341, 110 Stat. 888, 1007 (1996) (1996 Farm Bill). For fiscal years 1996 through 2002, the Secretary was to use CCC funds to carry out the CRP, WRP and the Environmental Quality Incentives programs (EQIP).³ *Id.* (Former 16 U.S.C. § 3841 (a)). More specifically, the 1996 Farm Bill authorized the Secretary to use CCC funds for technical assistance (as well as cost-share payments, incentive payments, and education) under the EQIP program. 16 U.S.C. § 3841(b). *Id.*⁴ While the 1996 Farm Bill authorized the use of CCC funds to carry out the CRP and WRP programs, it did not specifically authorize the funding of technical assistance out of program funds as it did for EQIP.

Importantly, five days before enactment of the 2002 Farm Bill when the Senate was considering the Conference Report on the Farm Bill, a colloquy among Senators Harkin, Chairman, Senate Agriculture, Nutrition and Forestry Committee, Lugar, its Ranking Republican Member, and Cochran, an Agriculture Committee member,⁵ makes it unmistakably clear that the section 11 cap was not meant to apply to the provision of technical assistance with respect to any of the conservation programs named in 16 U.S.C. § 3841(a):

“Mr. LUGAR. Mr. President, I wish to engage in a colloquy with the distinguished Senators from Iowa and Mississippi. Mr. President, the 1996 farm bill contained a provision which led to serious disruption in the delivery of conservation programs. Specifically, the 1996 act placed a cap on the transfers of Commodity Credit Corporation funds to other government entities. Is the distinguished Senator from Iowa aware of the so called "section 11 cap?"

Mr. HARKIN. I thank the Senator from Indiana for raising this issue, because it is an important one. The Section 11 cap prohibited expenditures by the Commodity Credit Corporation beyond the Fiscal Year 1995 level to

³ EQIP is a voluntary conservation program for farmers and ranchers that promotes agricultural production and environmental quality as compatible national goals. EQIP offers financial and technical help to assist eligible participants install or implement structural and management practices on eligible agricultural land. <http://www.nrcs.usda.gov/programs/eqip>.

⁴ The 1996 Farm Bill required that for fiscal years 1996 through 2002, 50 percent of the funding available for technical assistance, cost-share payments, incentive payments, and education under EQIP be targeted at practices relating to livestock production.

⁵ Chairman Harkin and Senator Cochran were Managers on the part of the Senate for the Conference Committee on the 2002 Farm Bill.

reimburse other government entities for services. Unfortunately, in the 1996 farm bill, many conservation programs were unintentionally caught under the section 11 cap. As a result, during the past 6 years, conservation programs have had serious shortfalls in technical assistance. There was at least one stoppage of work on the Conservation Reserve Program. The Appropriations Committees have had to respond to the problem ad hoc by redirecting resources and providing emergency spending to deal with the problem. This has been a problem not just in my state of Iowa or in your states of Indiana and Mississippi; it has been a nationwide constraint on conservation.

Mr. COCHRAN. I thank the Chairman for the clarification, and I would inquire whether the legislation under consideration here today will fix the problem of the section 11 cap for conservation programs.

Mr. HARKIN. I thank the Senator from Mississippi for his attention to this important issue. Section 2701 [16 U.S.C. § 3841] of the Farm Security and Rural Investment Act of 2002 recognizes that technical assistance is an integral part of each conservation program. Therefore, technical assistance will be funded through the mandatory funding for each program provided by the bill. As a result, for directly funded programs, such as the Conservation Security Program (CSP) and the Environmental Quality Incentives Program (EQIP), funding for technical assistance will come from the borrowing authority of the Commodity Credit Corporation, and will no longer be affected by section 11 of the CCC Charter Act.

For those programs such as the CRP, WRP, and the Grasslands Reserve Program (GRP), which involve enrollment based on acreage, the technical assistance funding will come from the annual program outlays apportioned by OMB-again, from the borrowing authority of the CCC. These programs, too, will no longer be affected by section 11 of the CCC Charter Act. This legislation will provide the level of funding necessary to cover all technical assistance costs, including training; equipment; travel; education, evaluation and assessment, and whatever else is necessary to get the programs implemented.

Mr. LUGAR. I thank the Chairman for that clarification. With the level of new resources and new workload that we are requiring from the Department, and specifically the Natural Resources Conservation Service, I hear concerns back in my state that program delivery should not be disrupted, and the gentleman has reassured me that it will not.”

148 Cong.Rec. S3979, 4020 (daily ed. May 8, 2002) (emphasis added).

In our view, the Congress intended all funding for the seven conservation programs authorized in section 3841 (§ 2701 of the 2002 Farm Bill), including funding for technical assistance, to be mandatory funding drawn from individual program funds, rather than from CCC’s administrative funds that are subject to the section 11 cap. Accordingly, based on the language of 3841, we conclude that the section 11 cap does not apply to funds for technical assistance provided under the conservation programs enumerated in section 3841.

2. Availability of the Conservation Operations Appropriation

The next issue is whether the Department of Agriculture’s Conservation Operations appropriation is available for technical assistance for the WRP and the FPP. As noted above, this issue arose when OMB advised Agriculture that its Conservation Operations appropriation could be used to fund this technical assistance. For the reasons that follow, we conclude that Agriculture may not use its Conservation Operations appropriation to fund the WRP and FPP.

The fiscal year 2002 Appropriation for the Conservation Operations account provides in pertinent part:

NATURAL RESOURCES CONSERVATION SERVICE CONSERVATION OPERATIONS

“For necessary expenses for carrying out the provisions of the Act of April 27, 1935 (16 U.S.C. 590a–f), including preparation of conservation plans and establishment of measures to conserve soil and water (including farm irrigation and land drainage and such special measures for soil and water management as may be necessary to prevent floods and the siltation of reservoirs and to control agricultural related pollutants); operation of conservation plant materials centers; classification and mapping of soil; dissemination of information; acquisition of lands, water, and interests therein for use in the plant materials program by donation, exchange, or purchase”

Pub. L. No. 107-76, 115 Stat. 704 at 717, 718 (2001). In addition to its availability to carry out the provisions of the Act of April 27, 1935 (16 U.S.C. § 590a-f), the fiscal year 2002 Conservation Operations appropriation is also available to carry out a variety of

other specified programs such as those authorized by 7 U.S.C. § 428a, 7 U.S.C. § 2209b, 7 U.S.C. § 2250a, § 202(c) of title II of the Colorado River Basin Salinity Control Act of 1974 (43 U.S.C. § 1592(c)): section 706(a) of the Organic Act of 1944 (7 U.S.C. § 2225), for employment under 5 U.S.C. § 3109 and 16 U.S.C. § 590e-2. OMB asserts that the language of the Conservation Operations appropriation and the Act of April 27, 1935 cited therein are broad enough to encompass the technical assistance that Agriculture will provide under the WRP, the FPP and the other section 3841 conservation programs. Since the technical services provided by Agriculture under the WRP and the FPP (and other section 3841 conservation programs) fall within the general purposes articulated in the fiscal year 2002 Conservation Operations appropriation, OMB considers the Conservation Operations appropriation as an additional available source of funding for technical assistance provided as part of the section 3841 conservation programs. In other words, the Conservation Operations appropriation is available to continue financing for the FPP and the WRP, when, in OMB's view, the section 11 cap limits the availability of CCC funds for those programs. We do not agree.

First, the Conservation Operations appropriation identifies specific programs that it is available to fund, including the authority to carry out the provisions of the Act of April 27, 1935 (16 U.S.C. § 590a-f) cited by OMB above. However, none of the specific statutory programs identified in the Conservation Operations appropriation include the FPP or the WRP found in 16 U.S.C. §§ 3838h- 3838i and 3837-3737f, respectively. The FPP and the WRP were authorized by Title XII of the Food Security Act of 1985, as amended, and the provisions of the Food Security Act of 1985 are not among the statutes listed in the Conservation Operations appropriation as an object of that appropriation. Thus, the Conservation Operations appropriation by its own terms does not finance Agriculture programs and activities under the Food Security Act.⁶⁷

Second, even if the language of the Conservation Operations appropriation could reasonably be read to include the WRP and the FPP, section 3841, as amended by the 2002 Farm Bill, very specifically requires that funding for technical assistance will come from the “funds, facilities, and authorities” of the CCC. Indeed, the statute is unequivocal—the Secretary “shall use the funds” of the CCC to carry out the seven conservation programs, including associated technical assistance. It is well settled that even an expenditure that may be reasonably related to a general appropriation may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation. 63 Comp. Gen. 422, 427-28, 432 (1984);

⁷ For fiscal year 1999, the Natural Resources Conservation Service sought to add language to the Conservation Operations appropriation to provide authority to expand the use of Conservation Operations funds to support the technical assistance activities of other programs administered by NRCS such as EQIP, WRP and CRP. Hearings before the House Committee on Appropriations, Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for Fiscal Year 1999, 105th Cong., 2nd Sess., Part 3 at 776 (1998). The language was not included in the final version of the Agriculture Appropriations Act for fiscal year 1999.

Third, this view is supported by the Senate colloquy on the 2002 Farm Bill Conference report:

“Mr. COCHRAN. It is then my understanding that, under the provisions of this bill, the technical assistance necessary to implement the conservation programs will not come at the expense of the good work already going on in the countryside in conservation planning, assistance to grazing lands, and other activities supported within the NRCS conservation operations account. And, further, this action will relieve the appropriators of an often reoccurring problem.

Mr. HARKIN. Both gentlemen are correct. The programs directly funded by the CCC-EQIP, FPP, WHIP, and the CSP--as well as the acreage programs--CRP, WRP, and the GRP-- include funding for technical assistance that comes out of the program funds. And this mandatory funding in no way affects the ongoing work of the NRCS Conservation Operations Program.”

148 Cong. Rec. S3979, 4020 (daily ed. May 8, 2002) (emphasis added).

This colloquy underscores the understanding that the 2002 Farm Bill specifically requires that funding for technical assistance will come from the borrowing authority of the CCC and will not interfere with other activities supported by the Conservation Operations appropriation.

Furthermore, before passage of the 1996 Farm Bill, which made a number of conservation programs, including the WRP, mandatory spending programs, the WRP received a separate appropriation for that purpose. In other words, before the 1996 farm bill provided CCC funding to run the program, the WRP was not funded out of the Conservation Operations appropriation. Pub. L. No. 103-330, 108 Stat. 2453 (1994); Pub. L. No. 102-142, 105 Stat. 897 (1991). Moreover, Agriculture has

⁸ OMB cites language in the legislative history of the Fiscal Year 2002 appropriations act that appears to support the use of the Conservation Operations appropriation for conservation technical assistance, and in particular WRP and CRP assistance. Our own review of the legislative history finds language that indicates a congressional intent that technical assistance for the conservation programs in question must be funded from CCC funds. However, in view of the subsequent enactment of the 2002 Farm Bill, which specifically and unequivocally requires that funding for technical assistance for conservation programs named in 16 U.S.C. § 3841 shall come from CCC funds, we do not consider the legislative history controlling.

previously concluded that the Conservation Operations appropriation is not available to fund technical assistance with respect to programs authorized under provisions of the Food Security Act. Their reasoning tracks ours—the provisions of the Food Security Act are not among the statutes cited in the Conservation Operations appropriation. Memorandum from Stuart Shelton, Natural Resources Division to Larry E. Clark, Deputy Chief for Programs, Natural Resources Conservation Service and P. Dwight Holman, Deputy Chief for Management, Natural Resources Conservation Service, October 7, 1998 (Conservation Operations appropriation is not available to fund technical assistance for the Conservation Reserve Program); GAO/RCED-99-247R, Conservation Reserve Program Technical Assistance, at 9 (Aug. 5, 1999).

Thus, the Conservation Operations appropriation is not an available funding source for WRP and FPP operations and associated technical assistance. To the extent that Agriculture might have used the Conservation Operations appropriation for WRP, Agriculture would need to adjust its accounts accordingly, deobligating amounts it had charged to the Conservation Operations appropriation and charging those amounts to the CCC funds. We note that in this event OMB would need to apportion additional amounts from CCC funds to cover such obligations.

3. Impoundment Control Act

The last question is whether OMB's July 18, 2002, decision not to apportion funds for technical assistance for the WRP and the FPP constitutes an impoundment under the Impoundment Control Act of 1974. Based upon the most recent information provided by OMB, to the extent OMB did not initially apportion funds for the FPP or the WRP, the delay was programmatic and did not constitute an impoundment of funds. Also, based on information recently provided by OMB, no impoundment of funds is occurring with respect to the FPP or the WRP.

We generally define an impoundment as any action or inaction by the President, the Director of OMB or any federal agency that delays the obligation or expenditure of budget authority provided in law. Glossary of Terms Used in the Federal Budget Process, Exposure Draft, GAO/AFMD-2.1.1, Page 52 (1993).⁹ However, our decisions distinguish between programmatic withholdings outside the reach of the Impoundment Control Act and withholdings of budget authority that qualify as

⁹ There are two types of impoundment actions—deferrals and rescissions. A deferral is a temporary withholding or delay in obligating or any other type of executive action which effectively precludes the obligation or expenditure of budget authority. Glossary of Terms Used in the Federal Budget Process, Exposure Draft, GAO/AFMD-2.1.1, Page 38 (1993). Deferrals are authorized only to provide for contingencies, to achieve savings made possible by changes in requirements or greater efficiency of operations, or as otherwise specifically provided by law. See 2 U.S.C. § 684. A rescission involves the cancellation of budget authority previously provided by Congress (before that authority would otherwise expire) and can be accomplished only through legislation enacted by Congress that cancels the availability of budgetary resources previously provided by law. See Glossary of Terms Used in the Federal Budget Process, Exposure Draft, GAO/AFMD-2.1.1, Page 70 (1993).

impoundments subject to the Act's requirements. B-290659, July 24, 2002. Sometimes delays are due to legitimate program reasons. Programmatic delays typically occur when an agency is taking necessary steps to implement a program even if funds temporarily go unobligated. *Id.* Such delays do not constitute impoundments, and do not require the sending of a special message to the House of Representatives and the Senate under 2 U.S.C. § 684(a). *Id.*

Here, OMB initially did not apportion funds for WRP and FPP technical assistance because it believed the section 11 cap was applicable and would be exceeded. OMB's General Counsel states that OMB reserved apportioning budget authority to discuss its funding concerns with Agriculture. These funding concerns generated a "vigorous and healthy internal legal discussion" between the Department of Agriculture and OMB. Letter from Nancy Bryson, General Counsel, Department of Agriculture to the Honorable Tom Harkin, Chairman, Senate Committee on Agriculture, Nutrition and Forestry, September 24, 2002. Since OMB delayed apportionment of technical assistance funds because of uncertainty concerning the applicability of statutory restrictions and since OMB approved Agriculture's subsequent apportionment requests, we conclude that OMB did not impound funds under the Impoundment Control Act. *See* B-290659, July 24, 2002 (delay in obligating funds because of uncertainty whether statutory conditions were met did not constitute an impoundment).

As noted above, according to OMB, Agriculture recently submitted revised apportionment requests for technical assistance for both the FPP and the WRP, and OMB has approved the revised apportionments. For the FPP, Agriculture requested an additional apportionment for financial assistance of \$2 million, bringing the total amount available for obligation to \$50 million. Thus, the entire \$50 million in FPP funds authorized by section 3841 have been apportioned. Since OMB advises that it has apportioned the full funding amount and that is available for obligation, these funds were not impounded for the FPP.

As for the WRP funding, as noted above, on June 19, 2002, Agriculture asked OMB to apportion a total of \$20,655,000 for WRP technical assistance. OMB did not apportion this amount. SF 132, Apportionment and Reapportionment Schedule for Farms Security and Rural Investment Programs, Account No. 1221004, July 18, 2002. On August 30, 2002, Agriculture requested an apportionment of WRP (and CRP) technical assistance for totaling \$5,950,000. SF 132, Apportionment and Reapportionment Schedule for Commodity Credit Corporation Reimbursable Agreements and Transfers to State and Federal Agencies, Account No. 12X4336. On September 3, 2002, OMB approved this request and apportioned \$5,950,000. *Id.* Since OMB apportioned the budget authority for the WRP and it was made available for obligation, there was no impoundment of funds in fiscal year 2002.

While the present record does not establish an impoundment of the fiscal year 2002 funds appropriated for the WRP and the FPP, we will continue to monitor this situation to ensure that any impoundment that might occur in fiscal year 2003 for conservation programs is timely reported.

We hope you find this information useful. If you have any questions, please contact Susan Poling, Managing Associate General Counsel, or Thomas Armstrong, Assistant

General Counsel, at 202-512-5644. We are sending copies of this letter to the Secretary of Agriculture, Director of the Office of Management and Budget, the Chairmen and Ranking Minority Members of the House and Senate Agriculture Committees and other interested Congressional Committees. This letter will also be available on GAO's home page at <http://www.gao.gov>.

Anthony H. Gamboa
General Counsel

B-291241 Digests

1. 15 U.S.C. § 714i authorizes the Commercial Credit Corporation (CCC) to use employees from other agencies, and, subject to a maximum limitation set at the fiscal year 1995 level (the “section 11 cap”), CCC may make transfers from its funds available for administrative purposes to those agencies to reimburse them for their assistance to CCC in the conduct of its business. 16 U.S.C. § 3841 (as amended by section 2701 of the 2002 Farm Bill, enacted May 13, 2002) specifically provides that the Secretary of Agriculture “shall use the funds” of the CCC to carry out seven conservation programs (including the wetlands reserve program and the farm protection program) named therein, including technical assistance. Based upon the language of the statutes, we conclude that the section 11 cap does not apply to technical assistance provided under the section 3841 conservation programs.
2. 16 U.S.C. § 3841 specifically provides that the Secretary of Agriculture “shall use the funds” of the Commercial Credit Corporation (CCC) to carry out seven conservation programs (including the wetlands reserve program and the farm protection program) named therein, including technical assistance. Therefore, the Secretary is required to use CCC funds for the conservation programs named in section 3841, including for technical assistance, rather than funds from the Department of Agriculture’s more general Conservation Operations appropriation.
3. Where the Office of Management and Budget (OMB) initially did not apportion funds for technical assistance for the wetlands reserve program (WRP) and the farm protection program (FPP) because of OMB’s uncertainty concerning applicability of statutory funding restrictions, and where OMB subsequently approved the Department of Agriculture’s revised apportionment requests for the WRP and the FPP, the delay in apportioning funds was programmatic and did not constitute an impoundment of funds.



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

B-329092

December 12, 2017

Congressional Committees

Subject: *Impoundment of the Advanced Research Projects Agency-Energy
Appropriation Resulting from Legislative Proposals in the President's
Budget Request for Fiscal Year 2018*

This letter is to inform you of an impoundment in the Advanced Research Projects Agency-Energy (ARPA-E) appropriation in fiscal year (FY) 2017. As explained in more detail below, ARPA-E withheld from obligation \$91 million of budget authority in violation of the Impoundment Control Act. See Pub. L. No. 93-344, title X, §§ 1001-1017, 88 Stat. 297, 332 (July 12, 1974), *classified at* 2 U.S.C. §§ 681-688. Since we have confirmed that the funds have been made available for obligation, we are not transmitting a report under the Impoundment Control Act because the impoundment is no longer taking place.

On May 23, President Trump submitted his budget request for FY 2018 to Congress. The budget request proposes the elimination of ARPA-E, an agency within the Department of Energy. The budget request asks that Congress cancel \$46.367 million of ARPA-E's unobligated balances and require that another \$45 million of ARPA-E's unobligated balances be used for "program direction,"¹ which will be used "to ensure full closure of ARPA-E by mid-2019."² In September, we received an inquiry about the status of these amounts.³ We contacted ARPA-E

¹ *Appendix, Budget of the United States Government for Fiscal Year 2018* (May 23, 2017), at 380-81, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/doe.pdf (last visited Dec. 11, 2017).

² *2018 Major Savings and Reforms, Budget of the United States Government for Fiscal Year 2018* (May 23, 2017), at 33, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf (last visited Dec. 11, 2017).

³ GAO is also currently conducting an audit engagement related to the Department of Energy's review of ARPA-E's funding opportunity announcements.

officials who told us that, per the Department of Energy's instructions, ARPA-E was withholding the obligation of more than \$91 million of budget authority in anticipation of congressional enactment of the legislative proposals in the budget request. We conclude that this withholding violated the Impoundment Control Act. The Department of Energy recently acknowledged that while ARPA-E's appropriation was fully apportioned and allotted in FY 2017, "limited oral conversations regarding whether to withhold any budget authority in the ARPA-E appropriation during FY 2017 pursuant to the FY 2018 President's Budget did occur." Letter from Acting General Counsel, Department of Energy, to Managing Associate General Counsel, GAO (Nov. 29, 2017).

All funds impounded in response to the President's budget request have been released. The Department of Energy provided us with an FY 2018 apportionment schedule and allotment record, showing that all of ARPA-E's unobligated balances, carried forward from previous fiscal years, are currently available for obligation. ARPA-E officials also orally confirmed that such budget authority is now available.

Background on the Impoundment Control Act

The Impoundment Control Act operates on the premise that when Congress appropriates money to the executive branch, the President is required to obligate the funds. See 2 U.S.C. §§ 681–688; B-203057, Sept. 15, 1981.⁴ In other words, an agency must make funds available for obligation unless otherwise authorized to withhold. The act authorizes the President to impound, or withhold the obligation of funds, in certain circumstances.⁵ The Impoundment Control Act separates

⁴ See also U.S. Const. art. II, § 3, cl. 5 (the President "shall take care that the laws be faithfully executed"); *Train v. City of New York*, 420 U.S. 35 (1975) (President Nixon improperly directed the Administrator of the Environmental Protection Agency to allot to the states only about half of funds appropriated for water pollution assistance).

⁵ The law includes this disclaimer: "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as . . . superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder." 2 U.S.C. § 681(4). The Comptroller General and the federal courts have interpreted this disclaimer to mean that the President may not use the Impoundment Control Act to withhold funds for formula grants. GAO, *President's Eighth Special Message for Fiscal Year 1982*, OGC-82-9 (Washington, D.C.: Mar. 10, 1982) ("[T]he executive branch may not violate specific statutory requirements while it seeks to have Congress change those requirements"); GAO, *President's Eleventh Special Message for FY 1981*, OGC-81-14 (Washington, D.C.: July 30, 1981 (agency may not withhold mandatory grants to states pending congressional consideration of rescission proposal); *Maine v. Goldschmidt*, 494 F.Supp. 93 (D. Me. 1980) (lawsuit in response to President Carter's proposal to defer the obligation of grants to states under the Federal-Aid Highway Act).

impoundments into two exclusive categories—deferrals and rescissions. If the President wishes to temporarily postpone the obligation of budget authority, he may propose a deferral. 2 U.S.C. § 684. Deferrals are permissible only to provide for contingencies, to achieve savings made possible by or through changes in requirements or greater efficiency of operations, or as specifically provided by law. *Id.* § 684(b). Any amount of budget authority deferred must be prudently obligated before the end of the period of availability. *Id.*; 54 Comp. Gen. 453 (1974).⁶

If the President wants Congress to permanently cancel the availability of budget authority, he may propose a rescission. 2 U.S.C. § 683. A rescission may be proposed for any reason, including policy reasons. Any amount of budget authority proposed to be rescinded must be made available for obligation unless Congress, within 45 legislative days, completes action on a bill rescinding all or part of the amount proposed for rescission. *Id.* § 684(b).

The President notifies Congress of his proposed deferral or rescission by transmitting a “special message.” The special message must describe, among other things, the amount of budget authority proposed for deferral or rescission, the relevant account and “specific project or governmental functions involved,” the reasons why the budget authority should be deferred or rescinded, the “estimated fiscal, economic, and budgetary effect” of the proposed deferral or rescission, and any other “relevant facts, circumstances, and considerations.” *Id.* §§ 683 (rescissions), 684 (deferrals).

The Comptroller General has a number of statutory responsibilities under the Impoundment Control Act. The Comptroller General is required to review each special message and report findings to Congress as soon as practicable. *Id.* § 685(b). The Comptroller General also ensures that the impoundment is not misclassified, such as a rescission proposal reported as a deferral. *Id.* § 686(b). In addition, if the Comptroller General becomes aware of an unreported impoundment, the Comptroller General must “make a report on such reserve or deferral and any available information concerning it to both Houses of Congress.” *Id.* § 686(a).

⁶ Not all delays constitute a reportable impoundment under the Impoundment Control Act. Legitimate programmatic delays may occur when the agency is taking reasonable and necessary steps to implement a program, even though funds temporarily go unobligated. GAO, *Impoundment Control: Deferral of DOD Budget Authority Not Reported*, GAO/OGC-91-8 (Washington, D.C.: May 7, 1991), at 3–4; GAO, *Impoundment Control: President’s Third Special Impoundment Message for FY 1990*, GAO/OGC-90-4, (Washington, D.C.: Mar. 6, 1990), at 9–10 (design modification); B-115398.51, Sept. 28, 1976 (low number of loan applications). Similarly, the Impoundment Control Act does not apply to delays or lapsing of budget authority resulting from ineffective program administration, unless there is “concrete evidence of an intent to withhold budget authority.” B-229326, Aug. 29, 1989.

Since the enactment of the Impoundment Control Act, our practice has been to review withholdings brought to our attention by concerned Members or congressional committees, intended recipients, or auditors. See, e.g., B-320091, July 23, 2010; GAO, *Comments on Unreported Impoundment of DOD Budget Authority*, GAO/OGC-92-11 (Washington, D.C.: June 3, 1992). In those situations, we review the agency's actions to determine if it has complied with the Impoundment Control Act and ultimately confirm that funds are made available for obligation.

Application to ARPA-E

ARPA-E historically receives an annual lump-sum, no-year appropriation for its programs. For instance, in FY 2017, ARPA-E received "\$306,000,000, to remain available until expended" for "Department of Energy expenses necessary in carrying out the activities authorized by section 5012 of the America COMPETES Act (Public Law 110-69)." Pub. L. No. 115-31, div. D, title III, 131 Stat. 135, 312 (May 5, 2017). ARPA-E's lump-sum appropriation also historically includes a line-item for "program direction," an amount which is available for two fiscal years. See, e.g., *id.* ("Provided, That of such amount, \$29,250,000 shall be available until September 30, 2018, for program direction").⁷

In mid-September, we received an inquiry about the status of \$91 million of ARPA-E's unobligated balances—\$46.367 million of which was proposed for cancellation and \$45 million of which was proposed to be used for "full closure of ARPA-E by mid-2019" in the President's budget request.⁸ We contacted ARPA-E officials, who told us that the Department of Energy had directed ARPA-E to withhold the obligation of all \$91 million in anticipation of congressional enactment of such proposals. On September 28, we communicated our concerns to the Department of Energy's Office of General Counsel. On October 4, we sent a letter to the Acting General Counsel to seek additional facts and legal views from the Department of Energy. On November 29, after conducting a review and consulting with the Office of Management and Budget (OMB), the Acting General Counsel responded:

"Our review found that all funds for that appropriation in FY 2017 were fully apportioned to DOE and fully allotted within DOE. Our review

⁷ The Department of Energy explains that "[p]rogram direction funds are utilized for salaries and benefits of federal staff; travel; support services contracts to provide technical advice and project management assistance; and other related expenses, including the DOE Working Capital Fund." Department of Energy, *FY 2017 Congressional Budget Request*, vol. 4, at 415 (Feb. 2016), available at www.energy.gov/sites/prod/files/2016/02/f29/FY2017BudgetVolume%204.pdf (last visited Dec. 11, 2017).

⁸ See notes 1 and 2, *supra*.

revealed that limited oral conversations regarding whether to withhold any budget authority in the ARPA-E appropriation during FY 2017 pursuant to the FY 2018 President's Budget did occur. Upon learning this, our office immediately apprised the relevant parties of the legal requirements of the Impoundment Control Act and the [OMB's] guidance on the same, contained in [C]ircular A-11, § 112.2. Those offices then took appropriate steps to be in compliance and have confirmed that all funds for this appropriation have been allotted in the current fiscal year, and that they are available for obligation.”

Until the Department of Energy's Office of the General Counsel intervened, ARPA-E improperly withheld the obligation of budget authority in connection with the President's proposed elimination of ARPA-E and a so-called “cancellation proposal” in the President's budget request. OMB describes a cancellation proposal as “a proposal by the President to reduce budgetary resources that are not subject to the requirements of Title X of the Congressional Budget and Impoundment Control Act.” OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 3, § 112.2 (July 2017), available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf (last visited Dec. 11, 2017). We have previously concluded that amounts withheld as a consequence of a “cancellation proposal” constitute impoundments that agencies may make only after the President transmits a special message to Congress under the Impoundment Control Act. B-308011, Aug. 4, 2006 (agency withheld \$2 million from a no-year account for several months pending congressional action on a proposed cancellation in the President's budget request); B-307122, B-307122.2, Mar. 2, 2006 (agencies withheld over \$470 million in budget authority, affecting 12 programs, for approximately two months pending congressional consideration of the President's proposed cancellations to offset Hurricane Katrina relief). OMB has reached a similar conclusion concerning the import of a cancellation proposal, instructing agencies that “[a]mounts proposed for cancellation are not to be withheld from obligation.” OMB Circular No. A-11, pt. 3, § 112.2.

We note that the Impoundment Control Act applies to ARPA-E's funds despite the fact that they were made available without fiscal year limitation. The law applies by its express terms to all budget authority. 2 U.S.C. §§ 683 (rescission), 684 (deferral). See also GAO, *Deferral of SPR Budget Authority Not Reported to Congress*, GAO/OGC-83-11 (Washington, D.C.: May 5, 1983) (reporting a deferral of \$800 million of no-year budget authority in the Strategic Petroleum Reserve account); B-200685, Dec. 23, 1980 (stating that any executive action or inaction is subject to the Impoundment Control Act “even if the budget authority involves no-year funds” and noting that “of the 132 deferrals and rescissions reported by the President during [FY] 1980, over half involved no-year funds”). Violations of the Impoundment Control Act hinge on whether the agency clearly intended to withhold

the obligation of budget authority. B-229326, Aug. 29, 1989.⁹ ARPA-E stated that it deliberately withheld the obligation of \$91 million in FY 2017, per the Department of Energy's instructions.


CONCLUSION

Agencies may only withhold budget authority from obligation if the President has transmitted a special message to Congress. 2 U.S.C. §§ 683 (rescission), 684 (deferral). ARPA-E withheld the obligation of \$91 million without the President transmitting a special message to Congress. Accordingly, ARPA-E violated the Impoundment Control Act.

Since the purpose here is to ensure funds are made available for obligation and we have confirmed that the agency has done so, we are not transmitting a report to Congress under the Impoundment Control Act. In the past, we have declined to transmit a report to Congress under similar circumstances. See B-307122, B-307122.2. The Department of Energy's recent apportionment schedule and allotment record show that all of ARPA-E's unobligated balances from previous fiscal years are currently available for obligation. ARPA-E officials also orally confirmed that the budget authority is now available.

If you have any questions, please contact Julia C. Matta, Managing Associate General Counsel, at (202) 512-4023.

Sincerely,



Thomas H. Armstrong
General Counsel

⁹ See note 6, *supra*.

List of Congressional Committees

The Honorable Lisa Murkowski
Chairman
The Honorable Maria Cantwell
Ranking Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Lamar Alexander
Chairman
The Honorable Dianne Feinstein
Ranking Member
Subcommittee on Energy and Water Development
Committee on Appropriations
United States Senate

The Honorable Lamar Smith
Chairman
The Honorable Eddie Bernice Johnson
Ranking Member
Committee on Science, Space, and Technology
House of Representatives

The Honorable Mike Simpson
Chairman
The Honorable Marcy Kaptur
Ranking Member
Subcommittee on Energy and Water Development, and Related Agencies
Committee on Appropriations
House of Representatives



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Decision

Matter of: Department of Commerce—Application of the Impoundment Control Act to Appropriations Enacted in Fiscal Years 2018 and 2019

File: B-331298

Date: December 23, 2020

DIGEST

In recent years, Congress has expressed concern with the number of vacant positions at the National Weather Service in the Department of Commerce, and in 2019, Members of Congress asked us whether the delay in filling vacant positions constituted an impoundment. We are unaware of any instruction from any official to withhold amounts from obligation. The Department of Commerce provided us with the rate of obligation for the appropriations that fund the National Weather Service's personnel costs. These data show that the Weather Service obligated amounts allotted to it at a robust yet measured pace that gives no indication that the agency withheld amounts from obligation. Based on this information, we conclude that the National Weather Service's execution of the relevant appropriations did not violate the Impoundment Control Act of 1974.

DECISION

This responds to a congressional request for our decision on whether the National Weather Service's (Weather Service) delay in filling vacant positions constituted an impoundment.¹ Letter from Representatives Jamie Raskin, Donald S. Beyer, Conor Lamb, and Daniel W. Lipinski to Comptroller General (Aug. 1, 2019) (Request Letter). As explained below, the Weather Service did not impound amounts appropriated in fiscal years 2018 or 2019 from accounts that fund personnel costs.

In accordance with our regular practice, we contacted the Department of Commerce (Commerce), where the Weather Service resides, for factual information and its legal

¹ An impoundment is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 61.

views on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting General Counsel, Commerce (Feb. 26, 2020). Commerce responded with relevant data and information and its legal views. Letter from Chief, General Law Division, Commerce, to Assistant General Counsel for Appropriations Law, GAO (Apr. 15, 2020) (Response Letter).

BACKGROUND

In a 2017 GAO audit report, we found that 11 percent of positions in Weather Service operational units were unfilled by the end of fiscal year 2016. GAO, *National Weather Service: Actions Have Been Taken to Fill Increasing Vacancies, but Opportunities Exist to Improve and Evaluate Hiring*, GAO-17-364 (Washington, D.C.: May 2017). Since then, Congress has expressed concern with the number of vacant Weather Service positions.² For example, a 2018 House of Representatives report stated that “the Committee consistently hears of staffing and management challenges within [the Weather Service]” and recommended an amount of “not less than \$625,000,000 for salaries and benefits of [Weather Service] employees.” H.R. Rep. No. 115-704, at 22 (May 24, 2018). The Request Letter we received also expressed concerns about the consistency of the Weather Service’s reports to congressional committees on the number of its vacant positions. Request Letter, at 1–3.

The Weather Service is a line office of the National Oceanic and Atmospheric Administration (NOAA) within Commerce. NOAA, *Organization*, available at <https://www.noaa.gov/about/organization> (last visited Dec. 10, 2020). As a general matter, Congress does not make line-item appropriations specifically for the Weather Service. For example, in both the Department of Commerce Appropriations Act, 2018³ and the Department of Commerce Appropriations Act, 2019,⁴ Congress made appropriations for NOAA. In turn, NOAA determined amounts to allot to the Weather Service for its operations. Neither of these acts contained line-item appropriations requiring amounts to be used for filling Weather Service vacancies. See generally Pub. L. No. 116-6, 133 Stat. 91–101; Pub. L. No. 115-141, 132 Stat. 400–409.

Costs for Weather Service personnel are mainly borne by NOAA’s Operations, Research, and Facilities (Operations) appropriation. Response Letter at 4, n.2; see, e.g., NOAA, *Budget Estimates Fiscal Year 2019*, at ORF-6. With respect to funding that could be used for Weather Service positions for fiscal years 2018 and 2019, the

² S. Rep. No. 115-275, at 45 (June 14, 2018); H.R. Rep. No. 115-704, at 22 (May 24, 2018); H.R. Comm. on Appropriations, 115th Cong., *Consolidated Appropriations Act, 2018*, 180–181 (Comm. Print 2018); S. Rep. No. 115-139, at 43 (July 27, 2017).

³ Pub. L. No. 115-141, div. B, title I, 132 Stat. 400–409 (Mar. 23, 2018).

⁴ Pub. L. No. 116-6, div. C, title I, 133 Stat. 91–101 (Feb. 15, 2019).

Operations appropriation has a 2-year period of availability and is “[f]or necessary expenses of activities authorized by law for [NOAA].” Pub. L. No. 116-6, 133 Stat. at 97; Pub. L. No. 115-141, 132 Stat. at 405.

NOAA’s Procurement, Acquisition and Construction (Procurement) appropriation also funds a smaller number of Weather Service positions. See, e.g., NOAA, *Budget Estimates Fiscal Year 2019*, at PAC-2. The Procurement appropriation is “[f]or procurement, acquisition and construction of capital assets . . . of [NOAA],” and amounts that could be used for Weather Service positions in fiscal years 2018 and 2019 have a 3-year period of availability. Pub. L. No. 116-6, 133 Stat. at 97–98; Pub. L. No. 115-141, 132 Stat. at 406.

DISCUSSION

The question presented is whether the Weather Service impounded funds from its allotted portion of the fiscal year 2018 and 2019 Operations and Procurement appropriations. Congress has vested the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances as expressly provided in the Impoundment Control Act of 1974. See 2 U.S.C. §§ 681–688; B-331564, Jan. 16, 2020. The President’s transmission of a special message to Congress is a necessary prerequisite of an authorized withholding. 2 U.S.C. §§ 683–684; B-331564. Here, the President did not submit a special message to Congress, so there is no authority for the Weather Service to impound funds. Therefore, we must determine whether the Weather Service withheld amounts from obligation, as any such withholding would constitute an improper impoundment.

An improper impoundment may result where an official within or outside of the agency (for instance, in the Office of Management and Budget (OMB)) directs the withholding of budget authority. See, e.g., B-331564, Jan. 16, 2020 (OMB withheld funds by issuing instructions through apportionment schedules); B-307122, Mar. 2, 2006 (agencies withheld amounts in anticipation of the President’s proposed rescissions). Commerce told us that “no direction has been given to withhold budget authority from obligation.” Response Letter, at 2. Commerce provided us with the OMB-approved apportionment actions, and they contained no instructions withholding amounts from obligation. Commerce also told us that “NOAA and [the Weather Service] took all necessary internal administrative actions to make all budget authority under” the fiscal year 2018 and 2019 Operations and Procurement appropriations available for obligation in accordance with OMB-approved apportionments. *Id.* Thus, in this case, we are unaware of any instruction from any official to withhold amounts from obligation.

Another indication of whether an impoundment occurred is the rate at which the agency obligates its appropriations. For example, we found that the National Aeronautics and Space Administration’s high obligation rate bore no indication of an impoundment. B-320091, July 23, 2010. Here, we examined documentation submitted to us by Commerce, including the obligation rates of the Operations and

Procurement appropriations enacted in fiscal years 2018 and 2019. See Pub. L. No. 116-6, 133 Stat. at 97–98; Pub. L. No. 115-141, 132 Stat. at 405–406. Because these amounts are appropriated to NOAA rather than to the Weather Service, we examined the rate at which the Weather Service obligated the amounts that NOAA allotted to it.

Commerce reported that the Weather Service had obligated a significant amount of its fiscal years 2018 and 2019 Operations and Procurement appropriations. Response Letter, at 4 and Attachment (Weather Service execution data); *id.* at n.2. The table below shows the Weather Service’s obligation rate for its allotted portion of NOAA’s Operations and Procurement appropriations, as reported to us by Commerce.

National Weather Service obligation rate for its allotted portion of NOAA’s Operations, Research and Facilities (Operations) and Procurement, Acquisition, and Construction (Procurement) appropriations, enacted in fiscal years 2018 and 2019

	Total percent obligated	
	Amounts enacted in Public Law 115-141	Amounts enacted in Public Law 116-6
Operations appropriation	99.99% ^a	98.62% ^b
Procurement appropriation	90.65% ^c	85.90% ^d

Source: Letter from Chief, General Law Division, Department of Commerce (Commerce), to Assistant General Counsel for Appropriations Law, GAO (Apr. 15, 2020) and Attachment (Weather Service execution data).

Note: For amounts that would be used to fund Weather Service positions, each Operations appropriation had a 2-year period of availability and each Procurement appropriation had a 3-year period of availability. Pub. L. No. 116-6, 133 Stat. at 97–98; Pub. L. No. 115-141, 132 Stat. at 405–406.

^a The percent obligated covers the entire period of availability of the Operations appropriation enacted in Public Law 115-141.

^b At the time of Commerce’s reporting, the Operations appropriation enacted in Public Law 116-6 still had 7 months remaining in its period of availability.

^c At the time of Commerce’s reporting, the Procurement appropriation enacted in Public Law 115-141 still had 7 months remaining in its period of availability.

^d At the time of Commerce’s reporting, the Procurement appropriation enacted in Public Law 116-6 still had 1 year and 7 months remaining in its period of availability.

These data show that the Weather Service obligated amounts allotted to it at a robust yet measured pace that gives no indication that the agency withheld amounts from obligation. Even if unobligated balances remained in the Operations and Procurement appropriation accounts by the end of their periods of availability,

relatively small unobligated sums alone do not indicate an impoundment. Under sound administrative funds control practices, agencies may obligate cautiously in order to cover unanticipated liabilities. Viewed another way, agencies obligating 100 percent of their available funds leave little to no room for obligations to be adjusted upward, and if unforeseen costs arise, those agencies run the risk of exceeding amounts available and violating the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A). See GAO, *Budget Issues: Key Questions to Consider When Evaluating Balances in Federal Accounts*, GAO-13-798 (Sept. 30, 2013) (describing various reasons expired, unobligated amounts may reasonably occur).

The legal standard for an impoundment rests on whether the agency withheld budget authority. A delay in filling vacancies, absent a withholding of funds, does not constitute an impoundment. The data Commerce provided does not give us reason to believe that the Weather Service is withholding budget authority, and given that we have no evidence of a direction to withhold funds, we conclude that the Weather Service did not impound Operations or Procurement amounts.

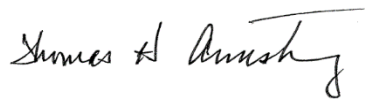
This decision considers only if the Weather Service executed amounts allotted to it in a manner consistent with the Impoundment Control Act of 1974. However, we also asked Commerce and the Weather Service to provide some context for how the Weather Service was responding to congressional concerns regarding its vacancies. Telephone Conversation with Chief, General Law Division, Commerce; Chief Financial Officer, Weather Service; Assistant General Counsel for Appropriations Law, GAO; Senior Attorney, GAO; and Staff Attorney, GAO (Dec. 3, 2020) (December Conversation). The Weather Service's Chief Financial Officer told us that, in response to a House recommendation to spend at least \$625 million for salaries and benefits of Weather Service employees, the Weather Service obligated more than \$625 million for salaries and benefits in fiscal year 2019 and again in fiscal year 2020. *Id.*; Email from Chief Financial Officer, National Weather Service, to Senior Attorney, GAO, *Re: GAO/Commerce phone call: NWS use of funds to address vacancies* (Dec. 9, 2020); H.R. Rep. No. 115-704, at 22. The official also stated that in the past two years there have been no reprogramming actions that have adversely affected the funding levels for employees' salaries and benefits. December Conversation. According to the official, the Weather Service has been fully executing each of its programs, projects, and activities. December Conversation.

The Weather Service Chief Financial Officer identified some of the factors contributing to vacancies, such as the rate of attrition; the administrative limitations on NOAA's capacity to hire and onboard personnel; the difference between funding levels and the pace of federal pay raises; and the difference between funding levels and operational requirements. *Id.* The official explained that the Weather Service has engaged in a multi-year effort to reduce the number of vacancies. *Id.* Part of this effort included improving NOAA's communication with Congress and clarifying the way NOAA reports full-time equivalent data in its spend plan; modifying NOAA's hiring process and prioritizing critical vacancies; implementing a career progression

program; and conducting studies to identify ways to achieve workplace efficiencies.
Id.

CONCLUSION

We conclude that the Weather Service's execution of its fiscal year 2018 and 2019 Operations and Procurement appropriations did not violate the Impoundment Control Act of 1974. We are unaware of any instruction from any official to withhold amounts from obligation. Data Commerce provided to us show that the Weather Service obligated amounts allotted to it at a robust yet measured pace that gives no indication that the agency withheld amounts from obligation.



Thomas H. Armstrong
General Counsel



Decision

Matter of: Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations

File: B-333110

Date: June 15, 2021

DIGEST

Congress has appropriated funds to the Department of Homeland Security (DHS) specifically for constructing fencing or barrier system at the southern border of the United States, commonly referred to as the border wall. On January 20, 2021, the President issued a Proclamation directing a pause in the construction of the border wall and a pause in obligation of funds for the wall.

DHS has almost fully obligated funds appropriated in previous fiscal years for border fence or barrier construction projects, and suspended work on some projects. DHS has not yet obligated funds appropriated in fiscal year 2021.

We conclude that delays in the obligation and expenditure of DHS's appropriations are programmatic delays, not impoundments. DHS and the Office of Management and Budget (OMB) have shown that the use of funds is delayed in order to perform environmental reviews and consult with various stakeholders, as required by law, and determine project funding needs in light of changes that warrant using funds differently than initially planned. As explained below, because the delay here is precipitated by legal requirements, the delay is distinguishable from the withholding of Ukraine security assistance funds.

In order to facilitate Congress's oversight of executive spending and its Constitutional power of the purse, the congressional oversight and appropriations committees should consider requiring OMB and DHS to submit a timeline detailing the planned uses and timeframes for obligating DHS's fiscal year 2021 appropriation. A detailed timeline could serve as a tool for rigorous oversight to ensure the President does not substitute his own policies and priorities in place of those established through the legislative process.

DECISION

On January 20, 2021, President Biden issued a Proclamation¹ terminating a previous declaration of national emergency concerning the southern border of the United States issued by President Trump.² Among other things, the Proclamation directs officials to “pause work on each construction project on the southern border wall, to the extent permitted by law . . . [and to] pause immediately the obligation of funds related to construction of the southern border wall, to the extent permitted by law.”³ Pursuant to our role under the Congressional Budget and Impoundment Control Act of 1974 (ICA), we are issuing this decision on whether a violation of the ICA occurred.⁴

As explained below, we conclude that neither the Proclamation nor its implementation violate the ICA. Funds appropriated to the Department of Homeland Security (DHS) in previous fiscal years are almost fully obligated on border barrier construction projects. Construction has been suspended for some projects in order to rescope the projects to mitigate environmental damage and minimize the impact on border communities, consistent with statutory requirements under environmental and other laws. Delays in spending these funds in order to satisfy applicable statutory requirements are programmatic delays, not impoundments.

Funds appropriated in fiscal year 2021 have not yet been obligated. Prior to obligating these funds for new construction projects, DHS must comply with environmental, procurement, and other statutory prerequisites because the Secretary of Homeland Security has decided not to exercise discretionary statutory waiver authority. In addition, before DHS obligates these funds, it must determine project needs, as initial plans for these funds presupposed the continued waiver of statutory prerequisites and continued participation of the Department of Defense (DOD) in barrier construction. Delays associated with meeting statutory prerequisites and determining funding needs in light of changed circumstances constitute programmatic delays, not impoundments.

The delays here are factually and legally distinguishable from the delay considered in our decision regarding the impermissible withholding of funds for Ukraine security

¹ Proclamation No. 10142, *Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, 86 Fed. Reg. 7225 (Jan. 20, 2021) (Proclamation).

² Proclamation No. 9844, *Declaring a National Emergency Concerning the Southern Border of the United States*, 84 Fed. Reg. 4949 (Feb. 15, 2019).

³ 86 Fed. Reg. 7225.

⁴ Pub. L. No. 93-344, title X, § 1015, 88 Stat. 297, 336 (July 12, 1974); 2 U.S.C. § 686.

assistance.⁵ OMB did not justify the withholding of Ukraine security assistance funding by presenting evidence of any statutory prerequisites that needed to be satisfied before funds could be obligated. Here, delays in the obligation and expenditure of DHS's border barrier appropriations stem from the time required to meet applicable statutory requirements and develop plans for the use of the funds that consider current circumstances.

In accordance with our regular practice, we contacted OMB and DHS to seek factual information and their legal views on this matter.⁶ OMB and DHS each responded with relevant information and their legal views.⁷ We also received supplemental information from Members of Congress seeking our views.⁸

⁵ B-331564, Jan. 16, 2020.

⁶ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html; Letter from General Counsel, GAO, to General Counsel, OMB (Apr. 7, 2021); Letter from General Counsel, GAO, to Principal Deputy General Counsel and Acting General Counsel, DHS (Apr. 7, 2021).

⁷ Letter from General Counsel, OMB, to General Counsel, GAO (May 6, 2021) (OMB Response); Letter from Assistant General Counsel for Appropriations and Fiscal Law, DHS, to Managing Associate General Counsel for Appropriations Law, GAO (May 10, 2021) (DHS Response). OMB's Response included the apportionment schedules for the relevant DHS appropriations. OMB also responded to follow-up questions via e-mail. E-mail from Deputy General Counsel, OMB, to Senior Attorney, GAO, *Subject: RE: GAO letter regarding Proclamation on Border Wall Funds and Impoundment Control Act* (May 20, 2021) (OMB Response Follow-Up E-mail). DHS's Response included an Appendix with obligations and expenditure data for the relevant DHS appropriations. DHS also responded to some follow-up questions via e-mail. E-mail from Assistant General Counsel for Appropriations and Fiscal Law, DHS, to Assistant General Counsel for Appropriations Law, GAO, *Subject: RE: GAO letter regarding Proclamation on Border Wall Funds and Impoundment Control Act* (May 20, 2021) (DHS Response Follow-Up E-mail).

⁸ On March 17, 2021, we received a letter from Members of the United States Senate to the Comptroller General regarding this matter. The signatories to that letter are listed at the end of this decision. We received two additional letters from Members of the House of Representatives and the United States Senate requesting to join the original letter seeking our views. The signatories for each additional letter are also listed at the end of this decision. We received an additional letter from Senators Shelley Moore Capito and Richard Shelby to supplement the record on May 12, 2021. We also received and responded to a letter from Members of Congress regarding the status of this decision on May 25, 2021. B-333110, June 2, 2021.

We note that this is our second decision related to funding for and construction of border barriers.⁹ In our earlier decision we examined whether it was permissible for DOD to transfer and use its fiscal year 2019 appropriations to construct border fencing. There we concluded that DOD's transfer of funds for border fence construction was consistent with DOD's statutory transfer authority and that use of these amounts for border fence construction was permissible.

BACKGROUND

DHS Border Barrier Authorities and Activities

DHS has statutory authority to control and guard the borders of the United States.¹⁰ Within DHS, responsibility for border security is carried out by the United States Customs and Border Protection (CBP).¹¹ Under CBP's Border Wall System Program, it plans for and executes deployment of barriers and other assets intended to prevent the illegal entry of people, drugs, and other contraband along the southern border.¹²

⁹ B-330862, Sept. 5, 2019.

¹⁰ 8 U.S.C. § 1103(a)(5). Specifically, DHS is required to take "actions as may be necessary to install additional physical barriers . . . in the vicinity of the United States border . . . [and] construct reinforced fencing along not less than 700 miles of the southwest border . . . and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, title I, § 102, 110 Stat. 3009, 3009-546, 3009-554 (Sept. 30, 1996) (IIRIRA), *as amended by* DHS Appropriations Act, 2008, Pub. L. No. 110-161, div. E, title V, § 564, 121 Stat. 1844, 2042, 2090–2091 (Dec. 26, 2007).

Notwithstanding this mandate, the law further provides that DHS is not required to install fencing, physical barriers, or other resources in a particular location, if the Secretary of Homeland Security determines that the use or placement of such resources is not the most appropriate means to achieve and maintain control of the border at that location. *Id.*

¹¹ 6 U.S.C. § 211.

¹² GAO, *Southwest Border Security: CBP Is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information*, GAO-18-614 (Washington, D.C.: Aug. 6, 2018); GAO, *DHS Annual Assessment: Most Acquisition Programs Are Meeting Goals but Data Provided to Congress Lacks Context Needed For Effective Oversight*, GAO-21-175 (Washington, D.C.: Jan. 19, 2021). For purposes of this decision, we adopt the term "southern border" as used in Proclamation No. 10142, in reference to the United States-Mexico land border, which is generally referred to in statute as the "southwest border." See, e.g., DHS

The Secretary of Homeland Security has statutory authority to waive all legal requirements where determined necessary to ensure expeditious construction of barriers along the border.¹³ The previous Secretary of Homeland Security waived a variety of environmental and natural resource laws, such as the National Environmental Policy Act of 1969 (NEPA),¹⁴ to ensure expeditious construction of barriers at the border.¹⁵ Note, this authority is discretionary, and the Secretary is not required to waive these requirements. In addition, the Secretary of Homeland Security is required by law to consult with the Secretary of the Interior, Secretary of Agriculture, states, local governments, Indian tribes, and property owners to “minimize the impact on the environment, culture, commerce, and quality of life” at sites where barriers are to be constructed.¹⁶

Each year, CBP receives a lump sum appropriation, available for multiple fiscal years, for its construction activities in its Procurement, Construction, and Improvements (PC&I) account. For example, for fiscal year 2019, CBP received about \$2.5 billion in its PC&I account.¹⁷

For fiscal years 2018, 2019, 2020, and 2021, the respective appropriation act designates a certain amount of funding from the PC&I lump sum that is specifically available for fencing or barrier system. For example, for fiscal year 2019, of the \$2.5 billion appropriated to CBP, \$1.375 billion is available for border fencing.¹⁸ Each year, the appropriations acts vary in the extent to which they include requirements

Appropriations Act, 2020, Pub. L. No. 116-93, div. D, title II, § 209(a)(1), 133 Stat. 2317, 2502, 2511 (Dec. 20, 2019).

¹³ IIRIRA, *as amended by* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, title I, § 102, 119 Stat. 231, 302, 306 (May 11, 2005).

¹⁴ Pub. L. No. 91-190, 83 Stat. 852 (1970). NEPA requires federal agencies to consider and disclose the environmental impacts of a proposed major federal action. 42 U.S.C. § 4332(C). Generally, NEPA requires agencies to prepare an environmental impact statement for a major federal action significantly affecting the quality of the human environment. *Id.* To determine if an environmental impact statement is necessary, an agency may also perform an environmental assessment, a document that briefly considers whether a more detailed environmental impact statement is required. 40 C.F.R. §§ 1501.3, 1501.5.

¹⁵ DHS Response, footnote 13.

¹⁶ IIRIRA, *as amended by* Pub. L. No. 110-161, § 564.

¹⁷ DHS Appropriations Act, 2019, Pub. L. No. 116-6, div. A, title II, 133 Stat. 13, 15, 18 (Feb. 19, 2019).

¹⁸ Pub. L. No. 116-6, § 230(a)(1); DHS Response, at 3.

regarding the design of fencing or barriers and/or the specific geographic areas along the southern border where fencing or barriers may be constructed.¹⁹ Appropriations for border fencing or barriers are available for obligation for five fiscal years.²⁰ This means that these amounts can be used for needs that arise any time during the five-year period of availability, consistent with the purposes of the appropriation.²¹

¹⁹ For fiscal year 2018, \$251 million was made available for secondary fencing, all of which provides for cross-barrier visual situational awareness, in the San Diego Sector; \$445 million was made available for primary pedestrian levee fencing in the Rio Grande Valley Sector; \$196 million was made available for primary pedestrian fencing in the Rio Grande Valley Sector; and \$445 million was made available for replacement of primary pedestrian fencing along the southwest border. All but the \$251 million was available only for operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, which was enacted May 5, 2017 (Consolidated Appropriations Act, 2017). DHS Appropriations Act, 2018, Pub. L. No. 115-141, div. F, title II, § 230, 132 Stat. 348, 605, 616-617 (Mar. 23, 2018); DHS Response, at 2–3. For fiscal year 2019, \$1.375 billion was made available for primary pedestrian fencing, including levee fencing, in the Rio Grande Valley Sector, and this amount was available only for operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017. Pub. L. No. 116-6, § 230; DHS Response, at 3. For fiscal year 2020, \$1.375 billion was made available for barrier system along the southwest border, and this amount was available only for operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017, or operationally effective adaptations of such designs. Pub. L. No. 116-93, § 209; DHS Response, at 3. For fiscal year 2021, the appropriation act provided that an amount equal to the amount made available in section 209 of Public Law 116-93 (the DHS Appropriations Act, 2019) is available for the same purposes as the amount provided under such section in such act. DHS Appropriations Act, 2021, Pub. L. No. 116-260, div. F, title II, § 210, 134 Stat. 1182, 1448, 1456-1457 (Dec. 27, 2020); DHS Response, at 3. Thus, for 2021, \$1.375 billion is available for barrier system along the southwest border. DHS Response, Appendix, at 9–10. Before obligating amounts provided for 2021, or amounts provided previously that remained available for obligation, DHS was required to submit an expenditure plan to the congressional appropriations committees. Pub. L. No. 116-260, § 208; DHS Response, at 3. The appropriations acts for each year prohibit construction of fencing or barriers in certain wildlife refuges and parks. Pub. L. No. 115-141, § 230(c); Pub. L. No. 116-6, § 231; Pub. L. No. 116-93, § 210; Pub. L. No. 116-260, § 211.

²⁰ DHS Response, Appendix, at 1.

²¹ 31 U.S.C. § 1502. When the five-year period of availability ends, the funds expire. Expired funds are not available to incur new obligations, but are available for five fiscal years for disbursement of obligations incurred during the period of availability, and for adjustments to obligations incurred during the period of availability. GAO, A

DHS obligates funds appropriated for fencing or barriers by entering into contracts for border barrier construction activities, or by placing orders for border barrier projects under interagency agreements with other federal agencies, such as the U.S. Army Corps of Engineers (USACE).²² DHS incurs an obligation when it enters into contracts, and when it places orders under the interagency agreements.²³ DHS has obligated fiscal year 2018, 2019, and 2020 fencing or barrier appropriations by entering into contracts and placing orders under interagency agreements for border barrier construction, and the majority of this funding was obligated by August 2020.²⁴ DHS has not yet obligated its fiscal year 2021 barrier system appropriation.²⁵

To support border barrier construction, DHS also requested and received assistance from DOD.²⁶ DOD transferred and used its appropriations to construct border fencing in support of DHS.²⁷ In addition, following the declaration of national

Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 23.

²² The interagency agreements here were entered into pursuant to the Economy Act, 31 U.S.C. § 1535, and authorities under 40 U.S.C. §§ 321, 501, 502. DHS Response, Appendix (table showing data on border barrier contracts, interagency agreements, obligations, and expenditures).

²³ An obligation is a “definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received.” *Glossary*, at 70. An agency incurs an obligation, for example, when it enters into a contract or takes an action requiring the government to make payments from one government account to another. *Id.*; see also 31 U.S.C. § 1535(d) (for interagency agreements under the authority of the Economy Act, the placement of an order under the agreement obligates the appropriation of the ordering agency); 31 U.S.C. § 1501(a)(1) (an agency shall record an obligation when supported by documentary evidence of a binding agreement between the agency and another agency); DHS Response, at 8. An expenditure is the actual spending of money, such as making a payment. *Glossary*, at 48.

²⁴ DHS Response, at 3, Appendix, at 2.

²⁵ DHS Response, Appendix, at 2–3.

²⁶ DOD has authority under 10 U.S.C. § 284(b)(7) to provide support for the counterdrug activities of other departments to include the “[c]onstruction of . . . fences . . . to block drug smuggling corridors across international boundaries of the United States.” See also GAO, *Southwest Border Security: Actions Are Needed to Address the Cost and Readiness Implications of Continued DOD Support to U.S. Customs and Border Protection*, GAO-21-356 (Washington, D.C.: Feb. 2021).

²⁷ In B-330862, Sept. 5, 2019, we concluded that DOD’s transfer of fiscal year 2019 amounts into its Drug Interdiction account for border fence construction was consistent with DOD’s transfer authority and that use of these amounts for the

emergency concerning the southern border,²⁸ the Secretary of Defense exercised statutory authority made available by the declaration of emergency to use unobligated military construction appropriations to undertake border barrier projects necessary to support the armed forces.²⁹ Also, DHS used amounts in the Treasury Forfeiture Fund for border barrier construction.³⁰

Proclamation Pausing Border Barrier Construction and Obligations

On January 20, 2021, President Biden issued a Proclamation terminating the previous declaration of national emergency concerning the southern border issued by President Trump.³¹ The Proclamation also directs officials to “pause work on each construction project on the southern border wall, to the extent permitted by law . . . [and to] pause immediately the obligation of funds related to construction of the southern border wall, to the extent permitted by law.”³² The Proclamation also requires the Secretary of Homeland Security, in coordination with other relevant agencies, to develop a plan within 60 days of the Proclamation that both redirects funds used for border barriers and provides for the continued use of funding expressly appropriated for border barriers consistent with that appropriated purpose.³³ In addition, the President’s Budget for Fiscal Year 2022 proposes the cancellation of all prior year border barrier construction funding that remains unobligated at the time of enactment of the Appropriations Act for Fiscal Year 2022.³⁴

purpose of border fence construction was permissible under various statutory provisions. The Court of Appeals for the Ninth Circuit held that the transfer of amounts was not authorized by DOD’s transfer authority. *California v. Trump*, 963 F.3d 926, 949 (9th Cir.), *cert. granted*, 141 S. Ct. 618 (2020).

²⁸ 84 Fed. Reg. 4949.

²⁹ 10 U.S.C. § 2808; GAO, *Southwest Border: Information on Federal Agencies’ Process for Acquiring Private Land for Barriers*, GAO-21-114 (Washington, D.C.: Nov. 2020).

³⁰ See 86 Fed. Reg. 7225; 31 U.S.C. § 9705(g)(4)(B).

³¹ 86 Fed. Reg. 7225.

³² *Id.*

³³ 86 Fed. Reg. 7226.

³⁴ *Appendix, Budget of the United States Government for Fiscal Year 2022*, at 517, available at https://www.whitehouse.gov/wp-content/uploads/2021/05/appendix_fy22.pdf (last visited June 1, 2021) (FY22 Budget Request).

DHS and USACE issued suspension of work orders on existing barrier construction contracts.³⁵ In addition, DOD announced it was cancelling all border barrier construction projects funded with appropriations originally intended for military missions and functions.³⁶

DISCUSSION

At issue here is whether the Proclamation and actions taken by OMB and DHS to implement the Proclamation violate the ICA. We first address DHS's fiscal year 2018, 2019, and 2020 appropriations, and then, separately, its fiscal year 2021 appropriation. We also address how the factual and legal circumstances here are distinguishable from our decision on Ukraine security assistance funding.³⁷ Lastly, we address President Biden's proposed cancellation of unobligated border barrier funding.

Analysis of Funding Appropriated In Previous Fiscal Years for Border Fencing and Barriers

DHS has almost fully obligated the approximately \$4 billion appropriated across fiscal years 2018, 2019, and 2020, for barrier construction projects.³⁸ DHS and

³⁵ DHS Response, at 5; DHS Response Follow-Up E-mail.

³⁶ DOD, *DOD Release Regarding Cancellation of Border Barrier Project Cancellation* (Apr. 30, 2021), available at <https://www.defense.gov/Newsroom/Releases/Release/Article/2591993/dod-release-regarding-cancellation-of-border-barrier-project-cancellation/> (last visited June 2, 2021). OMB and DOD announced that military construction appropriations previously planned for border barrier construction projects that remain unobligated (about \$2 billion) will be used instead for other DOD military construction projects, such as a ships maintenance facility in Virginia and a mission training complex in Germany. White House, Fact Sheet: *Department of Defense and Department of Homeland Security Plans for Border Wall Funds* (June 11, 2021), available at [FACT SHEET: Department of Defense and Department of Homeland Security Plans for Border Wall Funds | The White House](#) (last visited June 14, 2021); Department of Defense, Deputy Secretary of Defense Memorandum for Director, Office of Management and Budget, *Department of Defense Plan for the Redirection of Border Wall Funds* (June 10, 2021).

³⁷ B-331564, Jan. 16, 2020.

³⁸ Specifically, as of March 31, 2021, DHS obligated approximately 95 percent, 98 percent, and 96 percent of its fencing or barrier appropriations for fiscal years 2018, 2019, and 2020, respectively. See DHS Response, Appendix, at 4–5. Much of the amount appropriated for fiscal year 2018 was obligated during 2018, 2019, and 2020, on an interagency agreement with USACE for construction projects. DHS Response, at 3, Appendix (table showing data on border barrier contracts,

USACE issued suspension of work orders for some construction projects.³⁹ However, expenditures (payments) are continuing because construction work continues on some projects to “avert immediate physical dangers,” and work continues under other contracts in order to monitor the work areas where construction has been suspended.⁴⁰ In addition, DHS and USACE continue to make progress payments to contractors for work that occurred prior to issuance of the suspension of work orders.⁴¹

DHS explains that construction work is suspended so that it can take steps necessary to comply with statutory requirements under environmental laws and for stakeholder consultation.⁴² Specifically, for existing projects funded with fiscal year 2018, 2019, or 2020 appropriations, DHS will engage in the standard environmental planning and compliance process, including compliance with NEPA.⁴³ This process will include remediating or mitigating environmental damage caused by construction, to the extent possible.⁴⁴ The Secretary of Homeland Security is considering rescinding or revising previously issued waivers of environmental and other laws, but DHS will engage in the standard compliance process, regardless of whether a previously issued waiver is in place.⁴⁵

In addition, DHS suspended construction work to engage in more substantive consultation with stakeholders, such as property owners and border community

interagency agreements, obligations, and expenditures). A majority of amounts appropriated for fiscal year 2019 was obligated in May 2019 on an interagency agreement with USACE for construction projects. *Id.* A majority of amounts appropriated for fiscal year 2020 was obligated in May, June, and August of 2020, on an interagency agreement with USACE for construction projects, or on construction contracts awarded by DHS. *Id.* GAO is separately conducting a performance audit examining characteristics, including funding, of USACE’s contracts for border barrier construction, among other things. USACE’s obligations for border barriers is not the subject of this decision.

³⁹ See DHS Response, at 10; DHS Response Follow-Up E-mail; Federal Acquisition Regulation (FAR) § 52.242-14 (standard clause for inclusion in construction contracts stating that the government may suspend all or any part of the work called for under a contract for the period of time that the government determines appropriate, “for the convenience of the Government”).

⁴⁰ DHS Response, at 10, 12; DHS Response Follow-Up E-mail.

⁴¹ DHS Response, at 10.

⁴² See DHS Response, at 12.

⁴³ DHS Response, at 12.

⁴⁴ *Id.*

⁴⁵ *Id.*

residents, as required under the Secretary’s statutory consultation provision.⁴⁶ DHS states that consultation will be robust, and will inform both environmental planning and execution of barrier construction projects.⁴⁷ As a result of the need to comply with stakeholder consultation requirements, NEPA, and other environmental and natural resource laws, DHS states that it will rescope existing construction projects accordingly.⁴⁸

Any delays in expenditures here result from ensuring that requirements under environmental and stakeholder consultation laws are satisfied for border barrier projects. We have previously concluded that delays associated with the review of whether statutory prerequisites were satisfied are programmatic delays outside the reach of the ICA, not impoundments.⁴⁹ Following our previous decisions, delays of this nature are programmatic delays.

The fact that small amounts of unobligated sums remain in DHS’s appropriation accounts here does not indicate an impoundment.⁵⁰ These appropriations are

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See DHS Response, at 12–13.

⁴⁹ B-290659, July 24, 2002 (delay in obligation of appropriations for the United Nations Population Fund (UNFPA) to review whether UNFPA satisfied certain statutory prerequisites to receiving the funding was programmatic because the agency was reviewing whether the required legal conditions for use of the funds had been met). See also B-291241, Oct. 8, 2002 (delay in apportioning funds was programmatic because OMB was reviewing whether a statutory limit on the transfer of funds applied to the appropriation at issue). We have also previously concluded that delays stemming from changes to project design or scope are programmatic delays. B-221412, Feb. 12, 1986 (delays in the obligation of Veterans Administration appropriations were programmatic because they resulted from changes to project design or scope and there was no evidence of an intent to refrain from obligating the funds).

⁵⁰ B-200685, Dec. 23, 1980, at 2 (“[T]he mere failure to obligate the full amount of an appropriation before it expires does not necessarily mean that there has been an impoundment. There must be sufficient evidence of an intention to refrain from obligating or expending available budget authority, based on the facts and circumstances of each case.”). As previously described, DHS has obligated a majority of its fiscal year 2018, 2019, and 2020 appropriations for construction projects. In previous decisions where we found obligation rates were comparable across the years, and there was no evidence of an intent to withhold funds from obligation, we concluded that there was not an impoundment. Dec. 23, 2020 (The National Weather Service obligated funds “at a robust yet measured pace that [gave]

available for multiple fiscal years before they expire, and DHS can obligate additional amounts consistent with current project requirements. Additionally, DHS stated that it will maintain some unobligated balances in the accounts, pursuant to departmental funds control practices, in order to cover unanticipated liabilities that may arise in the future.⁵¹ We have recognized that sound administrative funds control practices may reasonably result in small amounts of expired, unobligated balances.⁵²

Furthermore, the apportionment schedules for each DHS appropriation reflect that amounts are apportioned and available for obligation.⁵³ OMB and DHS stated that no instructions to withhold these appropriations have been given.⁵⁴

DHS asserts that it is not impounding funds because it is not withholding funds from obligation or expenditure, and we agree.⁵⁵ Prior year funding for border fencing or barriers remains obligated for construction projects, and continues to be spent. Any delayed expenditures stem from DHS taking necessary steps to comply with statutory environmental and stakeholder consultation requirements for these construction projects and do not constitute an impoundment. Therefore, there is no violation of the ICA with regard to DHS's appropriations for fiscal years 2018, 2019, and 2020.

Analysis of Funding Appropriated In Fiscal Year 2021 for Border Barriers

For fiscal year 2021, DHS received \$1.375 billion in appropriations for the construction of barrier system along the southern border, and has not yet obligated

no indication that the agency withheld amounts from obligation.”); B-320091, July 23, 2010; B-331298.

⁵¹ See DHS Response, Appendix, at 2.

⁵² B-331298, Dec. 23, 2020.

⁵³ OMB Response, Attachment.

⁵⁴ OMB Response, Attachment; DHS Response, at 5–6, Appendix, at 7.

⁵⁵ DHS Response, at 10.

these funds.⁵⁶ DHS explains that this funding will be obligated for new construction projects once statutory prerequisites have been satisfied.⁵⁷

Specifically, the previous Secretary of Homeland Security exercised statutory authority to waive laws such as NEPA to expedite construction of barriers along the border.⁵⁸ The current Secretary of Homeland Security will not exercise authority to waive any laws with respect to barrier construction.⁵⁹ Therefore, prior to obligating 2021 barrier funds on contracts for new projects, DHS must first comply with applicable laws. For example, DHS must undertake environmental reviews and analysis, including compliance with NEPA and the Endangered Species Act, and consult with stakeholders.⁶⁰ Once those processes are complete, or nearly complete, DHS can finalize designs and begin the contracting process which, under the Competition in Contracting Act of 1984 (CICA),⁶¹ requires full and open competition.⁶² Indeed, DHS has no legal basis to proceed with contract awards without meeting these legal prerequisites.

⁵⁶ Pub. L. No. 116-260, § 210; DHS Response, Appendix, at 3. Unlike most of the amounts appropriated in previous fiscal years, the 2021 appropriation is not restricted in terms of the location where barriers may be constructed. Also, DHS explains that there are no statutory design restrictions with respect to fiscal year 2021 barrier funding, since the appropriation does not reference or incorporate the design restriction from the DHS Appropriations Act, 2020. DHS Response, Appendix, at 9–10.

⁵⁷ DHS Response, at 14.

⁵⁸ Pursuant to a law enacted in 2005, the Secretary of Homeland Security “shall have the authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of . . . barriers . . . [which] shall be effective upon being published in the Federal Register.” IIRIRA, *as amended by* Pub. L. No. 109-13, § 102. Under a statute in effect prior to enactment of the 2005 law, the Secretary of Homeland Security was authorized to waive the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 883 (Dec. 28, 1973), and NEPA, as necessary to ensure expeditious construction of barriers. Pub. L. No. 104-208, § 102(c).

⁵⁹ OMB Response, at 5–6; DHS Response, at 11, Appendix, at 4. The authority that Congress has provided to the Secretary of Homeland Security to waive legal requirements for barrier construction provides the Secretary with a choice of whether to waive any laws and, if so, which laws to waive. The statute could, of course, be amended by Congress to change the discretion afforded to the Secretary.

⁶⁰ OMB Response, at 5–6; DHS Response, at 11, 14, Appendix, at 4.

⁶¹ Pub. L. No. 98-369, div. B, title VII, 98 Stat. 494, 1175 (July 18, 1984).

⁶² DHS Response, at 14, Appendix, at 4.

A delay in the obligation of DHS's 2021 border barrier funding caused by steps DHS is taking to ensure compliance with environmental, stakeholder consultation, and procurement statutes is a programmatic delay, not an impoundment under the ICA.⁶³ By law, these requirements must be satisfied before DHS can obligate the funds, and OMB and DHS have shown that they intend to spend the funds for new construction projects once applicable legal processes and procedures have taken place.⁶⁴ Accordingly, the circumstances reflect a programmatic delay, not an impoundment.

DHS states that some of its 2021 border barrier funding will be obligated for existing barrier construction projects, once DHS has determined existing projects' needs.⁶⁵ Specifically, DHS is reviewing existing projects, and will use some of its 2021 funding for projects previously constructed by DOD, for the costs associated with bringing DHS's existing projects into compliance with statutory requirements under environmental laws, and for stakeholder consultation.⁶⁶ DHS asserts it has substantial discretion in determining the projects that will be funded with the 2021 appropriation.⁶⁷

A delay in obligation of funds while DHS determines project needs in light of changed circumstances is a programmatic delay, not an impoundment. We have previously concluded that delays associated with certain project changes are programmatic delays.⁶⁸ Here, there have been changes to existing projects, subsequent to enactment of the 2021 appropriation. In particular, DOD cancelled its barrier projects, and DHS decided that its approach to existing, previously funded projects will include standard environmental planning and compliance and robust stakeholder consultation.

On January 13, 2021, DHS submitted a statutorily required expenditure plan to the congressional appropriations committees regarding CBP's PC&I lump-sum appropriation.⁶⁹ With regard to the fiscal year 2021 appropriation for barrier system, the plan stated that the funds would be used for construction of 56 miles of border

⁶³ Under our previous decisions, delays associated with the review of whether statutory prerequisites were satisfied, or whether a statutory transfer limit applied, are programmatic delays. B-291241, Oct. 8, 2002; B-290659, July 24, 2002.

⁶⁴ DHS Response, at 14.

⁶⁵ OMB Response, at 9; DHS Response, at 13, Appendix, at 6.

⁶⁶ OMB Response, at 8; DHS Response, at 12.

⁶⁷ DHS Response, at 13.

⁶⁸ B-221412, Feb. 12, 1986.

⁶⁹ DHS Response, Appendix, at 3.

barrier system in top-priority locations.⁷⁰ Specifically, DHS planned to use its 2021 barrier appropriation for construction in California, and to award a contract by January 19, 2021, which would have required waiving NEPA and other laws to proceed on this timeline.⁷¹ DHS's plans presupposed continued DOD participation in existing barrier construction and waiver of environmental and natural resources laws.

We additionally note that the apportionment schedule for DHS's fiscal year 2021 border barrier appropriation reflects that amounts are available and that OMB has not created a reserve with respect to this funding.⁷² Also, OMB stated that it has not directed the withholding of this appropriation.⁷³ And DHS likewise stated that OMB has not instructed DHS to withhold funding from obligation or expenditure, pursuant to the Proclamation or otherwise.⁷⁴ Lastly, DHS stated it has not, and is not, withholding this funding in a manner prohibited by the ICA.⁷⁵

OMB and DHS assert that any delay in obligating fiscal year 2021 funding is programmatic, not an impoundment.⁷⁶ As explained, based on the information before us, we conclude that there is not an impoundment of DHS's fiscal year 2021 barrier appropriation and no violation of the ICA with respect to these funds. OMB and DHS have met their burden to justify why the funds have not been obligated: meeting the conditions of applicable laws, absent their waiver, must precede obligation of funds for new projects, and determination of existing projects' funding needs in light of changed circumstances must precede obligation of funds for current projects. We see nothing to indicate that either OMB or DHS is attempting to override congressional intent that these funds be used for constructing barriers at the southern border.

⁷⁰ DHS Response, footnote 17.

⁷¹ DHS Response, at 4.

⁷² OMB Response, at 10, Attachment, at 12; DHS Response, Appendix, at 7. The apportionment for the 2021 funds reflects a restriction in the DHS Appropriations Act, 2021, that CBP's lump-sum appropriation for PC&I is not available for obligation until DHS submits an expenditure plan to the congressional appropriations committees. Pub. L. No. 116-260, § 208 (statutory requirement to submit an expenditure plan); OMB Response, Attachment (fiscal year 2021 apportionment). DHS submitted the expenditure plan on January 13, 2021. DHS Response, at 3.

⁷³ OMB Response, Attachment, at 12.

⁷⁴ DHS Response, Appendix, at 7.

⁷⁵ *Id.*

⁷⁶ OMB Response Follow-Up E-mail; DHS Response, at 13–14.

However, we are sensitive to the fact that this appropriation was provided several months ago, and none of the funds have yet been obligated. Neither OMB nor DHS provided us with a detailed timeframe in which this appropriation will be obligated for new and/or existing barrier construction.⁷⁷ Therefore, in order to facilitate Congress's oversight of executive spending and its Constitutional power of the purse, the congressional oversight and appropriations committees should consider requiring OMB and DHS to submit a timeline detailing the planned uses and timeframes for obligating this appropriation.

Distinguishing the Withholding of Ukraine Security Assistance

Any delay in obligation or expenditure of border barrier funding is factually and legally distinguishable from OMB's impermissible withholding of funds appropriated to DOD for security assistance to Ukraine in B-331564, Jan. 16, 2020. In our decision regarding Ukraine security assistance funding, the uses of the funding had been planned for by DOD, and DOD even certified to Congress that statutory prerequisites had been satisfied. When OMB made the funds unavailable for obligation, it did not identify any circumstances to justify taking a different approach from the one planned for and certified by DOD. OMB asserted that the delay was associated with a need "to determine the best use of such funds," but OMB did not provide any support for why DOD's plan for the funds did not reflect the best use of the funds.⁷⁸ Nor did OMB identify any other legal requirements that needed to be met before the Ukraine security assistance funding could be spent. Instead, in its response to us, OMB described the withholding as necessary to ensure that the funds were not spent "in a manner that could conflict with the President's foreign policy."⁷⁹

Here, laws such as NEPA, CICA, and the stakeholder consultation statute constrain the obligation of DHS's barrier appropriations. While previous Secretaries of Homeland Security waived these laws under discretionary statutory authority, the current Secretary will not issue waivers, and the terms of legal prerequisites must be satisfied,⁸⁰ also resulting possibly in rescoping existing projects to mitigate environmental damage,⁸¹ for example.

⁷⁷ DHS noted that activities such as environmental reviews and requests for proposals may affect the timeline for contract execution, and that for large, complex, construction projects, full NEPA review and full and open competition for contract award can take several months to several years. DHS Response, at 14, footnote 57.

⁷⁸ B-331564, Jan. 16, 2020, at 6 (citation omitted).

⁷⁹ *Id.*

⁸⁰ OMB Response, at 9.

⁸¹ DHS Response, at 12.

Proposed Cancellation of Border Barrier Funding in Budget Request

We note that President Biden's FY22 Budget Request proposed cancellation of border barrier funding that remains unobligated.⁸² Cancellation of this funding can only be accomplished through a duly enacted law.⁸³ Withholding unobligated funding based on the FY22 Budget Request would violate the ICA.⁸⁴ Here, OMB stated that the Administration will continue obligating and expending DHS's border barrier funding "unless and until" Congress acts on the requested cancellation.⁸⁵ A proposed cancellation through the budget request, without being coupled with an impermissible withholding or delay, does not violate the ICA. As explained, we conclude that DHS's barrier appropriations are apportioned as available, and there is no indication of an impermissible delay in the obligation of funds.

CONCLUSION

President Biden announced a policy choice through the Proclamation that funding not be diverted for border barrier construction, and through the Budget Request that proposes cancellation of unobligated border barrier funding. However, making a policy choice through the Proclamation and Budget Request, without more, does not constitute an impoundment in violation of the ICA. Here, funds appropriated to DHS in previous fiscal years remain almost fully obligated for barrier construction projects. DHS and USACE suspended work after the current Secretary of Homeland Security exercised statutorily provided discretion to require that existing projects now comply with environmental and stakeholder consultation laws. Though DHS has not yet obligated its fiscal year 2021 appropriation, it must first comply with statutory prerequisites and finalize determinations for barrier project funding requirements in light of current circumstances. Delays in the obligation and expenditure of funds

⁸² FY22 Budget Request, at 517. OMB describes a cancellation proposal as "a proposal by the President to reduce budgetary resources that are not subject to the requirements of Title X of the Congressional Budget and Impoundment Control Act." OMB Circular No. A-11, *Preparation Submission, and Execution of the Budget*, pt. 3, § 112.2 (Arp. 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf> (last visited June 2, 2021). The Circular further states that amounts proposed for cancellation in the President's Budget Request are not to be withheld from obligation. *Id.*

⁸³ The Constitution sets forth the procedures of bicameralism and presentment, which are the only mechanism for enacting federal law. B-330330, Dec. 10, 2018.

⁸⁴ For example, we concluded that the withholding of appropriations for the Advanced Research Projects Agency-Energy based on the President's Budget Request, which proposed cancellation of the funds, violated the ICA. B-329092, Dec. 12, 2017.

⁸⁵ OMB Response, at 9.

here, associated with meeting statutory requirements and finalizing plans for the uses of funding, are programmatic delays, not impoundments.

To facilitate Congress's oversight of executive spending on border barrier construction, Congress should consider requiring OMB and DHS to submit a timeline detailing the planned uses and timeframes for obligation and expenditure of DHS's barrier appropriations. Having detailed information about the timeframes for spending these funds will help assure Congress that executive action is aligned with the policies and priorities it established in the legislative process.

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

Thomas H. Armstrong
General Counsel

List of Signatories of March 17, 2021 Letter

Shelley Morre Capito
United States Senate

Richard Shelby
United States Senate

Mitch McConnell
United States Senate

John Thune
United States Senate

Thom Tillis
United States Senate

Bill Hagerty
United States Senate

Jim Risch
United States Senate

John Kennedy
United States Senate

James M. Inhofe
United States Senate

Marco Rubio
United States Senate

Marsha Blackburn
United States Senate

Deb Fischer
United States Senate

Cindy Hyde-Smith
United States Senate

Roy Blunt
United States Senate

John Hoeven
United States Senate

Jerry Moran
United States Senate

Rand Paul, M.D.
United States Senate

John Barrasso, M.D.
United States Senate

Richard Burr
United States Senate

Lindsey O. Graham
United States Senate

James Lankford
United States Senate

Mike Braun
United States Senate

Joni K. Ernst
United States Senate

Pat Toomey
United States Senate

Mike Crapo
United States Senate

Roger W. Marshall
United States Senate

Roger F. Wicker
United States Senate

Rick Scott
United States Senate

John Boozman
United States Senate

M. Michael Rounds
United States Senate

Steve Daines
United States Senate

Rob Portman
United States Senate

Cynthia M. Lummis
United States Senate

Susan M. Collins
United States Senate

Tommy Tuberville
United States Senate

Kevin Cramer
United States Senate

Mitt Romney
United States Senate

Todd Young
United States Senate

John Cornyn
United States Senate

Tom Cotton
United States Senate

List of Signatories of March 23, 2021 Letter

John Katko
House of Representatives

Kay Granger
House of Representatives

Jason Smith
House of Representatives

Kevin McCarthy
House of Representatives

Steve Scalise
House of Representatives

Clay Higgins
House of Representatives

Michael Guest
House of Representatives

Dan Bishop
House of Representatives

Jeff Van Drew
House of Representatives

Ralph Norman
House of Representatives

Mariannette Miller-Meeks
House of Representatives

Diana Harshbarger
House of Representatives

Andrew S. Clyde
House of Representatives

Carlos A. Gimenez
House of Representatives

Jake Laturner
House of Representatives

Peter Meijer
House of Representatives

Kat Cammack
House of Representatives

August Pfluger
House of Representatives

Andrew Garbarino
House of Representatives

Harold Rogers
House of Representatives

Robert B. Aderholt
House of Representatives

Mike Simpson
House of Representatives

John Carter
House of Representatives

Ken Calvert
House of Representatives

Tom Cole
House of Representatives

Mario Diaz-Balart
House of Representatives

Steve Womack
House of Representatives

Jeff Fortenberry
House of Representatives

Charles Fleischmann
House of Representatives

David P. Joyce
House of Representatives

Andy Harris, M.D.
House of Representatives

Mark Amodei
House of Representatives

Chris Stewart
House of Representatives

Steven Palazzo
House of Representatives

David G. Valadao
House of Representatives

Dan Newhouse
House of Representatives

John Moolenaar
House of Representatives

John Rutherford
House of Representatives

Ben Cline
House of Representatives

Guy Reschenthaler
House of Representatives

Mike Garcia
House of Representatives

Ashley Hinson
House of Representatives

Tony Gonzales
House of Representatives

Tom McClintock
House of Representatives

Glenn Grothman
House of Representatives

Chris Jacobs
House of Representatives

Michael C. Burgess, M.D.
House of Representatives

Earl “Buddy” Carter
House of Representatives

Randy Feenstra
House of Representatives

Tedd Budd
House of Representatives

Anthony Gonzalez
House of Representatives

Christopher H. Smith
House of Representatives

Mo Brooks
House of Representatives

Barry Moore
House of Representatives

Andy Biggs
House of Representatives

Burgess Owens
House of Representatives

Scott DesJarlais, M.D.
House of Representatives

Michael Cloud
House of Representatives

Mike Rogers
House of Representatives

Dan Crenshaw
House of Representatives

Matt Rosendale
House of Representatives

Brian Babin, D.D.S.
House of Representatives

Doug Lamalfa
House of Representatives

Darrell Issa
House of Representatives

Rick W. Allen
House of Representatives

Bob Good
House of Representatives

Jaime Herrera Beutler
House of Representatives

Dan Sullivan
United States Senate

Mike Lee
United States Senate

Josh Hawley
United States Senate

Ron Johnson,
United States Senate

Signatory of April 16, 2021 Letter

James R. Comer
House of Representatives

Year in Review: Earmarks and Reprogrammings



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Decision

Matter of: Office of the Special Inspector General for the Troubled Asset Relief Program—Use of Amounts for Oversight Activities

File: B-330984

Date: May 27, 2020

DIGEST

Amounts provided to the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) by the Public-Private Investment Program Improvement and Oversight Act of 2009 (PPIP Act) are available to SIGTARP to carry out its authorities under the Emergency Economic Stabilization Act of 2008 (EESA). Though the PPIP Act requires SIGTARP to “prioritize” particular activities when utilizing amounts provided by such act, it may still use these amounts for other authorized purposes, such as to carry out activities authorized by EESA. Because the amounts made available to SIGTARP in the PPIP Act are available as an additional amount to carry out activities authorized by EESA, SIGTARP may use these amounts and its other appropriations, including its annual salaries and expenses appropriation, to carry out such activities.

DECISION

The General Counsel of the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), on behalf of the Special Inspector General, has requested an advance decision under 31 U.S.C. § 3529 on the propriety of using funding provided by the Public-Private Investment Program Improvement and Oversight Act of 2009 (PPIP Act),¹ to support oversight activities for all programs established under the Troubled Asset Relief Program (TARP). Letter from General Counsel, SIGTARP, to General Counsel, GAO, Apr. 19, 2019 (Request Letter). As explained below, we conclude that amounts provided by the PPIP Act are available to SIGTARP to carry out its authorities under the Emergency Economic Stabilization

¹ Pub. L. No. 111-22, div. A, title IV, § 402, 123 Stat. 1656 (May 20, 2009), *codified at* 12 U.S.C. § 5231a.

Act of 2008, in addition to any other amounts SIGTARP has available for such activities.

BACKGROUND

The Emergency Economic Stabilization Act of 2008 (EESA) authorized the Secretary of the Treasury (Secretary) to establish the Troubled Asset Relief Program (TARP) to purchase, or make commitments to purchase, troubled assets from any financial institution, and to establish a program to guarantee troubled assets issued before March 14, 2008. 12 U.S.C. §§ 5211(a)(1), 5212(a)(1). To ensure appropriate oversight of this new program, EESA also established the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) to “conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets . . . under any [TARP program],” and provided \$50,000,000 for SIGTARP to carry out these duties. 12 U.S.C. § 5231(a), (c), (j).

In the Public-Private Investment Program Improvement and Oversight Act of 2009 (PPIP Act), Congress provided \$15,000,000 to “be made available to the Special Inspector General, which shall be in addition to amounts otherwise made available to the Special Inspector General.” 12 U.S.C. § 5231a(c)(1). Congress also directed that in using these amounts, SIGTARP should “prioritize the performance of audits or investigations of recipients of non-recourse Federal loans . . . to the extent that such priority is consistent with other aspects of the mission of the Special Inspector General.” 12 U.S.C. § 5231a(c)(2). However, there has been little to no recent financial activity concerning non-recourse federal loans so “those areas of oversight are not consistent with the current and expected future mission of SIGTARP.” Request Letter, at 1.

SIGTARP believes that it may use the \$15,000,000 provided by the PPIP Act to fund oversight investigations of any ongoing TARP programs, in part, because there has been little to no recent activity on non-recourse federal loans. Request Letter, at 2. However, out of an abundance of caution, SIGTARP has requested an advance legal decision on the propriety of using these amounts to carry out such activities. *Id.*

DISCUSSION

Appropriated funds are available only for authorized purposes. 31 U.S.C. § 1301(a). When an appropriation does not specifically enumerate all of the items for which it is available, we apply the necessary expense rule to determine if an appropriation is available for a particular expenditure. B-303170, Apr. 22, 2005; 66 Comp. Gen. 356 (1987). The rule requires the identification of a reasonable, logical relationship between the proposed expenditure and the appropriation. B-303170, Apr. 22, 2005. To determine whether such a reasonable, logical relationship exists, the starting point is the language making the appropriation. B-323365, Aug. 6, 2014. Subsection (c)(1) of the PPIP Act provides \$15,000,000 to SIGTARP. Such subsection reads as follows:

(c) ADDITIONAL APPROPRIATIONS FOR THE SPECIAL INSPECTOR GENERAL.—

(1) IN GENERAL.—Of amounts made available under section 115(a) of [EESA, 12 U.S.C. § 5225(a)]², \$15,000,000 shall be made available to the Special Inspector General, which shall be in addition to amounts otherwise made available to the Special Inspector General.

(2) PRIORITIES.—In utilizing funds made available under this section, the Special Inspector General shall prioritize the performance of audits or investigations of recipients of non-recourse Federal loans made under any program that is funded in whole or in part by funds appropriated under [EESA], to the extent that such priority is consistent with other aspects of the mission of the Special Inspector General. . . .

12 U.S.C. § 5231a(c). Subsection (c)(1) of the PPIP Act does not enumerate the particular activities for which it makes amounts available. However, because the \$15,000,000 is derived from a larger sum made available in EESA, which also established SIGTARP, the provisions of EESA inform the purposes for which these amounts are available.

EESA authorized the Special Inspector General to conduct audits and investigations of all TARP programs. 12 U.S.C. § 5231(c). Reading the broad appropriations language in conjunction with SIGTARP’s organic legislation in EESA suggests that the amounts provided by the PPIP Act are available to carry out SIGTARP’s authorities, as enumerated by EESA. In this respect, the amounts Congress provided to SIGTARP under the PPIP Act are similar to lump-sum appropriations made available to agencies for broad purposes, such as for “salaries and expenses” or for “necessary expenses.” The purposes of such appropriations are similarly informed by the agency’s underlying organic legislation. See B-323365, Aug. 6, 2014 (where an agency received an annual appropriation broadly available for “expenses of” the agency, the appropriation was available for a grant program that was consistent with the agency’s statutory mission as stated in its authorizing legislation).

Subsection (c)(2) of the PPIP Act requires SIGTARP to “prioritize the performance of audits or investigations of recipients of non-recourse Federal loans made under any program that is funded in whole or in part by funds appropriated under [EESA], to

² Section 115(a) of EESA imposed a \$700 billion limit on the Secretary of the Treasury’s authority under section 118 of the act to use the proceeds of the sales of any securities issued under chapter 31 of title 31, United States Code, to carry out the program to purchase troubled assets from financial institutions and the program to guarantee troubled assets. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 115(a), 122 Stat. 3765, 3780 (Oct. 3, 2008). Congress subsequently lowered this limit to \$475 billion. 12 U.S.C. § 5225(a).

the extent that such priority is consistent with other aspects of the mission of the Special Inspector General.” 12 U.S.C. § 5231a(c)(2). This language does not restrict the availability of amounts provided by subsection (c)(1) of such section so that they are available *only* for the purposes described in subsection (c)(2). Rather, SIGTARP must “prioritize” these activities—that is, assign them precedence. See American Heritage Dictionary (5th Ed. 2020) (definition of “prioritize”). The directive for SIGTARP to prioritize certain activities still permits SIGTARP to carry out other activities, so long as the activities described in subsection (c)(2) receive higher priority.

Furthermore, subsection (c)(2) of the PPIP Act provides that the prioritization of certain investigations is necessary only if otherwise consistent with the mission of the Special Inspector General. 12 U.S.C. § 5231a(c)(2). As SIGTARP has explained, there has been little to no recent financial activity concerning non-recourse federal loans and, accordingly, that “those areas of oversight are not consistent with the current and expected future mission of SIGTARP.” Request Letter, at 1. Since the investigations that are required to be prioritized under subsection (c)(2) are not consistent with SIGTARP’s current mission, SIGTARP is not required to prioritize such investigations over ones that are consistent with its current mission. Because the amounts provided by subsection (c)(1) are available to carry out activities authorized by EESA and subsection (c)(2) does not strictly limit the purposes for which the amounts are available, we see no reason to question SIGTARP’s determination that it may use amounts provided under the PPIP Act to carry out other activities consistent with SIGTARP’s statutory authorities under EESA.³

We understand that SIGTARP currently has two funding sources available to carry out activities authorized by EESA: amounts provided by subsection (c) of the PPIP Act; and amounts appropriated to SIGTARP in the annual appropriations act. 12 U.S.C. § 5231a(c)(1); Financial Services and General Government Appropriations Act, 2020, Pub. L. No. 116-93, div. C, title I, 133 Stat. 2434, 2436 (Dec. 20, 2019). Under the necessary expense rule, an appropriation is not available for an expenditure where the expenditure is covered by another

³ SIGTARP also argues that a provision in section 127 of the Financial Services and General Government Appropriations Act, 2018, shows that Congress intended to permanently override the requirement to prioritize investigations of non-recourse federal loans. Request Letter, at 2; Pub. L. No. 115-141, div. E, § 127, 132 Stat. 535, 545 (Mar. 23, 2018). This provision was in an appropriations act and therefore was only in effect through fiscal year 2018. See B-288511, Aug., 22, 2001 (provisions in appropriations acts are presumed effective only for the covered fiscal year unless Congress makes clear that they are permanent). Although this provision was not permanent, the directive in subsection (c)(2) of the PPIP Act for SIGTARP to prioritize certain activities does not preclude SIGTARP from using the amounts provided by subsection (c)(1) for other activities authorized by EESA.

appropriation or funding source. B-321788, Aug. 8, 2011. In general, an agency must use the appropriation most specifically available for a particular object. B-307382, Sept. 5, 2006. And where two appropriations are equally available for a particular object, the agency generally must elect which appropriation to charge for such object and must continue to use that same appropriation. *Id.* Although rare, there are situations in which Congress makes multiple appropriations available for the same object. B-322062, Dec. 5, 2011; B-272191, Nov. 4, 1997.

Here, subsection (c)(1) of the PPIP Act expressly provides that amounts made available by such subsection are available “*in addition to amounts otherwise made available* to the Special Inspector General.” 12 U.S.C. § 5231a(c)(1) (emphasis added). This language makes clear that these amounts are available in addition to other funding available to SIGTARP, such as amounts Congress appropriates annually for SIGTARP’s salaries and expenses.⁴ See B-322062, Dec. 5, 2011; B-272191, Nov. 4, 1997.

CONCLUSION

Amounts provided to SIGTARP under the PPIP Act are available to SIGTARP to carry out its authorities under EESA, in addition to other appropriations that are available to carry out this work.



Thomas H. Armstrong
General Counsel

⁴ This conclusion is consistent with the legislative history of the annual appropriations made available to SIGTARP, which suggests that Congress intended for SIGTARP to use its annual appropriations and amounts provided in permanent statute to carry out its activities under EESA. See, e.g., H. Conf. Rep. No. 111-366, at 894 (2009) *accompanying the Consolidated Appropriations Act, 2010*, Pub. L. No. 111-117, 123 Stat. 3034 (Dec. 16, 2009) (stating that funding EESA provided to SIGTARP would finance its activities for only a portion of fiscal year 2010 and that the Congress was providing through an annual appropriation sufficient amounts for SIGTARP activities to continue for the entirety of fiscal year 2010).



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Decision

Matter of: Social Security Administration—Application of Reprogramming Notification Requirement

File: B-329964

Date: October 8, 2020

DIGEST

The Social Security Administration (SSA) did not violate a reprogramming notification requirement when it established a new office within the agency. SSA established the Office of Analytics, Review and Oversight (OARO) by realigning the functions of six existing offices within the agency. Section 514(a) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017 required SSA to notify and consult with both the House and Senate Appropriations Committees when funds were reprogrammed for certain purposes.

We conclude that SSA did not reprogram funds when it created OARO. As a result, SSA was not required to follow the consultation and notification procedures prescribed by section 514(a).

DECISION

This responds to a request for our decision concerning whether SSA violated a reprogramming notification requirement when it established a new office within the agency.¹ Section 514(a) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017 required SSA to notify both the House and Senate Appropriations Committees 10 days in advance of a reprogramming of funds that reorganized an office or programs, as well as consult those committees 15 days in advance of “an announcement of intent relating to such reprogramming.” Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017, Pub. L. No. 115-31,

¹ Letter from Representative Tom Cole, then-Chairman, Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education and Related Agencies, to Comptroller General, GAO (Jan. 23, 2018).

div. H, title V, § 514(a), 131 Stat. 502, 563–64 (May 5, 2017). The requester asked whether SSA violated this provision when it established OARO by realigning six existing offices performing data analysis, quality, review, and anti-fraud activities.

As explained below, we conclude that SSA did not reprogram funds when it created OARO. As a result, SSA was not required to follow the consultation and notification procedures prescribed by section 514(a).

In accordance with our regular practice, we contacted SSA to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, SSA (Sept. 17, 2018). In response, SSA provided its explanation of the pertinent facts and its legal analysis. Letter from General Counsel, SSA, to Assistant General Counsel for Appropriations Law, GAO (Oct. 16, 2018) (Response Letter); Letter from General Counsel, SSA, to Assistant General Counsel for Appropriations Law, GAO (July 19, 2019) (Supplemental Response).

BACKGROUND

On August 8, 2017, SSA's Acting Commissioner announced she would establish OARO in order "to maximize [agency] resources and better organize efforts to explore and develop the future of analyses and oversight." Response Letter at 2–3; Social Security Administration, Memorandum to Senior Staff, *Organizational Realignment - INFORMATION* (Aug. 8, 2017), at 2. To achieve this goal, the Acting Commissioner consolidated several existing agency offices into OARO. Response Letter, at 2. The work performed by these offices includes SSA's anti-fraud efforts, data analysis, and oversight of the disability adjudication system. *Id.* In moving these offices to create OARO, SSA did not change their functions. *Id.*, at 8.

SSA obligates the vast majority of its operating expenses, including OARO's operating expenses, against a lump-sum appropriation titled "Limitation on Administrative Expenses" (LAE). Response Letter, at 4; see also Pub. L. No. 115-31, 131 Stat. at 559–60. Obligations against the LAE appropriation support administrative expenses for various programs for which SSA bears statutory responsibility.² The explanatory statement accompanying SSA's 2017 appropriation

² Such programs include the Old-Age Survivors Insurance and Disability Insurance program, the Hospital Insurance and Supplemental Medical Insurance program, the Social Security Advisory Board, the Supplemental Security Income (SSI) program, and support for the Centers for Medicare and Medicaid Services in administering their programs. See Pub. L. No. 115-31, 131 Stat. at 559–60; SSA Fiscal Year 2017 Budget Justification, at 128, available at <https://www.ssa.gov/budget/FY17Files/2017FCJ.pdf> (last visited Apr. 22, 2020).

subdivided the total amount appropriated for LAE to specify particular amounts for SSA's administration of various programs.³ 163 Cong. Rec. H4025 (daily ed. May 3, 2017).

DISCUSSION

At issue here is whether SSA's establishment of OARO and attendant reorganization of administrative functions triggered section 514(a)'s notification and consultation requirements. Section 514(a) states that:

None of the funds provided under this Act, or provided under previous appropriations Acts to the agencies funded by this Act that remain available for obligation or expenditure in fiscal year 2017, or provided from any accounts in the Treasury of the United States derived by the collection of fees available to the agencies funded by this Act, shall be available for obligation or expenditure through a reprogramming of funds that . . . (5) reorganizes or renames offices; (6) reorganizes programs or activities . . . unless the Committees on Appropriations of the House of Representatives and the Senate are consulted 15 days in advance of such reprogramming or of an announcement of intent relating to such reprogramming, whichever occurs earlier, and are notified in writing 10 days in advance of such reprogramming.

Pub. L. No. 115-31, § 514(a), 131 Stat. at 563–64.⁴ Therefore, section 514(a) required consultation and notification if (1) SSA reprogrammed funds and (2) SSA

³ According to the SSA General Counsel, as required by law, SSA ultimately allocates amounts obligated against LAE to an appropriate trust fund or to the General Fund of the Treasury. For example, SSA allocates LAE obligations for the OASDI program against its corresponding trust fund, while SSA allocates LAE obligations for SSI against the general fund of the Treasury, consistent with the laws governing that program. Supplemental Response, at 4–6; see 42 U.S.C. § 401(g)(1)(B), (C).

⁴ SSA was funded under a continuing resolution from October 1, 2017, through March 23, 2018. Continuing Appropriations Act, 2018, Pub. L. No. 115-56, div. D, 131 Stat. 1129, 1139 (Sept. 8, 2017), *as amended by* Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, div. A, 131 Stat. 1280 (Dec. 8, 2017), *as further amended by* Further Additional Continuing Appropriations Act, 2018, Pub. L. No. 115-96, div. A, 131 Stat. 2044 (Dec. 22, 2017), *as further amended by* Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, div. B, 131 Stat. 29 (Jan. 22, 2018), *as further amended by* Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, div. B, subdiv. 3, 132 Stat. 120 (Feb. 9, 2018). Section 514(a) continued to apply to SSA's expenditures during the period of the continuing resolution. See 131 Stat. at 1139 (appropriating “[s]uch

used the reprogrammed funds for the movement of functions and offices to OARO. See B-323792, Jan. 23, 2013.

As we have noted previously, a reprogramming is a shifting of funds from one purpose to another *within* a single appropriation. B-323792, Jan. 23, 2013. Therefore, the appropriations act does not set forth the subdivisions that are relevant to determine whether an agency has reprogrammed funds. *Id.* The key question, then, when applying a reprogramming notification requirement such as the one in section 514(a), is how to determine the relevant subdivisions of the appropriation.

In many instances, Congress appropriates amounts to agencies in lump sums, as it did here. Agencies maintain executive flexibility to reprogram funds within a particular lump-sum appropriation so they may make necessary adjustments for changing circumstances and programmatic needs, provided of course that the resulting obligations remain consistent with the terms of the lump-sum appropriation and with any other applicable law. See 55 Comp. Gen. 307, 318 (1975); see also *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); B-215002, Aug. 3, 1987. Where Congress does not intend to permit an agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language. 55 Comp. Gen. at 318. For example, Congress enacted many such restrictions on SSA's use of its fiscal year 2017 LAE appropriation. See Pub. L. No. 115-31, 131 Stat. at 559 (requiring that not less than \$2.3 million was for the Social Security Advisory Board, while \$90 million was available specifically "for activities to address the hearing backlog" within a particular SSA office).

Reprogramming notification requirements embody a compromise between the agency flexibility that lump-sum appropriations afford and the congressional control of explicit statutory restrictions. Such notification requirements allow 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's understanding of how the agency would obligate its lump-sum appropriation. Therefore, to determine whether a reprogramming occurred, we must first establish how Congress understood that an agency would obligate its lump-sum appropriation. We do so by looking to congressional documents, the agency's budget documents, and the President's budget submission. See B-323792, Jan. 23, 2013. In the reprogramming analysis, we look to these documents to ascertain the subdivisions of a lump-sum appropriation among which funds might have been reprogrammed. 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). After complying with any notification requirements that are specified by law, the agency retains the authority to

amounts as may be necessary . . . under the authority and conditions provided" in the fiscal year 2017 appropriations act).

reprogram—that is, to obligate its appropriations in a manner that departs from the amounts specified in the relevant non-statutory documents but in a manner that is otherwise consistent with law.⁵

In this case, a joint explanatory statement accompanies the final appropriations act.⁶ 163 Cong. Rec. at H4025. The joint explanatory statement accompanying the appropriation provides the best evidence of Congress's expectations for the division of funds within an appropriation, as it is a bicameral document that reflects the final, enacted funding level for the appropriation. Where a joint explanatory statement subdivides an appropriation, we need not look to other committee reports or to the budget documents prepared by the agency or the President to determine whether an agency reprogrammed amounts.

Here, the explanatory statement accompanying SSA's 2017 appropriation contains a table that provides relevant subdivisions of the LAE appropriation. Specifically, the table identifies the amounts to be obligated on the administration of the Old-Age Survivors Insurance and Disability Insurance trust funds, the Hospital Insurance and Supplemental Medical Insurance trust fund, the Social Security Advisory Board, and the Supplemental Security Income (SSI) program. 163 Cong. Rec. at H4025. Changes to these amounts for one of the purposes enumerated in section 514(a) would constitute a reprogramming and trigger the consultation and notification requirements prescribed by section 514(a). *Cf.* B-323792, Jan. 23, 2013 (noting that changes to the amounts specified in an agency's budget request or the President's budget submission would constitute a reprogramming).

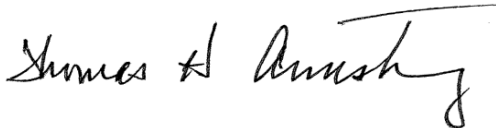
In creating OARO, SSA did not change its allocation of administrative costs between the subdivisions identified in the explanatory statement. As noted above, the explanatory statement divided the LAE by program, not by component office. SSA assigns administrative costs, including the costs associated with OARO's activities, to each of the categories identified in the statement based on the administrative workloads performed by the agency. Supplemental Response, at 4, 7. The creation of OARO did not change the allocations of each workload's costs among these categories. *Id.* Because the creation of OARO did not require SSA to shift administrative costs between these categories, SSA did not reprogram funds in order to establish this office and was not required to follow the consultation and notification procedures outlined in section 514(a).

⁵ Amounts specified in non-statutory documents do have the full force of law where Congress incorporates them by reference. See B-316010, Feb. 25, 2008. In such instances, an agency must obligate its appropriation in a manner consistent with the amounts specified in the incorporated document, except as permitted by law. See 31 U.S.C. § 1532 (agencies may transfer amounts only as authorized by law).

⁶ The appropriations act provides that this explanatory statement “shall have the same effect with respect to the allocation of funds . . . as if it were a joint explanatory statement of a committee of conference.” Pub. L. No. 115-31, § 4, 131 Stat. at 137.

CONCLUSION

SSA did not shift funds between the relevant subdivisions of the LAE found in the explanatory table accompanying SSA's 2017 appropriation. As a result, SSA did not reprogram funds when it consolidated six agency offices to create OARO and therefore was not required to consult with or notify Congress under section 514(a).

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first few letters.

Thomas H. Armstrong
General Counsel



Decision

Matter of: U.S. Commission on Civil Rights—Availability of Funds for the Commission on the Social Status of Black Men and Boys Act

File: B-332530

Date: February 18, 2021

DIGEST

Due to a recurring provision in the acts providing appropriations for the U.S. Commission on Civil Rights (USCCR), USCCR generally may not use its annual lump-sum appropriation for any activity or expense that is not explicitly authorized by 42 U.S.C. § 1975a. However, USCCR may obligate the earmarked amounts in USCCR's fiscal year 2021 appropriation, which constitute a minimum amount that USCCR may use to fund the recently established Commission on the Social Status of Black Men and Boys (Commission), for activities and expenses that are not explicitly authorized by § 1975a because such amounts are not subject to the limiting proviso. If USCCR also obligates amounts from its fiscal year 2021 lump-sum appropriation to fund the Commission, however, USCCR must determine that the use of funds in excess of the earmarked amount is consistent with the limiting proviso.

DECISION

The Staff Director of the U.S. Commission on Civil Rights (USCCR) requests an advance decision under 31 U.S.C. § 3529 on whether USCCR may use its appropriation for the Commission on the Social Status of Black Men and Boys, which was established by law in August 2020. Letter from Staff Director, USCCR, to Comptroller General (Sept. 9, 2020) (Request Letter). As explained below, we conclude that, due to a recurring provision in the acts providing USCCR's appropriation, USCCR generally may use its annual lump-sum appropriation to carry out activities of the Commission on the Social Status of Black Men and Boys Act only if USCCR determines that such activities are authorized by 42 U.S.C. § 1975a. We also conclude that the earmark in USCCR's fiscal year 2021 appropriation constitutes a minimum amount that is available to fund the Commission on the Social Status of Black Men and Boys, and that USCCR may obligate such amount for activities and expenses that are not explicitly authorized by § 1975a.

Our practice when rendering decisions is to obtain the legal views of the relevant agency and to establish a factual record on the subject of the request. See 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. USCCR provided its legal views in its request letter and we also reached out to USCCR to request additional factual information. Request Letter; E-mail from Senior Staff Attorney, GAO, to General Counsel, USCCR, *Subject: B-332530, Request for Additional Information* (Oct. 6, 2020); E-mail from General Counsel, USCCR, to Senior Staff Attorney, GAO, *Subject: Re: B-332530, Request for Additional Information* (Oct. 9, 2020) (USCCR Response).

BACKGROUND

On August 14, 2020, the President signed into law the Commission on the Social Status of Black Men and Boys Act (the Act). Pub. L. No. 116-156, 134 Stat. 700 (Aug. 14, 2020), 42 U.S.C. § 1975 note. The Act establishes the Commission on the Social Status of Black Men and Boys (Commission) within USCCR’s Office of the Staff Director and authorizes the Commission to “conduct a systematic study of the conditions affecting Black men and boys.” 42 U.S.C. § 1975 note. In addition to outlining the duties of the new Commission, the Act prescribes procedures for the appointment of members to the Commission, requires that members be appointed no later than 90 days after the Commission is established, and provides that members appointed to the Commission will serve without compensation. *Id.* The Act also assigns certain duties to the USCCR Staff Director. For example, the Act designates the USCCR Staff Director as an appointing authority and requires that the Office of the Staff Director provide staff and administrative support for the new Commission.¹ *Id.*

USCCR receives an annual lump-sum appropriation for its necessary expenses. See, e.g., Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. B, title IV, 134 Stat. 1182, 1273 (Dec. 27, 2020). In fiscal years 2020 and 2021, such appropriation included a proviso directing that “none of the funds appropriated in this

¹ USCCR anticipated that support for the following activities of the new Commission would require appropriated funds: (1) acquire meeting space, (2) receive logistics and contract support for meetings, (3) publish and disseminate reports, (4) conduct website development and maintenance, (5) receive information technology hardware and support, (6) purchase supplies, and (7) receive professional staff support to perform civil rights research and writing duties. Letter from Chair, USCCR, and Staff Director, USCCR, to Chairman, Senate Committee on the Judiciary, Ranking Member, Senate Committee on the Judiciary, Chairman, House Committee on the Judiciary, and Ranking Member, House Committee on the Judiciary (June 16, 2020), at 4.

paragraph shall be used for any activity or expense that is not explicitly authorized by section 3 of the Civil Rights Commission Act of 1983 (42 U.S.C. [§] 1975a).” Pub. L. No. 116-260, 134 Stat. at 1273; Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. B, title IV, 133 Stat. 2317, 2422 (Dec. 20, 2019) (section 3 proviso). Such proviso also applied to amounts appropriated to USCCR under the fiscal year 2021 continuing resolutions.² See, e.g., Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, div. A, §§ 101, 103, 134 Stat. 709, 710, 711 (Oct. 1, 2020) (incorporating conditions and restrictions from USCCR’s fiscal year 2020 appropriation); see also B-324481, Mar. 21, 2013, at 3–4 (explaining that agencies operating under a continuing resolution are to preserve the *status quo* as established by the appropriations acts identified in the continuing resolution until Congress completes action on appropriations acts for the remainder of the fiscal year).

Congress did not appropriate any amounts specifically for the Commission in fiscal year 2020, but, in fiscal year 2021, USCCR’s appropriation included a \$500,000 earmark to separately fund the Commission. Pub. L. No. 116-260, 134 Stat. at 1273. The earmark provided that such amounts were available notwithstanding the section 3 proviso. *Id.*

DISCUSSION

At issue here is the availability of USCCR’s appropriation for activities of the Commission on the Social Status of Black Men and Boys Act under (1) the act providing USCCR’s fiscal year 2020 appropriation, (2) the fiscal year 2021 continuing resolutions, and (3) the act providing USCCR’s fiscal year 2021 appropriation.

Fiscal Year 2020 Appropriation and Fiscal Year 2021 Continuing Resolutions

We first consider USCCR’s use of funds under the act providing USCCR’s fiscal year 2020 appropriation and under the fiscal year 2021 continuing resolutions. Each of these acts included the section 3 proviso and none of these acts appropriated amounts specifically to fund the Commission.

Appropriated funds are available only for the purposes for which Congress has provided them. 31 U.S.C. § 1301(a). Determining whether an appropriation is available for a particular purpose requires a three-step analysis: the obligation or expenditure must (1) bear a logical relationship to the appropriation charged, (2) not

² Congress enacted five continuing resolutions in fiscal year 2021. Pub. L. No. 116-246, 134 Stat. 1119 (Dec. 22, 2020); Pub. L. No. 116-226, 134 Stat. 1099 (Dec. 20, 2020); Pub. L. No. 116-225, 134 Stat. 1098 (Dec. 18, 2020); Pub. L. No. 116-215, div. A, § 101, 134 Stat. 1041, 1041 (Dec. 11, 2020); Pub. L. No. 116-159, div. A, §§ 101, 103, 134 Stat. 709, 710, 711 (Oct. 1, 2020).

be prohibited by law, and (3) not be otherwise provided for. See, e.g., B-330776, Sept. 5, 2019.

Here, USCCR's appropriation is available for the necessary expenses of activities authorized by § 1975a. See Pub. L. No. 116-93, div. B, title IV, 133 Stat. at 2422. Generally, we have found that when Congress assigns new duties to an agency, the agency may use an existing appropriation to carry out the new duties if the duties bear a sufficient relationship to the purpose of the existing appropriation. *E.g.*, B-290011, Mar. 25, 2002; B-211306, June 6, 1983; 46 Comp. Gen. 604 (B-158371, Jan. 10, 1967). Here, Congress enacted a law that requires the USCCR Office of the Staff Director to provide staff and administrative support for the new Commission. 42 U.S.C. § 1975 note. The law also designates the USCCR Staff Director as an appointing authority for the new Commission and houses the Commission within the USCCR Office of the Staff Director. *Id.* USCCR's lump-sum appropriation is available for the necessary expenses of activities authorized by § 1975a, and so, it would generally be available for activities of the Act that are also authorized under that section. See B-211306, June 6, 1983; 46 Comp. Gen. 604 (B-158371, Jan. 10, 1967); see also *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (“[T]he very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective and desirable way.”).

USCCR, however, provided its view that, although there is overlap between USCCR's authorities and the activities authorized by the Act, the new Commission has some responsibilities and duties that do not arise out of or directly relate to USCCR's work. See Request Letter, at 2, 8, 9. USCCR did not delineate which of the Commission's responsibilities and duties would not be authorized under § 1975a, nor did it ask us to opine on any specific activity. To the extent there are, in fact, responsibilities and duties that do not arise out of or directly relate to USCCR's work, USCCR must be mindful of the section 3 proviso that limits the use of its appropriation to activities explicitly authorized by § 1975a. See Pub. L. No. 116-93, div. B, title IV, 133 Stat. at 2422; B-308715, Apr. 20, 2007 (appropriations are not available for new duties where a specific provision of law prohibits the use of funds for such purposes).

In other words, USCCR may use its appropriation to carry out activities authorized by the Act only to the extent USCCR determines that such activities are also authorized by § 1975a. To determine the availability of USCCR's appropriation for any particular task or activity, USCCR must evaluate the attendant facts and circumstances and determine whether the activity is also authorized under § 1975a. *Cf.* B-329446, Sept. 17, 2020, at 6 (noting that an agency has a degree of discretion to determine how to carry out its authorized activities). Though we do not currently have the requisite facts to determine whether USCCR's lump-sum appropriation is

available for any particular activity or expense related to the Commission,³ we welcome USCCR to request future decisions from us regarding specific obligations. See B-329372, June 27, 2018.

Fiscal Year 2021 Appropriation

We next consider USCCR's use of funds under the act appropriating amounts for fiscal year 2021. Like the act providing USCCR's fiscal year 2020 appropriation and the fiscal year 2021 continuing resolutions, the act providing USCCR's fiscal year 2021 appropriation includes both the section 3 proviso and a lump-sum appropriation for USCCR's necessary expenses. Pub. L. No. 116-260, 134 Stat. at 1273. Unlike the prior acts, however, the fiscal year 2021 appropriations act earmarks amounts specifically to fund the Commission within USCCR's lump-sum appropriation:

“ . . . Provided further, That none of the funds appropriated in this paragraph shall be used for any activity or expense that is not explicitly authorized by section 3 of the Civil Rights Commission Act of 1983 (42 U.S.C. 1975a): Provided further, That notwithstanding the preceding proviso, \$500,000 shall be used to separately fund the Commission on the Social Status of Black Men and Boys.”

Pub. L. No. 116-260, 134 Stat. at 1273 (underline added). The language of the new proviso serves two purposes. First, it designates a specific amount within USCCR's lump-sum appropriation that cannot be diverted to purposes other than funding the Commission. B-326941, Dec. 10, 2015, at 6, 7; B-278121, Nov. 7, 1997. Second, the inclusion of the phrase “notwithstanding the preceding proviso” establishes an amount that is available to fund the Commission even if such use would be inconsistent with the section 3 proviso. See *generally National Labor Relations Board v. SW General, Inc.*, 137 S. Ct. 929, 939 (2017) (explaining that the use of the term “notwithstanding” in a statute “shows which provision prevails in the event of a clash”); *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (finding that the use of a notwithstanding clause “clearly signals the drafter's intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section”). In other words, the language makes the entire \$500,000 available only for the purpose of funding the Commission, and exempts such amount from the requirement that the activities or expenses be explicitly authorized by 42 U.S.C. § 1975a.

The remaining question, then, is whether funds in USCCR's fiscal year 2021 lump-sum appropriation are also available to supplement the earmark for funding the Commission.

³ As of the date of its most recent response, USCCR had not obligated any amounts for the new Commission. USCCR Response.

In general, where both a general and a specific appropriation are available for a given expenditure, an agency must use the specific appropriation to the exclusion of the more general appropriation. See 31 U.S.C. § 1301(a); B-330693, Oct. 8, 2019. However, where there is clear congressional intent to make one appropriation available to supplement a different appropriation for the same object, both appropriations are available for such object. See, e.g., B-272191, Nov. 4, 1997. In some cases, Congress may explicitly provide that certain amounts are “in addition to” other available funding, or may indicate that an earmark establishes a minimum amount for a specific purpose by including a phrase such as “not less than.” B-330984, May 27, 2020, at 5; B-327003, Sept. 29, 2015, at 4. Even without such modifiers, however, we have found that certain statutory language may constitute a minimum amount available for a specific purpose that an agency may supplement with a general appropriation. B-326941, Dec. 10, 2015; B-231711, Mar. 28, 1989.

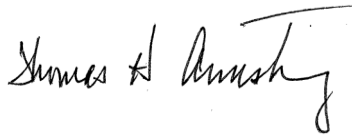
For example, in fiscal year 2014 the Small Business Administration (SBA) received an annual lump-sum appropriation for Salaries and Expenses. B-326941, Dec. 10, 2015, at 2, 6. Within that lump-sum, Congress included an earmark for the Loan Modernization and Accounting System and extended the period of availability of the earmarked funds by one fiscal year. *Id.*, at 6. We found that the earmark did not impose a line-item limitation or cap on the amount of funds available for obligation for the earmarked purpose; rather, it served two other functions: (1) it specified a particular amount that could be used only for the Loan Modernization and Accounting System, and (2) it limited the amount of funds that would remain available for obligation beyond the one-year default period of availability. *Id.*, at 6–7.

Similarly, the earmark in this case does not establish a limit on the amount of funds in USCCR’s fiscal year 2021 appropriation that are available for funding the Commission. Rather, the earmark establishes a limit on the amount of funds in USCCR’s fiscal year 2021 appropriation that are exempt from the section 3 proviso. The earmark also serves a protective purpose by ensuring that at least \$500,000 will be available for funding the Commission and not for other purposes.⁴ However, this does not prevent USCCR from supplementing the earmark with funds from USCCR’s fiscal year 2021 lump-sum appropriation within the scope of USCCR’s authority. In other words, USCCR may also obligate amounts from its lump-sum appropriation for activities authorized by the Act if it determines that the use of funds in excess of the earmarked amount is consistent with the section 3 proviso. In that regard, we remind USCCR that we would welcome a request for a future decision from us regarding specific obligations.

⁴ The legislative history of the fiscal year 2021 appropriations act suggests that Congress intended the \$500,000 earmark to be used for first-year costs to establish the Commission. 166 Cong. Rec. H7879, H7948 (Dec. 21, 2020) (explanatory statement).

CONCLUSION

Due to a recurring provision in the acts providing USCCR's appropriation, USCCR generally may not use its annual lump-sum appropriation for any activity or expense that is not explicitly authorized by § 1975a. However, USCCR may obligate the earmarked amounts in USCCR's fiscal year 2021 appropriation, which constitute a minimum amount that USCCR may use to fund the Commission, for activities and expenses that are not explicitly authorized by § 1975a because such amounts are not subject to the limiting proviso. If USCCR also obligates amounts from its fiscal year 2021 lump-sum appropriation to fund the Commission, USCCR must determine that the use of funds in excess of the earmarked amount is consistent with the limiting proviso.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first few letters.

Thomas H. Armstrong
General Counsel

Perspectives:

Testimony on the Power of the Purse Act



U.S. GOVERNMENT ACCOUNTABILITY OFFICE
A Century of Non-Partisan Fact-Based Work

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

B-333181
GAO-21-538T

April 29, 2021

The Honorable John Yarmuth
Chairman
The Honorable Jason Smith
Ranking Member
Committee on the Budget
House of Representatives

Subject: *Testimony before the House Committee on the Budget—Proposals to Reinforce Congress’s Constitutional Power of the Purse*

Chairman Yarmuth, Ranking Member Smith, and Members of the Committee:

Thank you for the opportunity to discuss Congress’s constitutional power of the purse, GAO’s role in serving this power, and several legislative proposals to reinforce this power.

Introduction

The framers vested Congress with the power of the purse by providing in the Constitution that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹ This arrangement ensures that the government remains accountable to the will of the people and provides a key check on the power of the other branches. The power of the purse allows Congress to reduce “all the overgrown prerogatives of the other branches of government.”²

In 1921, Congress created the General Accounting Office—now the Government Accountability Office—through the Budget and Accounting Act to assist it in the discharge of its core constitutional powers, including the power of the purse.³ As

¹ U.S. Const., art. I, § 9, cl. 7.

² The Federalist No. 58 (1788) (James Madison).

³ Budget and Accounting Act, 1921, Pub. L. No. 67-13, title III, 42 Stat. 20, 23–27 (June 10, 1921). See 61 Cong. Rec. 1090 (1921) (statement of Rep. Good) (“It was the intention of the committee that the comptroller general should be something more than a bookkeeper or accountant; that he should be a real critic, and at all

part of its exercise of the power of the purse, Congress has vested GAO with statutory responsibilities to investigate and oversee the use of public money. For example, GAO issues decisions on the use of appropriations to the Congress and Executive Branch officials.⁴ GAO also has responsibilities under the Congressional Budget and Impoundment Control Act of 1974, where Congress provided that the Comptroller General will review any special messages submitted by the President pursuant to the act and report to Congress when a special message is either improperly classified or not transmitted at all.⁵ And, in 2004, Congress amended the Antideficiency Act to require agencies to send to the Comptroller General a copy of each violation report on the same date the agency sends the report to the President and Congress.⁶ Additionally, the Senate Appropriations Committee directed GAO to establish a central repository of Antideficiency Act violation reports and to track all reports, including responses to GAO legal decisions and findings in audit reports and financial statement reviews.⁷

GAO's expertise with regard to appropriations law matters is widely understood and respected throughout the government. Indeed, courts frequently cite to GAO's legal decisions and *Principles of Federal Appropriations Law* (often referred to as the "Red Book") in their decisions involving appropriations law. For example, when ruling on the Navy's use of appropriations, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) noted that our decisions are "expert opinion, which we should prudently consider."⁸ Additionally, the Supreme Court has cited GAO's Red Book in support of its positions on appropriations law matters.⁹

GAO's role to provide information and expert legal analysis to Congress on appropriations law matters is essential to ensuring respect for Congress's constitutional power of the purse. As we have carried out our responsibilities under the statutory framework governing the obligation and expenditure of appropriated funds, our experiences, for over 100 years now, have revealed some ways that

times should come to Congress, no matter what the political complexion of Congress or the Executive might be, and point out inefficiency, if he found that money was being misapplied—which is another term for inefficiency—that he would bring such facts to the notice of the committees having jurisdiction of appropriations.”).

⁴ 31 U.S.C. §§ 3526, 3529.

⁵ 2 U.S.C. §§ 685–686.

⁶ Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004), *codified at* 31 U.S.C. § 1351.

⁷ S. Rep. No. 108-307, at 43 (2004).

⁸ *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, at 1349 (*quoting Ass'n of Civilians Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001)).

⁹ *See, e.g., Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 190–199 (2012).

Congress could enhance this legal framework to provide more visibility, enhanced transparency, and greater oversight of agency activities.

Changes to the Antideficiency Act

Congress enacted the Antideficiency Act to protect and underscore Congress's constitutional prerogatives of the purse in response to various abuses.¹⁰ Prior to the enactment of this act, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these "coercive deficiencies."¹¹ These were obligations to others who had fulfilled their part of the bargain with the United States and who now had at least a moral—and in some cases also a legal—right to be paid. Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget. As a result, Congress enacted the Antideficiency Act, which, in pertinent part, prohibits government officials from obligating or expending in excess of or in advance of appropriations.¹²

The Antideficiency Act has been called "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds."¹³ To guarantee that Congress has the information it needs to conduct oversight of executive branch activities, I would like to discuss some ideas we have for legislative changes to the Antideficiency Act. First, we recommend Congress clarify the reach of the Antideficiency Act to correct the underreporting of Antideficiency Act violations. Second, we recommend that Congress require the Department of Justice to report on whether reported Antideficiency Act violations will be prosecuted. Third, we recommend Congress require agencies to report the obligations they incur during lapses in appropriations. These changes would provide increased transparency and visibility into executive branch activities for both Congress and the American people, as well as improved consistency in the Antideficiency Act's application.

Correcting the Underreporting of Antideficiency Act Violations

In June 2019, the Office of Management and Budget (OMB) amended its Circular No. A-11 addressing agency reports of Antideficiency Act violations found by GAO.

¹⁰ See U.S. Const., art. I, § 9, cl. 7 (power of the purse, statement and account of public money); B-328450, Mar. 6, 2018; B-317450, Mar. 23, 2009.

¹¹ Gary Hopkins and Robert Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 57–58 (1978); Louis Fisher, *Presidential Spending Power*, 232 (1975).

¹² 31 U.S.C. § 1341(a)(1)(A).

¹³ Hopkins and Nutt, *at* 56.

The June 2019 revision instructs agencies to report such violations only if “the agency, in consultation with OMB, agrees that a violation has occurred.”¹⁴ This revision was a departure from longstanding instructions to agencies. OMB had long instructed each executive branch agency to submit such a report whenever GAO found an Antideficiency Act violation.¹⁵ Since 2004, when Congress amended the Antideficiency Act, GAO’s practice has been that if GAO concludes that an agency has violated the Antideficiency Act and the agency does not make its required report, we notify Congress of the violation.¹⁶

In response to OMB’s June 2019 revision to Circular No. A-11, GAO’s General Counsel transmitted a letter to agency general counsels explaining that GAO will continue to notify Congress of an agency’s Antideficiency Act violation if the agency does not do so, noting the agency’s failure to report.¹⁷ The letter also noted that if GAO publishes a decision concluding that an Antideficiency Act violation occurred, we will contact the relevant agency to ensure a report of the violation, and if the agency does not report within a reasonable period, GAO will notify Congress of the violation.¹⁸ Since issuing this letter to agency general counsels, we have reported to Congress six Antideficiency Act violations that agencies have failed to report.¹⁹ While a GAO notification puts the violation before Congress, our reports only include information in the record associated with a decision; they do not include other information Congress may find useful, like agency activity to prevent recurrence of

¹⁴ OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, § 145.8 (June 28, 2019).

¹⁵ See, e.g., GAO, *Anti-Deficiency Act: Agriculture’s Food and Nutrition Service Violates the Anti-Deficiency Act*, GAO/AFMD-87-20 (Washington, D.C.: Mar. 17, 1987) (citing OMB Cir. No. A-34, *Instructions on Budget Execution* (1987)); OMB Cir. No. A-11, pt. 4, § 145.8 (June 2018); OMB Cir. No. A-11, pt. 4, § 145.8 (July 2007) (revised Nov. 20, 2007); OMB Cir. No. A-34, *Instructions on Budget Execution*, pt. 2, § 22.8 (Nov. 7, 1997).

¹⁶ See, e.g., B-308715, Nov. 13, 2007.

¹⁷ B-331295, Sept. 23, 2019.

¹⁸ *Id.*

¹⁹ B-331132, Aug. 6, 2020 (reporting an Antideficiency Act violation by the Office of Information and Regulatory Affairs); B-331093, June 30, 2020 (reporting an Antideficiency Act violation by the U.S. Department of the Treasury); B-331094, June 25, 2020 (reporting an Antideficiency Act violation by the U.S. Department of Agriculture); B-330776, Apr. 22, 2020 (reporting an Antideficiency Act violation by the U.S. Department of the Interior); B-331428, Sept. 23, 2019 (reporting an Antideficiency Act violation by the U.S. Environmental Protection Agency); B-331296, Sept. 23, 2019 (reporting an Antideficiency Act violation by the Commodity Futures Trading Commission).

the violation or administrative discipline imposed upon agency officials responsible for the violation.

The Antideficiency Act itself requires agencies to notify Congress when agencies identify violations, but is silent on what agencies should do when GAO finds a violation.²⁰ The June 2019 revisions to OMB Circular No. A-11 and our recent experiences suggest that agencies may rely on this statutory silence to avoid reporting Antideficiency Act violations to Congress when GAO identifies a violation. Not only does this withhold important information from congressional oversight, it reflects diminished respect for Congress's constitutional power of the purse. We encourage OMB to amend Circular No. A-11 to instruct agencies to report Antideficiency Act violations that GAO identifies. Moreover, to ensure that any future changes to OMB instructions do not interfere with congressional oversight, we recommend that Congress amend the Antideficiency Act to clearly require agencies to report when GAO finds a violation. Such a change will increase transparency and provide increased visibility into agency operations.²¹

In 2007, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum concluding that a violation of a spending restriction that Congress enacted in a permanent statute does not violate the Antideficiency Act because the prohibition is not "in an appropriation."²² This conclusion results in a rather anomalous policy that turns solely on Congress's choice of a legislative vehicle—permanent law or appropriations act—asserting, in effect, that Congress need not know of violations of statutory restrictions, only appropriations act restrictions. This is not GAO's view.²³ In 2009, in response to a request from members of the Senate Committee on Appropriations, GAO concluded that a violation of any prohibition on the use of public money is a violation of the Antideficiency Act.²⁴ If there are no funds available in an appropriation because of a statutory prohibition or restriction—whether enacted as part of the appropriations act or in other law—any obligation or expenditure would be in excess of the amount available for obligation or expenditure as provided for in the Antideficiency Act.

²⁰ 31 U.S.C. §§ 1351, 1517(b).

²¹ A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 212 (2020).

²² Memorandum Opinion for the General Counsel, Environmental Protection Agency, *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, OLC Opinion, Apr. 5, 2007, at 1.

²³ B-317450, Mar. 23, 2009; B-300826, Mar.3, 2005.

²⁴ B-317450, Mar. 23, 2009.

As a result of OLC's conclusions, executive branch agencies may not report violations of funding restrictions that are not in an appropriation even though GAO would conclude those violations are also Antideficiency Act violations.²⁵ We might offer that Congress could fix the underreporting of these violations by revising the Antideficiency Act, or enacting a permanent statute, to clarify that violations of funding restrictions—whether they are in an appropriation or not—are violations of the Act.

Reporting Prosecutions of Antideficiency Act Violations

The Antideficiency Act is unique among fiscal law statutes in that it carries civil and criminal penalties for its violation. The Act requires that the officer or employee responsible for an Antideficiency Act violation be subject to “appropriate administrative discipline,” including removal from office.²⁶ In addition, an individual who “knowingly and willfully” violates the Antideficiency Act may be subject to criminal penalties, including a fine of up to \$5,000, a term of imprisonment not to exceed two years, or both.²⁷ The U.S. Department of Justice is responsible for prosecuting violations of the Antideficiency Act. To our knowledge, the Department of Justice has never brought charges against a government official or employee for a criminal violation of the Antideficiency Act. It has long been understood that the criminal penalties contemplated by the Act serve as an important deterrent. Lest that deterrent effect be mitigated by the lack of prosecutions, we recommend requiring the Department of Justice to annually review Antideficiency Act reports in GAO's repository and issue a report to Congress, with a copy to GAO, on whether criminal charges have been brought for any of the Antideficiency Act violations reported that year to Congress.²⁸ Such a requirement would ensure that the Department of Justice fully consider each Antideficiency Act violation and would provide transparency in the enforcement of the Act.

²⁵ GAO has received some Antideficiency Act reports stemming from violations of prohibitions that were not enacted in an appropriations act. *See, e.g., Antideficiency Act Reports—Fiscal Year 2019*, GAO-ADA-19-04, at 5 (Apr. 27, 2020) (Defense Logistics Agency reporting a violation of 10 U.S.C. §§ 2533a as a violation of the Antideficiency Act). However, given OLC's guidance, GAO is concerned that agencies may fail to consistently report similar Antideficiency Act violations.

²⁶ 31 U.S.C. § 1349.

²⁷ 31 U.S.C. § 1350.

²⁸ A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 213 (2020).

Reporting Obligations Incurred during a Lapse in Appropriations

The Antideficiency Act's prohibitions prohibit agencies from continuing most activities during a lapse in appropriations. At present, OMB Circular No. A-11 requires agencies to develop and maintain plans for an orderly shutdown in the event of a lapse in appropriations.²⁹ While these plans provide a helpful overview of agency activities during a lapse, the plans do not go into great detail about the programs for which agencies will incur obligations or the amounts of those obligations. We recommend that Congress enact legislation to require executive branch agencies to provide an accounting, by program, of the obligations that were incurred during a lapse in appropriations.³⁰ Having this information would help Congress more quickly identify where agencies may have violated the Antideficiency Act and allow Congress to act swiftly to prevent future violations. In addition, preparing these reports would encourage executive branch agencies to minimize obligations during a lapse in appropriations and would impose discipline in following the law.

These recommended changes to the Antideficiency Act will ensure that the cornerstone of Congress's power of the purse is respected and consistently applied throughout the federal government.

Changes to the Impoundment Control Act

In 1974, Congress enacted the Impoundment Control Act in response to attempts by the executive branch to thwart the will of Congress by refusing to spend congressionally-appropriated funds.³¹ The Impoundment Control Act operates on the constitutional premise that the President must obligate funds appropriated by Congress, unless otherwise authorized to withhold.³² The Act permits the President to temporarily impound—withhold the obligation of—appropriated funds in certain circumstances if the President notifies the Congress by transmitting a “special message.”³³

The Act gives the Comptroller General the responsibility to review all special messages submitted pursuant to the Impoundment Control Act and to report to

²⁹ OMB Circular No. A-11, pt. 4, § 124.2 (Mar. 24, 2021).

³⁰ A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 203 (2020).

³¹ Pub. L. No. 93-344, title X, 88 Stat. 297, 332–339 (July 12, 1974), *classified at* 2 U.S.C. §§ 681–688.

³² B-329092, Dec. 12, 2017.

³³ 2 U.S.C. §§ 681–688.

Congress when the Comptroller General determines the President has improperly withheld funds.³⁴ The Act also authorizes the Comptroller General to bring a civil action to compel the release of any budget authority improperly withheld.³⁵ GAO's investigation of and reporting on potential impoundments alerts Congress to executive branch attempts to undermine Congress's power of the purse by refusing to spend budget authority appropriated by Congress. As a result, GAO's role under the Impoundment Control Act is essential to ensuring respect for Congress's power of the purse by providing increased visibility and oversight into executive branch activities.³⁶

In order to ensure that enacted appropriations are carried out in accordance with Congress' directives, we would like to propose several amendments to the Impoundment Control Act. First, we recommend Congress amend the Impoundment Control Act to explicitly require the prudent obligation of appropriated budget authority. Second, we recommend that Congress clarify the extent of GAO's reporting authority under the Impoundment Control Act and provide that reports made by the Comptroller General do not act as a special message. Third, we recommend Congress require the President to publicly post apportionments and report to Congress the expired and cancelled balances of each appropriation account. These changes will provide Congress with the information it needs to conduct effective oversight of agency activities and ensure appropriated funds are obligated in a timely manner.

Requiring the Prudent Obligation of Appropriated Budget Authority

The Impoundment Control Act contemplates two types of withholdings—deferrals and rescission proposals. Deferrals are the temporary withholding of budget authority, permitted to provide for contingencies, to achieve savings made possible by or through changes in requirements or greater efficiency of operations, or as specifically provided by law.³⁷ Rescission proposals seek the permanent cancellation of budget authority through legislative action. When the President transmits a special message proposing a rescission, he may withhold the funds for a period of 45 calendar days of continuous session of the Congress.³⁸ If Congress does not complete action on a rescission bill rescinding all or part of amounts proposed to be rescinded within the 45-day period, such amounts must be made available for obligation.³⁹

³⁴ *Id.* §§ 685–686.

³⁵ *Id.* § 687.

³⁶ See B-331564, Jan. 16, 2020.

³⁷ 2 U.S.C. § 684.

³⁸ 2 U.S.C. §§ 682(3), 683.

³⁹ 2 U.S.C. § 683(b).

The Impoundment Control Act explicitly states that deferrals may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral was transmitted to Congress.⁴⁰ By contrast, the Act does not explicitly impose a similar limitation for rescission proposals. In 2018, in response to a request from members of this Committee, GAO concluded that the Impoundment Control Act does not authorize the withholding of budget authority through its date of expiration.⁴¹

The President's authority to withhold budget authority pursuant to a rescission proposal is inextricably linked to the requirement that the budget authority be made available for prudent obligation.⁴² As budget authority is available to incur obligations only during its period of availability, the funds proposed for rescission must not be expired at the conclusion of the prescribed 45-day period. Consequently, the Impoundment Control Act does not permit budget authority proposed for rescission to be withheld until its expiration simply because the 45-day period has not yet elapsed. A withholding of this nature would be an aversion both to the constitutional process for enacting federal law and to Congress's constitutional power of the purse, for the President would preclude the obligation of budget authority Congress has already enacted and did not rescind.

For example, consider a situation where fiscal year budget authority is withheld pursuant to a special message submitted less than 45 days before the end of the fiscal year and where, upon conclusion of the 45-day period, Congress has not completed action on a corresponding rescission bill. An interpretation of the Impoundment Control Act that would permit the withholding of such budget authority for the duration of the 45-day period would result in the expiration of the funds during that period. The expired amounts then could not be made available for obligation despite Congress not having completed action on a bill rescinding the amounts, as expired appropriations are not available for obligation. Such a result would frustrate

⁴⁰ 2 U.S.C. § 684(a).

⁴¹ B-330330, Dec. 10, 2018. In that decision, we recognized that some previous GAO decisions intimated that the President might withhold budget authority for the duration of the 45-day period, and that Congress would have to take affirmative action to prevent the withheld funds from expiring. However, our earlier opinions were based on premises that the Supreme Court has since invalidated. Any sound exercise of legal reasoning necessarily considers the most recent rulings from courts of jurisdiction. Accordingly, our 2018 decision overruled prior decisions consistent with the Constitution, the text of the Impoundment Control Act, and with Supreme Court precedent.

⁴² The amount of time required for prudent obligation will vary from one program to another. In some programs, prudent obligation may require hours or days, while others may require weeks or months.

the design of the Impoundment Control Act, as it would contravene the requirement that funds be made available for obligation at the conclusion of the prescribed 45-day period.

Moreover, to allow such so-called “pocket rescissions” would upset the delicate balance of powers provided for in the Constitution. Congress wields the authority to introduce, consider, and pass legislation—including appropriations—and the President must take care that enacted laws be faithfully executed. Appropriations are laws like any other and can be rescinded only through the bicameralism and presentment procedures that the Constitution prescribes.⁴³ Indeed, the Supreme Court has noted that there “is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”⁴⁴ Interpreting the Impoundment Control Act as authorizing the President to unilaterally cancel budget authority would bestow powers upon the President beyond those the Constitution contemplates and would deny Congress its constitutionally prescribed role in the enactment of law. To ensure consistency in the application of the Impoundment Control Act and the timely obligation of enacted budget authority, we recommend amending the Act to make clear that budget authority may not be withheld through its date of expiration under any circumstances.⁴⁵

Clarifying the Extent and Impact of GAO’s Authority to Report Unauthorized Impoundments

One of GAO’s several roles under the Impoundment Control Act is to report to Congress when GAO identifies an impoundment of budget authority for which no special message has been transmitted.⁴⁶ When we become aware of a potential violation of the Impoundment Control Act, GAO sends a letter to the relevant agency requesting factual information and the agency’s legal views. The agency’s response informs our understanding of the agency’s actions and its justification for those actions. When we identify an improper impoundment, GAO must report it if it is an ongoing impoundment of budget authority, but GAO is not explicitly required to report withholdings that are no longer ongoing. Our current practice is to report withholdings that are no longer ongoing when we conclude the executive branch has

⁴³ See *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁴⁴ *Id.* at 438. Similarly, when the Impoundment Control Act was under consideration, a Senator noted, “The recommendation of the President that an appropriation be eliminated or reduced in and of itself would have no legal effect whatsoever.” 120 Cong. Rec. 20,473 (June 21, 1974) (statement of Sen. Ervin).

⁴⁵ A similar provision was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 101 (2020).

⁴⁶ 2 U.S.C. § 686(a).

violated the Impoundment Control Act and where notification would enhance congressional oversight.⁴⁷ Enacting into law explicit authority supporting this practice would firmly establish the value that Congress places on this work while underscoring its importance for congressional oversight and accountability in government. Therefore, we recommend that Congress amend GAO's authority under the Impoundment Control Act to explicitly include reporting withholdings of funds that are not ongoing.⁴⁸

GAO reports under the Impoundment Control Act are instrumental in alerting Congress to executive branch attempts to undermine Congress's power of the purse by refusing to spend appropriated budget authority. However, in its current form, the Impoundment Control Act considers such a report by the Comptroller General to be a special message, entitling the President to withhold the subject budget authority in accordance with the Act's requirements.⁴⁹ As a result of GAO's report, a President who has violated the Impoundment Control Act by failing to follow the required procedures may subsequently withhold the funds from obligation lawfully instead of making them available for obligation. Thus, the Comptroller General, in discharging his statutory duty to report violations of the Impoundment Control Act, ratifies the continuation of the initial violation. In order to avoid this result when improperly withheld funds have already been made available for obligation, GAO has issued decisions describing such violations, rather than transmitting a formal report to Congress.⁵⁰ To improve consistency, incentivize compliance with the law, and enable congressional oversight, we recommend amending the Impoundment Control Act such that a report by the Comptroller General does not serve as a special message ratifying an improper impoundment of funds.⁵¹

⁴⁷ See, e.g., B-331564, Jan. 16, 2020 (informing Congress of an Impoundment Control Act violation even though the subject funds had been made available for obligation and obligated before their date of expiration).

⁴⁸ A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 103 (2020).

⁴⁹ 2 U.S.C. §686(a).

⁵⁰ See, e.g., B-329092, Dec. 12, 2017 (explaining that “[s]ince the purpose here is to ensure funds are made available for obligation and we have confirmed that the agency has done so, we are not transmitting a report to Congress under the Impoundment Control Act”).

⁵¹ A similar provision was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 103 (2020).

Reporting of Apportionments and Expired and Cancelled Balances

Special messages and reports by the Comptroller General under the Impoundment Control Act are an important source of information about agency activities. Even so, Congress should consider requiring the executive branch to provide additional information that would improve transparency and assist Congress in identifying potential violations of the Impoundment Control Act.

First, we recommend that Congress require the President to report to Congress when appropriated funds are cancelled or expire unobligated.⁵² Appropriations expire at the end of their period of availability. For example, a fiscal year appropriation expires at midnight on September 30—the last day of the fiscal year. Expired appropriations are available to record, adjust, and liquidate obligations properly made during the appropriation’s period of availability.⁵³ After five fiscal years in expired status, any remaining balance in the appropriation account is cancelled and is no longer available for obligation or expenditure.⁵⁴ Requiring the President to report on the expired and cancelled balances in executive branch accounts could alert Congress to withholdings of funds that may violate the Impoundment Control Act.⁵⁵

Second, we recommend that Congress consider requiring the Office of Management and Budget (OMB) to publicly post all apportionments of executive branch appropriations.⁵⁶ The Antideficiency Act requires OMB to apportion appropriations to prevent the need for a deficiency or supplemental appropriation.⁵⁷ Recently, OMB has impermissibly used that apportionment power in an attempt to evade the

⁵² Similar requirements were included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., §§ 201, 202 (2020). Later this year, GAO will issue a report on the extent of cancelled appropriations at federal agencies as required by the National Defense Authorization Act for Fiscal Year 2020.

⁵³ 31 U.S.C. § 1553(a).

⁵⁴ 31 U.S.C. § 1552(a).

⁵⁵ Even if unobligated balances remain in a particular account, relatively small unobligated sums alone do not indicate an impoundment. Under sound administrative funds control practices, agencies may obligate cautiously in order to cover unanticipated liabilities and avoid violating the Antideficiency Act. See B-331298, Dec. 23, 2020. Large unobligated balances, however, may indicate an improper impoundment.

⁵⁶ A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 102 (2020).

⁵⁷ 31 U.S.C. § 1512(a).

Impoundment Control Act's requirements.⁵⁸ As a result, many of GAO's inquiries into potential violations of the Impoundment Control Act include requesting the relevant apportionment documents from OMB. The public posting of all apportionments and reapportionments would substantially expedite GAO's inquiries. Moreover, publicly available apportionments would greatly increase visibility into OMB's use of its apportionment authority, enhancing Congress's ability to conduct oversight of OMB's operations.

Changes to GAO's authorities

Congress vested GAO with the authority to "investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds" ⁵⁹ As such, GAO is integral to Congress' exercise of its oversight powers. Not only does GAO provide essential objective, non-partisan information to Congress, GAO is also authorized to settle the accounts of the United States and provide advance decisions on appropriations law matters to executive branch officials.⁶⁰

I would like to discuss potential changes to GAO's authorities that will improve visibility into and accountability for executive branch actions. First, we recommend reducing the waiting period for the Comptroller General to bring suit under the Impoundment Control Act. Second, we recommend that Congress require the President to respond to GAO's requests for information within a certain time period. Taken together, these changes will strengthen Congress's oversight of executive branch agencies by enhancing GAO's efficiency and effectiveness.

Shortening the Waiting Period for the Comptroller General to Bring Suit under the Impoundment Control Act

Congress has authorized the Comptroller General to bring suit under the Impoundment Control Act to compel the release of improperly withheld budget authority.⁶¹ Before bringing suit, the Comptroller General must first give Congress 25 days advance notice with an explanatory statement explaining the circumstances giving rise to the suit.⁶²

When budget authority is improperly impounded late in the fiscal year, the 25-day waiting period required by the Impoundment Control Act can threaten the

⁵⁸ B-331564, Jan. 16, 2020.

⁵⁹ Pub. L. No. 67-13, § 312(a), 42 Stat. at 25, *codified at* 31 U.S.C. § 712(1).

⁶⁰ 31 U.S.C. §§ 3526, 3529.

⁶¹ 2 U.S.C. § 687.

⁶² *Id.*

Comptroller General's ability to confirm that budget authority is made available for obligation before its expiration. For example, if the President improperly withholds fiscal-year funds from obligation on September 6, the Comptroller General would be unable to file suit until October 1, after the funds had already expired. Thus, the 25-day waiting period hampers the Comptroller General's capacity to make certain that budget authority will be made available in sufficient time for its prudent obligation. As a result, we recommend that Congress consider reducing or eliminating the 25-day waiting period so that GAO may exercise its statutory authorities in a timely manner.⁶³

Improving GAO's Access to Information from the Executive Branch

When GAO issues an appropriations law decision, we send a letter to solicit the agency's views of the facts and the law related to the decision. We have had difficulty in getting timely responses from agencies, and, in some cases, we have not received responses at all. For example, in a recent decision regarding the National Park Service's activities during a lapse in appropriations, we did not receive a response from the Department of the Interior until the day after we issued our decision, even after repeated attempts to acquire the necessary information.⁶⁴ In another recent decision on the Impoundment Control Act, we received no response to our inquiries from the Department of Defense.⁶⁵ In yet another instance, we did not receive a response from the Environmental Protection Agency related to the agency's use of Twitter.⁶⁶ Perhaps most egregiously, we were unable to provide a substantive response to a congressional request for a decision because the Department of the Interior declined to provide the necessary information.⁶⁷

Delays in receiving information from executive branch agencies impede our ability to issue decisions on a timely basis. To ensure that GAO receives timely responses to our requests, we recommend a provision of law to require agencies to respond to our letters within a certain time period. We might also recommend that you consider imposing penalties or a reporting requirement on agencies that fail to respond to

⁶³ A similar provision was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 104 (2020).

⁶⁴ B-330776, Sept. 5, 2019. See also B-318274, Dec. 23, 2010 (despite numerous telephone requests, the Department of the Interior did not respond to our letter prior to the issuance of our decision); B-309181, Aug. 17, 2007 (explaining that the Department of the Interior "provided the requested information but declined to provide its legal views in response to questions we asked").

⁶⁵ B-331564, Jan. 16, 2020.

⁶⁶ B-330107, Oct. 3, 2019.

⁶⁷ B-329372, June 27, 2018.

GAO within the allotted time.⁶⁸ Requiring timely responses to GAO promotes greater transparency and accountability and, as Congress relies on the information GAO provides, will enhance congressional oversight of executive branch activities.

Each of these legislative proposals would strengthen GAO's existing role to provide information and legal analysis to Congress regarding the spending of public money. But, more importantly, these proposals would also support and advance Congress's constitutional prerogatives. It is imperative that Congress's power of the purse and oversight role are respected, upheld, and sustained in order to ensure accountability in the spending of public money.

Chairman Yarmuth, Ranking Member Smith, and members of the Committee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have.

Edda Emmanuelli Perez
Deputy General Counsel

⁶⁸ A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 103 (2020).

Year in Review: Interagency and Other Transactions Topics of Interest



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Decision

Matter of: *U.S. Department of Transportation—Federal Aviation Administration Reimbursable Work Agreement*

File: B-331090

Date: June 8, 2020

DIGEST

In fiscal year 2019, the Federal Aviation Administration (FAA) entered into a reimbursable work agreement to perform aircraft certification services for an airline. We conclude that FAA obligated available budget authority to provide the services, and therefore did not violate the Antideficiency Act. FAA charged the airline a fee for the services FAA provided without authority to do so. As such, FAA must refund improperly collected amounts to the airline.

DECISION

This responds to a request for a decision regarding a reimbursable work agreement FAA, U.S. Department of Transportation (DOT), entered into with an airline prior to the fiscal year (FY) 2019 lapse in appropriations. Letter from Representative David Price, House Committee on Appropriations, Chairman of the Subcommittee on Transportation, and Housing and Urban Development, and Related Agencies, to Comptroller General (May 22, 2019). The request raises two issues: (1) whether FAA violated the Antideficiency Act when it provided services pursuant to the agreement during the lapse in appropriations; and (2) whether FAA had authority to charge for the services it provided pursuant to the agreement.

As discussed below, FAA obligated its “Operations” appropriation for the services it provided the airline. This appropriation did not expire until September 30, 2019, and had sufficient budget authority to obligate for the services at issue. Therefore, FAA did not violate the Antideficiency Act. While FAA had authority to perform these

services for the airline, FAA lacked authority to charge a fee for the services. Therefore, FAA must reimburse the airline for the improperly collected amount.¹

In accordance with our regular practice, we contacted DOT to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to General Counsel, DOT (June 24, 2019). FAA responded with its explanation of the pertinent facts and its legal analysis. Letter from Deputy Chief Counsel, FAA, to Assistant General Counsel, GAO (July 22, 2019) (Response Letter); Email from Deputy Chief Counsel, FAA, to Senior Staff Attorney, GAO, *Subject: Request for Additional Information: FAA RWA with Southwest Airlines* (Aug. 23, 2019) (Additional Response). FAA also provided copies of the reimbursable work agreement between FAA and the airline and the invoice for services. Non-Federal Reimbursable Agreement between Department of Transportation, Federal Aviation Administration, and Southwest Airlines, Inc. (Dec. 21, 2018) (December Agreement); FAA, *Invoice for Southwest Airlines Aircraft Certification Actions* (June 13, 2019) (June Invoice).

BACKGROUND

On December 21, 2018, FAA entered into a reimbursable work agreement by which FAA agreed to provide an airline with services that allowed the airline to add aircraft to its air carrier operating specifications.² Response Letter, at 1, 2. According to FAA, “almost all of the work needed” to add the aircraft to the airline’s operating specifications had been completed before FAA entered into the agreement. Additional Response. As a result, the work that FAA performed under the agreement consisted of reviewing documentation to confirm that the necessary steps had been completed. *Id.*

Congress enacted in FY 2018 an Operations appropriation, which was available to FAA for “aviation safety activities,” among other things. Pub. L. No. 115-141, div. L, title I, 132 Stat. 348, 976 (Mar. 23, 2018). These amounts were available through

¹ The requester asked whether FAA was permitted to accept payment in arrears. Authority to charge for the services would be a necessary precondition to any authority to accept payment in arrears. Because we conclude that FAA had no authority to charge for the services, we do not reach the question of whether FAA had authority to collect payment in arrears.

² Operations specifications are issued to air carriers by FAA and must contain, among other things, the registration markings and serial numbers of each aircraft authorized for use, as well as each airport to be used in the carrier’s scheduled operations. 14 C.F.R. § 119.49(a)(4). Air carriers may not operate using any aircraft or airport not listed in the operations specifications. *Id.* Operations specifications may be amended by the Administrator. 14 C.F.R. § 119.51.

September 30, 2019. Pub. L. No. 115-141, 132 Stat. at 976. FAA obligated this appropriation for the services at issue.³ Response Letter, at 2. According to FAA, this account had available budget authority at the time of obligation. *Id.*

The agreement provided that the airline would pay FAA for the aircraft certification services in arrears.⁴ December Agreement, at 2. FAA does not generally charge a fee for approving changes to air carrier operating specifications. Additional Response. The airline paid FAA \$1,317.92 for these services on June 13, 2019. *Id.* FAA credited the payment to its FY 2018 Operations account. *Id.*

DISCUSSION

At issue here is whether FAA had available budget authority to perform the aircraft certification services, and whether FAA had authority to collect from the airline a fee for these services.

Application of the Antideficiency Act

The Antideficiency Act is not implicated where an agency permissibly obligates available budget authority, even if other agencies or programs within an agency are concurrently experiencing a lapse in appropriations. B-330720, Feb. 6, 2019, at 2-3. As noted above, Congress in FY 2018 appropriated to FAA amounts for Operations that remained available through September 30, 2019. Pub. L. No 115-141, 132 Stat. at 976. Here, FAA obligated amounts available in its Operations appropriation for the costs FAA incurred while providing services pursuant to the December Agreement. As noted above, this appropriation is available for “aviation safety activities.” *Id.* FAA generally uses funds available for aviation safety activities to perform the work required to add aircraft to an airline’s operations specifications. Additional Response. Because the appropriation contained sufficient balances to fund the services here, and was available for these particular activities, FAA did not violate the Antideficiency Act when it incurred obligations for services it provided pursuant to the agreement.

FAA’s authority to collect reimbursement from the airline

When Congress provides an appropriation for a program or activity, that appropriation establishes the maximum authorized program level which the agency may not exceed. B-300826, Mar. 3, 2005. An agency may not circumvent this

³ Some of FAA’s other appropriations were affected by a funding lapse from December 22, 2018 through January 25, 2019.³ See Response Letter, at 1.

⁴ Certain sections of the agreement reference advance payments even though the payment terms specify that payment will be made in arrears. See December Agreement, at 4, 5.

limitation by augmenting its appropriations from sources outside the government, unless Congress has so authorized the agency. *Id.*

FAA does have specific statutory authority to charge for some of the services it provides. See, e.g., 49 U.S.C. § 45305 (authorizing FAA to charge fees for a variety of services, including the issuance of airman certificates and the recording of security interests in aircraft); 49 U.S.C. § 45301 (authorizing FAA to charge fees for certain services provided to foreign governments). However, we are not aware of, nor does FAA cite any specific statutory authority for imposing user fees to charge airlines for the work required to add aircraft to their air carrier operating specifications. Therefore, we must assess whether FAA may charge for these services under a more general authority.

Congress has granted agencies general authority to impose user fees under the Independent Offices Appropriation Act (IOAA), also known as the User Charge Statute. 31 U.S.C. § 9701. IOAA allows agencies to “prescribe regulations establishing the charge for a service or thing of value provided by the agency.” *Id.* § 9701(b). IOAA was enacted in order to allow the government to recoup costs where the services provided by the agency benefitted “identifiable ‘special beneficiaries,’” rather than the general public. *New England Power Co. v. Federal Power Commission*, 467 F.2d 425, 428 (D.C. Cir. 1972) (quoting H.R. Rep. No. 82-384, at 2 (1952)), *aff’d*, 415 U.S. 345 (1974); see also 59 Comp. Gen. 294 (1980) (an agency could not augment its appropriations by charging a fee for services that benefitted the general public rather than a particular entity).

In order to establish a charge under IOAA, an agency must first promulgate regulations. B-316796, Sept. 30, 2008; see also *Alyeska Pipeline Service Co. v. United States*, 624 F.2d 1005, 1010 (Ct. Cl. 1980) (holding that fees assessed under IOAA were invalid where the agency had not first promulgated regulations authorizing the fee). The IOAA’s grant of charging authority is prospective and only applies where the required regulation has already been issued and is in effect. B-145252-O.M., Nov. 12, 1976. Here, FAA issued no such regulations prior to entering into the arrangement with the airline.

Moreover, since 1998, Congress has enacted a restriction in FAA’s annual appropriation which states that “none of the funds in this Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act.” See, e.g., Pub. L. No. 115-141, 132 Stat. at 977 (enacting the provision for fiscal year 2018); Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, 111 Stat. 1425, 1429 (Oct. 27, 1997) (enacting a substantively similar prohibition for fiscal year 1998). The prohibition was intended to prevent FAA from “circumvent[ing] the legislative process and avoid[ing] the normal cost controls which apply to other federal agencies.” *Id.*, at 41. Here, the prohibition on implementing regulations to establish new aviation user fees precluded FAA from charging the airline under

IOAA. See Pub. L. No. 115-141, 132 Stat. at 977; Pub. L. No. 115-245, 132 Stat. at 3123.

FAA asserts that the charge at issue here is authorized because the agency may enter into other transaction agreements “on such terms and conditions as the Administrator considers appropriate.” Additional Response (discussing and paraphrasing 49 U.S.C. § 106(I)(6)). FAA believes that this authority is sufficient to allow the agency to collect reimbursement for the services it provided. Additional Response.⁵ We disagree.

We will not find a grant of fee-charging authority without explicit statutory terms to that effect. See B-300826, Mar. 3, 2005; see *also* B-244345, June 23, 1992 (limiting an agency’s fee-charging authority to the specific terms of the statute). FAA’s own fee-charging authorities are instructive. Each statute authorizing FAA to impose fees is specific and explicit in its authorization. See, e.g., 49 U.S.C. § 45305 (directing that the Administrator of FAA “shall establish and collect a fee” for specified services). By contrast, FAA’s other transaction authority does not mention or explicitly authorize the imposition of fees. Nor did Congress direct FAA to charge for the services at issue here. Therefore, we cannot conclude that Congress intended to grant broad fee-charging authority when it authorized FAA to enter into other transactions.

Furthermore, FAA may not craft agreements to circumvent legislatively enacted restrictions on its authority. Just as an agency cannot use its other transaction authority to skirt procurement contracting requirements, FAA cannot rely on its other transaction authority to implement a user fee that Congress has expressly prohibited. See B-310741, Jan. 28, 2008 (noting that other transaction agreements may not be used where a procurement contract is required); Pub. L. No. 115-141, 132 Stat. at 977; Pub. L. No. 115-245, § 102 (prohibiting the use of FAA’s appropriations for the implementation of regulations establishing new aviation user fees); see *also* 55 Comp. Gen. 1059, 1061 (1976) (“It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly.”). Therefore, FAA could not rely on its other transaction authority to impose this charge. For the reasons stated above, we find that FAA did not have the authority to charge the airline for the services the agency provided under the agreement.

⁵ FAA also argues that the charge at issue is not a user fee, but a condition of the agreement with the airline. We disagree with FAA’s characterization of the charge and find that it meets the definition of a user fee, as it is a charge that has been assessed to an identifiable beneficiary for benefits beyond what is available to the general public. See *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 349 (1974) (noting that fees relate to “specific charges for specific services to specific individuals or companies”).

Remedial action

FAA's annual appropriation authorized the agency to credit its Operations appropriation with funds collected from "private sources." See Pub. L. No. 116-6, div. G, title I, 133 Stat. 13, 401 (Feb. 15, 2019); Pub. L. No 115-141, 132 Stat. at 977. However, because FAA collected fees without authority to do so, the agency must refund those amounts to the airline. B-145252-O.M., Nov. 12, 1976; see also 49 U.S.C. § 45303(b) (authorizing the Administrator to refund "any fee paid by mistake or any amount paid in excess of that required").

Where an agency improperly relies on the IOAA to assess an unauthorized fee and credits the funds to a particular appropriation, the refund is chargeable to the credited appropriation. See, e.g., 55 Comp. Gen. 625, 627 (1976). Here, we apply the same principle to the funds FAA improperly collected when it relied on its other transaction authority. FAA credited its fiscal year 2018 Operations appropriation, which is available for obligation during fiscal years 2018 and 2019. Response Letter, at 2. Therefore, the refund of the improperly collected amount should be drawn from that appropriation.

CONCLUSION

Because FAA had available budget authority at the time it obligated funds to provide the services at issue, its actions did not violate the Antideficiency Act. While FAA had authority to perform the services at issue, FAA did not have authority to charge a fee for the services it provided. FAA's other transaction authority did not, standing alone, authorize the imposition of a fee in this instance, nor was FAA authorized to impose the fee under the IOAA, as the agency is prohibited from promulgating regulations to establish new aviation user fees. Therefore, FAA must refund any improperly collected amounts to the airline.



Thomas H. Armstrong
General Counsel



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Decision

Matter of: U.S. Department of the Interior—Operation of the Old Post Office Observation Tower during the Fiscal Year 2019 Lapse in Appropriations

File: B-330775.1

Date: October 1, 2020

DIGEST

The National Park Service (Park Service), U.S. Department of the Interior, incurred obligations related to the reopening and operation of the Old Post Office Building observation tower during the fiscal year 2019 lapse in appropriations.

The Park Service did not violate the Antideficiency Act when it incurred obligations for the salaries of the employees who operated the observation tower during the lapse in appropriations because the Park Service obligated available budget authority. In addition, the Park Service permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations for the salaries of two Park Service officials who signed interagency agreements related to the observation tower with the U.S. General Services Administration during the lapse in appropriations.

DECISION

This responds to a request regarding whether the National Park Service (Park Service), a bureau within the U.S. Department of the Interior (Interior), violated appropriations laws when it reopened and operated the Old Post Office Building observation tower during a lapse in appropriations that occurred between December 22, 2018, and January 25, 2019.¹ In response to the same request, on

¹ Letter from Senator Thomas R. Carper, Ranking Member of the Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs, Representative Elijah E. Cummings, then-Chairman, House Committee on Oversight and Reform, and Senator Gary C. Peters, Ranking (continued)

September 5, 2019, we issued a legal decision assessing the U.S. General Services Administration's (GSA) compliance with the Antideficiency Act regarding the reopening of the observation tower during the lapse in appropriations. B-330775, Sept. 5, 2019 (concluding that GSA's obligations with regard to the observation tower did not violate the Antideficiency Act because GSA obligated available budget authority for its activities).

As explained below, we conclude that the Park Service did not violate the Antideficiency Act when it obligated available budget authority for the salaries of the employees who operated the observation tower during the lapse in appropriations. We also conclude that the Park Service permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations for the salaries of two Park Service officials who signed interagency agreements related to the observation tower with GSA during the lapse in appropriations.

In accordance with our regular practice, we contacted Interior to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to then-Acting Solicitor, Interior (May 2, 2019); E-mail from Assistant General Counsel, GAO, to Associate Solicitor, Interior, *Subject: B-330775.1: Old Post Office Decision—Performance of Non-Excepted Activities* (July 16, 2020). Interior responded with its explanation of the pertinent facts, legal analysis, and multiple exhibits. Letter from then-Associate Solicitor, Interior, to Assistant General Counsel, GAO (Sept. 12, 2019) (Response Letter); see also Telephone Conversation with Associate Solicitor, Interior (July 20, 2020) (July 20 Conversation); Telephone Conversation with Assistant Solicitor, Interior (July 22, 2020) (July 22 Conversation); Telephone Conversation with Assistant Solicitor, Interior (August 4, 2020) (August 4 Conversation).

BACKGROUND

By law, GSA is required to enter into an agreement with Interior providing for the Park Service to operate the GSA-owned observation tower in the Old Post Office Building. Pub. L. No. 98-1, § 4, 97 Stat. 3, 4 (Feb. 15, 1983); see Pub. L. No. 110-359, § 2, 122 Stat. 4005, 4005 (Oct. 8, 2008). The statute authorizes GSA to transfer amounts from the Federal Buildings Fund to the Park Service to cover the

(continued)

Member, Senate Committee on Homeland Security and Governmental Affairs, to Comptroller General (May 23, 2019); Letter from Representative Raúl M. Grijalva, Chairman, House Committee on Natural Resources, Representative Betty McCollum, Chair of the Subcommittee on Interior, Environment and Related Agencies, House Committee on Appropriations, and Representative Mike Quigley, Chairman of the Subcommittee on Financial Services and General Government, House Committee on Appropriations, to Comptroller General (Feb. 11, 2019).

Park Service's costs of operating the tower. Pub. L. No. 98-1, § 4; see 40 U.S.C. § 592 (Federal Buildings Fund). Under the statutorily required agreement, the services the Park Service typically provides for the observation tower include education and interpretation services for visitors, public information services for Park Service activities in the observation tower, and services related to staff and visitor safety. Response Letter, at 1–2; Memorandum of Agreement between GSA and the Park Service (Dec. 28, 2018) (December MOA), at 1–3.

According to the Park Service, GSA and the Park Service agreed on the terms of the fiscal year 2019 agreement in October 2018. Response Letter, at 8. However, as of December 22, 2018, the agencies had not executed a written interagency agreement that would provide for GSA to reimburse the Park Service for operating the observation tower. *Id.*, at 4. On December 22, 2018, the Park Service experienced a lapse in appropriations and closed the observation tower.² *Id.* On December 28, 2018, the agencies executed a written agreement documenting their previously agreed-upon responsibilities and a written agreement providing for GSA to reimburse the Park Service for its services. *Id.*, at 3–4; Interagency Agreement between GSA and the Park Service (Dec. 28, 2018) (funding document through December 31, 2018), Box 11; December MOA; see also Interagency Agreement between GSA and the Park Service (Jan. 4, 2019) (funding document through March 31, 2019), Box 27. The Park Service reopened the observation tower on December 29, 2018. Response Letter, at 4.

During the lapse in appropriations, the Park Service obligated its Operation of the National Park System (ONPS) appropriation for the salaries of the two Park Service officials who executed the interagency agreements with GSA and its Construction appropriation for the salaries of the employees who operated the observation tower after the tower reopened on December 29, 2018. *Id.*, at 6. Pursuant to the interagency agreements, GSA later reimbursed the Park Service for the costs the Park Service incurred to operate the tower during the lapse in appropriations. *Id.*, at 6, 7. The Park Service has since credited these reimbursements to its Construction appropriation. *Id.*, at 6.

DISCUSSION

In general, the Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation, or from accepting voluntary services for the United States. 31 U.S.C. §§ 1341, 1342. Thus, if a program lacks

² The lapse in appropriations began when the continuing resolution providing funding for Park Service activities expired at midnight on December 21, 2018, and ended when Congress enacted another continuing resolution for Park Service activities on January 25, 2019. See Pub. L. No. 115-298, 132 Stat. 4382 (Dec. 7, 2018) (continuing resolution through December 21, 2018); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 101, 133 Stat. 10 (Jan. 25, 2019) (continuing resolution through February 15, 2019).

sufficient budget authority to continue operating, the Act generally requires that the agency commence an orderly shutdown of the affected function. See B-330720, Feb. 6, 2019, at 4, 5. Nevertheless, if an appropriation or continuing resolution expires prior to the enactment of a new appropriation, a program may be able to continue operating if the agency has remaining budget authority for the program. B-330775, Sept. 5, 2019, at 7.

Here, GSA and the Park Service executed an interagency agreement during the lapse in appropriations that provided for GSA to reimburse the Park Service for the cost of operating the observation tower. Response Letter, at 6. After the agencies signed the agreement, the Park Service reopened the tower and obligated its Construction appropriation for the salaries of the employees who operated the tower during the lapse.³ *Id.* The Construction appropriation is a no-year appropriation and is available without fiscal year limitation. Pub. L. No. 115-141, div. G, title I, 132 Stat. 348, 641 (Mar. 23, 2018). Because the Construction appropriation remains available for obligation for an indefinite period of time, the Park Service could incur obligations for the salaries of the employees who operated the tower without violating the Antideficiency Act so long as the Park Service had available carryover balances in that appropriation account at the time it incurred the obligations. See B-330775, Sept. 5, 2019, at 7.

We note that absent an interagency agreement with GSA, the Park Service would have no independent authority to operate, nor would its Construction appropriation be available for the purpose of operating, the GSA-owned observation tower. 31 U.S.C. § 1301(a). *Cf.* 63 Comp. Gen. 422 (1984) (concluding that the Department of Defense's Operation and Maintenance appropriation is not available for certain civic and humanitarian assistance activities where such activities are ordinarily administered by another agency). However, Public Law 98-1 requires that GSA enter into an interagency agreement with the Park Service to operate the tower and authorizes GSA to reimburse the Park Service for those services using amounts in the Federal Buildings Fund. Pub. L. No. 98-1, § 4, 97 Stat. at 4. Pursuant to the agencies' interagency agreements under Public Law 98-1, GSA, as the requesting agency, typically obligates and transfers amounts from the Federal Buildings Fund to the Park Service to reimburse the Park Service for the expenses of operating the observation tower. Response Letter, at 3.

The interagency agreements under Public Law 98-1 constitute an obligation of GSA's appropriations and it is the statutory restrictions, limitations, and exemptions

³ The executed agreements contained deficiencies such as a lack of signatures from certain officials and incorrect or ambiguous dates in the scopes of agreement or periods of performance. We emphasize, as we did in our September 5, 2019, decision examining GSA's actions, that agencies should enter into interagency agreements only with documentation that clearly shows the terms of the agreement and indicates mutual assent. B-330775, Sept. 5, 2019, at 10 n.10.

on the Federal Buildings Fund that apply to such obligations. See B-234427, Aug. 10, 1989; 21 Comp. Gen. 254 (1941); 18 Comp. Gen. 489 (1938). We previously concluded that GSA properly obligated amounts in the Federal Buildings Fund for this purpose. B-330775, Sept. 5, 2019, at 9. By virtue of the specific statute requiring this agreement and authorizing this funding mechanism, we do not object to the Park Service temporarily charging, and crediting with reimbursements from GSA, its Construction appropriation here. Cf. Response Letter, at 6 (noting that the Park Service includes “record[ing] transactions related to reimbursable activities and agreements” in its budget request for its Construction appropriation account); December MOA, at 5 (providing that GSA will transfer funding to the Park Service).

For the salaries of the two Park Service officials who executed the interagency agreements with GSA during the lapse in appropriations, the Park Service obligated the ONPS appropriation. Unlike the Construction appropriation, the ONPS appropriation is a one-year appropriation, which expired with the commencement of the lapse, and so, the Park Service did not have available budget authority at the time it incurred these obligations. See, e.g., Pub. L. No. 115-141, 132 Stat. at 640. As such, the Park Service could permissibly incur obligations only if an exception to the Antideficiency Act permitted it to do so. See, e.g., B-330775, Sept. 5, 2019, at 7.

Here, the Park Service did not argue that executing the interagency agreements constituted an excepted function. Rather, the Park Service asserted that the two officials who signed the interagency agreements with GSA were recalled to perform other functions properly designated as excepted under the Antideficiency Act’s exception for “emergencies involving . . . the protection of property” and that the officials had “intermittent availability for non-excepted requirements.” 31 U.S.C. § 1342; see Response Letter, at 6–7; August 4 Conversation.

Under the Antideficiency Act’s exception for emergencies to protect property, an agency must demonstrate: (1) the property involved is government-owned property or property for which the government has a responsibility, and (2) the specific functions performed do not include those functions that, if suspended, would not “imminently threaten” the protection of property. 31 U.S.C. § 1342; B-331093, Oct. 22, 2019. Because the Antideficiency Act is central to Congress’s constitutional power of the purse, we interpret exceptions narrowly and in a manner to protect congressional prerogative, applying a case-by-case analysis. B-331093, Oct. 22, 2019, at 7.

Regarding the first requirement, the two Park Service officials performed functions related to property in the National Capital Region that is within the Park Service’s jurisdiction.⁴ August 4 Conversation. Because such property is government-owned

⁴ The Park Service’s National Capital Region includes parks, memorials, and buildings throughout the Washington, D.C. area, including the Belmont-Paul Women’s Equality National Monument, Ford’s Theatre National Historic Site, Martin

and the Park Service has a responsibility for the property, we conclude that these areas constitute property within the meaning of the Antideficiency Act. See 54 U.S.C. §§ 100101, 100501; B-331093, Oct. 22, 2019, at 6; see also August 4 Conversation.

On the second requirement—whether the suspension of the functions would imminently threaten the protection of property—Interior explained that the two Park Service officials who signed the interagency agreements held leadership positions within the Park Service’s National Capital Region and were charged with addressing and coordinating an immediate response to any threats to property under the Park Service’s jurisdiction within that region. August 4 Conversation. To enable prompt action in response to any threats, the officials’ responsibilities included liaising with other entities, such as the D.C. government or the United States Park Police, and, if necessary, determining whether and when to recall additional Park Service employees to perform functions properly excepted under the Antideficiency Act. August 4 Conversation.

Given the Park Service’s mission and statutory responsibilities related to the subject government property and the nature of these officials’ leadership duties, we conclude that the Park Service could permissibly obligate amounts for the salaries of these two Park Service officials under the Antideficiency Act’s exception for emergencies to protect property. Specifically, because the officials’ responsibilities included coordinating an immediate response to protect government property in the event of an emergency, we conclude that the Park Service could incur obligations for the salaries of these officials under such exception to ensure that they would be available to perform the excepted functions as needed.⁵

The remaining issue is whether the officials were permitted to perform other, non-excepted functions, such as executing the interagency agreements with GSA, while they remained at work but were not actively performing the excepted functions.

We addressed a similar situation when the Farm Service Agency (FSA), within the U.S. Department of Agriculture (USDA), recalled certain employees to perform excepted functions during the fiscal year 2019 lapse in appropriations. B-331092,

Luther King, Jr. Memorial, and Washington Monument. August 4 Conversation; Park Service, *Region 1: National Capital Area*, available at <https://www.nps.gov/orgs/1465/visit-the-parks.htm> (last visited Sept. 29, 2020).

⁵ In this decision, we address only whether the Park Service could obligate amounts for the salaries of the leadership officials who signed the interagency agreements with GSA on December 28, 2018, and January 4, 2019. In a separate decision, we addressed the Park Service’s use of its appropriations for the purposes of maintaining national park sites that remained accessible to visitors during the fiscal year 2019 lapse in appropriations. B-330776, Sept. 5, 2019 (concluding that the Park Service violated the purpose statute and the Antideficiency Act).

June 29, 2020. According to USDA, the employees had to remain at work to be ready to perform the excepted functions even though this resulted in periods of time when the employees were not actively performing, and were not expected to perform, the excepted functions. *Id.*, at 8. In that regard, USDA provided that the employees performed non-excepted work during the “intervals between excepted activities [that] were too short to enable the employee to be furloughed.” *Id.* Because the employees’ readiness was critical to performance of the excepted functions, the agency properly incurred obligations for the employees’ salaries for the entire period of time the employees had to maintain readiness. *Id.* In those limited circumstances, we did not object to the employees’ performance of the non-excepted functions. *Id.*

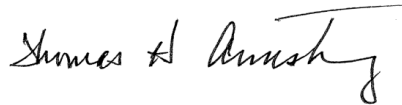
Central to that conclusion were three fact-specific conditions regarding the nature of each excepted function. First, we concluded that the permissibility of the excepted activity was a necessary prerequisite to the permissibility of the non-excepted activity. *Id.* Second, we concluded that the nature of the excepted activity must require that the employee remain at work to be immediately available to perform the excepted activity. *Id.* Third, we highlighted that the excepted work must take priority. *Id.* That is, that the employee may perform the non-excepted work only during intervals of time that the employee is not performing, and is not expected to perform, the excepted work and that the performance of a non-excepted activity must not interfere with the proper execution of, or readiness to perform, the excepted activity. *Id.*

Here, the Park Service permissibly incurred obligations for the salaries of the two officials who signed the interagency agreements with GSA because the officials were recalled to perform activities that fell under the Antideficiency Act’s exception for emergencies to protect property. Further, consistent with the second condition outlined above, Interior indicated that each official’s readiness to perform the excepted function was critical to the performance of the excepted function. August 4 Conversation. Additionally, in keeping with the third condition, Interior provided that the officials performed the non-excepted work only during intervals of time when each official was not performing, and was not expected to perform, the excepted work and that the officials’ performance of the non-excepted activity did not in any way interfere with the proper execution of, or each official’s readiness to perform, the excepted activity. *Id.* Under these limited circumstances, we do not object to the Park Service’s decision to allow these two Park Service officials to perform the non-excepted functions at issue here.⁶

⁶ During the lapse in appropriations, an official in the Park Service Office of the Comptroller appropriately highlighted the limited nature of an employee’s authority to perform non-excepted functions and also emphasized that “[e]mployees should document any use of this *very narrow* allowance.” E-mail from Park Service Official, Office of the Comptroller, to Park Service Officials, *Subject: very narrow allowance for non-excepted de minimis work* (Dec. 28, 2018) (emphasis with bold and underline in original).

CONCLUSION

The Park Service did not violate the Antideficiency Act when it incurred obligations for the salaries of the employees who operated the observation tower during the lapse in appropriations because the Park Service obligated available budget authority. In addition, the Park Service permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations for the salaries of two Park Service officials who signed interagency agreements related to the observation tower with GSA during the lapse in appropriations.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first few letters.

Thomas H. Armstrong
General Counsel



U.S. GOVERNMENT ACCOUNTABILITY OFFICE
A Century of Non-Partisan Fact-Based Work

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

Decision

Matter of: U.S. Chemical Safety and Hazard Investigation Board—Independent Statutory Authority to Enter into Interagency Agreements

File: B-331739

Date: March 18, 2021

DIGEST

This decision recognizes an exception to the general prohibition on transfers of funds between agencies, 31 U.S.C. § 1532. While the Economy Act, 31 U.S.C. § 1535, is one such exception, a provision in the U.S. Chemical Safety and Hazard Investigation Board's (CSB) enabling statute, 42 U.S.C. § 7412(r)(6)(N), is another. It provides CSB with authority to enter into contracts, leases, cooperative agreements or other transactions that are necessary to conduct its duties and functions, with any other agency, institution, or person. Based on the plain language of this provision, we conclude that it provides CSB with specific statutory authority to enter into agreements with other federal agencies, independent of the general Economy Act provisions in 31 U.S.C. § 1535.

DECISION

Pursuant to 31 U.S.C. § 3529, the General Counsel of the U.S. Chemical Safety and Hazard Investigation Board (CSB) requested a decision regarding whether a provision in CSB's enabling statute, 42 U.S.C. § 7412(r)(6)(N), authorizes CSB to enter into agreements with other federal agencies, independent of the authority provided by the Economy Act, 31 U.S.C. § 1535. Letter from General Counsel, CSB, to General Counsel, GAO (Jan. 8, 2020) (Request Letter). As explained below, we conclude that § 7412(r)(6)(N), based on its plain meaning, grants CSB independent statutory authority to enter into agreements with other federal agencies. This provision is an exception to the general prohibition on transfers of funds between agencies, 31 U.S.C. § 1532.

Our practice when rendering decisions is to obtain facts and legal views from the relevant agency. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. CSB provided factual information, supporting documentation, and the agency's legal views in its request letter. Request Letter.

BACKGROUND

CSB is an independent federal agency created by the Clean Air Act Amendments of 1990. Request Letter, at 1; see 42 U.S.C. § 7412(r)(6). The agency is charged with, among other things, investigating chemical accidents and issuing reports regarding the safety of chemical production, processing, handling, and storage. See 42 U.S.C. § 7412(r)(6)(C). In addition, CSB's enabling statute authorizes it "to enter into contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of the duties and functions of the Board with any other agency, institution, or person." *Id.* § 7412(r)(6)(N). In its request letter, CSB provided its view that its enabling statute provides it with authority to enter into agreements with other federal agencies, independent of the Economy Act, 31 U.S.C. § 1535. Request Letter, at 3.

DISCUSSION

At issue here is whether 42 U.S.C. § 7412(r)(6)(N) grants CSB authority to enter into agreements with other federal agencies, independent of the Economy Act.

Unless otherwise authorized by law, transfers of funds between government agencies and instrumentalities are prohibited. 31 U.S.C. § 1532. Congress may, however, enact a law that provides transfer authority that is either specific to an agency or more generally available to the government as a whole. B-308762, Sept. 17, 2007, at 9.

The Economy Act is a statute applicable governmentwide that authorizes an agency to provide goods or services to another agency on a reimbursable basis. 31 U.S.C. § 1535; B-289380, July 31, 2002, at 1 (citing to 70 Comp. Gen. 592, 595 (1991)). Congress enacted the Economy Act to "permit the utilization of the materials, supplies, facilities, and personnel belonging to one department by another department or independent establishment which is not equipped to furnish the materials, work, or services for itself, and to provide a uniform procedure so far as practicable for all departments." 57 Comp. Gen. 674, 680 (1978); H.R. Rep. No. 72-1126, at 15 (1932).

Congress has at times also provided specific statutory authority for an agency to enter into agreements with other agencies, independent of the Economy Act. See, e.g. B-289380, July 31, 2002; B-282601, Sept. 27, 1999; 55 Comp. Gen. 1497 (1976). For example, the Consumer Product Safety Commission (Commission) is "authorized to enter into contracts with governmental entities, private organizations, or individuals" for the conduct of certain activities. 15 U.S.C. § 2076(g). We previously concluded that, based on the plain meaning of the terms of and the legislative history for the provision, such provision clearly gave the Commission independent statutory authority to make contracts with federal agencies. B-289380, July 31, 2002, at 2–3.

Similarly, CSB's enabling statute authorizes it "to enter into contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of the duties and functions of the Board with any other agency, institution, or person." 42 U.S.C. § 7412(r)(6)(N). This provision clearly gives CSB independent contractual authority to enter into contracts with other agencies, institutions or people. The only remaining issue to consider is whether "agency" includes federal agencies.

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

As we have stated before, there is no one definition of the term "agency" that has general, governmentwide applicability. Rather, the term "agency" and related terms like "executive agency" and "federal agency" have been defined in different ways in different laws and regulations. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 9. Although CSB's enabling statute does not define the term "agency," the statute uses the term "agency," or its plural form, "agencies," more than once in different provisions. 42 U.S.C. § 7412(r)(6)(C)–(F), (N), (R), (S). When a statute uses an identical word more than once in a statute, the settled principle of statutory construction is that the word has the same meaning "in the absence of evidence to the contrary." 43 Comp. Gen. 252, 254 (B-151007, Sept. 12, 1963) (citing *United States v. Cooper Corp.*, 312 U.S. 600 (1941); *Atlantic Cleaners & Dyers vs. United States*, 286 U.S. 427, 433 (1932)); see also *Barber v. Thomas*, 560 U.S. 474, 483–484 (2010). For example, the meaning of a word may vary "to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners & Dyers*, 286 U.S. at 433.

The term "agency" and "agencies" appears multiple times in the CSB enabling statute, but in many instances, qualifying language is used to describe the entities to be included in the scope of the term in that particular instance. For example, another provision in the CSB enabling statute, 42 U.S.C. § 7412(r)(6)(C)(ii), establishes CSB's duty to issue reports to certain parties including "Federal, State and local agencies . . . concerned with the safety of chemical production, processing, handling and storage" The use of the qualifiers "Federal, State, and local" demonstrates that the meaning of the term "agency" in that provision is meant to include agencies at the federal, state, and local levels with the concerns described in the statute. By way of another example, a different section of the CSB enabling statute authorizes CSB to conduct studies in certain instances, and requires that, to the extent practicable, CSB conduct the studies in cooperation with, "other Federal agencies having emergency response authorities, State and local

governmental agencies . . .” and other entities. 42 U.S.C. § 7412(r)(6)(F). In this case, qualifiers were used to refer specifically to a subset of federal agencies, as well as state and local governmental agencies. In a final example, language in the CSB enabling statute directs CSB to “coordinate its activities with investigations and studies conducted by other agencies of the United States having a responsibility to protect public health and safety.” 42 U.S.C. § 7412(r)(6)(E). In that instance, once again, the statute specifically refers to a subset of federal agencies with certain responsibilities. The use of qualifiers throughout CSB’s enabling statute thus demonstrates that the meaning of the term “agency” can vary based on the qualifiers used in each specific context.

The provision that authorizes CSB to contract with other parties includes the authority to contract with “any other agency.” 42 U.S.C. § 7412(r)(6)(N). In contrast with other provisions where qualifying language clarified the scope of the term “agency” or “agencies,” the only qualifier here is the word “other.” In the absence of language limiting the scope, it is therefore reasonable to read the term “agency” broadly in this instance. Additionally, because CSB is itself a federal agency, it is reasonable to conclude that other federal agencies would fall within the scope of “other agencies” as it is used in the provision.¹ Accordingly, we conclude that CSB has authority to enter into agreements with other federal agencies, independent of the Economy Act.

CONCLUSION

Based on the plain language of 42 U.S.C. § 7412(r)(6)(N), we conclude that this provision grants CSB statutory authority, independent of the Economy Act, to enter into agreements with other federal agencies.



Thomas H. Armstrong
General Counsel

¹ CSB asserts that the word “agency,” as it is used in 42 U.S.C. § 7412(r)(6)(N) without the qualification that it is an “agency of the United States,” should be interpreted broadly to include state and local agencies, as well as federal agencies. Request Letter, at 2–3. Because we were asked to address CSB’s authority to enter into agreements only with other federal agencies, independent of the Economy Act, we need not opine on CSB’s assertion here.

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

**GAO**

Accountability * Integrity * Reliability

**Comptroller General
of the United States****United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Patent and Trademark Office—High-speed Internet Access in Employees' Homes

File: B-308044

Date: January 10, 2007

DIGEST

The United States Patent and Trademark Office (PTO) may reimburse employees for high-speed internet service at employees' homes incident to the agency's telework program. We recommend that PTO periodically review reimbursements to ensure that it has adequate safeguards against private misuse and is reimbursing employees for home internet service used for official purposes.

DECISION

The Acting Chief Financial Officer of the United States Patent and Trademark Office (PTO) has requested an advance decision under 31 U.S.C. § 3529 on the propriety of reimbursing its employees for costs associated with maintaining high-speed internet access at employees' homes incident to the agency's telework program. Letter from Barry K. Hudson, Acting Chief Financial Officer, United States Patent and Trademark Office, to Anthony H. Gamboa, General Counsel, GAO, June 15, 2006 (Hudson Letter). As we explain below, PTO may reimburse employees for high-speed internet access, but we recommend that PTO periodically review reimbursements to ensure that it has adequate safeguards against private misuse and is reimbursing employees for internet service used for official purposes.

Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006). In this regard, PTO supplied additional information, including a draft statement of policy and procedures for its proposed reimbursement program, in September 2006. Letter from James A. Toupin, General Counsel, PTO, to Thomas H. Armstrong, Assistant General Counsel for

Appropriations Law, GAO, Sept. 6, 2006 (Toupin Letter), *enclosing* PTO Internet Service Provider Reimbursement Policy for Patents Hoteling Programs (Policy).

BACKGROUND

The Patent and Trademark Office is a federal agency within the Department of Commerce charged with promoting the progress of science and the useful arts by securing for limited times to inventors the exclusive right to their discoveries.¹ PTO proposes a telecommuting program that would permit its employees to telecommute up to 4 days per week from an approved designated alternative work site, typically the employee's home. Hudson Letter. The agency believes the program will improve workforce recruitment and retention, reduce traffic congestion and pollution in the metropolitan Washington, D.C., area, and realize substantial cost savings to PTO. *Id.* PTO expects to have 3,300 employees participating in the program by 2011. *Id.* PTO would require employees to maintain high-speed internet access meeting certain minimum technical requirements at their residence or other designated alternative work site. *Id.* As part of the telecommuting program, PTO proposes to reimburse participating employees for the costs employees incur to maintain such internet access. *Id.*

Employees requesting reimbursement must submit copies of invoices from their internet service provider (ISP) and attest to the appropriate percentage of ISP services used for work-related purposes. *Id.*, Toupin Letter. Employees would be eligible for only 50 or 100 percent reimbursement for ISP connection depending on the amount of monthly business use of the internet service. Toupin Letter. For example, employees requesting the full 100 percent reimbursement would attest to the following: "I hereby certify that my Internet service connection for which I am requesting reimbursement has been used solely for official USPTO purposes (including 'limited personal use' allowed by the USPTO's 'Rules of the Road')." Policy at ¶ 1. Alternatively, employees could sign the following certification for 50 percent reimbursement: "I hereby certify that my Internet service connection for which I am requesting reimbursement has been used in part for official USPTO purposes. Personal use was less than 50% of the total usage." *Id.*

The program would only reimburse the basic rate for ISP connection services per billing period. *See* Policy at ¶12. That is, PTO would not reimburse charges or costs associated with service initiation, activation, installation, or deactivation; taxes; equipment rental fees; or any other miscellaneous charges or fees. *Id.* at ¶ 14; Hudson Letter. Reimbursements also would be limited to the amount PTO would have had to pay to procure these services directly. *Id.* The maximum allowable

¹ *See generally* www.uspto.gov (last visited Dec. 14, 2006). PTO's statutory authorities are found in title 35 of the United States Code.

reimbursable amount for high-speed internet access would be \$100 per month. Policy at ¶ 5.

To ensure that the program only covers ISP connection costs, PTO would deduct amounts from reimbursement requests based on certain required employee disclosures. For example, participating employees would be required to disclose any “free” equipment or other promotional items or rebates that they receive from their ISP. *Id.* at ¶12. PTO would deduct amounts based on the facts and circumstances of each case, including fair market value of the equipment, service agreement terms, and other items. *Id.* Employees also would be required to disclose whether the ISP provides “bundled” services, for example, cable television and/or telephone service along with high-speed internet connection; only the *pro rata* share of ISP costs would be reimbursable. *Id.* at ¶¶ 4(a), 11. Also, if the ISP offers a discount for bundled services, the *pro rata* share of the discount would be applied to the ISP costs to determine the reimbursable amount. *Id.* If bundled services do not provide pricing information sufficient to determine the *pro rata* costs of the ISP component, no ISP costs would be reimbursable. *Id.* at ¶ 4(b).

PTO has imposed other controls that it believes will help ensure that ISP services are reimbursed only for work-related purposes. For example, PTO would measure the productivity of participating employees biweekly, quarterly, and annually. Toupin Letter at 2. Employee performance plans establish standards for required production rates. *Id.* Patent examiners’ work, for example, is primarily production-oriented, measured in precisely defined actions taken with respect to patent applications. *Id.* Examiners’ patent files are also tracked in the agency’s Patent Automated Locating and Monitoring (PALM) system. *Id.* To participate in the telework program, an employee must be rated at least “fully successful” overall in the most recent performance evaluation, not be under any performance or conduct warnings, and must agree to give up the employee’s individual office at PTO headquarters. *Id.* at 3.

DISCUSSION

The Patent and Trademark Office asks whether it may use its appropriations to reimburse employees for home high-speed internet access under its proposed telecommuting program.

Public Law 104-52 authorizes federal agencies to use appropriated funds to install telephone lines and “necessary equipment” and to pay monthly charges in any residence of an employee authorized to work at home, provided that the agency “certifies that adequate safeguards against private misuse exist, and that the service is necessary for direct support of the agency’s mission.” Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, title VI, § 620, 109 Stat. 468, 501 (Nov. 19, 1995), *reprinted at* 31 U.S.C. § 1348 note.

PTO has determined that internet access is “necessary equipment” for PTO employees authorized to work at home and necessary for direct support of PTO’s mission as required by section 620 of Public Law 104-52. Internet service has become an essential tool in today’s workplace. As PTO explains, patent examiners must have high-speed internet access to telework without diminished performance. We agree. Like telephone service, internet access is necessary for PTO employees, regardless of worksite, and in particular to telework without diminished performance.²

The question remains whether PTO can certify, as section 620 requires, that its proposal provides “adequate safeguards against private misuse.” Over the years, our Office has issued a number of decisions concerning adequate safeguards for cost reimbursements of items and services that would otherwise be considered a personal expense of federal employees. Consistent with section 620, we have not objected to reimbursement plans, for example, for use of personal cell phones for official purposes where adequate safeguards prevent improper reimbursement for personal use.

We found adequate safeguards in a Nuclear Regulatory Commission (NRC) proposal to reimburse employees for the actual costs of maintaining personal cell phone service for official use and the additional costs of official calls actually made or received on the employees’ cell phones. B-291076, Mar. 6, 2003. NRC proposed to (1) reimburse the costs of the employees’ activation plan at an amount no greater than what NRC itself would have paid; and (2) adjust the costs of an activation plan to deduct the value of so-called “free” telephones and accessories, rationalizing that such equipment is not actually free but factored into the plan’s cost by the service provider. *Id.* Importantly, the NRC plan required employees to submit a monthly itemization of calls so that NRC could verify which calls were personal and which were official in nature. *Id.* We advised NRC that where monthly itemizations are unavailable, prorating government-related calls to personal calls with additional tracking and accounting procedures might prove an acceptable safeguard to prevent abuse. *Id.*, citing B-287524, Oct. 22, 2001.

In another case, we objected to a Western Area Power Administration (WAPA) proposal to reimburse employees for government use of personal cell phones at a flat rate, without additional tracking and accounting procedures. B-287524, Oct. 22, 2001. Without those additional procedures, WAPA’s proposal failed to provide

² *See, e.g.*, Department Of Transportation and Related Agencies Appropriations, 2001, Pub. L. No. 106-346, § 359, 114 Stat. 1356, 1356A-36 (Oct. 23, 2000) (requiring executive agencies to establish policies under which eligible employees “may participate in telecommuting to the maximum extent possible without diminished employee performance.”)

adequate safeguards to verify government calls and separate them from personal calls. *Id.*

Here, PTO has proposed a number of safeguards similar to those we considered in NRC's cell phone reimbursement plan. *See* B-291076, Mar. 6, 2003. PTO's proposal would require employees to sign an attestation certifying the employees' proration of business to personal use of ISP services. The agency also would monitor employee performance and productivity on a biweekly, quarterly, and annual basis. *See* 68 Comp Gen. 502 (1989).³

We do not object to PTO's telecommuting program proposal, but recommend that PTO periodically review ISP reimbursements. Periodic reviews, which could include such things as analyses of payment trends, would help support PTO's factual basis for certifying that it has adequate safeguards against private misuse and it is reimbursing employees for home internet service used for official purposes. Pub. L. No. 104-52, § 620. *See also* 35 U.S.C. §§ 3512 (b), (c) (requiring federal agencies to maintain internal controls); GAO, *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7 (Washington, D.C.: May 18, 1993), *available at* www.gao.gov/decisions/ppm7.pdf (last visited Dec. 18, 2006).

CONCLUSION

We do not object to PTO's proposal to reimburse employees for high-speed internet service at the employees' home incident to the agency's telework program. We recommend that PTO periodically review the reimbursements to ensure that it has adequate safeguards against private misuse and it is reimbursing employees for home internet service used for official purposes.



Gary L. Kepplinger
General Counsel

³ Our 1989 decision predates the telework statutes cited above, but its logic remains relevant. We did not object to the compensation of federal employees for work done at home when, among other things, the agency could verify and measure the performance of assigned work against established quantity and quality norms. 68 Comp. Gen. 502.



U.S. GOVERNMENT ACCOUNTABILITY OFFICE
A Century of Non-Partisan Fact-Based Work

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

Decision

Matter of: Privacy and Civil Liberties Oversight Board—Reimbursement for Employees' Home-to-Work Travel via Taxi or Rideshare Service

File: B-332633

Date: June 3, 2021

DIGEST

Absent specific statutory authority, appropriated funds generally are not available for the personal expenses of an employee such as commuting expenses. A Privacy and Civil Liberties Oversight Board (PCLOB) employee traveled from home to work via taxi or rideshare services. While transit subsidies are available to employees who use public transportation, we are aware of no statutory authority permitting PCLOB to pay for employee commutes via taxi or rideshare services. PCLOB, therefore, may not use appropriated funds to reimburse an employee for this home-to-work travel.

DECISION

This responds to a request for our decision regarding the availability of Privacy and Civil Liberties Oversight Board (PCLOB) appropriations to reimburse a PCLOB employee for expenses the employee incurs when commuting to the agency via taxi or rideshare services. Letter from Executive Director and General Counsel, PCLOB, to Comptroller General, GAO (October 16, 2020) (Request Letter). As explained below, we conclude that PCLOB may not reimburse the employee for such expenses because commuting is a personal expense of the employee.

In accordance with our regular practice, we contacted PCLOB to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 5, 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to Executive Director and General Counsel, PCLOB (Dec. 17, 2020). PCLOB responded with its explanation of the pertinent facts and its legal analysis. Letter from Executive Director and General Counsel, PCLOB, to Assistant General Counsel, GAO (Jan. 7, (2021)) (Response Letter). We also contacted PCLOB by telephone to obtain additional information. Telephone Conversation with General Counsel, PCLOB, Chief Financial Officer, PCLOB; Assistant General Counsel for

Appropriations Law, GAO, and Law Clerk, GAO (Dec. 17, 2020) (December Conversation).

BACKGROUND

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency in response to the 2019 novel coronavirus (COVID-19). Secretary of Health and Human Services, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020), available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last visited Apr. 19, 2021). Shortly thereafter, the Office of Personnel Management published guidance for executive departments and agencies directing them to review their continuity of operations plans and ensure that telework eligible employees were telework ready. Office of Personnel Management, *Memorandum for Heads of Executive Departments and Agencies, Preliminary Guidance to Agencies during Coronavirus Disease 2019 (COVID-19)* (Mar. 3, 2020), at 1, available at <https://www.chcoc.gov/content/preliminary-guidance-agencies-during-coronavirus-disease-2019-covid-19> (last visited Apr. 19, 2021).

PCLOB is an independent agency within the executive branch. 42 U.S.C. § 2000ee(a). PCLOB's mission is to provide oversight and advice to the executive branch to ensure that actions taken to prevent terrorism are balanced against privacy and civil liberty interests. 42 U.S.C. § 2000ee(c). In fulfilling its statutory duties, PCLOB makes use of a Sensitive Compartmented Information Facility (SCIF) for work on classified projects.¹ Response Letter, at 1. Both the PCLOB SCIF and the PCLOB employee's official worksite are located at the PCLOB office in Washington, D.C. Response Letter, at 1.

With the onset of the COVID-19 pandemic, PCLOB implemented its continuity of operations plan. Response Letter. PCLOB directed its employees to telework from March 12, 2020, through June 14, 2020, rather than reporting to their official worksites. *Id.* Beginning June 15, 2020, while employees continued to perform most of their duties through telework, PCLOB also resumed limited access to its SCIF for employees to engage in priority mission work involving classified information. Response Letter, at 1. Upon explicit instructions from PCLOB management, the PCLOB employee reported to his official worksite once or twice a month in order to work on classified matters in the SCIF. December Conversation. To travel between his home and the official worksite on these days, the employee used taxi or rideshare services. Request Letter, at 1.

¹ A SCIF is a discrete, secured area within which agency staff may store, use, discuss, and electronically process particularly sensitive classified information. B-404051, Dec. 27, 2010. PCLOB employees have Top Secret clearances and sensitive compartmented information access so they can review classified information as it relates to PCLOB's mission. Request Letter.

DISCUSSION

At issue here is whether PCLOB may reimburse its employee for expenses incurred when traveling between the employee's residence and official worksite via taxi or rideshare services.

Under the purpose statute, appropriated funds are available only for the purposes authorized by Congress. 31 U.S.C. § 1301(a). Because each authorized expense need not be stated explicitly in an appropriation, application of the purpose statute requires a necessary expense analysis, which involves a determination of whether an expenditure bears a reasonable, logical relationship to the purpose of the appropriation. See, e.g., B-303170, Apr. 22, 2005. Generally, among the expenses that bear a reasonable and logical relationship to the purpose of the appropriation are the salaries for the federal employees whose work helps to carry out the authorized purposes. Employees may then use their salaries as they see fit to provide for their personal needs, such as for their meals, clothing, commuting expenses, and other living expenses.

Generally, appropriated funds are not available for the personal expenses of an employee unless Congress enacts statutory authority specifically providing for the payment of such expenses. E.g., B-330935.2, Oct. 24, 2019; B-305864, Jan. 5, 2006; see *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1349 (D.C. Cir. 2012). Because commuting is a personal expense, federal employees must bear the costs of transportation between their residence and their official worksite. B-305864; B-261729, Apr. 1, 1996, see also B-318229, Dec. 22, 2009. This rule is essential for the maintenance of public trust in the use of appropriated funds. Stewardship of public money, and accountability to Congress for the proper use of public money appropriated to agencies, demands an exceptionally high bar to overcome this overarching principle. B-326021, Dec. 23, 2014, at 2; see also *Navy*, 665 F.3d at 1350.

As our prior decisions recognize, proper stewardship of appropriated funds requires consistent adherence to this settled rule, even in emergencies and other extraordinary circumstances. For instance, when a transit strike shut down public transportation, we concluded that an agency could not use its appropriations to reimburse affected employees for excess costs incurred in commuting by private vehicle or rental car. 60 Comp. Gen. 420 (1981). Similarly, we held an agency could not reimburse employees for mileage costs incurred when traveling between their residences and regular places of duty for call-back overtime duty. B-189061, Mar. 15, 1978; see also 36 Comp. Gen. 618 (1957); 36 Comp. Gen. 450 (1956).

In some instances, appropriations are available for personal expenses where Congress permits by law. For example, Congress enacted legislation authorizing agencies to provide transit subsidies for employee commutes to encourage employees to use means other than single-occupancy motor vehicles to commute to and from work. Federal Employees Clean Air Incentives Act, Pub. L. No. 103-172,

§ 2(a), 107 Stat. 1995 (Dec. 2, 1993), *codified at* 5 U.S.C. § 7905. See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, title III, § 3049, 119 Stat. 1144, 1711–12 (Aug. 10, 2005) (requiring that agencies in the National Capital Region implement a transit benefits program as described in section 2 of Executive Order No. 13150); Exec. Order No. 13150, *Federal Workforce Transportation*, 65 Fed. Reg. 24613 (Apr. 21, 2000). PCLOB makes use of such authority by maintaining a Transit Benefit Program to reimburse employees who commute to work via public transportation. See Response Letter, at 2 and Attachment (Transit Benefit Program training). In this case, the employee did not use public transportation for which transit subsidies would have been available. Rather, the employee traveled to his official worksite by using taxi or rideshare services. Request Letter.

We are aware of no statutory provision permitting PCLOB to pay for employee commutes via taxi or rideshare services, nor has PCLOB brought such a provision to our attention. Accordingly, because travel from home to an employee's official worksite is a personal expense, and because we are aware of no statutory provision making appropriations available for this expense, agency appropriations are not available for the payment of this personal expense. Beyond the transit subsidies previously discussed, the mode of transportation does not alter this conclusion. Employees may, of course, select whatever mode of transportation best suits their needs, preferences, and budgets. See 27 Comp. Gen. 1 (1947); 16 Comp. Gen. 64 (1936); *Navy*, 665 F.3d at 1350. Should the employee here elect to use a taxi or rideshare service, the employee bears responsibility for the expense.

PCLOB posits that the employee's travel is an official expense of the agency, rather than a personal expense, because the employee engaged in agency-mandated travel to work on priority-mission projects at the PCLOB's SCIF. The agency's argument rests on the assumption that because the employee is engaged in priority mission work, the employee's commute is an official expense of the agency. Undoubtedly, all PCLOB employees, including those working virtually, engage in work critical to accomplishing the agency's mission. However, the critical nature of a particular project or of the agency's work does not transform employee commuting expenses from personal to official. No matter how critical the agency's work, commuting to the official worksite is a personal expense that the employee must bear.

PCLOB also points out that the pandemic is a once-in-a-hundred-year event that disrupted federal government operations. We agree. Employees' concerns with their safety and well-being are warranted in light of the difficult and ever-changing circumstances of the pandemic. Current circumstances have forced federal agencies to confront arduous challenges and unique burdens associated with serving their statutory missions while protecting employees' health and wellness. Even under these extraordinary circumstances, appropriations generally remain unavailable for the payment of personal expenses. Nevertheless, agencies may use

other authorities available to them by law to adapt their operations to carry out their missions while respecting employee concerns and safeguarding public health.

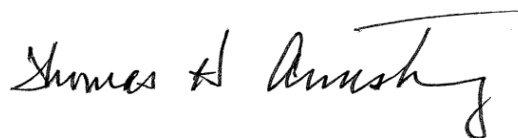
PCLOB used these authorities in this case when, at the onset of the pandemic, its employees began teleworking from home in accordance with the agency's continuity of operations policy. Response Letter. Employees continued to carry out most of their duties by telework as the pandemic continued. Once PCLOB determined that it could safely resume limited access to the SCIF, it did so under a rigid protocol to ensure employee health and safety. *Id.* Employees continued to carry out the bulk of their duties via telework while reporting to the SCIF on an as-needed basis to complete priority mission work that involves classified information and can be completed only in the SCIF. *Id.* PCLOB allows no more than four employees inside the SCIF at any one time. December Conversation. Even those mission staff working on classified matters do not report to the SCIF on a routine or daily basis; instead, they report "only as needed for their specific priority mission project, perhaps once a week (although not necessarily every week)." Response Letter.

Employees may have reservations with commuting to the office and working in proximity to others, even with safety protocols in place. Because commuting to the official worksite is a personal expense, agency appropriations are not available to pay for the commute, even if the cost of the commute increases as a result of precautions the employee may take. However, PCLOB may adopt other solutions or safeguards to help address employee concerns, as consistent with the law and with the agency's mission needs. For example, if its mission and staffing permit, PCLOB could reassign responsibilities to employees who are more comfortable with in-person attendance at the SCIF.

PCLOB has already demonstrated its capacity to respond nimbly to current circumstances with its transition to telework and its limited-access approach at the SCIF. Indeed, PCLOB noted that its limited-access approach has already succeeded in moving forward priority PCLOB projects while keeping employees safe and healthy. Response Letter, at 3. We trust that the agency will continue to find solutions that respect the needs of employees whilst fulfilling mission priorities.

CONCLUSION

Absent specific statutory authority, appropriated funds generally are not available for the personal expenses of an employee such as commuting expenses. Therefore, PCLOB may not use appropriated funds to reimburse an employee for home-to-work travel via taxi or rideshare services.



Thomas H. Armstrong
General Counsel



G A O

Accountability * Integrity * Reliability

Memorandum

Date: May 28, 2003

To: General Counsel, OGC - Anthony Gamboa

Thru: Deputy General Counsel, OGC - Gary Kepplinger

From: Managing Associate General Counsel, OGC - Susan Poling

Subject: Proposed Purchase of Protective Hoods (B-301152)

Anthony H Gamboa
Gary P. Kepplinger
Susan Poling

This responds to your question regarding the availability of GAO appropriations to purchase protective hoods for use in the event of a terrorist attack involving explosives or chemical or biological weapons. For the reasons discussed below, we conclude that GAO's operating appropriation is available to cover the expense of acquiring protective hoods. Further, the Comptroller General would be within his discretionary authority to acquire hoods adequate to cover the estimated number of persons in the building, not just employees.

We are currently in the extraordinary circumstance where the government is advising that everyone take special precautions in the event of a terrorist attack and that government facilities are a likely target. See, e.g., Letter from Kay Coles James, Director, OPM, accompanying the Federal Manager's/Decision Maker's Emergency Guide, March 2003, www.opm.gov/emergency/TEXT/ManagersGuide.txt. Accordingly, GAO is in the process of evaluating to what extent GAO headquarters is at risk from either a direct attack or from collateral damage from attack on a nearby structure.¹ These attacks could potentially involve biological or chemical weapons. One feature of the agency emergency plan in the event of a chemical or biological attack might reasonably include the use of protective hoods.

From an appropriations law standpoint, we have never specifically considered an agency's purchase of hoods or other protective gear on as broad a basis as is being considered here, where the purpose is to address a threat of attack and provide for either a safe "shelter-in-place" or the orderly and safe evacuation of employees and other building occupants in that event. The issue presented in cases such as this is the availability of the public's money to supply equipment and services that inure in a very real sense to the benefit of individuals. We generally resolve this issue by assessing the benefits to the agency from any such expenditure. Of course, an individual is likely to attain at least some collateral benefit from most expenditures such as this, but the potential receipt of a benefit, however real, is not the

¹ GAO is also evaluating the risk to employees in audit sites and field offices.

determinative factor. The determinative factor is whether, on balance, the individual receives the primary benefit. If the primary beneficiary of an expenditure of public funds is the individual, not the agency or government, the well-established rule is that such expenditures are personal in nature and hence not an authorized use of appropriated funds.

As we explain in detail below, so long as an agency determines that the threat of attack is legitimate, and that the protective hoods or other gear, equipment or services sought is an appropriate, reasonable, and responsible response to such threat, agencies' operating appropriations are available for that purpose. In the exigent circumstances that we face today, it would be irresponsible, we believe, for an agency to ignore legitimate dangers posed to the premises the agency occupies. Hence, should GAO determine that there is a threat to the health and safety of its employees and others in the GAO Building, we believe an expenditure for protective hoods is a necessary, bona fide expense chargeable to GAO's appropriations.

Generally, in common law, our society expects that a property owner or an occupant in possession of property, while not an insurer of safety, will exercise reasonable care to keep the premises safe for those lawfully coming onto the premises, including employees, independent contractors, and employees of independent contractors, as well as visitors. *See* J. Michael Russo, "Failure to Provide Safe Place to Work," 2 Am.Jur. Proof of Facts 2d 517 (2002); 65A C.J.S. Negligence, § 598 (2002). Although our case law and federal statutory law speak most specifically to protection of federal employees and providing them a safe place to work, the case and statutory law, as well as recent emergency guidance provided to federal managers, when viewed together in an historical context, is consistent with the common law notion that an occupant of premises will exercise reasonable care to keep the premises safe for those on the premises.

As far back as World War II we have recognized that agencies have an obligation to protect their employees and maintain a healthy work environment when confronted with exigent circumstances. In 21 Comp. Gen. 731 (1942), we concluded that the then-War Department could use its appropriations to purchase protective clothing and equipment, including gas masks, for all the employees of ordnance plants in the event there are explosions or chemical releases. The Department was retaining title to the equipment; it prohibited employees from removing the equipment from the plant; and, the equipment was available for use in furtherance of the safe and successful operation of the plants primarily for the benefit of the government in keeping everyone safe. We did not view the equipment as equipment the employees reasonably might be expected to furnish as part of equipping themselves for the job. Then-Comptroller General Warren further noted that the War Department's submission made "apparent . . . from an administrative standpoint" that the equipment in question was necessary "not only for the protection of the wearers, but, also, for the protection of their fellow employees, the public, and the plant in which worn." *Id.* at 733. Analytically, the Comptroller General focused, not narrowly on the individual, but broadly to all workers, the public, and the facility as a whole. *Id.* See also B-247871, April 10, 1992 (contaminated water supply system to an agency building justified agency purchase of bottled water).

That 1942 case predated three pieces of legislation we considered in later cases involving government purchases of apparel or equipment for the health and safety of employees. The first of these is 5 U.S.C. § 7903, which authorizes the use of appropriations for the procurement of “special clothing and equipment” for the protection of personnel in the performance of their jobs. Most of our cases here involve apparel or equipment needed by specific employees doing specific jobs. The standard we apply is that the item must be special and not part of the ordinary and usual items an employee may reasonably be expected to provide for himself; it must be for the benefit of the government and not just the employee; and, the employee must be engaged in hazardous duty.

In addition, there is specific authority for agencies to establish an agency health service program to promote and maintain the health and physical fitness of its employees in 5 U.S.C. § 7901. This is the authority under which GAO supports our fitness center and health unit, which purchases equipment needed to protect the health of GAO employees, including things like flu shots and other vaccines. In 64 Comp. Gen. 789 (1985), based upon the authority in 5 U.S.C. § 7901, we held that “Smokeeaters” air purifiers placed on the desks of federal employees who smoke can be purchased with appropriated funds where they are intended to provide a general benefit to all employees working in the area.

The third line of statutory authority is the Occupational Safety and Health Act (OSHA) requirements.² Under 29 U.S.C. § 668, federal agencies are required to provide safe and healthful conditions in workplaces. Under section 668(a)(2), heads of agencies are authorized to “acquire, maintain and require the use of safety equipment, personal protection equipment, and devices reasonably necessary to protect employees.” The OSHA regulations also have a section on the provision of employee protection in 29 C.F.R. § 1910.132(a), which states that personal protection equipment shall be provided, used and maintained whenever necessary because the hazards of the environment could cause injury or physical impairment. Under the Congressional Accountability Act, Pub. L. No. 104-1, § 215, 109 Stat.16, Jan. 23, 1995, (2 U.S.C. § 1341), GAO is required to establish and maintain an effective and comprehensive occupational health and safety program consistent with the OSHA regulations. See GAO Order No. 2792.4, Health and Safety Program, April 1, 1999.

In the 1950s and 1960s, our country faced a danger not unlike what we face today; then, we faced the threat of thermonuclear war, and planners assumed that Washington D.C. was a prime potential target. Before the full effect of radiation was understood, early efforts centered on sheltering people from a nuclear blast. There was an extensive program of designating shelter areas in government buildings and building public shelters, and equipping these for survival. As planners learned more about the full effect of nuclear blasts, emergency preparedness turned to plans for evacuation. All of these efforts were taken under the Federal Civil Defense Act of 1950, which provided for a federal role in civil defense. Codified at 50 U.S.C. App. §§ 2251 – 2297, repealed by Pub. L. No. 103-337, div. C, tit. XXXIV, § 3412(a), 108 Stat. 3111 (1994). The Act authorized federal spending for, among other things, building

² OPM’s Federal Manager’s/Decision Maker’s Emergency Guide, *supra*, noted that federal agencies which operate in buildings managed by GSA are required to establish an Occupant Emergency Plan for safeguarding lives and property under OSHA regulations, 29 C.F.R. 1910.38.

shelters and procuring “radiological instruments and detection devices, protective masks and gas detection kits” for civil defenses purposes. 50 U.S.C. App. § 2281(h).³

Recently, the Director of the Office of Personnel Management, in a letter accompanying emergency guidance to federal managers, stated: “We all recognize that Federal office buildings are potential targets for those who would threaten our security...[I]t is up to each agency to design and to communicate a comprehensive plan that takes into account the threats that its employees are most likely to face.” Letter from Kay Coles James, Director, OPM, accompanying Federal Manager’s/ Decision Maker’s Emergency Guide, March 2003.

Consistent with societal expectations rooted in common law, and as reflected in our decisions, the cases and statutes discussed as well as the federal government’s response to recent and Cold War threats, when viewed together, evidence the government’s willingness to provide not only for the safety and health of government employees and their work environment, but also for maintaining the safety and health of the premises. In considering the availability of an agency’s appropriations for operational expenses, it is important to factor into our consideration notice of what our society expects of its employers. Without question, an agency may use appropriated funds to satisfy basic fundamental needs such as potable water, clean air, and sufficient light. It would be unreasonable to suggest that appropriations are not available for maintaining certain facilities such as restrooms. Similarly, we think that it would be irresponsible to conclude that appropriations are not available to exercise the degree of supervisory care to maintain safe premises that our society expects of the owner/occupants of those premises, particularly in the face of exigent circumstances like those we confront today. For that reason, we would not object to an agency, either as an owner of the work premises or as an occupant and supervisor of the premises, using its appropriations to supply appropriate equipment and services to maintain the safety and healthiness of those premises in response to legitimately anticipated dangers and exigencies.

For GAO in particular, the Comptroller General has exclusive custody and control over the GAO headquarters building in Washington, D.C., including the protection of the property and persons in the building. 31 U.S.C. § 781. The Comptroller General has broad authority “to make all needful rules and regulations for the Government of the General Accounting Office Building.” 31 U.S.C. § 783. Given the current circumstances, the Comptroller General, in exercising this authority, would be justified in purchasing a reasonable quantity of protective hoods, based on an estimate of the number of people in the GAO headquarters building at any one time, as a necessary expense in furtherance of his responsibilities regarding the protection of persons under 31 U.S.C. § 781. Although our 1942 decision in 21 Comp. Gen. 731, supra, did not specifically address this, we would not have found it objectionable if the War Department had supplied gas masks to contractors or other visitors to the ordnance plants for the same reasons they were supplied to plant employees. Similarly, a protective hood is an emergency item neither employees nor visitors to the building would be expected to provide. GAO would keep title to the equipment and it would be dispensed only when warranted to whomever is in the building at the

³ The GAO Historian was unable to find any memoranda discussing GAO’s Cold War efforts in this regard.

time, which would include employees, contractors, and visitors.⁴ Under the unique circumstances posed by the nature of the threat and the unpredictability of a terrorist attack, the protective hoods would prove beneficial to the protection of employees and other building occupants during either a shelter-in-place scenario or an orderly evacuation of the building.

⁴ We note that currently the Army Corps of Engineers is leasing space on the third floor of the GAO headquarters building. It is our understanding that the Corps is planning to purchase and provide protective hoods to Corps employees stationed in the GAO building.



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Decision

Matter of: Department of Commerce—Disposable Cups, Plates, and Cutlery

File: B-326021

Date: December 23, 2014

DIGEST

The Department of Commerce may not use appropriated funds to purchase disposable cups, plates, and cutlery for employee use. An agency may not use appropriated funds to purchase items considered personal expenses without specific statutory authority to do so, unless the agency can demonstrate that the provision of items that would otherwise constitute a personal expense directly advances the agency's statutory mission and the benefit accruing to the agency clearly outweighs the ancillary benefit to the employee. Here, the disposable cups, plates, and cutlery are primarily for the convenience of agency employees and thus constitute a personal expense.

DECISION

The Department of Commerce (Commerce) requests a decision under 31 U.S.C. § 3529(a) regarding the use of appropriated funds to purchase disposable cups, plates, and cutlery for use by certain employees of the National Weather Service (NWS).¹ Letter from Assistant General Counsel for Administration, Commerce, to General Counsel, GAO (June 25, 2014) (Request Letter). As explained below, because Commerce has not demonstrated that the provision of items that would otherwise constitute a personal expense directly advances its statutory mission, and

¹ Our practice when rendering decisions is to obtain the legal views of the relevant agency and to establish a factual record on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. The request letter provided relevant facts and the agency's views, as well as a copy of the opinion issued by an arbitrator on this issue. We considered those in reaching this decision.

the primary benefit of these items does not inure to the agency, Commerce may not use appropriated funds to purchase these items.

BACKGROUND

On September 25, 2009, Commerce² and the National Weather Service Employees Organization (NWSEO)³ signed a Memorandum of Understanding (MOU) on the implementation of the H1N1 Preparedness Plan of Action. Request Letter, at 1. This MOU provides in part that Commerce “will hereafter provide hand sanitizer at each work station and in each cubical or office, disinfectant spray or wipes for shared services, and tissues, paper towels, disposable cups, plates an[d] utensils.” *Id.* Commerce requested our decision only with regard to the purchase of disposable cups, plates, and cutlery.

After signing the MOU in 2009, Commerce purchased and provided disposable cups, plates, and utensils for everyday use by NWS employees in regional offices. *Id.*, Attachment 1, at 3. On March 26, 2013, Commerce announced that appropriated funds could not be spent to purchase disposable plates, cups, and cutlery and directed that purchases of these items be discontinued. Request Letter, at 1. NWSEO objected, arguing that this action violated the MOU. *Id.* On May 17, 2013, the Office of the General Counsel for Commerce advised the National Oceanic and Atmospheric Administration (NOAA) that appropriated funds could not be expended to purchase these items “because the purchase was for the primary benefit of the employees.” *Id.*

Given this dispute, Commerce and NWSEO appeared for arbitration on December 19, 2013. *Id.* The arbitrator found that disposable items could help Commerce maintain a healthy work environment and that employee sickness could be an inconvenience to the agency. Request Letter, Attachment 2, at 14–15. The arbitrator also noted that employees might spend less time away from their work stations if they were provided disposable items than if they had to wash non-disposable items in the break rooms. *Id.*, Attachment 2, at 20. The arbitrator concluded that the disposable items could be purchased with appropriated funds

² For purposes of this decision, “Commerce” will generally refer to the Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA), and the National Weather Service (NWS). NOAA is a bureau within the Department of Commerce. NOAA is comprised of several subagencies, one of which is the NWS. NWS signed the Memorandum of Understanding at issue in this decision.

³ NWSEO is a labor and professional association that represents 4,000 employees of NOAA in Commerce. NWSEO, *Home*, available at www.nwseo.org/ (last visited Dec. 19, 2014).

because these benefits accrued to the agency and the decision by the agency, therefore, to stop providing those items violated the MOU. *Id.*, Attachment 2, at 15.

On June 3, 2014, Commerce filed Exceptions to the Arbitration Award with the Federal Labor Relations Authority (FLRA). Commerce requested that FLRA stay its decision on the Exceptions pending GAO's decision herein. Request Letter, at 2, 4.

DISCUSSION

There can be no doubt that disposable plates, cups, and cutlery are personal items, and that the benefit of their use (and thus the cost of acquiring them) inures to the individuals who use them. It is axiomatic that public funds are generally not available for the cost of personal items for the public's employees. Stewardship of public money, and accountability to Congress for the proper use of public money appropriated to agencies, demands an exceptionally high bar to overcome this overarching principle.⁴ An expense will not overcome this principle where it "would serve no purpose other than accommodating employees' personal tastes—a purpose that generally cannot justify the expenditure of public funds." *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1350 (D.C. Cir. 2012).

Congress itself, as a matter of public policy, may enact a statute authorizing an agency to use public money for what is otherwise a personal expense. Congress has enacted statutes authorizing agencies to pay for otherwise personal expenses such as per diem allowances to employees traveling on official business. 5 U.S.C. § 5702. Also, Congress has authorized agencies to provide transit benefits to employees to encourage commuting by means other than single-occupancy motor vehicles. 5 U.S.C. § 7905. Otherwise, an agency must present a compelling justification for the use of public money for a personal expense. For example, we found that the use of appropriated funds to purchase samples of food for a cultural awareness ceremony was appropriate where the samples were served as an integral part of a formal cultural awareness program to advance Equal Employment Opportunity (EEO) objectives and the agency determined that the provision of food was offered as part of the larger program to serve an educational function. B-301184, Jan. 15, 2004. On the other hand, we found that funds were not available to purchase food for a Combined Federal Campaign (CFC) kick-off event, where the agency asserted that food would simply contribute to the "celebratory nature" of the kick-off event. B-325023, July 11, 2014.

⁴ The Supreme Court has stated that "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

GAO accepts justifications for the use of appropriated funds for personal expenses only rarely. B-318386, Aug. 12, 2009 (noting that “[b]ecause of the clear potential for abuse, we find exceptions to the general rule only rarely”). See, e.g., 60 Comp. Gen. 633 (1981) (employees must bear the costs of transportation between their residences and official duty locations, even when unusual conditions may increase commuting costs); 37 Comp. Gen. 360 (1957) (agency could not use appropriated funds to purchase Christmas cards to send to “important individuals” in countries where the agency had overseas posts); B-193104, Jan. 9, 1979 (raincoats and umbrellas for employees who must frequently go out in the rain are personal items that the employee must furnish). We will consider exceptions to the general rule against using appropriated funds for personal expenses only after careful consideration of particular factual circumstances in which an agency can demonstrate that the item will directly advance an agency’s statutory mission and objectives. B-318386, Aug. 12, 2009. Any exception, therefore, is necessarily case-specific. In order to find such an exception, we must conclude that the benefit of the expense accrues to the government, notwithstanding collateral benefit to the individual. B-318499, Nov. 19, 2009. For example, we permitted the Veterans Benefits Administration (VBA) to use appropriated funds to pay for incentives in the form of refreshments or light meals to increase participation in and the effectiveness of focus groups, where VBA had a statutory requirement to measure and evaluate veterans benefit programs to assess their effectiveness. B-304718, Nov. 9, 2005. On the other hand, we did not permit the use of appropriated funds to pay for lunch for a focus group where the agency did not identify a specific statutory objective advanced by the focus group. B-318499. The fact that there may be a collateral benefit to the agency—such as increased participation in a focus group—is not enough to overcome the general principle.

With regard to the personal items at issue here, Commerce has offered no rationale in support of using its appropriation for this purpose. Indeed, Commerce, which is responsible for the legal and proper use of its appropriation, has concluded that “there is no legal basis for expending appropriated funds to purchase disposable plates, cups and cutlery for [agency] employees.” Request Letter, at 4.

The handful of rare occasions where GAO has permitted the use of appropriated funds to purchase disposable cups, plates, cutlery, and similar items are easily distinguishable from the facts presented here. In 1996, when Combined Federal Campaign (CFC) regulations in place at the time specifically authorized the use of CFC campaign funds to be spent on refreshments to recognize workers for the completion of a successful campaign, we did not object to the use of appropriated funds on paper plates, forks, and napkins. B-247563, Dec. 11, 1996. This result was consistent with GAO’s longstanding position that agencies may spend reasonable amounts of appropriated funds specifically to promote the CFC. However, the CFC regulations were subsequently amended to prohibit the use of CFC funds for food or refreshments at a special event. See B-325023, July 11, 2014, at 3. The answer in the present case, however, is clear. In contrast to the

1996 case, no such regulatory scheme exists here to support the use of appropriated funds to purchase disposable cups, plates, and cutlery.

We have also permitted the use of appropriated funds for the temporary purchase of paper napkins to be provided to employees in a newly constructed cafeteria, located at an Internal Revenue Service (IRS) facility. B-204214, Jan. 8, 1982. In that case, napkins were temporarily made available to remedy the shortage of paper towels in the restrooms, which employees had been using in the absence of available napkins. In 1971, we permitted the Federal Aviation Administration to use appropriated funds to provide employees with stainless steel cooking utensils if “a responsible official . . . determined that these utensils are essential for the proper performance of the air traffic control facility involved.” B-173149, Aug. 10, 1971. It is important to note that the cooking utensils were not intended solely for the use of any one employee.

Here, Commerce has not demonstrated, nor does the arbitrator’s opinion demonstrate, that the provision of individual disposable cups, plates, and cutlery would directly advance its statutory mission or that the benefit accruing to the government through the provision of such items outweighs the personal nature of the expense. Commerce has not shown that employees will work more efficiently if provided with disposable utensils, noting instead that “employees can indeed forecast the weather and perform other work duties without the agency’s provision of [these items].” Request Letter, at 2.

As noted above, the dispute between Commerce and NWSEO was presented for arbitration, and Commerce provided us with the arbitrator’s opinion, *In the matter of Arbitration between [NWSEO], Union and [Commerce], Agency*, FMCS Case No. 13-02394-1, Opinion and Award, May 5, 2014. Request Letter, Attachment 2. In finding that Commerce violated its collective bargaining agreement with NWSEO when it discontinued providing free disposable plates, cups, and cutlery, the arbitrator concluded that Commerce’s appropriation is available for this purpose. Request Letter, Attachment 2, at 15. The arbitrator said that Commerce is the primary beneficiary of these items because paper products facilitate food consumption by permitting employees to spend less time in the kitchenette away from their work stations as they prepare their meals, and eliminate the need to spend time washing dishes and returning them to the cupboards. *Id.*, Attachment 2, at 20. The arbitrator also noted that disposable products would contribute to healthy staff, minimizing the spread of illness—a benefit, according to the arbitrator, that accrues to the agency. *Id.*, Attachment 2, at 14–15.

An agency may cite to empirical evidence to help support its assertion that an expenditure of this nature is an essential part of accomplishing a statutory responsibility of the agency. See B-325023; B-304718. No such empirical evidence has been presented in this case. Although the arbitrator asserts that disposable cups, plates, and cutlery could benefit Commerce by both helping to prevent

employee sickness and allowing employees to spend less time away from their work stations, we have been provided with no empirical evidence supporting either assertion. In fact, Commerce's Pandemic Flu Index does not recommend the use of goods such as disposable cups, plates, or cutlery as an effective way to prevent the spread of disease. Request Letter, Attachment 1, at 12–13. Further, the pandemic influenza plan issued by the Department of Health and Human Services (HHS) advises that "[s]eparation of eating utensils for use by a patient with influenza is not necessary, as long as they are washed with warm water and soap." HHS, *HHS Pandemic Influenza Plan*, available at www.flu.gov/planning-preparedness/federal/hhspandemicinfluenzaplan.pdf (last updated Nov. 2005), at S5-7. Finally, employees could easily bring their own disposable cups, plates, or cutlery when they bring their own meals to work.

Consequently, we have no legal basis on which to conclude that Commerce's appropriations are available to provide free disposable plates, cups, and cutlery to Commerce employees. Appropriations are not available for the personal expenses of an agency's employees unless the agency articulates a reasonable and compelling justification, establishing a clear benefit to the agency, contributing to the fulfillment of express statutory duties, requirements, or functions.

CONCLUSION

Disposable cups, plates, and cutlery clearly constitute a personal expense. Commerce has not demonstrated that using appropriated funds to provide these items would directly advance its statutory mission and that the benefit accruing to the government through the provision of these items outweighs the personal nature of the expense. Accordingly, appropriated funds are not available to pay for cups, plates, and cutlery for Commerce employees.



Susan A. Poling
General Counsel

Resources

<https://www.gao.gov/legal/appropriations-law/forum>

- Participants of this year's forum can download forum materials for this year, and prior years, from the hyperlink above. Additional information about GAO's annual appropriations law forum can also be found on this webpage.

<https://www.gao.gov/legal/appropriations-law/red-book>

- The Red Book is GAO's multi-volume treatise concerning federal fiscal law. More information about the Red Book can be found on the webpage in the hyperlink above. Please also note that forum participants may email questions they may have during the forum to redbook@gao.gov. Time permitting, speakers and panelists will attempt to answer any questions that are received. If we are not able to answer your question during the forum, GAO will follow up with you after the forum.

<https://www.gao.gov/legal/appropriations-law/resources>

- Additional information about the Antideficiency Act and GAO's roles and responsibilities with regard to the act can be found in the hyperlink above.

<https://www.gao.gov/legal/appropriations-law/appropriations-law-training>

- GAO provides a 2 ½-day course taught by experienced GAO appropriations law attorneys. More information about the class, registration enrollment, and a complete course outline can be found in the hyperlink above.

<https://www.gao.gov/products/gao-05-734sp>

- GAO's Budget Glossary can be found in the hyperlink above. This document provides standard terms, definitions, and classifications for the government's fiscal, budget, and program information. It is a basic reference document for Congress, federal agencies and others interested in the federal budget-making process.

<https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act>

- GAO's appropriations law team also fulfills GAO's responsibilities under the Federal Vacancies Reform Act of 1998. The Federal Vacancies Reform Act requires executive departments and agencies to report certain information about vacancies in presidentially-appointed, Senate confirmed positions to Congress and the Comptroller General. More information about this work can be found in the hyperlink above.

<https://www.gao.gov/legal/other-legal-work/congressional-review-act>

- GAO's appropriations law team also fulfills GAO's responsibilities under the Congressional Review Act. The Congressional Review Act requires GAO to report on major rules. More information about this work can be found in the hyperlink above.

Contributors

The 2021 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, Paul Blenz, James Dubois Jr., Holly Firlein, John Formica, Kristine Hassinger, Jeffery Haywood, Andrew Howard, Melissa Jamison, Young Lee, Doug Sahmel, Will Shakely, Heather Stryder, Crystal Wesco, Nicole Willems, and Nihar Vora. The team receives support from the Appropriations Law Support Branch (ALSB). ALSB is led by Barbara Galimore-Williams, Manager, and includes two paralegals, Lydia Koeller, Aisha Patel-Smith, one clerk, Beth Sodee, and two interns, Rachel Friedman and Sarah Glenn.