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Acquisition and Provision of Goods and Services

In the course of performing its duties, a government agency routinely needs to acquire various goods and services from outside sources. These outside sources may include federal entities as well as private parties. The agency may also have to dispose of property or equipment which it no longer needs, or may be authorized to provide certain goods or services to others as part of its mission. Fiscal aspects of government contracting are dealt with in virtually every chapter of this publication. This chapter addresses several topics not covered elsewhere whose only common thread is that they relate loosely to the general theme of how the government "does business."

A. Acquisition and Disposal of Personal Property for Government Use

1. GSA Supply Programs

The General Services Administration has broad authority over the acquisition of personal property for other government agencies. Section 201(a) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 481(a), authorizes GSA, if it determines it to be advantageous to the government in terms of economy, efficiency, or service, to do the following with respect to executive agencies:

> "(1) subject to regulations prescribed by the Administrator for Federal Procurement Policy prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions . . . ;
>
> "(2) operate . . . consolidate, take over, or arrange for the operation by any executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and
>
> "(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities . . . . "

Section 201(b)(1), 40 U.S.C. § 481(b)(1), authorizes GSA to provide the same services, upon request, to "any other Federal agency," mixed ownership corporation, or the District of Columbia. The term "federal agency" brings in the legislative and judicial branches except for the Senate, House of Representatives, and Architect of the Capitol. 40 U.S.C. § 472(b). GSA published a detailed explanation and listing of who is eligible to use its supply services in 57 Fed. Reg. 41503 (September 10, 1992).[1]

One way GSA implements its authority under the Federal Property Act is through its stock system described in 41 C.F.R. Subpt. 101-26.3. Basically, GSA maintains a stock of commonly used items which may be requisitioned by using agencies. Operations are financed through the revolving General Supply Fund (40 U.S.C. § 756). At one time, the regulations provided for mandatory use, which GSA could waive upon request. See 63 Comp. Gen. 579, 581-82 (1984). Now, the regulations provide a three-tiered system an agency can follow if it thinks that "alternative sources are more favorable." If the total requirement is below a specified "de minimis" amount, the agency can simply procure elsewhere. If it is between that amount and a specified ceiling, the agency can procure elsewhere but must include a written justification in its purchase file. If the total requirement exceeds the ceiling, the agency must procure from GSA unless GSA grants a waiver. 41 C.F.R. § 101-26.301(b). The determination that alternate sources are more favorable should not be based on price alone, and agencies should not divide requisitions to avoid the higher threshold requirements. Id. and § 101-26.301(c).

An agency which tries to procure a mandatory item on the open market without seeking a GSA waiver is acting beyond its authority and does not validly obligate its appropriation. See 63 Comp. Gen. at 582. The agency should not initiate the procurement action until GSA acts on the waiver request. 41 C.F.R. § 101-26.100-2(d); 63 Comp. Gen. at 582; B-221536, June 12, 1986. If the agency does procure elsewhere in violation of the regulations, the vendor can be

[1]Our limited coverage here of the more common systems should not be taken to indicate that other authorities do not exist. See, for example, 62 Comp. Gen. 245 (1983), discussing GSA's barter authority under the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. § 98e(c).

paid if the standards for quantum valebant recovery are met, but the amount paid cannot exceed what the item would have cost had it been procured as a GSA stock item. 63 Comp. Gen. at 585. See also 34 Comp. Gen. 280 (1954); 30 Comp. Gen. 23 (1950).

Another of GSA's basic supply systems is the Federal Supply Schedule system. GSA enters into requirements contracts with suppliers on either a single-award or multiple-award basis. As the term implies, a single-award contract is a contract with a single supplier for items or services on a schedule. Under a multiple-award schedule—known as GSA's "MAS" program—GSA contracts with more than one supplier for comparable items on a schedule. The objective is to obtain, through consolidation and volume buying, lower prices than could be realized through individual-order purchasing. Federal Acquisition Regulation, codified in 48 C.F.R. § 8.401(a) (hereafter cited as FAR; B-213966, January 25, 1984. Schedules are mandatory for some users, optional for others. Each schedule identifies its mandatory users. FAR, § 8.404(c)(3). GSA for many years included ordering instructions in the Federal Property Management Regulations, but dropped them in 1995. 60 Fed. Reg. 19674 (April 20, 1995).

At one time, multiple award schedule contracts were entered into for 1 year only. In the early 1980s, GSA developed a system, which GAO approved in 63 Comp. Gen. 129 (1983), for entering into MAS contracts on a multi-year basis. Under that system, the government does not obligate itself to spend any money when it signs the MAS agreement. It merely promises that "if an agency determines that it has a requirement for a scheduled item, the agency will place an order for the item from a contractor if he has offered the lowest price." Id. at 131. No obligation of appropriations takes place until a using agency determines that it has a requirement and issues a purchase order. Of course, the agency must have available appropriations when it does that.

While it has been suggested that this is illusory and unenforceable, it is GAO's position that there is adequate consideration for a valid requirements contract even though there is no obligation in the appropriations accounting sense and even though the contract includes a "no guarantee that any quantities will be purchased" clause. 52 Comp. Gen. 732 (1973). See also B-259274, May 22, 1996 ("a naked contractual obligation that carries no financial exposure to the government does not violate the Antideficency Act").

A mandatory user is required to purchase from the schedule unless one of the regulatory exemptions applies or GSA grants a waiver. B-237150, January 17, 1990; B-228302, January 13, 1988. One of the exemptions is for urgent delivery requirements. FAR, § 8.404(c)(3)(i). Another is where a lower price for an identical item is available from a non-schedule source. Id. 48 C.F.R. § 8.404(c)(3)(iv); B-224022 et al., January 5, 1987. "Identical" in this context means more than just functionally equivalent. B-219909.2, January 15, 1986. It means an "exact duplicate" (id.), or "same make and model" (FAR § 8.404(c)(3)(iv)). A mandatory MAS user is not required to select the vendor with the lowest price provided it can adequately justify its selection. B-231344, August 10, 1988; B-224219, January 23, 1987. The precise regulation cited in these two cases has been dropped, but the "best value" standard of FAR § 8.404(b) takes you to essentially the same place.

Quotations from Federal Supply Schedule vendors are not "offers" that the government "accepts." Rather, they are regarded as informational responses. Therefore, there is no requirement that the quotation conform precisely to the agency's request, nor for the agency's delivery order to conform precisely to the quotation. B-232007, October 19, 1988; B-225575, May 1, 1987. Of course, any maximum order limitation must be followed. 69 Comp. Gen. 438 (1990); B-230876, July 8, 1988.

The Supply Schedule system applies to nonpersonal services as well as personal property. For example, GSA is within its authority under the Federal Property Act to establish a mandatory supply schedule for debt collection services. The using agency's authority in 31 U.S.C. § 3718 to contract for debt collection services does not override GSA's authority to determine how the procurement is to be accomplished. B-259975, September 18, 1995.

If a mandatory user determines that schedule items will not meet its specific needs but similar non-schedule items will, it can request a waiver from GSA. FAR § 8.404-3(a). See, e.g., B-252754.3, January 30, 1995. As with stock items, the agency is expected to defer initiating the procurement until GSA approves the request. FAR § 8.404-3(b). A non-schedule procurement in violation of the regulations is an unauthorized act, but again as with stock items, the vendor can be paid if the quantum meruit/quantum valebant standards are met. However, payment may not exceed the amount payable under an applicable mandatory Supply Schedule. B-213489, March 13, 1984; B-195123, July 11, 1979. In 69 Comp. Gen. 13 (1989), this rationale was extended to a non-mandatory schedule. In a few cases where the property was delivered and the vendor paid, GAO has had to grudgingly concede that corrective action was no longer feasible. 54 Comp. Gen. 488, 490 (1974); B-217302, March 19, 1985.

For a non-mandatory user, the decision whether to purchase from a Supply Schedule vendor or elsewhere is regarded as a business judgment within the contracting agency's discretion. B-270483, March 12, 1996; B-232660, January 10, 1989.

As with any other agency program, there are certain expenses GSA must bear incident to administering the Federal Supply Schedule program. One example is discussed in 42 Comp. Gen. 563 (1963), in which GSA directed a supply schedule gasoline contractor to litigate the constitutionality of a state gasoline tax. The cost was simply a cost of carrying out GSA's normal duties and there was no basis for passing it on to user agencies.

2. Stationery and Supplies

Originally enacted in 1868 (15 Stat. 246), 41 U.S.C. § 13 provides:

> "Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made."

Our research failed to disclose a definition of "supplies" for purposes of this statute, although the request for decision in one case assumed it meant "supplies which are consumed in the use thereof, such as food, gasoline," etc., and nothing in the decision contradicted that assumption. 19 Comp. Gen. 980, 981 (1940). The statute was often cited along with other fiscal control laws such as the Antideficiency Act, Adequacy of Appropriations Act, bona fide needs statute, etc., and its independent significance received little attention. E.g., 36 Comp. Gen. 683 (1957). Apart from certain indefinite-quantity or requirements contracts (e.g., A-60589, July 12, 1935), it added little to what was already prohibited by the other statutes.

In any event, while the law is still on the books, statutory exemptions have whittled it down to virtually nothing. The Federal Property and Administrative Services Act of 1949 included an exemption for the General Services Administration and agencies acting under a GSA delegation, later expanded to what is now the first sentence of 41 U.S.C. § 260:

"Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter."

Since this provision originated in the Federal Property Act, that act's definition of "executive agency," 40 U.S.C. § 472(a), would presumably apply to "any executive department or independent establishment in the executive branch of the government, including any wholly owned Government corporation." "This is almost identical to the definition in 5 U.S.C. § 105, which in turn would implicate 5 U.S.C. § 104 for the definition of "independent establishment." See W.B. Fishburn Cleaners, Inc. v. Army & Air Force Exchange Service, 374 F. Supp. 162, 165-166 (N.D. Tex. 1974).

In addition, 10 U.S.C. § 2314 provides:

"Sections 3709 and 3735 of the Revised Statutes (41 U.S.C. [§§] 5 and 13) do not apply to the procurement or sale of property or services by the agencies named in section 2303 of this title."

Section 2303 lists the Departments of Defense, Army, Navy, Air Force, the Coast Guard, and the National Aeronautics and Space Administration.

GAO has pointed out that these exemptions are just that—exemptions from 41 U.S.C. § 13—and do not by themselves authorize anyone to obligate funds in advance of appropriations. 63 Comp. Gen. 129, 135 (1983); 48 Comp. Gen. 497, 500 (1969).

3. Exchange/Sale Authority

Section 201(c) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 481(c), provides:

"In acquiring personal property, any executive agency [subject to regulations of the General Services Administration, which in turn are subject to regulations of the Office of Federal Procurement Policy] may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment for the property acquired: Provided, That any transaction carried out under the authority of this subsection shall be evidenced in writing."

The reason for this legislation is that, without it, the acquiring agency would have to charge the full purchase price to its appropriation while depositing the proceeds from the disposition of old material in the Treasury as miscellaneous receipts, even though it may have budgeted on the basis of net cost. For an example of this problem, see 21 Comp. Gen. 294 (1941). This was true regardless of whether the old material was sold for cash (15 Op. Att'y Gen. 322 (1877)) or traded in for an allowance against the purchase price (5 Comp. Dec. 716 (1899)). GAO had come to the conclusion that there was "no complete and satisfactory solution of the problem except by obtaining necessary legislation." 21 Comp. Gen. at 297. Section 201(c) was the culmination of legislative attempts that began decades earlier. The first statutes tended to be limited either to a particular agency or to particular types of personal property such as automobiles. See, e.g., 19 Comp. Gen. 906 (1940). The origins and history of section 201(c) are outlined in B-169903-O.M., January 8, 1973. Although the statute uses the term "executive agency," GAO regards it as applicable to itself by virtue of 31 U.S.C. § 704(a) which makes laws "generally related to administering an agency" applicable to GAO. B-201082-O.M., December 2, 1980.

Implementation of the exchange/sale authority is the primary responsibility of the General Services Administration, whose regulations are found in 41 C.F.R. Part 101-46, part of the Federal Property Management Regulations. GAO has considered various aspects of the exchange/sale authority on many occasions, but relies heavily on the GSA regulations and will not interfere with any reasonable application by GSA. See B-189300, May 5, 1978.

The regulations authorize use of the exchange/sale authority only when the following conditions apply:

- The item sold or exchanged must be "similar to the item acquired."
- The items sold or exchanged must not be excess, and the items acquired must be necessary to the conduct of approved programs.
- Subject to certain exceptions, "[o]ne item is to be acquired to replace one similar item."

- There must be an appropriate written administrative determination at the time of the exchange or sale.
- The transaction must foster the "economical and efficient accomplishment of an approved program." 41 C.F.R. § 101-46.202(b).

If the exchange/sale authority applies, the agency is under no requirement to give precedence to other disposal options under the Federal Property Act, such as donation programs. B-153771, June 12, 1964.

The first listed condition is simply a restatement of the requirement of the statute that the items be "similar." GAO has observed that "'similar items' is not a precise term" and that the law "affords [GSA] a flexible standard in the promulgation of regulations." 41 Comp. Gen. 227, 228-29 (1961). GSA regards items as similar for purposes of the exchange/sale statute when:

"(i) The replaced item and the acquired item are identical;

"(ii) The acquired item is designed and constructed for the same specific purpose as the replaced item, or both constitute parts or containers for identical or similar end items; or

"(iii) The acquired item and the replaced item both fall within a single Federal Supply Group [except for certain items listed elsewhere in the regulation as ineligible]." 41 C.F.R. § 101-46.202(b)(1).

Under the second standard, items need not be identical if they are "designed and constructed for the same specific purpose." Thus, ambulances and station wagons adapted for use as ambulances are similar for purposes of the statute. 41 Comp. Gen. 227 (1961). Different types of trucks qualify because they are designed and intended to be used for the transportation of property. B-47592, February 14, 1945. So do vessels designed for hydrographic surveying, notwithstanding differences in size and capacity which would preclude their operation under the same conditions. B-127659, June 5, 1956.

The statute and regulations are designed to facilitate the legitimate replacement of property and should not be used for what amounts to a new acquisition in the guise of an exchange. In 55 Comp. Gen. 1268 (1976), GSA had disapproved an exchange of gold for silver proposed by the Defense Department and the National Aeronautics and Space Administration. Notwithstanding the assertion that the two were "virtually interchangeable," an examination of the proposal showed that they would not serve the same specific purpose, and that GSA was therefore correct. See also B-149858-O.M., February 25, 1963 (diamonds not similar to rubies). The purpose to be served must be specific. Intermingling dissimilar items for use on a common project—unless they are within the same Federal Supply Group—is not enough. Thus, trucks and shovels, for example, are not "similar" simply because they will be used as "road building equipment." 27 Comp. Gen. 540 (1948). In general, "in the purchase of a truck only a truck may be sold or exchanged, a tractor for a tractor, a boat for a boat, etc." 23 Comp. Gen. 931, 934 (1944).

The regulations also treat items as similar if they are parts for similar end items. See, e.g., 34 Comp. Gen. 452 (1955) (United States Mint at Philadelphia could sell high-frequency motor-generator set and use proceeds for parts for high-frequency melting units); B-126544, February 17, 1956 (another case involving U.S. Mint equipment we don't understand either). The 1955 decision cautioned that while the proceeds could be applied to the purchase of the new equipment, they could not be used for such things as removal, modification, installation, or assembly. 34 Comp. Gen. at 454.

Sales proceeds can be applied to a different program or activity in the same agency as long as they are applied to the purchase of similar items. This follows logically from the agency's authority under 40 U.S.C. § 483(c) to reassign property within the agency before reporting it to GSA as excess. B-153771, June 12, 1964.

There are a number of important exclusions from the exchange/sale authority. One is mandated by the very premise of the statute—it applies only to personal property, not to real property. E.g., B-128706, August 14, 1956 (41 miles of telephone line not "personal property"). Others are contained in the regulations. Items are not eligible for exchange/sale treatment if they are found in any of more than two dozen federal supply classification groups listed in 41 C.F.R. § 101-46.202(a). The groups listed range from hand tools and office supplies to weapons and nuclear ordnance. Another provision specifies that the exchange/sale authority may not be used if the acquisition is not otherwise authorized by law or is in contravention of an applicable restriction. 41 C.F.R. §§ 101-46.202(c)(1) and (2). For example, it could not be used to acquire a passenger motor vehicle by an agency which lacks the specific authority required by 31 U.S.C. § 1343(b). 27 Comp. Gen. 105 (1947). The exchange/sale authority may not be used to dispose of excess or surplus property. 41 C.F.R. § 101-46.202(c)(4). See B-163084, February 5, 1979; B-169903, July 27, 1970. Nor may it be used to dispose of scrap materials except scrap gold for fine gold (see B-163084, cited above), or property in new or unused condition. 41 C.F.R. §§ 101-46.202(c)(8) and (9).

Long before the enactment of 40 U.S.C. § 481(c), GAO had taken the position that an agency disposing of personal property through competitive bids should solicit cash bids as well as trade-in offers, and should accept whichever was more favorable to the government. E.g., 5 Comp. Gen. 798 (1926). This position continued after enactment of the Federal Property Act. 45 Comp. Gen. 671 (1966); B-150296, March 14, 1963. The point was reflected in GSA's regulations but was dropped in a 1988 revision. In 64 Comp. Gen. 132 (1984), GAO sustained a bid protest where the solicitation failed to include the cash option. The decision stated:

"[W]here an agency contemplates considering offers for the government's old equipment in conjunction with an acquisition of new equipment, we question whether it is fair or even in the government's best interest to limit offers for the old equipment to firms also offering to supply the new equipment, if there exists a third-party market for the old equipment that might be willing to offer more on a cash basis than the government could have obtained from any exchange allowance." Id. at 134.

While the requirement was still in the regulations at the time of that decision, the quoted passage suggests a significance independent of the regulations.

GAO has approved issuing a request for quotations for the sole purpose of comparing trade-in offers where the agency contemplated making the actual acquisition by purchase request from the Federal Supply Schedule. B-181146, November 21, 1974. GAO has also concurred with a proposal by GSA to sell used cars, many of which are exchange/sale cars, on consignment through private auction houses. 64 Comp. Gen. 149 (1984).

Of course, the main reason for the enactment of 40 U.S.C. § 481(c) was to permit the proceeds of the exchange or sale to be applied towards acquisition of the new item. Applicable requirements are set forth in GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, section 5.5.D (1993), most of which has been incorporated into GSA's regulations at 41 C.F.R. § 101-46.304. If the proceeds are received after the obligation for the replacement property has been incurred, they may be credited directly to the appropriation account charged. If the proceeds are received before the obligation for the replacement property has been incurred, they remain available for the purchase during the fiscal year in which the property was sold and for one fiscal year thereafter. If an administrative determination to use the proceeds has been made and documented, the money should be credited to the appropriate budget clearing account. When the obligation is incurred, the clearing account is charged and the appropriation account credited. This prevents expiration of the appropriation from thwarting the legitimate exercise of the exchange/sale authority. If the obligation does not occur within the prescribed time period, the money goes to the Treasury asmiscellaneous receipts, the theory being that it would no longer be a bona fide replacement.

4. Disposal of Personal Property

The principles which govern the disposal of government property are, for the most part, the same for real and personal property although they differ in detail. Those principles, discussed further in Chapter 16, are:

- Under the Property Clause of the Constitution (Art. IV, sec. 3, cl. 2), disposal of government property requires statutory authority.
- Congress has implemented the Property Clause primarily through the Federal Property and Administrative Services Act of 1949. The General Services Administration has primary responsibility for administering the Federal Property Act, and does so in turn through the Federal Property Management Regulations, 41 C.F.R. Ch. 101.
- Disposal is a three-stage process: reassignment within the agency; transfer to other federal agencies (excess property); sale or other authorized disposal outside of the government (surplus property). The definitions of excess and surplus property are the same for real and personal property.

Upon determining that an item of personal property is no longer needed “for the purposes of the appropriation from, which it was purchased,” the agency’s first task is to see if it can be reassigned for use elsewhere in the agency. 40 U.S.C. § 483(c); 41 C.F.R. § 101-43.102(a). The statutory language makes clear that this includes activities within the agency financed by different appropriations. B-139655-O.M., July 20, 1959. If the property is not needed elsewhere in the agency, it is declared excess and reported to GSA. GSA can then direct transfer to another agency, government corporation, or the District of Columbia, or can redistribute the property through its own supply centers. 40 U.S.C. § 483(a)(1).

As with real property, the statute requires reimbursement by the receiving agency of the property’s “fair value” if either the transferor or the transferee is the District of Columbia or a government corporation subject to the Government Corporation Control Act, or if the property was acquired by using a revolving or reimbursable fund and the transferor agency requests reimbursement of the net proceeds. In all other cases, the extent of reimbursement is left to the determination of GSA and the Office of Management and Budget. 40 U.S.C. § 483(a)(1). The regulations provide that, except for the situations mandated by the statute and a few others, transfers of excess personal property are without reimbursement. 41 C.F.R. § 101-43.309-3(a). This “no reimbursement” policy is within GSA’s discretion under the law. B-101646, February 11, 1977 (internal memorandum).

A little-known (and probably even less observed) statute is 40 U.S.C. § 483b, which prohibits the use of appropriated funds “for the purchase of furniture by any department or agency in any branch of the Government if such requirements can reasonably be met . . . by transfer of excess furniture including rehabilitated furniture from other departments and agencies” in accordance with the Federal Property Act.

Excess property in a foreign country is subject to different provisions of the law. Each agency is responsible for disposing of its own foreign excess property. 40 U.S.C. § 511. Methods of disposal include sale, exchange, lease, or transfer, or the property can be returned to the United States for handling as domestic excess property. 40 U.S.C. § 512. This broad authority includes transfer to another federal agency without reimbursement. 42 Comp. Gen. 21 (1962).

If the property is found to be excess to all federal agencies, GSA declares it to be surplus. GSA has "supervision and direction over the disposition of surplus property." 40 U.S.C. § 484(a). Another agency can sell surplus property only if it has specific authority which overrides the Federal Property Act or upon delegation from GSA. 56 Comp. Gen. 754 (1977). GSA's regulations amount to a blanket delegation to authorized agencies to either sell their own surplus property or have GSA sell it for them for a fee. 41 C.F.R. § 101-45.103-1.

Subsection (c) of 40 U.S.C. § 484, provides that agencies authorized by GSA to dispose of surplus property—

> "may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the [Federal Property Act]."

With appropriate safeguards, GSA may, for example, sell surplus vehicles on consignment through private auction houses. 64 Comp. Gen. 149 (1984). Subsection (c) authorizes credit sales. The regulations require prior GSA approval. 41 C.F.R. § 101-45.304-9. Subject to GSA's authority under the Federal Property Act, there is no statutory prohibition against accepting payment by credit card although certain conditions some issuers might like to impose may be unacceptable to the government. 52 Comp. Gen. 764 (1973).

Disposal by sale is governed by 40 U.S.C. § 484(e). Advertising for bids is the preferred method. 40 U.S.C. § 484(e)(1). The statute further provides that:

> "award shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: Provided, That all bids may be rejected when it is in the public interest to do so." 40 U.S.C. § 484(e)(2)(C).

Generally speaking, this requires award to the highest bidder. 36 Comp. Gen. 94 (1956); B-192592, November 16, 1978. The winning bidder must be responsive and responsible. These terms have the same meaning as in the procurement arena. Responsive means that the bid must conform to the advertised terms and conditions (49 Comp. Gen. 244, 246 (1969)); responsible refers to ability to perform (B-160179(1), December 12, 1966).

Subsection (e)(3) sets forth nine exceptions—situations in which the sale may be negotiated rather than advertised. They include such things as national emergency; estimated fair market value does not exceed $15,000; and advertisement fails to produce reasonable bids. Another of the exceptions, 40 U.S.C. § 484(e)(3)(D), is where sale by competitive bidding "would cause such an impact on an industry or industries as adversely to affect the national economy," provided that negotiation will produce the estimated fair market value. This does not authorize an agency to address economic impact by advertising a sale with the condition that the property must be scrapped by the purchaser. 43 Comp. Gen. 15 (1963). Another portion of the statute, 40 U.S.C. § 484(e)(5), authorizes GSA to sell surplus personal property by negotiation at fixed prices which reflect estimated fair market value, without regard to subsections (e)(2) or (e)(3).

A provision that has generated some controversy is 40 U.S.C. § 484(d):

> "A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under [the Federal Property Act] shall be conclusive evidence of compliance with the provisions of [the Federal Property Act] insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance."

This was derived from a very similar provision in the Federal Property Act's predecessor, the War Surplus Property Act of 1944, designed to protect the good-faith purchaser, in the absence of fraud, against attack based on mistake or lack of authority. United States v. Jones, 176 F.d 278, 288 (9th Cir. 1949). See also East Tennessee Iron and Metal Co. v. United States, 218 F. Supp. 377 (E.D. Tenn. 1963) (mutual mistake). It will protect an otherwise innocent party who acquires title from a fraudulent vendee. United States v. Mailet, 294 F. Supp. 761 (D. Mass. 1968). The provision has also been viewed as a protection for the title of a good-faith purchaser where the property had never been declared surplus and was therefore disposed of in violation of the Federal Property Act and regulations and without authority. Pacific Harbor Capital, Inc. v. United States

Department of Agriculture, 845 F. Supp. 1 (D.D.C. 1993). GAO has held that where the notice of award specifies that title does not pass until the property is removed, section 484(d) does not apply until the property is removed. 58 Comp. Gen. 240 (1979). GAO has also suggested that the statute should not be read as, in effect, permitting disregard of any statutory violation. B-150468, December 23, 1963.

One situation in which 40 U.S.C. § 484(d) will not prevail is illustrated in Dubin v. United States, 289 F.2d 651 (Ct. Cl. 1961). The government had erroneously sold certain defense articles as surplus. A provision of the Espionage Act, 18 U.S.C. § 793(d), gives the government the right to recover the articles, a right which prevails over the purchaser's claim to title under 40 U.S.C. § 484(d). The person surrendering the property is entitled to recover only his out-of-pocket expenses. 40 U.S.C. § 655; B-247981, July 24, 1992.

Another major method of disposal of surplus personal property is donation to the states, set out in 40 U.S.C. § 484(j). Early amendments to the Federal Property Act authorized the donation of surplus personal property to states for educational, public health, or civil defense purposes. Congress significantly revised the law in 1976 to expand the range of authorized purposes. In brief, GSA transfers surplus property, without cost, to state agencies designated under state law to receive surplus federal property. GSA is supposed to try to allocate property among the states on a fair and equitable basis. The state agency may then distribute the property—

"(A) to any public agency for use in carrying out or promoting for the residents of a given political area one or more public purposes, such as conservation, economic development, education, parks and recreation, public health, and public safety; or

"(B) to nonprofit educational or public health institutions or organizations . . . for purposes of education or public health (including research for any such purpose)." 40 U.S.C. §§ 484(j)(3)(A), (B).

GAO has reviewed the donation program on several occasions and found that it was generally meeting its goals. The most comprehensive report is Transfers of Excess and Surplus Federal

Personal Property—Impact of Public Law 94-519, GAO/LCD-80-101 (September 30, 1980).[2]

Title to property in the custody of the state receiving agency remains with the United States. 41 C.F.R. § 101-44.205(a). Upon taking possession from the state agency, the donee receives "conditional title." 41 C.F.R. § 101-44.208(c). The donee must return the property if it is not used for the donated purpose within one year of donation, or if it ceases being used within one year after being placed in use. 40 U.S.C. § 484(j)(4)(C)(ii); 41 C.F.R. § 101-44.208(a)(2). In addition, there are recapture provisions for noncompliance. 41 C.F.R. §§ 101-44.208(e) and (f). Absent "conditional title," if full legal title passed to the donee free of federal "strings," and the donee sold the property, the federal government would have no claim to the proceeds. 41 Comp. Gen. 20 (1961).

The statute provides no standards as to when property should be sold or when it should be donated. It does not require GSA to consider various policy factors in making the determination. Northrop University v. Harper, 580 F. Supp. 959, 963 (C.D. Cal. 1983). It confers "unfettered discretion" on GSA. Id. at 964.

The statute and regulations, in addition to the more general features noted above, address many highly specialized situations. For example, 40 U.S.C. § 484(i) authorizes the Maritime Administration to dispose of surplus vessels determined to be "merchant vessels or capable of conversion to merchant use," in accordance with the Merchant Marine Act. The procedures of the Merchant Marine Act take precedence over those in the Federal Property Act. 42 Comp. Gen. 69 (1962). Dredges are apparently not regarded as within the scope of subsection 484(i) (B-158429, April 20, 1966), so there is separate authority in 40 U.S.C. § 483d to dispose of dredges.

A situation the statute does not address is the disposal of property held by a commission composed equally of federal and state members. Confronted with one such situation, GAO said there is a

[2] The last of GAO's statutorily mandated biennial reports was Property Management: Excess and Surplus Personal Property Transfers to Nonfederal Organizations, GAO/GGD-88-68 (May 1988). Under the law as changed in 1988, GAO now reviews GSA's reports.

choice: divide the property in half with the federal portion of the commission disposing of its half in accordance with the Federal Property Act, or sell it with the United States receiving half the proceeds. Absent statutory guidance, the choice is up to the commission. B-185203, April 8, 1976.

Unless one of several statutory exceptions applies, the proceeds from the sale of surplus personal property must be deposited in the Treasury as miscellaneous receipts. 40 U.S.C. § 485(a); 41 C.F.R. § 101-45.307; B-200962, May 26, 1981. One exception (40 U.S.C. § 485(b)) is personal property "related" to real property sold by GSA. Another (§ 485(c)) is property originally acquired by a revolving or reimbursable fund. E.g., B-162337-O.M., October 2, 1967. Another (§ 485(d)) permits a portion of the proceeds to be deposited in a special account from which to pay refunds that may become necessary. When property is repossessed under the Espionage Act noted earlier, for example, the refund may be paid from one of these accounts. B-163028, January 8, 1968. Still another (§ 485(e)) permits proceeds from the sale of "contractor inventory," including government-furnished property, to be applied against the contract price when so provided in the contract. E.g., B-140689-O.M., October 29, 1959; B-139655-O.M., July 20, 1959. When GSA sells surplus personal property, it may deduct from the proceeds its costs of conducting the sale, and may deposit those amounts in the General Supply Fund. 40 U.S.C. § 485(i).

Finally, while the Federal Property Act governs the vast majority of disposals, other authorities exist in specific contexts. For example:

- The Secretary of the Treasury is authorized to sell gold and silver. 31 U.S.C. § 5116. GSA can conduct the sale as Treasury's agent. See B-87620, January 27, 1976.
- The Comprehensive Crime Control Act of 1984 provides several options for the use and disposition of forfeited property, summarized in B-225008, February 24, 1987.

- Excess and surplus government personal property can be donated to Indian tribes and tribal organizations under the Indian Self-Determination Act, 25 U.S.C. § 450j(f). If someone obtains property under this authority to sell to third parties, the government may bring criminal charges. E.g., United States v. Hacker, 883 F. Supp. 444 (D.S.D. 1994).

B. Interagency Transactions

1. The Economy Act

a. Origin, Legislative History, General Requirements

In 1932, as part of a package of measures designed to reduce government spending and help the nation fight its way out of the Great Depression, Congress enacted the first governmentwide statutory authorization for federal agencies to provide work, services, or materials to other federal agencies on a reimbursable basis. The advantages of interagency dealings had long been apparent, but widespread use had been discouraged by the "well established rule that one Government activity may not be reimbursed for services performed for another except to the extent that it is shown that increased costs have been incurred." A-31040, May 6, 1930.[3] In addition, the early decisions held that statutory authority was necessary if doing work for another agency would require an increase in the plant or personnel of the performing agency. 10 Comp. Gen. 131, 134 (1930); 7 Comp. Gen. 709, 710 (1928).[4] Furthermore, there was discomfort with the concept of the government contracting with itself. See, e.g., 26 Comp. Dec. 1022, 1023 (1920); 22 Comp. Dec. 684, 685 (1916).

[3]See also, e.g., 10 Comp. Gen. 193 (1930); 10 Comp. Gen. 131 (1930); 8 Comp. Gen. 600 (1929); 6 Comp. Gen. 81 (1926). Under this rule, the performing agency could not recover costs it would have incurred in any event, a prime example being the salaries of personnel used in providing the service.

[4]This rule was based on 31 U.S.C. § 1301(a), which limits the use of appropriations to their intended purposes. 7 Comp. Gen. at 710; 3 Comp. Gen. 974, 976 (1924).

The 1932 legislation did not hatch fully grown. A general, albeit limited, provision had been enacted in 1920 authorizing ordering agencies to transfer appropriations to performing agencies "for direct expenditure." Act of May 21, 1920, ch. 194, § 7, 41 Stat. 607, 613.[5] In addition, a number of agency-specific statutes were on the books. For example, a permanent provision in the Navy Department's 1927 appropriation act, Act of May 21, 1926, ch. 355, 44 Stat. 591, 605, directed agencies ordering services or materials' from the Navy to pay the actual cost to the Navy's working fund, either in advance or by reimbursement. This law, quoted in 10 Comp. Gen. 275, 277 (1930), was the source of some of the language used a few years later in the Economy Act.

Against this backdrop, Representative Burton French sponsored legislation in 1930 to provide general authority for reimbursable interagency transactions. The purpose of the legislation, Representative French testified, was

> "to permit the utilization of facilities and personnel belonging to one department by another department or establishment and to enact a simple and uniform procedure for effecting the appropriation adjustments involved." Interdepartmental Work: Hearings on H.R. 10199 Before the Committee on Expenditures in the Executive Departments, 71st Cong., 2d Sess. 3 (1930), quoted in 57 Comp. Gen. 674, 678 (1978).

Representative French explained how the bill conformed with certain fundamental tenets of appropriations law:

> "It is also a requirement of law, in using appropriations for the support of any activity that the appropriation be expended only for the objects specified therein.
>
> "This requires that when one department obtains work, materials or services from another department it should pay the full cost of such work, materials or services.

[5] A few of the numerous decisions discussing and applying this provision are 4 Comp. Gen. 674 (1925); 27 Comp. Dec. 684 (1921); 27 Comp. Dec. 106 (1920); A-31068, March 25, 1930.

"If full cost is not paid, then such part of the cost as is not reimbursed must fall upon the department doing the work, which is contrary to [31 U.S.C. § 1301(a)] and the appropriation of the department for which the work was done will be illegally augmented because it does not bear all of the cost of the work done for it." Id. at 4, 57 Comp. Gen. at 678.[6]

The report of the House Committee on Expenditures in the Executive Departments mirrored the sponsor's testimony:

"The purpose of this bill is 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.

"Your committee also believes that very substantial economies can be realized by one department availing itself of the equipment and services of another department in proper cases. A free interchange of work as contemplated by this bill will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities of [their] own.

. . . .

"Heretofore the cost of such services as have been performed by one department for another has frequently been paid for out of the appropriations for the department furnishing the materials and services. This is unfair to the department doing the work. All materials furnished and work done should be paid for by the department requiring such materials and services. [The bill's funding provisions] will hold each department to strict accountability for its own expenditures and result in more satisfactory budgeting and accounting." H.R. Rep. No. 71-2201, at 2-3 (1931).

The bill was not enacted immediately, however. The following year, it was again reported favorably, in the same language as quoted above, by the House Committee on Economy. H.R. Rep. No. 72-1126, at 15-16 (1932). This time it became law as section 601 of the

[6]As we will note in our discussion of interagency details of personnel, the reason the accounting officers had not previously espoused this eminently logical application of the purpose statute and augmentation concept was rooted more in history than in law. Certainly in non-Economy Act situations, the proposition that using agency A's appropriations to do agency B's work violates the purpose statute is stated largely as dogmatic. E.g., 59 Comp. Gen. 403, 404 (1980).

Legislative Branch Appropriation Act for 1933, ch. 314, 47 Stat. 382, 417 (1932), which almost immediately upon enactment became popularly known as the "Economy Act."[7]

Section 601 of the Economy Act has been amended several times, receiving its current structure and designation in the 1982 recodification of Title 31, and is now found at 31 U.S.C. §§ 1535 and 1536. The basic authority is set out in 31 U.S.C. § 1535(a):

"(a) The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if—

> "(1) amounts are available;
>
> "(2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
>
> "(3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and
>
> "(4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise."

The introductory portion of 31 U.S.C. § 1535(a) tells you who can use the authority and what they can use it for. Both points will be explored later in more detail. The numbered subsections establish four basic conditions on use of the authority.

(1) <u>Funds available</u>

The first condition is that "amounts are available" or, in the original language, "if funds are available therefor" (47 Stat. 417-418). Since nothing in the Economy Act in any way abrogates or diminishes 31 U.S.C. § 1301(a), the ordering agency must have funds which are available for the contemplated purpose, or, in other words, the

[7]Excerpts from House Report 1126 are quoted in 52 Comp. Gen. 128, 131-132 (1972), and the history of section 601 is discussed in more detail in 57 Comp. Gen. 674 (1978). Technically, section 601 was cast as an amendment to the 1920 statute noted earlier in the text. Certain documents in the legislative history, one of which is quoted in 57 Comp. Gen. at 679, cite GAO decision A-2272, June 16, 1924. For the benefit of future researchers, there is no such decision. The correct reference is A-2272, June 18, 1924, published at 3 Comp. Gen. 974.

purpose of the transaction must be something the ordering agency is authorized to do. 26 Comp. Gen. 545, 548 (1947); 16 Comp. Gen. 3, 4 (1936); 15 Comp. Gen. 704 (1936); 15 Comp. Gen. 5 (1935); B-259499, August 22, 1995. The ordering agency does not need specific authority in its appropriation language to use the Economy Act, but of course must adhere to any monetary limits Congress may choose to impose. 19 Comp. Gen. 585 (1939).

In brief, the Economy Act does not authorize an agency to use another agency to do anything it could not lawfully do itself. This is merely a continuation of the rule in effect under the Economy Act's 1920 predecessor. E.g., 5 Comp. Gen. 757 (1926). This point—that transfer of funds to another agency cannot be used to circumvent 31 U.S.C. § 1301(a)—is not limited to Economy Act transactions but applies to all transfers, whether in advance or by reimbursement, to working funds or otherwise, unless authorized under a statute which expressly provides differently. See, e.g., 7 Comp. Gen. 524, 526 (1928), emphasizing that since the appropriation in question "is not available for direct expenditure for such purpose . . . it can not be made available for such purpose by transfer" to another agency. See also 30 Comp. Gen. 453 (1951); 28 Comp. Gen. 365 (1948); 22 Comp. Gen. 462 (1942); 19 Comp. Gen. 774 (1940).

(2) Interest of the government

The second condition is that the head of the ordering agency must determine that the order is in the best interests of the government. This appears to offer little impediment, and our research has disclosed no instance where a proposed transaction was rejected for this reason.[8]

(3) Performing agency's "position"

The third condition—agency is "able to provide" the goods or services—is best understood by again referring to the original language: the performing agency must be "in a position to supply or equipped to render" the materials or' services in question (47 Stat. 418). (The "get by contract" part was added by amendments starting

[8]This of course does not mean that it has never happened. The issue would involve an internal debate and would not likely surface outside of the agency.

in 1942, and will be addressed later in our discussion.) This requirement goes to the essence of the Economy Act. The objective of the statute is to permit an agency to take advantage of another agency's experience or expertise, not merely to "dump" either work or funds or to avoid legislative restrictions. A good example is 13 Comp. Gen. 138 (1933), in which a government corporation issuing its own securities sought Economy Act assistance from the forerunner of the Bureau of the Public Debt.

The "in a position" requirement does not mean that the performing agency must have all required equipment and personnel already on hand before it may validly accept an Economy Act order. If necessary, the agency may, as long as the work or service is within the scope of activities it normally performs, procure additional supplies or equipment or add additional temporary personnel. B-197686, December 18, 1980. For example, the agreement in 13 Comp. Gen. 138 was not objectionable merely because the Public Debt Service had to take on some additional personnel in order to handle the increased workload. Similarly, GAO found a proposed transfer of funds to enable the performing agency to hire additional personnel authorized in 14 Comp. Gen. 526 (1935). GAO noted in B-119846, September 8, 1955, that this authority is not unlimited, otherwise the statutory condition would be negated. However, nothing thus far has purported to define precisely where those limits might be.

Property purchased incident to an Economy Act transaction is, upon completion of the work, "an asset of the agency bearing the cost of its acquisition." 33 Comp. Gen. 565, 567 (1954). If the ordering agency has paid through an advance of funds to the performing agency, then whatever remains when performance is done should be returned to the ordering agency for use or disposal as appropriate. Id. If several agencies have contributed to the cost, the property is regarded as "owned" by all of the agencies on a pro rata basis. 38 Comp. Gen. 36 (1958).

It is one thing to acquire property incident to performing an Economy Act order. It is entirely different, and far more questionable, to acquire substantial equipment—or to solicit funds from potential customer agencies to do so—solely to put yourself "in a position" to perform Economy Act services. B-119846, July 23, 1954. And, of course, in order to be "in a position" to do anything under the Economy Act, the performing activity must be in existence. B-37273, October 16, 1943.

Whether an agency is "in a position" to do Economy Act work is primarily the agency's own determination, one which merits substantial weight. 23 Comp. Gen. 935, 937 (1944). However, the agency's status includes legal as well as factual considerations. The legal part of the formula is the absence of any statutory prohibitions or restrictions which would obstruct performance. Id. at 937-938. The Economy Act does not give a performing agency any authority which it would not otherwise have. 18 Comp. Gen. 262, 266 (1938).

(4) Lower cost

The Economy Act was never intended to foster an incestuous relationship in lieu of normal contracting with private business concerns. Hence the fourth condition of 31 U.S.C. § 1535(a)—the ordering agency must determine that it cannot obtain the goods or services "as conveniently or cheaply" from a private contractor.[9] It should be apparent that this refers to services which are "lawfully procurable" from private sources in the first place and not to "regular governmental functions." 19 Comp. Gen. 941 (1940).

In making the "lower cost" determination, it is permissible to solicit bids and then reject all bids if they exceed the cost of dealing with another agency. 37 Comp. Gen. 16 (1957).[10] Even if the determination is made, however, the authority to use the Economy Act is permissive rather than mandatory. Id. If the agency cannot make the determination, although the recodified language is less explicit in this regard (compare the original language, 47 Stat. at 418), use of the Economy Act is improper.

[9]As originally enacted, this requirement explicitly referred to "work or services performed" but not to "materials, supplies, or equipment furnished." See, e.g., 12 Comp. Gen. 597, 598 (1933). The substitution of the word "goods" came about as part of the 1982 recodification of Title 31. See 31 U.S.C. §1535 (Rev. Notes). While a recodification is not supposed to make substantive changes, this is nevertheless what the statute now says. Perhaps it simply reflects the deduction that "work" implies a product.

[10]This decision implies that an agency can enter into an Economy Act agreement with a nonappropriated fund activity, and to that extent was modified by 64 Comp. Gen. 110 (1984). It remains valid for the points cited in the text.

The cost comparison of 31 U.S.C. § 1535(a)(4) is required only where the agency is contemplating an Economy Act transaction. It does not apply where the agency chooses to perform a function in-house in lieu of renewing an existing commercial contract. Techniarts Engineering v. United States, 51 F.3d 301 (D.C. Cir. 1995).

The Economy Act itself does not require that agencies document the two determinations called for by 31 U.S.C. § 1535(a) (interest of the government and lower cost). Interagency Agreements: Fiscal Year 1988 Agreements at Selected Agencies Were Proper, GAO/AFMD-88-72 (September 1988). However, GAO regards documenting the determinations as "sound practice" and a desirable internal control. Id. at 8. The Federal Acquisition Regulation was amended in 1995 to require that the two determinations be documented in a Determination and Finding. 48 C.F.R. § 17.503(a) (60 Fed. Reg. 49721, September 26, 1995).

(5) Written agreement

Another important requirement which should be emphasized at the outset is not specified in the statute but finds its authority in common sense. An Economy Act transaction should be evidenced by a "written order or agreement in advance, signed by the responsible administrative officer of each of the departments or offices concerned." 13 Comp. Gen. 234, 237 (1934).[11] A written agreement is important because, as in any contract situation, the terms to which the parties agree, as reflected in the writing, establish the scope of the undertaking and the rights and obligations of the parties. Also, the written agreement can establish a ceiling on the ordering agency's financial obligation. 22 Comp. Gen. 74 (1942).

While an advance agreement normally "should be regarded as essential . . . the lack of a specific agreement does not necessarily preclude reimbursement" in appropriate cases. B-39297, January 20, 1944. An "appropriate case," although the decisions do not use this language, generally means one in which the facts are sufficient to establish an implied contract, or an express contract which was not finalized. In A-85201, April 15, 1937, for example, an agreement had been in effect for several prior years and the facts showed an intent

[11] 64 Comp. Gen. 370 (1985) overruled other aspects of 13 Comp. Gen. 234.

to continue the agreement for the year in question. Another appropriate case is where there is a written agreement and the parties subsequently agree to an "adjustment" for some additional amount or item which is otherwise proper but was not included in the original agreement. 22 Comp. Gen. 74 (1942); B-31862, February 27, 1943.

Apart from common sense, another reason for an advance agreement is that written documentation is necessary in order to record an obligation under 31 U.S.C. § 1501(a). See 34 Comp. Gen. 418, 421 (1955).

GAO recommends that the agreement specify at least the following:

- Legal authority for the agreement;
- Terms and conditions of performance;
- The cost of performance, including appropriate ceilings when cost is based on estimates;
- Mode of payment (advance or reimbursement);
- Any applicable special requirements or procedures for assuring compliance; and
- Approvals by authorized officials.

GAO, Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 2.4.C.2e. The documentation requirements of the Federal Acquisition Regulation are found in 48 C.F.R. § 17.504(b). In addition, it is extremely useful for the agreement to set forth a requirement and procedures for the performing agency to notify the ordering agency if it appears that performance will exceed estimated costs and to cease or curtail performance as may be necessary. This is an important safeguard to protect the performing agency against Antideficiency Act violations. See 7 GAO-PPM § 2.4.C.2g; B-234427, August 10, 1989 (non-decision letter).

b. Who Is Covered

The coverage of the Economy Act is broad, and there is no distinction between who can place an order and who can perform one. The statute says that "[t]he head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency." 31 U.S.C. § 1535(a). This embraces all three branches of the federal government. Within the legislative branch, for example, one of the earliest Economy Act decisions applied the statute to the

Architect of the Capitol. 12 Comp. Gen. 442 (1932). Financial audits of legislative branch agencies include the Economy Act as one of the laws tested for compliance. E.g., Financial Audit: First Audit of the Library of Congress Discloses Significant Problems, GAO/AFMD-91-13 at 29 (August 1991). And GAO has always viewed the law as applicable to itself. B-156022-O.M., January 6, 1972; B-130496-O.M., March 13, 1957; B-13988, January 7, 1941. See also A-31068, March 25, 1930 (Economy Act's 1920 predecessor applicable to Botanic Garden). The court in United States v. Mitchell, 425 F. Supp. 917, 918 (D.D.C. 1976), regarded the law as applicable to the judicial branch.[12]

The Economy Act applies to government corporations. 13 Comp. Gen. 138 (1933); B-116194, October 5, 1953; B-39199, January 19, 1944; B-27842, August 13, 1942; A-46332, January 9, 1933. The cited decisions involve a variety of government corporations in the capacity of both ordering agency and performing agency. Although the specific corporations in those cases are now defunct, the point remains valid.

The Act also applies to temporary boards and commissions. See B-157312, August 2, 1965 (Public Land Law Review Commission). However, GAO found it inapplicable to the land and timber appraisal committee established by 43 U.S.C. § 181f-1 even though it was to be federally funded and permanent, because two of its three members could not be employees of the United States. 33 Comp. Gen. 115, 116-17 (1953).

The common thread of applicability is that the entity in question must be an agency or instrumentality of the United States government. Accordingly, the Economy Act does not apply to the District of Columbia government. 50 Comp. Gen. 553, 556 (1971); B-107612, February 8, 1952. (As we will see later, there is separate legislation applicable to the District of Columbia.) It also does not apply to the National Guard, except possibly when the Guard is

[12]The Economy Act originally said "executive department or independent establishment of the Government" (47 Stat. 417). The indefatigable researcher will find one GAO opinion, B-25199, May 15, 1942, holding the Act inapplicable to the legislative branch. While B-25199 has never been overruled, it has never been followed either, and the Revision Note to 31 U.S.C. § 1535 explicitly adopts the broader views of 12 Comp. Gen. 442 and the Mitchell case.

called into federal service. B-152420, October 3, 1963, aff'd on recons., B-152420, February 25, 1964. Nor does it apply to Indian tribes (B-44174, September 6, 1944), agencies of the United Nations (23 Comp. Gen. 564 (1944)), American Samoa (B-194321, August 7, 1979), or a presidential inaugural committee (62 Comp. Gen. 323, 330 (1983)).

There are also a few instances in which entities which clearly are agencies or instrumentalities of the United States, or which are treated as such for other purposes, are not covered. For example, the Postal Service although clearly an instrumentality of the United States is subject only to those statutes specifically designated in the Postal Reorganization Act; however, the Economy Act is not one of the statutes designated. 58 Comp. Gen. 451, 459 (1979). It also does not apply to nonappropriated fund instrumentalities. 64 Comp. Gen. 110 (1984).

Finally, it is important to note that the Economy Act authorizes intra-agency, as well as inter-agency, transactions. E.g., 57 Comp. Gen. 674 (1978); 25 Comp. Gen. 322 (1945); B-77791, July 23, 1948. While the decisions had consistently taken this position, this is one instance in which the recodified language of 31 U.S.C. § 1535(a) ("major organizational unit within the same agency") is more precise than the original language. While the two bureaus or offices may be part of the same department or agency, they must be funded under separate appropriations. 38 Comp. Gen. 734, 738 (1959); B-60609, September 26, 1946.[13] However, the Economy Act does not apply with respect to separate appropriations of a single bureau or office. 38 Comp. Gen. at 737-738.

c. Fiscal Matters

(1) Payment: types and accounting

The payment provision of the Economy Act is 31 U.S.C. § 1535(b):

> "Payment shall be made promptly by check on the written request of the agency or unit filling the order. Payment may be in advance or on providing the goods or services ordered and shall be for any part of the estimated or actual cost as

[13]The concept of the Economy Act simply does not "fit" where the two units are funded under the same appropriation. Presumably, although we have found no cases, an agency could administratively apply similar principles since it needs no statutory authority to shift funds within a lump-sum appropriation.

determined by the agency or unit filling the order. A bill submitted or a request for payment is not subject to audit or certification in advance of payment. Proper adjustment of amounts paid in advance shall be made as agreed to by the heads of the agencies or units on the basis of the actual cost of goods or services provided."

This provision authorizes two types of payment, advance and reimbursement. The decision is up to the performing agency.[14] Payment may be in a lump sum or in installments. Pre-audit is not required.

Payments made in advance will often necessarily be based on estimates, in which event the amounts should be adjusted, up or down as the case may be, when the actual cost is known. Any excess (the amount by which the advance exceeds actual cost) should be returned to the ordering agency. Retention of the excess amount by the performing agency is an improper augmentation of its funds. 72 Comp. Gen. 120 (1993). If the account to which the excess would otherwise be returned has been closed, the money should be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 1552(b).

If the excess is determined while the appropriation charged with the advance is still available for obligation, the performing agency should pay special attention to returning the funds in time for the ordering agency to be able to use them. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 2.4.C.2d (May 1993).

The authority to pay by reimbursement amounts to an exception to 31 U.S.C. § 1301(a) by implicitly authorizing the performing agency to temporarily use its own funds to do the ordering agency's work. See B-234427, August 10, 1989 (nondecision letter); B-6124-O.M., October 11, 1939. The statute requires that payment be made "promptly."

Accounting for payments is addressed in 31 U.S.C. § 1536. Subsection (a) sets forth general requirements; subsection (b) deals with goods provided from stock. Subsection (a) provides:

[14]As a practical matter, if the performing agency is not in a position to use its own funds initially, or simply does not wish to do so, it doesn't have to accept the order.

"An advance payment made on an order under section 1535 of this title is credited to a special working fund that the Secretary of the Treasury considers necessary to be established. Except as provided in this section, any other payment is credited to the appropriation or fund against which charges were made to fill the order."

This provision amounts to an exception—albeit a necessary one if the Economy Act is to succeed—to the "miscellaneous receipts" statute, 31 U.S.C. § 3302(b). 56 Comp. Gen. 275, 278 (1977).

Advance payments are to be credited to special working funds created for that purpose. 31 U.S.C. § 1536(a), supra. (A working fund is simply a type of intragovernmental revolving fund.)[15] The intent of the original Economy Act was that Treasury would establish a working fund when requested by the performing agency. H.R. Rep. No. 1126, 72d Cong., 1st Sess. 16 (1932). The language of the 1982 recodification would appear to give Treasury the final decision on the need to create such a fund. When the work is completed, the amount of the advance is adjusted as noted above.

Payments made as reimbursements are credited to the appropriation(s) of the performing agency "against which charges were made" in effecting performance. This means that the reimbursement must be credited to the fiscal year in which it was "earned," that is, the fiscal year actually charged by the performing agency, without regard to when the reimbursement is made. If the appropriation which earned the reimbursement is still available for obligation at the time of reimbursement, the money may be used for any authorized purposes of that appropriation. 31 U.S.C. § 1536(b). (This would be true as a matter of general appropriations law even if the statute were silent.) If the appropriation is no longer available for new obligations, the reimbursement must be credited to the appropriate expired account or, if the account has been closed, to miscellaneous receipts. B-260993, June 26, 1996; 31 U.S.C. § 1552(b). See also B-211953, n.8, December 7, 1984; B-194711-O.M., January 15, 1980.

[15]Compare the definition of "Working Capital Funds" contained in A Glossary of Terms Used in the Federal Budget Process: Exposure Draft at 86 (GAO/AFMD-2.1.1, Rev. January 1993) (here after cited as Budget Glossary Exposure Draft).

If this causes problems for the performing agency, its choices are to (1) seek advance payment, (2) bill the ordering agency promptly as soon as the work is completed, or (3) bill periodically as portions of the work are done. Program to Improve Federal Records Management Practices Should Be Funded by Direct Appropriations, GAO/LCD-80-68, 12 (June 23, 1980).

Although not expressly provided in the Economy Act, an agency may, if it chooses, deposit reimbursements in the Treasury as miscellaneous receipts. 56 Comp. Gen. 275, 278-279 (1977) (indirect costs); 57 Comp. Gen. 674, 685 (1978) (applying same conclusion to direct costs). The latter decision pointed out that crediting a reimbursement to an appropriation against which no charges had been made would amount to an improper augmentation. Thus, there could be situations—the closed account being one example—where the performing agency has no choice but to deposit the reimbursement as miscellaneous receipts. 57 Comp. Gen. at 685-86.

A significant exception to 31 U.S.C. § 1536(b) exists for the Department of Defense. By virtue of 10 U.S.C. §§ 2205(a) and 2210(a), Defense may, at its option, credit Economy Act reimbursements to the appropriations which earned them or, if those appropriations have expired, to appropriations current at the time of collection. Reimbursements to Appropriations: Legislative Suggestions for Improved Congressional Control, GAO/FGMSD-75-52 (November 1, 1976); B-179708-O.M., December 1, 1975 at 16.

With respect to items provided from stock, 31 U.S.C. § 1536(b) provides in part:

> "Where goods are provided from stocks on hand, the amount received in payment is credited so as to be available to replace the goods unless—
>
> "(1) another law authorizes the amount to be credited to some other appropriation or fund; or

"(2) the head of the executive agency filling the order decides that replacement is not necessary, in which case, the amount received is deposited in the Treasury as miscellaneous receipts."[16]

This provision, which limits the performing agency's authority to retain payment to cases where replacement is necessary, illustrates the Economy Act's approach of structuring the transaction so that the performing agency neither profits nor is penalized. It does not say merely that payments are available for replacement, but limits their availability to cases where replacement is necessary. B-36541, September 9, 1943. The apparent theory is that retaining payment when replacement is not necessary would amount to a form of profit. 41 Comp. Gen. 671, 674 (1962) (purpose of provision is "to preclude augmentation of the appropriations involved").

The law does not require "concurrent replacement," that is, replacement in the same fiscal year as delivery, but does require, in general terms, that "agency accounting systems . . . be able to relate credits from the use of stocks on hand in Economy Act transactions to replacement needs." B-179708-O.M., July 10, 1975. In this connection, B-179708-O.M. states beginning on page 15:

"The crucial factor with respect to implementation of the statute is the determination that replacement is necessary—or, more precisely, not unnecessary—rather than the actual replacement transaction. Thus we believe that the statutory requirement is satisfied by some mechanism for screening out payments for stocks not in need of replacement and insuring that such payments are treated as miscellaneous receipts rather than credits. Once this is accomplished, we think the timing of replacements, including fiscal year differences, is essentially immaterial, except perhaps to the extent that time lapses are so great as to be relevant from an audit standpoint in terms of the validity of the determination that replacement was necessary. Finally, we perceive no objection to the fact that replacement items might not be identical to the materials furnished from stocks so long as there is sufficient similarity to justify a bona fide replacement relationship."

It follows that if the appropriation which earned the reimbursement has expired and the performing agency has made the replacement decision but has not implemented it prior to expiration, the payment may be credited to the corresponding appropriation current at the time of collection, since this is the only way it can be "credited so as

[16]Retention of the word "executive" in this subsection in the 1982 recodification was inadvertent. Resort to the source provision makes clear that "agency" as used in 31 U.S.C. § 1536(b) is the same as "agency" in 31 U.S.C. § 1535(a).

to be available to replace the goods." Receipt of payment too late in the fiscal year to permit conducting a procurement for the replacement items poses a problem, but there is no authority to put the payment in some sort of holding account to be credited to next year's appropriation when it shows up. A-92491, April 5, 1938. If the payment then arrives in that fiscal year, it effectively becomes the budgetary resource for purposes of the obligation; if it arrives in the following year, it is credited to the expired account.

While the replacement items need not be identical, the Economy Act does not authorize exchange of dissimilar items. 41 Comp. Gen. 671 (1962). That case involved a proposal by the Public Health Service and the Defense Supply Agency to exchange lists of medical goods and equipment in long supply or available for rotation and to, in effect, swap supplies and equipment not presently needed, making necessary appropriation adjustments periodically. GAO recognized that the proposal had merit and suggested that the agencies seek legislative authority, but was forced to conclude that 31 U.S.C. § 1536(b) does not authorize what amounts to "program replacements," i.e., replacements of excess materials with other materials within the general area covered by the appropriation.

(2) "Actual cost": meaning and application

Payment under the Economy Act, whether by advance with subsequent adjustment or by reimbursement, must be based on "the actual cost of goods or services provided." 31 U.S.C. § 1535(b). This applies to both intra-agency and inter-agency transactions under the Act. 57 Comp. Gen. 674, 684 (1978). Unfortunately, as the decisions have pointed out, neither the statute nor its legislative history address the meaning of the term "actual cost." Id. at 681.

In setting out an analytical framework, it is useful to start by recalling that agencies using the Economy Act must avoid the unauthorized augmentation of anyone's appropriations. B-250377, January 28, 1993. Charging too much augments the appropriations of the performing agency. B-45108/B-48124, February 3, 1955; B-101911-O.M., April 4, 1951. Charging too little augments the appropriations of the ordering agency. 57 Comp. Gen. at 682. In connection with this latter proposition, GAO quickly recognized that the Economy Act legislatively abolished the prior decisional rule that limited the performing agency's recovery to additional costs.

12 Comp. Gen. 442 (1932).[17] Once this is accepted, the approach then becomes a matter of seeking to apply the concept of "actual cost" consistent with the statutory objectives and such guidance as the legislative history does provide.

The following passage from 57 Comp. Gen. 674, at 681 describes this approach:

"While the law and its legislative history are silent as to what was meant by the term 'actual cost' . . . the legislative history does indicate that . . . Congress intended to effect savings for the Government as a whole by: (1) generally authorizing the performance of work or services or the furnishing of materials pursuant to inter- and intra-agency orders by an agency of Government in a position to perform the work or service; (2) diminishing the reluctance of other Government agencies to accept such orders by removing the limitation upon reimbursements imposed by prior [GAO] decisions [footnote omitted]; and (3) authorizing inter- and intra-departmental orders only when the work could be as cheaply or more conveniently performed within the Government as by a private source. Thus in determining the elements of actual cost under the Economy Act, it would seem that the only elements of cost that the Act requires to be included in computing reimbursements are those which accomplish these identified congressional goals. Whether any additional elements of cost should be included would depend upon the circumstances surrounding the transaction."

Thus, the universe of costs may be divided into (1) required costs and (2) what we may term "situational" costs.

Required costs consist in large measure of direct costs—expenditures incurred by the performing agency which are specifically identifiable and attributable to performing the transaction in question. Quoting from 57 Comp. Gen. at 682:

"The Economy Act clearly requires the inclusion as actual cost of all direct costs attributable to the performance of a service or the furnishing of materials, regardless of whether expenditures by the performing agency were thereby increased."

One element of direct cost is the salary of employees engaged in doing the work. 12 Comp. Gen. 442 (1932). This means gross

[17]Loathe to summarily throw out the old rule, some early Economy Act decisions treated the "actual cost" prescription as discretionary, holding that agencies could agree to operate under the old rule. E.g., 13 Comp. Gen. 150, 153 (1933). This "option approach" has long since been discarded.

compensation. 14 Comp. Gen. 452 (1934). It includes, for example, the accrual of annual leave. 32 Comp. Gen. 521 (1953); 17 Comp. Gen. 571 (1938).

Another common element is the cost of materials or equipment furnished to the ordering agency or consumed in the course of performance. "Actual cost" in this context means historical cost and not current replacement or production cost. B-130007, December 7, 1956. See also 58 Comp. Gen. 9, 14 (1978). This does not necessarily have to be the original acquisition cost, however, but may be the most recent acquisition cost of the specific kind of item provided to the requesting agency. B-250377, January 28, 1993. Related transportation costs are another reimbursable direct cost item. Id.

Not every identifiable direct cost is reimbursable under the "actual cost" formulation. An illustration is 39 Comp. Gen. 650 (1960). The Maritime Administration was activating several tankers for use by the Navy. In the course of performing this activity, an employee of the Maritime Administration's contractor was injured, sued the United States under the Suits in Admiralty Act, and recovered a judgment which the Maritime Administration paid from an available revolving fund. While certainly a very real cost actually incurred in the course of performance, the judgment was not "necessary or required in order to condition the tanker for use by the Navy" (id. at 653), and therefore was properly payable as a judgment and not as a reimbursable cost which could be billed to Navy.[18]

In addition to direct costs, it has long been recognized that "actual cost" for Economy Act purposes includes as well certain indirect costs (overhead) proportionately allocable to the transaction. E.g., 22 Comp. Gen. 74 (1942). Indirect costs are those "incurred for common objectives and therefore cannot be directly charged to any single cost objective."[19] Indirect costs which (1) are funded out of currently available appropriations, and (2) bear a significant

[18]"Properly payable as a judgment" means payable from the permanent judgment appropriation (31 U.S.C. § 1304) unless, as was the case here, the agency has an available appropriation or fund.

[19]A Glossary of Terms Used in the Federal Budget Process, GAO/PAD-81-27, 87 (3d ed. March 1981). The term does not appear in the 1993 draft revision (Budget Glossary Exposure Draft, supra note 15).

relationship to the service or work performed or the materials furnished, are recoverable in an Economy Act transaction the same as direct costs. 56 Comp. Gen. 275 (1977), as modified by 57 Comp. Gen. 674 (1978), as modified in turn by B-211953, December 7, 1984. Examples of indirect costs include administrative overhead applicable to supervision (56 Comp. Gen. 275), and rent paid to the General Services Administration attributable to space used in the course of performing Economy Act work (B-211953).

The costs discussed thus far are those which the Economy Act can fairly be said to require. In addition, there may be others, so-called "situational costs." The discussion in 57 Comp. Gen. 674 goes on to say:

> "[The Economy Act] is not so rigid and inflexible as to require a blanket rule for costing throughout the Government . . . . Certainly neither the language of the Economy Act nor its legislative history requires uniform costing beyond what is practicable under the circumstances. This is not to say that costing is expected to be different in a substantial number of circumstances. We are merely recognizing that in some circumstances, other competing congressional goals, policies or interests might require recoveries beyond that necessary to effectuate the purposes of the Economy Act
>
> . . . .
>
> "[T]he term ['actual costs'] has a flexible meaning and recognizes distinctions or differences in the nature of the performing agency, and the purposes or goals intended to be accomplished." Id. at 683, 685.

For example, under the rules stated above, depreciation is not normally recoverable because it is not funded out of currently available appropriations. 57 Comp. Gen. 674; 72 Comp. Gen. 159, 162 (1993).[20] However, in 57 Comp. Gen. 674, in view of the congressionally established goal that the performing agency (the government entity which operated Washington National and Dulles International Airports) be self-sustaining and recover its operating costs and a fair return on the government's investment, it was appropriate to include depreciation and interest as indirect costs.

[20]Under prior decisions, actual cost could include depreciation. E.g., 38 Comp. Gen. 734 (1959). This is one of the aspects of the earlier cases superseded by the 57 Comp. Gen. 674 "family."

The amounts so recovered were deposited in the general fund of the Treasury as miscellaneous receipts. Id. at 685-86.

Another example of permissible "situational costs" is where the performing activity is funded by a statutorily authorized stock, industrial, or similar fund which provides for "full cost" recovery, i.e., beyond what the Economy Act would otherwise require, and the fund's Economy Act work is an insignificant portion of its overall work. In such a situation, there might be sound reasons for charging all customers alike. B-250377, January 28, 1993.

While particular circumstances might authorize some indirect costs beyond what the Economy Act requires, their inclusion in the performing agency's charges is not required but is discretionary. Failure to recover them is not legally objectionable, except in the unlikely event it could be shown to be an abuse of discretion. B-198531, September 25, 1980.

The Economy Act was intended to promote interagency cooperation, not interagency bickering over billings. Hence, the statutory scheme emphasizes the role of agreement. It contemplates that application of the "actual cost" standard in a given case should be "primarily for administrative consideration, to be determined by agreement between the agencies concerned." 22 Comp. Gen. 74, 78 (1942). In the interest of intragovernmental harmony, it has been held that the Economy Act does not require a detailed cost audit by the ordering agency. 32 Comp. Gen. 479 (1953); 39 Comp. Gen. 548, 549-50 (1960). Nor does it require the performing agency to provide a detailed breakdown unless the agreement provides otherwise. B-116194, October 5, 1953. Payment is authorized "at rates established by the servicing agency so long as they are reported to be based upon the cost of rendition of the service and do not appear to be excessive." 32 Comp. Gen. at 481.

While at times actual cost can be computed with precision, the Economy Act does not require that the determination be an exact science. Cases on reimbursable work even before the Economy Act recognized the acceptability of a reasonable and appropriate methodology over "absolutely accurate ascertainment" which might entail considerable burden and expense. 3 Comp. Gen. 974 (1924). As stated in B-133913, January 21, 1958, "[a]s long as the amount agreed upon results from a bona fide attempt to determine the actual cost and, in fact, reasonably approximates the actual cost," the Economy Act is satisfied. One methodology GAO has found to be reasonable and "consistent with the minimum legal requirements of the Economy Act" is billing on the basis of "standard costs" derived from documented costs of the last acquisition or production. B-250377, January 28, 1993 (containing a detailed discussion); Iran Arms Sales: DOD's Transfer of Arms to the Central Intelligence Agency, GAO/NSIAD-87-114, 8 (March 1987) .

There are limits, however, and the "methodology" cannot be totally divorced from the determination or reasonable approximation of actual costs. Thus, a cost allocation in which some customers are paying excessive amounts and effectively subsidizing others is improper. 70 Comp. Gen. 592 (1991). So is an allocation based on the availability of appropriations (B-114821-O.M., November 12, 1958), or a per capita funding arrangement not related to the goods or services actually received (67 Comp. Gen. 254, 258 (1988)).

Agencies may waive the recovery of small amounts where processing would be uneconomical. An agency wishing to do this should set a minimum billing figure based on a cost study. B-156022, April 28, 1966. The case for waiver is even stronger when the account to be credited with the payment is no longer available for obligation. See B-120978-O.M., October 19, 1954.

Finally, while the statute talks about the "actual cost of goods or services provided," there is one situation in which payment of actual costs will have no relationship to anything "provided." For various reasons, an agency may find it necessary to terminate an Economy Act contract before it is completed. It can terminate the contract "for convenience," the same as it could with a commercial contract, in which event the performing agency should not have to bear the loss for any expenses it has already incurred. The Comptroller General addressed the situation as follows in B-61814, January 3, 1947:

> "[W]here an order issued pursuant to [the Economy Act] is terminated after the establishment receiving said order has incurred expenses incident thereto the amount of such expenses or costs is for determination and adjustment by agreement between such agencies . . . . [T]here would appear to be ample authority for an agreement between the agencies . . . to effect an adjustment of the appropriations and/or funds of said agencies on the basis of the actual amount of the costs or expenses incurred."

(3) Obligation and deobligation

The obligational treatment of Economy Act transactions is addressed in 31 U.S.C. § 1535(d):

"An order placed or agreement made under this section obligates an appropriation of the ordering agency or unit. The amount obligated is deobligated to the extent that the agency or unit filling the order has not incurred obligations, before the end of the period of availability of the appropriation, in—

"(1) providing goods or services; or

"(2) making an authorized contract with another person to provide the requested goods or services." (Emphasis added.)

The first sentence of section 1535(d) establishes that an Economy Act agreement is sufficient to obligate the ordering agency's appropriations even though the agency's liability is not subject to enforcement the same as a contract with a private party. This sentence must be read in conjunction with 31 U.S.C. § 1501(a)(1), which recognizes interagency agreements and prescribes the requirements for a valid obligation. Under section 1501(a)(1), an obligation is recordable when supported by documentary evidence of:

"(1) a binding agreement between an agency and another person (including an agency) that is—

> "(A) in writing, in a way and form, and for a purpose authorized by law; and
>
> "(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided[.]"

Thus, an Economy Act agreement is recordable as an obligation under 31 U.S.C. § 1501(a)(1) if it meets the requirements specified in that section. 34 Comp. Gen. 418, 421 (1955); 39 Comp. Gen. 317, 318-19 (1959). It must, for example, involve a definite commitment for specific equipment, work, or services. See, e.g., 15 Comp. Gen. 863 (1936). Also, the recording statute reinforces a point in the Economy Act itself, namely, that the order or agreement must be for a purpose the ordering agency is authorized to accomplish.

In addition, a valid Economy Act obligation must satisfy the basic fiscal requirements applicable to obligations in general. Specifically, it must comply with the bona fide needs rule. E.g., 58 Comp. Gen. 471 (1979); B-195432, July 19, 1979. And, of course, the ordering agency must have sufficient obligational authority to satisfy the Antideficiency Act.

While the order must be placed or the agreement entered into before the ordering agency's appropriation expires for obligational purposes, actual payment to the performing agency may occur in a later fiscal year. If payment does not take place until after the obligated account has closed pursuant to 31 U.S.C. § 1552, the payment must be charged to a current appropriation of the ordering agency available for the same purpose. 31 U.S.C. § 1553(b); B-260993, June 26, 1996.

The second sentence of section 1535(d) lays out the requirement that the performing agency must incur obligations to fill the order within the period of availability of the appropriation being used. Otherwise the funds deobligate. In the case of a contract with a private party, as discussed in Chapter 5, obligated funds remain available to fund work performed in a subsequent fiscal year as long as the obligation met bona fide need concerns when it was incurred. Some statutes authorizing interagency transactions specifically provide for obligations to be treated the same as obligations with private contractors. E.g., 41 U.S.C. § 23. Subsection (c) of the original Economy Act contained similar language (47 Stat. 418). However, a concern soon arose that the Economy Act was being used to effectively extend the obligational life of appropriations beyond that which Congress had provided. Legislative resolution came about in stages. First, a 1936 statute restricted the period of availability of advance payments under the Economy Act to that provided in the source appropriation.[21] See 16 Comp. Gen. 752, 754 (1937); 16 Comp. Gen. 575, 577 (1936); 15 Comp. Gen. 1125 (1936).

A more comprehensive provision was enacted as part of the General Appropriation Act for 1951, September 6, 1950, ch. 896, § 1210,

[21] Act making deficiency appropriations for 1936, June 22, 1936, ch. 689, § 8, 49 Stat. 1597, 1648. The Act of June 26, 1943, ch. 150, 57 Stat. 219, amended the Economy Act itself to reflect the 1936 legislation.

64 Stat. 595, 765. This provision, the origin of what is now the second sentence of 31 U.S.C. § 1535(d), restricted the availability of any funds "withdrawn and credited" under the Economy Act to the period provided in the act which appropriated them. The obvious purpose, as reflected in pertinent committee reports, was to prevent use of the Economy Act as a subterfuge to continue the availability of appropriations beyond the period provided in the appropriating act. See 31 Comp. Gen. 83, 85 (1951); B-95760, June 27, 1950. Thus, funds obligated under the Economy Act must be deobligated at the end of their period of availability (fiscal–year or multiple-year period) to the extent the performing agency has not performed or itself incurred valid obligations as part of its performance (34 Comp. Gen. 418, 421-422 (1955)). The 1982 recodification of Title 31, United States Code, restated the provision as a positive requirement to deobligate.

The deobligation requirement is not limited to advance payments but applies as well to payment by way of reimbursement. 31 Comp. Gen. 83 (1951). Accordingly, as stated in 31 Comp. Gen. at 86,

> "where work is performed or services rendered on a reimbursable basis by one agency for another over a period covering more than one fiscal year, the respective annual appropriations of the serviced agency must be charged pro tanto with the work performed or services rendered in the particular fiscal year."

The deobligation requirement of 31 U.S.C. § 1535(d) does not apply where the appropriation originally obligated is a no-year appropriation. 39 Comp. Gen. 317 (1959).

A concrete example will illustrate the difference between a commercial contract and an Economy Act contract. Suppose that, towards the end of fiscal year 1996, an agency develops the need for some sort of statistical study. It enters into a contract with a private party a few days before the end of the fiscal year, obligating fiscal year 1996 appropriations, knowing full well that most of the work will be done in the following year. Assuming the need was legitimate, the obligated funds remain available to pay for the work. Now take the same situation except the contract is with another government agency under the Economy Act and the work is to be done by personnel of the performing agency. The 1996 funds may be used only for work actually done in the remaining days of that fiscal year. The remainder must be deobligated and reobligated against

1997 appropriations. See B-223833, November 5, 1987; B-134099, December 13, 1957.

The deobligation requirement of 31 U.S.C. § 1535(d) applies only to obligations under the Economy Act and has no effect on obligations for interagency transactions under other statutory authorities. E.g., 55 Comp. Gen. 1497 (1976); 51 Comp. Gen. 766 (1972); B-108332, March 26, 1952; B-95760, June 27, 1950.[22]

(4) Applicability of limitations and restrictions

Every agency is subject to a variety of authorities, limitations, restrictions, and exemptions. Some are governmentwide. Others are agency-specific. Still others may be bureau- or even program-specific. In analyzing the relationship of such provisions to an Economy Act transaction, it is important to start with an understanding of what the Economy Act is and is not supposed to do. As we have noted previously, the law is designed to permit an agency to accomplish some authorized task more simply and economically by using another agency's experience and/or expertise. It is not intended to permit an agency to avoid legislative restrictions on the use of its funds, nor is it intended to permit an agency running short of money to dip into the pocket of another vulnerable and more budgetarily secure agency.

The rule, as stated in 18 Comp. Gen. 489, 490-491 (1938), is as follows:

> "Funds transferred from the appropriations under one department to another department for the performance of work or services under authority of [the Economy Act], or similar statutory authority, are available for the purposes for which the appropriation from which transferred are available, and also subject to the same limitations fixed in the appropriations from which the funds are transferred."

Under the first part of this rule, the purpose availability of the funds is determined by reference to the purpose availability of the source appropriation. This is closely related to the rule discussed earlier under the "Funds available" heading, that an Economy Act transfer cannot expand that purpose availability.

[22] See Chapter 7 for further elaboration and case summaries.

The second part of the rule is easier to state than to apply. Transferred funds remain subject to limitations and restrictions applicable to the transferring agency, as a general rule. One example is expenditure limitations applicable to the source appropriation. 17 Comp. Gen. 900 (1938); 17 Comp. Gen. 73 (1937); 16 Comp. Gen. 545 (1936).[23] A 1951 decision, 31 Comp. Gen. 109, held that an appropriation rider which limited the filling of vacancies arising during the fiscal year followed an advance of funds to a working fund. A decision just two months later found the result equally applicable to payment by reimbursement. B-106101, November 15, 1951.

The same rule applies to exemptions from general prohibitions. For example, a statute long since repealed prohibited what GAO's decisions referred to as "the employment of personal services" in the District of Columbia without express authority. The Navy had a statutory exemption. The Army had one too, but it was much more limited. In a case where the Army was doing Economy Act work for the Navy, GAO held that the exemption applicable to the Navy controlled. Therefore, the Army could proceed without regard to the restriction it would have had to follow when making direct expenditures for its own work. 18 Comp. Gen. 489 (1938). In a similar case, the Commerce Department needed to procure supplies for use in Economy Act work it was doing for the Army. Both agencies had exemptions from the advertising requirement of 41 U.S.C. § 5 for small dollar amounts—$500 for the Army but only $25 for Commerce. The Comptroller General advised that even though Commerce was doing the purchasing, it could do so under the Army's more liberal exemption because it would be using Army money to make the purchase. 21 Comp. Gen. 254 (1941). See also B-54171, December 6, 1945.

There have been a number of exceptions to the rule that Economy Act transfers are subject to the limitations of the source appropriation. The substantive aspects of the exceptions are less important than their rationale. One case, B-106002, October 30, 1951, concluded that funds advanced or reimbursed in Economy Act

[23]The rule quoted in the text from 18 Comp. Gen. 489 refers to the Economy Act "or similar statutory authority." Hence, the cases cited in the text commingle Economy Act and non-Economy Act applications without distinction.

transactions were not subject to a monetary limit on personal services contained in the ordering agency's appropriation, because it could be clearly demonstrated that the ceiling was based on the cost of employees on the agency's payroll and did not include the estimated cost of Economy Act services either performed by the agency or reimbursed to it.

A similar limitation for the Bureau of Reclamation was the subject of another exception in B-79709, October 1, 1948. Legislative history revealed that the limitation stemmed from a congressional concern over an excessive number of administrative and supervisory personnel employed by the Bureau. Thus, the limitation was more on the Bureau than on the funds in the sense that it was apparently not intended to limit funds which could be transferred to some other agency, and spent by it to pay its own personnel used in performing Economy Act work requested by the Bureau. Thus, the Bureau could pay for Economy Act work without regard to the ceiling. However, work the Bureau did for other agencies had to be charged against the ceiling because, unlike the situation in B-106002 noted above, the figures upon which the ceiling in B-79709 was based did include transfers from other agencies.

Still another group of exceptions involved the authority to employ (and pay) personnel without regard to certain of the civil service laws. The issue first arose in 21 Comp. Gen. 749 (1942), in connection with Economy Act work being performed by the Bureau of the Census for various national defense agencies. The question was whether the Census Bureau was bound by limitations in the source appropriations. The decision noted the line of cases applying the general rule, such as 18 Comp. Gen. 489 and 21 Comp.Gen. 254, summarizing them as follows:

"[S]uch decisions involved cases in which it was sought to employ transferred funds for purposes for which the funds would not have been available in the transferring agency; or where it was sought to use transferred funds to employ personal services when such services could not have been employed (regardless of the method of appointment or the rates of pay) by the transferring agency; or where the transferred funds were directly subject to restrictions regarding the amount expendable therefrom for passenger-carrying automobiles, or for procurements without advertising, etc." Id. at 752.

The decision then went on to distinguish the prior cases on the following grounds:

"What is involved in the instant matter is essentially different being the accomplishment of certain object for which the funds of the transferring agency are available and which the agency to which the transfer is made is equipped to accomplish by the use of personnel and equipment it already has or is otherwise authorized to procure. Under such circumstances, the charge to be made by the performing agency against the funds of the agency desiring the services—whether under a reimbursement or advance-of-funds procedure—should be on the basis of the rates of compensation which the performing agency is otherwise authorized by law to pay to its personnel used in the performance of the services." Id.

Later cases applying this holding are B-38515, December 22, 1943, B-43377, August 14, 1944, and B-76808, July 29, 1948. A similar rationale is found in B-259499, August 22, 1995, advising the Central Intelligence Agency on the extent to which it could use its own personal services contractors in performing Economy Act orders where the ordering agency lacks authority to contract for personal services. Where the CIA is merely using the contractors along with its own employees to perform otherwise authorized work, there is no violation. This is merely "a means to an otherwise authorized end, and not an end in itself." Id. at 8. However, B-259499 noted, the Economy Act would be violated by placing the contractors under the direct supervision and control of the ordering agency, or by procuring the contractors solely in response to the ordering agency's needs. The latter two situations would amount to using the Economy Act to circumvent limitations on the ordering agency's authority.

We have noted that one of the Economy Act's objectives is to avoid improper augmentations. An Economy Act transaction carried out in accordance with law serves this purpose. It has been stated that Economy Act agreements "do not increase or decrease the appropriation of the requisitioned agency." A-99125, November 21, 1938. That case held that Economy Act transactions would not violate an appropriation proviso which limited the amounts available to a particular agency to the funds appropriated in that act. Similarly, absent some indication of a contrary intent, a monetary limit on general transfer authority is aimed at transfers which supplement the appropriation in question, and does not apply to credits to that appropriation incident to otherwise proper Economy Act transactions. B-120414, June 17, 1954. Variations in discernible intent may change the result. See B-30084, November 18, 1942.

In 31 Comp. Gen. 190 (1951), an agency whose appropriation contained a monetary ceiling on personal services asked whether the ceiling applied to services provided to others under the Economy Act or, more precisely, whether reimbursements received from ordering agencies counted against the ceiling. Viewing the limitation as applicable to expenses incurred for the agency itself, and noting the point from A-99125, November 21, 1938, that Economy Act transactions do not serve to increase or decrease the performing agency's appropriation, the decision said no. Absent evidence of a contrary intent, the rationale of 31 Comp. Gen. 190 would presumably apply as well to other types of limitations on the performing agency.

(5) Accountability issues

A payment to another federal agency differs from a payment to a private party in that an overpayment or erroneous payment to another agency does not result in an actual loss of funds to the United States. 24 Comp. Gen. 851, 853 (1945); B-156022, April 28, 1966; B-116194, October 5, 1953; B-44293, September 15, 1944. As stated in 24 Comp. Gen. at 853:

> "The question here presented does not involve the discharge of a Government obligation to a non-Government agency or individual where an excess payment might result in a loss to the United States. In case of an overpayment by one department to another, the matter can be adjusted upon discovery."

Consistent with this, the Economy Act includes in its payment provision the statement that a "bill submitted or a request for payment is not subject to audit or certification in advance of payment." 31 U.S.C. § 1535(b). The language had appeared in various places prior to the Economy Act, one example being the 1926 Navy working fund statute noted in our introductory comments. While research discloses no attempt to define "certification" for purposes of these statutes, the term does have a plain and well-known meaning in the payment context—the verification and endorsement of a payment voucher by a certifying officer or other authorized official—normally performed in advance of payment. See 31 U.S.C. § 3528. As the narrower and more specific provision, the no advance certification language in 31 U.S.C. § 1535(b) would take precedence over the more general certification requirements of 31 U.S.C. § 3528.

Thus, an ordering agency is not required to certify vouchers prior to payment when making payment to another federal entity, whether in advance or by reimbursement, in an Economy Act transaction.[24] However, keeping in mind that the ordering agency "remains accountable to the Congress for activities under appropriations made to it" (46 Comp. Gen. 73, 76 (1966)), an agency could presumably, on a voluntary basis, pass vouchers through some form of limited certification process as an internal control device, at least as long as it does not materially delay payment. Certainly the no audit or certification in advance of payment language does not permit the agency to completely disregard the conditions set forth in 31 U.S.C. § 1535(a). 16 Comp. Gen. 3, 4-5 (1936). Of course, the no advance certification language has no application to disbursements by a performing agency.

The preceding paragraphs presuppose a two-step payment process—payment by the ordering agency to the performing agency either preceded or followed by obligation and payment by the performing agency. There is an approach, described and approved in 44 Comp. Gen. 100 (1964), that consolidates these into a single step and effectively removes the no advance certification language from consideration. In that case, the former Department of Health, Education, and Welfare (HEW) was performing Economy Act services for the Agency for International Development (AID). Under the terms of the arrangement, AID would establish appropriate fund limitations and HEW certifying officers would certify vouchers directly against AID appropriations for direct payment of costs incurred in performing, with HEW being responsible for staying within the established fund limitations. Once it was established that the agencies were agreeable to operating this way, the primary legal obstacle was that certifying officers are normally supposed to be employees of the agency whose funds they are certifying. The solution was a slight bit of legerdemain that could be referred to as "cross-certification." The ordering agency appoints the performing agency's certifying officer as an officer or employee of it, the ordering agency, without compensation, and then designates him or her as one of its own certifying officers. Voila!

[24]To the extent it supports a contrary proposition, the editors view 39 Comp. Gen. 548 (1960) as incorrect. It inexplicably fails to consider the no advance certification language, and is inconsistent with the plain terms of the Economy Act itself (see 37 Op. Att'y Gen. 559 (1934)), and with applications of similar language in other statutes, such as 44 U.S.C. § 310 (payments for printing and binding). See also 56 Comp. Gen. 980 (1977); A-30304-O.M., February 10, 1930.

The concept of “cross-certification” has a number of applications in situations where financial services are themselves the subject of an Economy Act agreement. For example, the General Services Administration not infrequently enters into Economy Act “support agreements” with smaller agencies, boards, or commissions to provide administrative support services, including the processing of payment vouchers. In 55 Comp. Gen. 388 (1975), GSA inquired as to the potential liability of its certifying officers in such a situation. The answer is that it depends on exactly what has preceded the GSA certifying officer’s actions. Certainly, GSA could provide full certification under the agreement, in which event the GSA certifying officer would be the equivalent of the HEW certifying officer in 44 Comp. Gen. 100. However, if an official of the client agency certifies the voucher before it gets to GSA, GSA’s administrative processing is not “certification” for purposes of the accountable officer laws, and the GSA official will be liable only for errors made during his or her final processing.

For temporary agencies, the support agreement may include the payment of obligations after the agency has gone out of existence. However, the “appointment without compensation” sleight-of-hand cannot possibly be stretched to apply where the agency no longer exists. In such a case, before the GSA certifying officer can certify the voucher, (1) the agencies must have entered into an Economy Act agreement while the client agency was still “alive,” (2) the agreement must expressly authorize GSA to perform this function, and (3) the debt in question must have been incurred prior to the client agency’s expiration. 59 Comp. Gen. 471 (1980).

The cross-certification concept has also found overseas applications. For example, State Department officials may perform certifying and disbursing functions for military departments overseas, charging payments directly to the applicable military appropriations. 44 Comp. Gen. 818 (1965); 22 Comp. Gen. 48 (1942). Similarly, when the Department of Education was created and took over responsibility for the Defense Department’s Overseas Dependents’ Schools, Education wanted to retain Defense’s financial support services which had been in place for decades. It could accomplish this with an Economy Act agreement, applying guidance from decisions such as 44 Comp. Gen. 100 and 55 Comp. Gen. 388. B-200309-O.M., April 3, 1981.

Anyone processing payments for the Defense Department will sooner or later run into a confidential “emergency or extraordinary expense” payment. In a 1993 case, a State Department certifying officer in Haiti asked whether he could properly certify a voucher for unspecified “emergency or extraordinary” expenses where nobody would furnish supporting documentation or tell him what the money was for. Under 10 U.S.C. § 127, all that is required is a certification of confidentiality by an authorized military official. The State Department official could not question that certification. Under these circumstances, the State Department certifying officer’s “certification”—certifying merely that the payment was being charged to the emergency expense appropriation for that fiscal year—was little more than “subsequent administrative processing” as discussed in cases like 55 Comp. Gen. 388. 72 Comp. Gen. 279 (1993).

Fiscal services provided under an Economy Act agreement can, in appropriate circumstances, include disbursing cash from an imprest fund. The fact that the cashier is disbursing another agency’s money has no effect on accountability or liability. 65 Comp. Gen. 666, 675-77 (1986).

d. What Work or Services May Be Performed

(1) Details of personnel

A very common type of interagency service is the loan or detail of personnel. A detail is “the temporary assignment of an employee to a different position or a specified period, with the employee returning to regular duties at the end of the detail.” 64 Comp. Gen. 370, 376 (1985). Some of the earliest administrative decisions deal with details of personnel.

In 14 Comp. Dec. 294 (1907), the Comptroller of the Treasury was asked to advise the Secretary of the Treasury on a proposal to loan an employee to another agency, with the “borrowing agency” to reimburse only the employee’s travel and incidental expenses, but not basic salary. The Comptroller knew what the answer should be:

> “If these were questions of first impression I would be impelled to answer each of them in the negative, because of that provision in the statute [31 U.S.C. § 1301(a)] which requires all appropriations to be used exclusively for the purposes for which made.” 14 Comp. Dec. at 295.

However, he continued, “they are not questions of first impression.” Id. The practice had developed in the executive branch of loaning employees without reimbursement except for extra expenses incurred on account of the detail. This practice had been around for so long, according to the Comptroller, that it was virtually etched in stone. Id. at 295-96. As long as the agency could spare the employee for the requested time, it would be

> “in the interest of good government and economy to so utilize his services. His regular salary would be earned in any event, and in all probability without rendering in his own Department adequate services therefor. Therefore reimbursement has never, to my knowledge, been made on such details for regular salaries. But where additional expenses have accrued because of such detail such expenses have always been reimbursed to the regular appropriation from which originally paid . . . .” Id. at 296.

This rationale was quite remarkable. Subsequent comptrollers obviously struggled with the rationale’s weakness and were careful not to expand the rule of the 1907 case. Thus, if the loaning agency had to employ someone else to do the detailed employee’s job while he was gone, the salary was reimbursable. 22 Comp. Dec. 145 (1915). A 1916 case, 23 Comp. Dec. 242, soundly attacked the rationale of 14 Comp. Dec. 294, specifically the assumption that the employee “would have remained idle if he had not been loaned,” 23 Comp. Dec. at 245, and came close to throwing it out, but did not. Early GAO decisions failed to seize the opportunity but instead adhered to the “no reimbursement” rule. E.g., 6 Comp. Gen. 217 (1926).[25]

The 1932 enactment of the Economy Act provided the vehicle for change, but it was slow to implement. It was quickly recognized that the Economy Act authorized fully reimbursable details of personnel. 13 Comp. Gen. 234 (1934). However, as with the first round of Economy Act decisions in other contexts, the early decisions held that agencies had a choice. If they chose not to enter into a written Economy Act agreement expressly providing for full reimbursement, they could continue to operate under the old rules.

[25]Oddly, the early decisions were not so rigid when it came to intra-agency work. Where an employee did work for different bureaus within the same agency, the agency could prorate the salary among the appropriations involved, or could pay the entire salary from one appropriation and seek reimbursement from the others. 5 Comp. Gen. 1036 (1926).

Id. at 237. The question of how you could have nonreimbursable details in light of 31 U.S.C. § 1301(a) never went away but, like a stubborn weed in the garden, the "informal accommodation" approach survived (e.g., B-182398, March 29, 1976; B-30084, November 18, 1942), and was reaffirmed as late as 59 Comp. Gen. 366 (1980).

If enactment of the Economy Act was the first shoe dropping, the second shoe didn't drop until 64 Comp. Gen. 370 (1985). After reviewing the prior decisions and the legislative history of the Economy Act, the Comptroller General said in 1985 what the Economy Act probably thought it was saying in 1932, and certainly what the Comptroller of the Treasury really wanted to say in 1907:

> "Although Federal agencies may be part of a whole system of Government, appropriations to an agency are limited to the purposes for which appropriated, generally to the execution of particular agency functions. Absent statutory authority, those purposes would not include expenditures for programs of another agency. Since the receiving agency is gaining the benefit of work for programs for which funds have been appropriated to it, those appropriations should be used to pay for that work. Thus, a violation of the purpose law does occur when an agency spends money on salaries of employees detailed to another agency for work essentially unrelated to the loaning agency's functions." 64 Comp. Gen. at 379.

Accordingly, absent specific statutory authority to the contrary, details of personnel between agencies or between separately funded components of the same agency may not be done on a nonreimbursable basis, but must be done in accordance with the Economy Act, which requires full reimbursement of actual costs, one of which is the employee's salary. The fact that the loaning agency pays the employee from a revolving fund changes nothing; a nonreimbursable detail still creates an unauthorized augmentation of the receiving agency's appropriation, as well as violates the purpose limitations of 31 U.S.C. § 1301(a). B-247348, June 22, 1992.

Apart from details which may be reimbursable under some specific statutory authority, the decisions recognize two exceptions. First, nonreimbursable details are permissible "where they involve a matter similar or related to matters ordinarily handled by the loaning agency and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided." 64 Comp. Gen. at 380. Second, details "for brief periods when the numbers of persons and cost involved are minimal" and "the fiscal impact on the appropriation is negligible" do not require reimbursement. Id.

at 381. GAO has declined to attempt to specify the limits of the "de minimis" exception but it could not, for example, be stretched to cover a detail of 15-20 people. 65 Comp. Gen. 635 (1986).

The Department of Justice's Office of Legal Counsel has taken essentially the same position as 64 Comp. Gen. 370. 13 Op. Off. Legal Counsel 188 (1989) (United States Attorney's Office for the District of Columbia must reimburse Defense Department for year-long detail of 10 lawyers); 12 Op. Off. Legal Counsel 233 (1988) (detail of Internal Revenue Service agents to investigate tax fraud for an Independent Counsel could be nonreimbursable under the commonality of functions exception). While the OLC's approach and analysis are otherwise the same, it has misgivings over the propriety of a "de minimis" exception. 13 Op. Off. Legal Counsel at 190 n.3.

While the agreement should normally precede the detail, an agreement entered into after the detail has started can include the services already performed. B-75052, May 14, 1948. Reimbursement should include accrued annual and sick leave. 17 Comp. Gen. 571 (1938). It should also include travel expenses incurred in connection with the detail work. 15 Comp. Gen. 334 (1935); B-141349, December 9, 1959. If the detail is to be for a substantial period of time, the loaning agency should change the employee's official duty station to the location of the detail and then restore it when the assignment is done. If applicable to the distances involved, the employee may then become entitled to allowances incident to a permanent change of station, such as shipment of household goods. 24 Comp. Gen. 420 (1944). A case where this was done is B-224055, May 21, 1987.

If interagency details are authorized under statutory authority other than the Economy Act, whether or not they are reimbursable will naturally depend on the terms of the statute. A statute which is silent on the issue will generally be construed as not precluding reimbursement unless a contrary intent is manifested. For example, 5 U.S.C. § 3341 authorizes intra-agency details within the executive branch for renewable periods of not more than 120 days. The statute says nothing about reimbursement. GAO regards this as merely providing authority to make the details and not as exhibiting an intent that they be nonreimbursable. 64 Comp. Gen. at 381-82. The same applies to 5 U.S.C. § 3344 which authorizes detailing of administrative law judges but is similarly silent on the issue of reimbursement. 65 Comp. Gen. 635 (1986). The Justice Department has said the same thing with respect to "temporary reassignments" under the Anti-Drug Abuse Act of 1988. 13 Op. Off. Legal Counsel 188 (1989). An example of a statute which addresses reimbursement is 3 U.S.C. § 112, which authorizes details of executive branch employees to various White House offices and requires reimbursement for details exceeding 180 calendar days in any fiscal year. See 64 Comp. Gen. at 380; B-224033, May 26, 1987 (internal memorandum).

A different type of statute, discussed and applied in B-247348, June 22, 1992, is 44 U.S.C. § 316, which prohibits details of Government Printing Office employees "to duties not pertaining to the work of public printing and binding . . . unless expressly authorized by law."

Finally, it is not uncommon for agencies to detail employees to congressional committees. Two 1942 decisions, 21 Comp. Gen. 954 and 21 Comp. Gen. 1055, addressed this situation and held essentially that the details could be nonreimbursable if the committee's work for which the detail was sought could be said to help the agency accomplish some purpose of its own appropriations. These cases were the source of the "commonality of function" exception which 64 Comp. Gen. 370 applied across the board. See 64 Comp. Gen. at 379. The second 1942 decision emphasized that "mutuality of interest" is not enough.

> "[I]t must appear that the work of the committee to which the detail or loan of the employee is made will actually aid the agency in the accomplishment of a purpose for which its appropriation was made such as by obviating the necessity for the performance by such agency of the same or similar work." 21 Comp. Gen. at 1058.

A 1988 decision applied these precedents to conclude that the Treasury Department could detail two employees to the House Committee on Government Operations on a nonreimbursable basis to work with the committee on the oversight and review of the FTS-2000 telecommunications project. B-230960, April 11, 1988.

As to reimbursable details, section 202(f) of the Legislative Reorganization Act of 1946, 2 U.S.C. § 72a(f), provides that "[n]o committee [of the Congress] shall appoint to its staff any experts or other personnel detailed or assigned from any department or agency of the Government, except with the written permission of" specified committees. The Justice Department's Office of Legal Counsel regards this as implicit authority for reimbursable details of executive branch personnel to congressional committees, the theory being that a restriction like 2 U.S.C. § 72a(f) would be rather pointless if the authority didn't already exist. 12 Op. Off. Legal Counsel 184, 185 (1988). See also 1 Op. Off. Legal Counsel 108 (1977). However, the OLC cautions that agencies should have due regard for potential ethics and separation-of-powers concerns. 12 Op. Off. Legal Counsel at 186-89. GAO has pointed out that 2 U.S.C. § 72a(f) is a limitation on the authority of congressional committees, not a limitation on the loaning agency, and that compliance is not the loaning agency's responsibility. B-129874, January 4, 1971.

GAO details its own personnel to congressional committees under various authorities. A provision in GAO's organic legislation, 31 U.S.C. § 712(5), requires the agency to provide requested help, presumably including loans of personnel, to committees "having jurisdiction over revenue, appropriations, or expenditures." Details under this provision are not required to be reimbursed. B-129874, January 4, 1971; B-130496-O.M., March 13, 1957. In addition, GAO has applied the two 21 Comp. Gen. decisions to itself. B-41849, May 9, 1944; B-130496-O.M., above. Another statute, 31 U.S.C. § 734, provides that the Comptroller General "may assign or detail [GAO employees] to full-time continuous duty with a committee of Congress for not more than one year." A part of this statute which required reimbursement by the Senate was deleted in the 1985 Legislative Branch Appropriations Act "to put the Senate on the same basis as the House in this regard." S. Rep. No. 98-515, 15 (1984).

(2) Loans of personal property

Another area where the Economy Act wrought considerable change was reimbursement for interagency loans of equipment and other personal property. Prior to 1932, there was no authority to charge another government agency for the use of borrowed property. E.g., 9 Comp. Gen. 415 (1930). Also, as discussed under the Interagency Claims heading in Chapter 12, the borrowing agency lacked authority to use its appropriations to repair the borrowed property unless for its own continued use, the theory being that the property belonged to the United States and not to any individual agency. To some extent at least, the Economy Act amounts to “tacit recognition of property ownership rights in the various departments and agencies possessing such property.” 30 Comp. Gen. 295, 296 (1951).

Thus, one early case held that the Economy Act provided sufficient authority for the old Civil Aeronautics Board to lease surplus aircraft from another government agency. 24 Comp. Gen. 184 (1944). It also authorized the Soil Conservation Service to borrow a shallow draft river boat from the Bureau of Land Management for certain work in Alaska. 30 Comp. Gen. 295 (1951). The logic of the 1951 decision is simple. If the Economy Act authorizes the permanent transfer of equipment, and it unquestionably does, then it must also authorize “lesser transactions between departments on a temporary loan basis.” Id. at 296. Another boat was involved in 38 Comp. Gen. 558 (1959). The Maritime Administration wanted to loan a tug to the Coast Guard and asked if the transaction was within the scope of 24 Comp. Gen. 184. Sure it was, GAO replied. There was no “essential difference” between the lease in the 1944 case and the loan in this one (id. at 559), and therefore no reason not to follow 24 Comp. Gen. 184 and 30 Comp. Gen. 295.

That the Economy Act authorizes interagency loans of personal property has been confirmed in several judicial decisions, a rare example of the Economy Act coming before the courts in any context. The cases arose out of the 1973 occupation of the village of Wounded Knee, South Dakota, by members of a group called the American Indian Movement. Various law enforcement agencies had been called in, including the United States marshals and the Federal Bureau of Investigation. The Army provided substantial amounts of equipment, such as sniper rifles, protective vests, and armored personnel carriers. Defendants charged with obstructing law enforcement officers tried to argue that the Army’s involvement violated 18 U.S.C. § 1385, the so-called Posse Comitatus Act, which prohibits use of the Army or Air Force for law enforcement unless specifically authorized. With one exception, the courts held that the Posse Comitatus Act applies to personnel, not to equipment, and in any event providing the equipment was authorized by the Economy Act. United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1976), aff’d sub nom. United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), cert. denied, 430 U.S. 970; United States v. Red Feather, 392 F. Supp. 916, 923 (D.S.D. 1975); United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974), appeal dismissed, 510 F. 2d 808 (8th Cir.

1975). As the McArthur court noted, borrowing "highly technical equipment . . . for a specific, limited, temporary purpose is far preferable" to having to maintain the equipment permanently. 419 F. Supp. at 194. One court disagreed, holding that the Economy Act applies "only to sales, and not to loans." United States v. Banks, 383 F. Supp. 368, 376 (D. S.D. 1974). However, Banks goes against the clear weight of authority in this respect.[26]

The reimbursement of "actual costs" is somewhat different for loans of personal property than for other Economy Act transactions. If an agency loans a piece of equipment to another agency and the borrowing agency returns it in as good condition as when loaned, the loaning agency has not incurred any direct costs. Thus, the decision at 24 Comp. Gen. 184 (lease of surplus aircraft) said merely that the borrowing agency should agree "to reimburse the department for the cost, if any, necessarily incurred by it in connection with such transaction," plus repair costs. Id. at 186. Depreciation is an identifiable indirect cost, but recovery of depreciation is normally inappropriate under the standard of 57 Comp. Gen. 674 (1978), previously discussed under the Actual Cost heading. Reimbursable costs (or costs the borrowing agency should pay directly in the first instance) include such things, as and to the extent applicable, as transportation, activation, operation, maintenance, and repair. See, e.g., 38 Comp. Gen. 558, 560 (1959). Another permissible item of "cost" is a refundable deposit on containers. B-125414, September 30, 1955. An important expense which the borrowing agency should assume under the agreement, discussed further in Chapter 12, is the cost of repairing and/or restoring the property so as to return it to the lending agency in the same condition as when borrowed. E.g., 30 Comp. Gen. 295 (1951).

While there is no payment for the bare use of the property, i.e., divorced from some cost actually incurred by one of the agencies, the Economy Act should not be used for loans for indefinite periods

[26]Subsequent to the Wounded Knee litigation, Congress enacted 10 U.S.C. § 372, which expressly authorizes the Secretary of Defense to make equipment available to law enforcement organizations. At first, reimbursement was discretionary. See Pub. L. No. 97-86, § 905(a)(1), 95 Stat. 1099, 1116 (1981); 6 Op. Off. Legal Counsel 464 (1982). The reimbursement provision, 10 U.S.C. § 377, was amended in 1988 to require reimbursement, with certain exceptions, "[t]o the extent otherwise required" by the Economy Act or other applicable law.

which amount to permanent transfers in disguise. The reason is that a permanent transfer, while authorized under the Economy Act, requires payment for the property. 59 Comp. Gen. 366, 368 (1980); 38 Comp. Gen. 558, 560 (1959). In 16 Comp. Gen. 730 (1937), for example, an agency had loaned office equipment to another agency. When the borrowing agency's need for the property continued to the point where the lending agency had to replace it for its own use, the borrowing agency paid for the equipment. Agencies desiring a permanent transfer without reimbursement should seek statutory authority. 38 Comp. Gen. at 560.

A permanent transfer raises the question of how to value the property. The same question arises when property loaned under the Economy Act is totally destroyed. The decision at 16 Comp. Gen. 730 does not specify how the amount of the payment was calculated. In a case where property was destroyed, the question was whether value should be set at acquisition value or the value of similar property being disposed of as surplus property. GAO declined to choose, advising that the amount to be billed "is primarily a matter for adjustment and settlement" between the agencies concerned. B-146588, August 23, 1961. In 25 Comp. Gen. 322 (1945), however, a case involving lost property, the answer was zero. The parties could have provided for the situation in an Economy Act agreement, except they didn't enter into one. Once the property was lost, "there existed no proper subject of a purchase and sale," and, absent a prior agreement to that effect, the borrowing agency's appropriations were not available to purchase nonexistent property. Id. at 325.

(3) Common services

Questions concerning the provision and funding of common services arise most frequently in the case of larger agencies made up of component bureaus or offices funded under separate appropriations. It often makes sense, economically as well as operationally, to provide certain common services, procurement for example, centrally. How the agency goes about doing this depends primarily on its appropriations structure.

One approach might be to budget specifically for common services from a single, centralized appropriation. For example, a Department might receive an appropriation which is available for certain specified department-wide services such as personnel, information resources management, and "other necessary expenses for management support services to offices of the Department." Under this type of structure, questions of reimbursement should not arise. Indeed, requiring reimbursement from the component bureaus when Congress has provided funding in the departmental appropriation would be improper. B-202979-O.M., September 28, 1981.

A different approach is illustrated by 43 U.S.C. § 1467, which establishes a working capital fund for the Interior Department, to be available for specified common services—reproduction (of documents, we think), communication, supply, library, and health—plus "such other similar service functions as the Secretary determines may be performed more advantageously on a reimbursable basis." The receiving components are required to reimburse the fund "at rates which will return in full all expenses of operation, including reserves for accrued annual leave and depreciation of equipment." Under this structure, services within the scope of the working fund are provided centrally, but each component bureau must budget for its own needs, much as agencies budget for and pay rent to the General Services Administration.

If each bureau receives its own appropriations for support services and there is no further statutory guidance, the agency may centralize the provision of common services on a reimbursable basis under authority of the Economy Act—provided the reimbursements correspond to the value actually received. 70 Comp. Gen. 592, 595 (1991) (executive computer network); B-77791, July 23, 1948 (procurement of office supplies); B-202979-O.M., September 28, 1981 (legal services).

The centralization of common services may be equally desirable in the case of a single bureau with more than one operating appropriation, or a smaller agency which is not divided into component entities but which nevertheless receives several separate appropriations. While statutory authority is necessary because separate appropriations are involved, the Economy Act does not apply in this situation. 38 Comp. Gen. 734, 737-738 (1959). Following the 1959 decision, the Bureau of the Census, to whom that decision had been addressed, sought and received specific authority to charge common services to any available appropriation, provided the benefiting appropriation(s) reimbursed the financing appropriation no later than the end of the fiscal year. Pub. L. No. 87-489, 76 Stat. 104 (1962). Other agencies sought similar authority and GAO supported the enactment of governmentwide legislation. See B-136318, December 20, 1963. This was done a few years later, and the authority is now found at 31 U.S.C. § 1534, discussed under the Transfer heading in Chapter 2.

Thus, for intra-bureau services, or intra-agency services for agencies not divided into component entities, 31 U.S.C. § 1534 provides the necessary authority. For agencies composed of separately funded bureaus or offices, 31 U.S.C. § 1534 exists side-by-side with the Economy Act, and the agency would appear to have discretion in choosing which authority to use, although 31 U.S.C. § 1534 seems somewhat broader. The difference may be illustrated by the situation in 17 Comp. Gen. 748 (1938). The Bureau of Prisons entered into a contract for safety inspections and evaluations of all federal prisons. It proposed charging the contract price to the appropriation for one penitentiary, subject to proportionate reimbursement by the others. This, the decision concluded, could not be authorized under the Economy Act. At the time, the only option was for the voucher to list all contributing accounts, although a single check could of course be issued. Id. at 751. Now, however, assuming federal prisons were still receiving individual line-item appropriations, which they are not, this type of "convenience transaction" could presumably be done under authority of 31 U.S.C. § 1534.

(4) Other examples

As summarized earlier, the subject of an Economy Act transaction must be something the ordering agency is authorized to do and the performing agency is in a position to provide. Also, there must be direct benefit to the paying agency. B-16828, May 21, 1941; B-170587-O.M., October 21, 1970. Apart from these general prescriptions, the Economy Act makes no attempt to define the kinds of work, services, or materials that can be ordered. This is in apparent recognition of the great diversity of tasks and functions one encounters in the federal government, and the fact that these tasks and functions are subject to change over time. The legislative history gives some idea of what Congress had in mind:

"For illustration, the Navy maintains a highly specialized and trained inspection service. Why should not this personnel, when available, be used by other departments to inspect materials and supplies ordered to make certain that such materials comply strictly with specifications? Or if a department needs statistical work that can be more expeditiously done by another department it should have the right to call upon the agency especially equipped to perform the work. The Bureau of Standards is a highly specialized agency and its equipment and technical personnel should be made available to other services. Frequently the engineering staff of one department might be utilized by another department to great advantage.

"The War and Navy Departments are especially well equipped to furnish materials, work, and services for other departments. . . .

"The Treasury Department, Department of Justice, Interior Department, and Shipping Board have many vessels at sea. The Government navy yards should be available to these whenever repairs or other work can be done by the Navy Department as expeditiously and for less money than the materials and services will cost elsewhere.

"Illustrations might be multiplied but the above are sufficient to give a general idea of what may reasonably be expected under the [bill]." H.R. Rep. No. 72–1126, 15-16 (1932).

The examples we offer here are cases in which the cited decision or opinion either directly approved the proposed transaction (which does not necessarily mean that it actually took place), or at least noted it without further question in a context which can fairly be viewed as implicit approval.

One situation is the provision of administrative support services. Typically, the Economy Act is used to enable the General Services Administration to provide support services to smaller agencies. E.g., B-130961, April 21, 1976 (Federal Election Commission). In the case of a temporary agency or commission, the agreement may authorize GSA to perform various "posthumous" functions necessary for the liquidation of the agency's assets and liabilities. E.g., B-210226, May 28, 1985. However, there is no authority for anyone to do anything until the agency actually comes into existence and enters into such an agreement. B-230727, August 1, 1988 (legislative authority would be necessary to enable GSA or Treasury or anyone else to accept or act as custodian of private funds donated for use of commission prior to its statutory effective date).

Another group of cases involves the use of federal facilities (real property) of one type or another. A long line of decisions predating the Federal Property and Administrative Services Act of 1949 established the proposition that an agency could, under authority of the Economy Act, make surplus space available to other agencies. For government-owned buildings, the amount charged could include special services such as utilities and janitor services, but not rent. 26 Comp. Gen. 677 (1947); B-70978, December 5, 1947. For leased premises, the charge could include a proportionate share of the rent. 27 Comp. Gen. 317 (1947); 24 Comp. Gen. 851 (1945); B-74905, May 13, 1948; B-48853, April 21, 1945. It could also include alterations made by the agency holding the lease to adapt the space for use by the new tenant. B-72269, January 16, 1948. Agencies subject to the Federal Property Act now obtain their space requirements through GSA and no longer need to rely on the Economy Act. However, in situations not covered by the Federal Property Act, the old cases continue to apply. E.g., 43 Comp. Gen. 687 (1964). That case involved a proposal to make space in leased Postal Service facilities available to the Customs Service for it to perform its mail examining responsibilities. Since the Postal Service has its own space acquisition authorities, and since GSA regarded Customs' space as "special purpose space" and hence beyond GSA's responsibility, the solution was an Economy Act agreement based on 24 Comp. Gen. 851 and its progeny.

Similarly, when the Coast Guard needed temporary residential facilities at an airport in Alaska pending construction of permanent quarters, it could obtain them from the Federal Aviation Administration under the Economy Act. B-150530, January 28, 1963. See also B-14855, February 8, 1941 (agency can store and service another agency's motor vehicles if it can do so at less cost than private sources).

Medical services and facilities are not treated any differently. Thus, the Department of Veterans Affairs can make its hospitals available to nonveteran beneficiaries of other agencies, such as the Public Health Service, on a space-available basis, but cannot "bump" its own veteran beneficiaries in order to put itself in a position to do so. B-156510, June 7, 1965; B-156510, February 23, 1971. See also B-183256-O.M., December 22, 1975, and B-133044-O.M., August 11, 1976 (Economy Act authorizes VA to provide medical services to persons eligible for medical assistance from the Defense Department). A variation is B-171924, April 7, 1971, holding that an Air Force hospital on Clark Air Force Base in the Philippines could provide services to a child struck by a Coast Guard vehicle, to be reimbursed by the Coast Guard under the Economy Act.[27] A final medical case is B-62540, February 12, 1947, holding that the Economy Act was the appropriate authority for using agencies to pay proportionate shares of the operating cost of an emergency room run by the Public Health Service in a federal office building.

Another broad area in which the Economy Act is particularly useful is the occasional need by one agency of something another agency performs or produces on a regular basis. One example noted earlier is 13 Comp. Gen. 138 (1933), in which a government corporation authorized to issue securities sought help from what is now the Bureau of the Public Debt. Similarly, when Congress directed the Treasury Department to sell a portion of the nation's gold reserves, Treasury entered into an Economy Act agreement with the General Services Administration to conduct the sale. B-183192, June 17, 1975. Again, when the Defense Department wanted to conduct examinations of credit unions at U.S. military installations overseas, it logically turned to what is now the National Credit Union Administration, which routinely conducts similar examinations of credit unions stateside. B-158818, May 19, 1966. Other examples in this family are 54 Comp. Gen. 624, 630 (1975) (Secret Service protection for government officials other than those statutorily entitled to receive it); B-192875, January 15, 1980 (hearing examiners provided to other agencies by the Equal Employment Opportunity Commission in discrimination complaints); B-150322, December 7, 1962 (poll of employees of a private corporation on a labor relations issue conducted by National Labor Relations Board for the Federal Mediation and Conciliation Service); B-98216, October 2, 1950 (purchase by Defense Department of surplus potatoes from Department of Agriculture); B-95094, June 2, 1950 (technical services by National Bureau of Standards for the Bureau of the Mint).

Finally, we note a few miscellaneous cases, primarily to try to give some idea of the variety of transactions that can fit under the Economy Act's umbrella. The Economy Act has been used in, or at least was recognized as available for, the following situations:

[27] This is another example where the Economy Act was used as authority even though there was no written agreement "up front."

- Sale of arms by Defense Department to Central Intelligence Agency for use in covert operations. B-225832-O.M., February 25, 1987.
- Civic/humanitarian assistance activities by the Defense Department overseas. 63 Comp. Gen. 422, 443-46 (1984).
- Agreement between Veterans Administration and Navy whereby Navy would execute and superintend a contract for the construction of the Corregidor-Bataan Memorial. 46 Comp. Gen. 73 (1966).
- Attendance at conference (non-training) by employees of agencies other than sponsoring agency. B-190244, November 28, 1977.
- Purchase by Walter Reed Army Medical Center of motion picture supplies and services from Department of Agriculture. B-140652, November 9, 1959.
- Agreement between Bureau of Land Management and Fish and Wildlife Service for "control of predatory animals and rodents" on public domain lands. A-82570/B-120739, August 21, 1957.
- Services of National Park Service in planning and supervising installation of equipment in Franklin D. Roosevelt Library. B-64762, March 31, 1947.
- A congressional subcommittee study concluded that agencies could and should share federal laboratories under the Economy Act, if no more specific authority was available. Subcommittee on Science, Research, and Development, House Committee on Science and Astronautics, 90th Cong., 2d Sess., Utilization of Federal Laboratories (Comm. Print 1968).

e. What Work or Services May Not Be Performed

Apart from the restrictions specified in the Economy Act itself, limitations on what can be done under the Economy Act derive largely from common sense and axiomatic requirements of the appropriations process. One rule frequently encountered is that the Economy Act may not be used for services which the performing agency is required by law to provide and for which it receives appropriations. As the Department of Justice has noted, this rule "is required in order to prevent agencies from agreeing to reallocate funds between themselves in circumvention of the appropriations process." 9 Op. Off. Legal Counsel 96, 98 (1985) (preliminary print). See also 61 Comp. Gen. 419, 421 (1982) (charging the receiving agency "would compromise the basic integrity of the appropriations process" and would amount to a "usurpation of the congressional prerogative").

For example, if a GAO audit enables an agency to recover overcharges, the amounts recovered may not be paid over to GAO to help defray the cost of conducting the audit. B-163758-O.M., December 3, 1973. The reason is that conducting audits is GAO's job and it receives appropriations for that purpose. Similarly, the Social Security Administration is not authorized to charge the Railroad Retirement Board for information it is required to furnish under 45 U.S.C. § 231f(b)(7). 44 Comp. Gen. 56 (1964).[28]

Nor may the Justice Department, which is required by law to conduct the government's litigation and which receives appropriations for its litigation functions, pass the costs on to the "client agency." 16 Comp. Gen. 333 (1936). However, while Justice must conduct the litigation, the client agency typically provides a variety of support to the Justice Department, and to that extent Economy Act agreements are possible, even extending to the hiring of additional attorneys, provided that the work for which the client agency is paying is work it is authorized to do itself. 9 Op. Off. Legal Counsel 96 (1985) (preliminary print); 2 Op. Off. Legal Counsel 302 (1978). The types and extent of support depend in part on the breadth of the client agency's own statutory authority. 2 Op. Off. Legal Counsel at 305-06.

If a service is required to be provided on a nonreimbursable basis, the inadequacy of the providing agency's appropriations is legally irrelevant and does not permit reimbursement by the receiving agency. 18 Comp. Gen. 389, 391 (1938). If the service is authorized but not required, there may be circumstances under which reimbursement is permissible. An internal memorandum, B-194711-O.M., January 15, 1980, discussed one such situation. Each agency is required by 44 U.S.C. § 3102 to have a records management program. In addition, the National Archives and Records Administration has oversight and assistance responsibilities, which include conducting surveys and inspections. When NARA is performing its oversight function, or conducts a study on its own initiative, the general rule applies and NARA's appropriations must bear the cost. However, if an agency wants to conduct a study of its own program and asks NARA to do it, and NARA's appropriations are insufficient, nothing precludes a reimbursable arrangement under the Economy Act. Also, if

[28]Several additional examples are summarized under the "Other Augmentation Principles and Cases" heading in Chapter 6.

Congress has provided appropriations for a particular activity for an initial start-up period, and later discontinues funding with the intent that the activity become self-sufficient, reimbursement under the Economy Act is authorized. B-165117-O.M., December 23, 1975.

An agency providing services over and above what it is required by law to provide may invoke the Economy Act to recover the actual costs of the non-required services. For example, 44 U.S.C. § 1701 requires the Government Printing Office to provide addressing, wrapping, and mailing services for certain public documents. It cannot charge for these required services. 29 Comp. Gen. 327 (1950). However, section 1701 specifically excludes certain documents from its mandate. Since, GPO was also in a position to provide those services in an efficient and economical manner with respect to the excluded documents, it could do so on a reimbursable basis under the Economy Act. Id. Similarly, the Secret Service is statutorily required to provide protective services to specified officials. Officials other than those specified may obtain the services only by "purchasing" them under the Economy Act. 54 Comp. Gen. 624 (1975), modified on other grounds, 55 Comp. Gen. 578 (1975).

A variation worthy of note occurred in 34 Comp. Gen. 340 (1955). A series of decisions in the early 1950s had held that the Patent and Trademark Office could not charge fees to other government agencies for services performed in administering the patent and trademark laws. 33 Comp. Gen. 559 (1954), modified, 34 Comp. Gen. 340 (1955); 33 Comp. Gen. 27 (1953), amplified, 33 Comp. Gen. 559 (1954); 32 Comp. Gen. 392 (1953). In 34 Comp. Gen. 340, the Army had entered into an agreement with the United Kingdom for a royalty-free license to an invention, with the Army to bear all costs associated with filing and prosecuting a patent application in the United States. GAO agreed with the Patent Office that the rule need not apply because the services were not really being rendered to another government agency. The fees were essentially part of the consideration for the license. The law was changed in 1965 to authorize the Patent Office to charge fees to other government agencies, subject to discretionary waiver in the case of an "occasional or incidental request." 35 U.S.C. § 41(e). While the payment in 34 Comp. Gen. 340 would now be authorized under the statute, the approach of that decision could still be useful in analogous situations.

Closely related in both concept and rationale is the principle that an agency may not transfer administrative functions to another agency under the aegis of the Economy Act. Even under the Economy Act's 1920 predecessor, the Comptroller of the Treasury had held that "a particular duty placed on one branch of the Government by enactment of Congress or going to the essence of its existence" could not be transferred to another agency without statutory authority. 27 Comp. Dec. 892, 893 (1921). See also 8 Comp. Gen. 116 (1928). The rule continued under the Economy Act, its rationale being stated as follows in B-45488, November 11, 1944:

> "The theory . . . is that there is inherent in a grant of authority to a department or agency to perform a certain function, and to expend public funds in connection therewith, a responsibility which, having been reposed specifically in such department or agency by the Congress, may not be transferred except by specific action of the Congress. The soundness of this principle is without question . . . ."

The difficulty in applying the rule is that no one has ever attempted to define the admittedly vague term "administrative function" in this particular context, although as the rule has evolved a definition is arguably unnecessary. Certainly it would prohibit transfer of an entire appropriation. Decision of July 7, 1923 (no file designation), 23A MS 101. That decision stated the following rather fundamental proposition:

> "The intent of the Congress in requiring estimates and the making of appropriations thereon is the imposition of a duty upon the department to which [the appropriations are] made to act and be responsible for the expenditures made under the appropriations."

The rule has been held to embrace functions with respect to which an agency has authority to make "final and conclusive" determinations. Thus, the Veterans Administration could not transfer to the Federal Housing Administration management and disposal functions with respect to property acquired incident to its credit programs. B-156010-O.M., March 16, 1965. Equally unauthorized is the transfer of debt collection responsibilities under the Federal Claims Collection Act. While debt collection services can be provided under the Economy Act, they may not include the taking of final compromise or termination action. B-117604(7)-O.M., June 30, 1970. Both of these cases involve functions subject to "final and conclusive" authority. See also 17 Comp. Gen. 1054 (1938) holding, in a case predating the Federal Claims Collection Act, that there was no authority for an agency to transfer its debt collection responsibilities. In any event, while “final and conclusive,” authority will most likely bring a function under the rule, it is not an indispensable prerequisite.

Earlier decisions seemed to emphasize the permanency of the proposed transfer. E.g., 14 Comp. Gen. 455 (1934). However, later decisions recognize the crucial factor as who ends up exercising ultimate control. The first case to adopt this approach appears to have been B-45488, November 11, 1944. The Civil Service Commission proposed, at least for the duration of wartime conditions, to advance to the Army funds from the Civil Service Retirement and Disability Fund. The Army would hold the money in a trust account and treat it as a working fund from which to make refunds of retirement deductions to certain separating civilian employees. All concerned seemed to accept, as a starting premise, that the proposal amounted to performance by the Army of an administrative function of the Civil Service Commission. However, the proposal also contemplated that the Commission would audit all cases of refunds, and this, said the decision, “must be considered as a retention of a certain degree of supervision and control.” Thus, while the Army would be actually making the refunds, “responsibility for the performance of the function generally would remain” in the Commission. Therefore, the proposal was authorized under the Economy Act.

In sum, the lesson of B-45488 is that, for purposes of applying the “administrative function” rule, the allocation of ultimate responsibility is more important than becoming immersed in a semantic morass over what does or does not constitute an administrative function. An agency can acquire services under the Economy Act, but cannot turn over the ultimate responsibility for administering its programs or activities.

f. Contracting Out and “Off-Loading”

As originally enacted, the Economy Act made no provision for the performing agency to contract out all or any part of its performance. Indeed, the law authorized only work or services the performing agency was “in a position” to provide, and GAO construed this as precluding performance by use of contracts with third parties. 20 Comp. Gen. 264 (1940); 19 Comp. Gen. 544 (1939). Notwithstanding this limitation, it soon became clear that the use of commercial contracts in performing Economy Act orders could in certain circumstances be advantageous.

In 1942, Congress considered legislation which would have amended the Economy Act to authorize all agencies to use private contracts in performing Economy Act orders. GAO found the proposal unobjectionable. See B-18980, February 13, 1942. However, the legislation as enacted (Act of July 20, 1942, ch. 507, 56 Stat. 661) authorized contracting out only if the ordering agency was one of five specified agencies—Army, Navy, Treasury, Federal Aviation Administration, and Maritime Administration. The only explanation appearing in any printed legislative history materials was some concern over "trading going on among too many departments." See 52 Comp. Gen. 128, 133 (1972). This remained the law for 40 years.

The only decisional incursion of any significance during this period was 52 Comp. Gen. 128 (1972), advising the Environmental Protection Agency that the Economy Act did not inhibit the joint funding of contracts to carry out mutually beneficial projects where EPA was statutorily authorized to cooperate with the other participating agencies. The decision further noted that the Economy Act would not preclude EPA from acting as grantor under specific authority to make grants to other agencies which might in turn use contracts as part of their performance. Id. at 134.

In 1982, Congress again amended the Economy Act, this time authorizing all agencies to obtain goods and services by contract in fulfilling Economy Act orders. Pub. L. No. 97–332, 96 Stat. 1622. The legislative history described some of the potential advantages:

> "Since 1942, when the Economy Act was amended to allow agencies to contract out for goods and services on behalf of only 5 specified agencies, numerous areas of agency expertise have been developed. With the authority extended to allow agencies to contract out on behalf of any other Federal agency, an agency having only an occasional requirement in a specific area could turn to an agency with substantial experience in the area for assistance. This would eliminate the need to duplicate the requisite expertise. For instance, if the Immigration and Naturalization Service has a requirement for night sensors for border protection, that agency could seek assistance from the Department of Defense which presumably has already developed expertise in that area. Or, if the Coast Guard had a requirement for navigational equipment, it could seek assistance from the Department of the Navy to acquire such, rather than duplicate research and development already under way or completed. Various statutes now permit such interagency requisitioning in specific areas; however, removal of the general restriction allows the maximum utilization by the Government of valuable expertise developed over the years in the various Government agencies. In addition, such generally available authority creates the potential for wider use by the Government of quantity discounts or other benefits which may not have been available in the

past. It will also permit an agency to use another agency which has some, though not all, of the capability to do the requisitioned work by allowing the requisitioned agency to simply contract out the part of the work that it cannot do." H.R. Rep. No. 97–456, 4 (1982), reprinted in 1982 U.S.C.C.A.N. 3182, 3185.

The 1982 amendment changed the Economy Act in three ways. First, it amended 31 U.S.C. § 1535(a)(3) to generally authorize performing agencies to obtain ordered goods and services by contract, and deleted the limitation to the five named agencies. This eliminated the existing inhibition. Second, it amended 31 U.S.C. § 1535(a)(4)—the "lower cost" determination quoted at the beginning of our coverage—to replace the specific reference to competitive bids with a more general reference to providing the goods or services simply "by contract." The intent of this change was to permit the performing agency to use whatever methods of procurement are available to it. H.R. Rep. No. 97–456 at 5; 1982 U.S.C.C.A.N. at 31, 86. Finally, it added 31 U.S.C. § 1535(c):

"A condition or limitation applicable to amounts for procurement of an agency or unit placing an order or making a contract under this section applies to the placing of the order or the making of the contract."

This provision is designed to preclude use of the Economy Act to avoid legal restrictions on the availability of appropriated funds. Originally recommended by GAO,[29] it "prevents the ordering agency from accomplishing under the guise of an Economy Act transaction, objects or purposes outside the scope of its authority." B-259499, August 22, 1995, at 8.

The Competition in Contracting Act requires that procuring agencies obtain full and open competition "except in the case of procurement procedures otherwise expressly authorized by statute." 41 U.S.C. § 253(a)(1) (civilian procurements); 10 U.S.C. § 2304(a)(1) (military procurements). For purposes of this provision, the Economy Act is one of the otherwise authorized procedures. National Gateway Telecom. Inc. v. Aldridge, 701 F. Supp. 1104, 1113 (D.N.J. 1988), aff'd

[29] Reorganization Act of 1981; Amend Economy Act to Provide That All Departments and Agencies Obtain Materials of Services from Other Agencies by Contract; and Amend the Federal Grant and Cooperative Agreement Act: Hearings on H.R. 2528 et al. Before a Subcomm. of the House Comm. on Government Operations, 97th Cong., 1st Sess. 78 (1981) (statement of Milton J. Socolar, Special Assistant to the Comptroller General of the United States).

mem., 879 F.2d 858 (3d Cir. 1989) (10 U.S.C. § 2304); 70 Comp. Gen. 448, 453-54 (1991) (41 U.S.C. § 253). Thus, an agency can obtain its needs under another agency's requirements contract, as long as the transaction is in compliance with the Economy Act and the action is permissible under the performing agency's contract. National Gateway, 701 F. Supp. at 1114; 70 Comp. Gen. at 454; B-244691.2, November 25, 1992, recons. denied, B-244691.3, January 5, 1993. Exceeding a maximum quantity specified in the contract, however, would be outside the scope of the contract and would violate CICA's competition requirements. 70 Comp. Gen. at 457.

One of the Economy Act requirements the ordering agency must satisfy is the "lower cost" determination, 31 U.S.C. § 1535(a)(4). For example, in B-244691.2, November 25, 1992, the ordering agency made the determination without testing the open market because the price under the performing agency's requirements contract was lower than the current Federal Supply Schedule price, and agencies are permitted to purchase from a Supply Schedule contract without seeking further competition. This, GAO found, was perfectly reasonable.

As long as the various requirements of the Economy Act are satisfied, the ordering agency may also legitimately take into consideration such factors as administrative convenience or procurement risks, 70 Comp. Gen. at 454 n.5, or the need to obligate funds to avoid future funding cuts, National Gateway, 701 F. Supp. at 1111.

In the late 1980s and early 1990s, congressional attention to reported abuses under the Economy Act resulted in a detailed report by the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs—Off-Loading: The Abuse of Inter-Agency Contracting to Avoid Competition and Oversight Requirement, S. Prt. No. 61, 103d Cong., 2d Sess. (1994). The report's title reflects the birth of a new term, off-loading, defined (on page 1 of the Senate report) as "when one agency buys goods or services under a contract entered and administered by another agency." The report found that government agencies "off-load billions of dollars of contracts every year," and that "improper off-loads total at least in the hundreds of millions of dollars, and losses to the taxpayers are at least in the tens of millions of dollars." Id.

at 5. Among the abuses the report cited were the use of off-loading to avoid competition, to direct contracts to favored contractors, to improperly obligate expiring year-end appropriations, and to make a variety of inappropriate purchases. Id. at 6. The report recommended that off-loading be limited and subject to stronger regulatory controls. Id. at 44-46.

Congress responded with two pieces of legislation: for military procurements, section 844 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547, 1720, enacted into law as the Senate report was being written; and for civilian procurements, section 1074 of the Federal Acquisition Streamlining Act of 1974, Pub. L. No. 103-355, 108 Stat. 3243, 3271. The two provisions are virtually identical and require that the governing procurement regulations be amended to:

- permit off-loading only if the performing agency (a) has an existing contract for the same or similar goods or services, (b) is better qualified to enter into or administer the contract by reason of capabilities or expertise the ordering agency does not have, or (c) is specifically authorized by law to act in that capacity;
- require that off-loads be approved in advance by an authorized official of the ordering agency; and
- prohibit the payment of any fee in excess of the performing agency's actual costs or, if not known, estimated costs.

Implementing regulations are found in the Federal Acquisition Regulation, 48 C.F.R. Subpart 17.5 (60 Fed. Reg. 49720, September 26, 1995).[30] In addition, the law directed the Secretary of Defense and the Administrator for Federal Procurement Policy to develop systems to collect and evaluate data in order to monitor compliance.

2. Other Authorities

Although the best known interagency authority is the Economy Act, there are many others. Some are mandatory; most are optional. Some of the more common, like printing by the Government

[30] A very preliminary review of implementation indicated reasonable progress. See Interagency Contracting: Controls Over Economy Act Orders Being Strengthened, GAO/NSIAD-96-10 (October 1995).

Printing Office or the various services provided by the General Services Administration, are touched upon elsewhere in this work. Our purpose here is to present a few of the lesser-known authorities.

The Economy Act will not apply in the face of a more specific statute. E.g., 44 Comp. Gen. 683 (1965); 6 Op. Off. Legal Counsel 464 (1982); Integrated Systems Group, Inc. v. GSA and Department of the Army, GSBCA No. 13108-P, 95-1 B.C.A. ¶ 27, 484 (1995). Having said this, there are still situations in which it is legitimate to look to the Economy Act for guidance even though, strictly speaking, it does not apply, an example being where the statute prescribes reimbursement only in general terms. E.g., 72 Comp. Gen. 159 (1993) (term "reimbursable basis" in statute directing agencies to furnish certain services to Nuclear Regulatory Commission can include "added factor" for overhead). Be that as it may, the starting point is that each statute stands on its own with respect to what services can be provided, who the customers may be, and who bears the costs.

Government Employees Training Act. Under the Government Employees Training Act, an agency covered by the act (as defined in 5 U.S.C. § 4101) can extend its training to employees of other government agencies. The key provision is 5 U.S.C. § 4104:

> "An agency program for the training of employees by, in, and through Government facilities under this chapter shall . . .
>
> "(2) provide for the making by the agency, to the extent necessary and appropriate, of agreements with other agencies in any branch of the Government, on a reimbursable basis when requested by the other agencies, for—
>
>> "(A) use of Government facilities under the jurisdiction or control of the other agencies in any branch of the Government; and
>>
>> "(B) extension to employees of the agency of training programs of other agencies."

The legislative history of this provision, discussed in B-193293, November 13, 1978, makes clear that training can be reimbursable or nonreimbursable, in the discretion of the agency providing it. Thus, the Defense Department may, in its discretion, make its procurement training courses available on a space-available and tuition-free basis to employees of civilian agencies. Id. An agency choosing to charge a fee for its training is equally free to do so, and may credit fees received from other government agencies (but not private participants) to the appropriation which financed the training. B-241269, February 28, 1991.

Department of Defense. The Defense Department has the following provision:

> "If its head approves, a department or organization within the Department of Defense may, upon request, perform work and services for, or furnish supplies to, any other of those departments or organizations, without reimbursement or transfer of funds." 10 U.S.C. § 2571(b).

Authority to furnish the supplies or perform the services already exists under the Economy Act, so this provision adds nothing in that respect. What it does is authorize the military department or organization, at its discretion, to provide the supplies or services to another military entity on a nonreimbursable basis, i.e., free.

Tennessee Valley Authority. The Tennessee Valley Authority is authorized to "provide and operate facilities for the generation of electric energy for the use of the United States or any agency thereof." 16 U.S.C. § 831h-1. Rates charged are calculated to produce sufficient revenue to cover the operation, maintenance, and administration of the power system, payments to states and counties in lieu of taxes, required payments to the United States Treasury, and commitments to bondholders. 16 U.S.C. § 831n-4(f). This is an example of a statute which is sufficiently specific and detailed to wholly displace the Economy Act. 44 Comp. Gen. 683 (1965). Since electric power is a utility service, the General Services Administration can, under 40 U.S.C. § 481(a)(3), contract with TVA for periods of up to 10 years, and can delegate this authority to other agencies. Id.

District of Columbia. Enacted as part of the 1973 District of Columbia home rule legislation, 31 U.S.C. § 1537 authorizes the United States government and the District of Columbia government to provide reimbursable services to each other. Services provided under this authority are to be documented in an agreement negotiated by the respective governments and approved by the Director of the Office of Management and Budget and the Mayor of the District of Columbia. Subsection (c) provides that—

"(1) costs incurred by the United States Government may be paid from appropriations available to the District of Columbia government officer or employee to whom the services were provided; and

"(2) costs incurred by the District of Columbia government may be paid from amounts available to the United States Government officer or employee to whom the services were provided."

Charges are to be "based on the actual cost of providing the services." 40 U.S.C. § 1537(b)(2). Under this authority, for example, the Bureau of Prisons could provide personnel to the District of Columbia Department of Corrections in the event of a strike by District employees. 4B Op. Off. Legal Counsel 826 (1980). Another example is printing done for the District of Columbia by the Government Printing Office. 60 Comp. Gen. 710 (1981). That decision pointed out that, since the District is not a federal agency, the federal agency providing the services can charge interest on overdue accounts, and can collect a debt by administrative offset, but not against amounts withheld from the salaries of federal employees for D.C. income tax.

National Academy of Sciences. A statute dating back to the Civil War era (1863, to be precise) provides that the National Academy of Sciences—

"shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art, the actual expense of such investigations, examinations, experiments, and reports, to be paid from appropriations which may be made for the purpose, but the academy shall receive no compensation whatever for any services to the Government of the United States." 36 U.S.C. § 253.

This statute authorizes the Academy to be reimbursed for its "actual expenses," but nothing beyond that. A formal contract is not required, although the documentation used should adequately describe the services to be provided and the payment terms. B-37018, October 14, 1943.

An agreement calling for a fixed price which is not confined to reimbursement of actual expenses has been said to violate the statute. B-4252, June 21, 1939. It is probably more accurate to say that it creates no obligation over and above the payment of actual expenses. The other side of the coin is that the Academy has been permitted to recover the excess where its actual expenses exceeded the fixed price. 39 Comp. Gen. 71 (1959), as modified by 39 Comp. Gen. 391 (1959). GAO's suggestion is that the agreement should provide for the reimbursement of actual expenses up to a stipulated maximum, and should also provide that no costs be incurred above that amount unless authorized by some form of supplemental agreement. 39 Comp. Gen. at 392. A flat surcharge for overhead also violates the statute, but if the interagency work causes the Academy to increase its normal overhead, the amount of the increase (or a reasonable approximation) constitutes part of the actual expenses. B-19556, August 28, 1941. Cases like these do not stand for the proposition that the Academy's cost recovery cannot be subjected to contractual limits. Thus, a 1977 decision held the Academy's recovery of Independent Research and Development costs limited by provisions in procurement regulations to which it had agreed to be bound. B-58911, August 1, 1977.

Inspection of Personal Property. Section 201(d) of the Federal Property and Administrative Services Act, 40 U.S.C. § 481(d), provides that, subject to General Services Administration regulations—

> "any executive agency may utilize the services, work, materials, and equipment of any other executive agency, with the consent of such other executive agency, for the inspection of personal property incident to the procurement thereof, and notwithstanding section 1301(a) of title 31 or any other provision of law such other executive agency may furnish such services, work, materials, and equipment for that purpose without reimbursement or transfer of funds."

This provision is similar to the Defense Department statute noted above in that the service involved—property inspection in this case—could have been furnished under the Economy Act. Like the Defense Department statute, the significance of 40 U.S.C. § 481(d) is that it authorizes the providing agency to waive reimbursement.

National Archives and Records Administration. The Archivist of the United States has a range of duties and responsibilities with respect to the custody and preservation of government records. The Archivist is authorized by 44 U.S.C. § 2116(c) to charge a user fee for making or authenticating copies or reproductions of materials in his custody, calculated to recover costs including increments for the estimated cost of equipment replacement. The statute further provides:

"The Archivist may not charge for making or authenticating copies or reproductions of materials for official use by the United States Government unless appropriations available to the Archivist for this purpose are insufficient to cover the cost of performing the work."

The problem with this is that NARA receives a lump-sum operating appropriation and has the normal range of discretion in using it. Therefore, unless the Office of Management and Budget were to apportion a specific amount for reproducing documents for other agencies, when could it fairly be said that appropriations were insufficient? To avoid this problem, NARA simply stopped requesting appropriations for that specific purpose and funded the entire program on a reimbursable basis, an approach GAO approved in 64 Comp. Gen. 724 (1985). This, observed GAO, was "the most equitable way of allocating cost in performing this activity," since any other approach would inevitably favor early (in the fiscal year) users over later ones. Id. at 726.

3. Franchise Funds

Many agencies, and certainly most if not all of the larger ones, have working capital funds for providing common services. Each agency's working capital fund is designed primarily to service that agency. An idea that gained ground in the 1990s was to foster competition among agencies in the area of providing common services, the theory being that this would result in increased efficiency at reduced cost.

Section 403 of the Government Management Reform Act of 1994, Pub. L. No. 103-356, 108 Stat. 3410, 3413, 31 U.S.C. § 501 note, introduced the concept of the "franchise fund" as a pilot program. Subsection (a) authorizes the establishment of franchise funds in six executive agencies to be selected by the Office of Management and Budget in consultation with specified congressional committees. Subsection (b) provides:

"Each such fund may provide, consistent with guidelines established by [OMB], such common administrative support services to the agency and to other agencies as the head of such agency, with the concurrence of the Director, determines can be provided more efficiently through such a fund than by other means. To provide such services, each such fund is authorized to acquire the capital equipment, automated data processing systems, and financial management and management information systems needed. Services shall be provided by such funds on a competitive basis."

Subsection (c) addresses funding by providing those elements commonly found in revolving fund legislation. It authorizes the necessary start-up appropriations and the transfer of certain unexpended balances and inventories. It also addresses the charging and disposition of fees as follows:

> "Fees for services shall be established by the head of the agency at a level to cover the total estimated costs of providing such services. Such fees shall be deposited in the agency's fund to remain available until expended, and may be used to carry out the purposes of the fund." Pub. L. No. 103-356, § 403(c)(2), 108 Stat. 3414.

Thus, a franchise fund is basically a type of working capital fund, which in turn is a type of revolving fund, designed to compete with similar funds of other agencies to provide common administrative services. Examples of such services include accounting, financial management, information resources management, personnel, contracting, payroll, security, and training.[31]

The following franchise funds were established in 1997 appropriation acts:

- Department of Veterans Affairs, Pub. L. No. 104-204, 110 Stat. 2874, 2880 (1996).
- Environmental Protection Agency, Pub. L. No. 104-204, 110 Stat. at 2912.
- Federal Aviation Administration, Pub. L. No. 104-205, 110 Stat. 2951, 2957 (1996).
- Department of the Interior, Pub. L. No. 104-208, § 113, 110 Stat. 3009, 3009-200 (1996).
- Department of the Treasury, Pub. L. No. 104-208, 110 Stat. at 3009-316.

The provisions are fundamentally similar. Each provision authorizes the rates to include depreciation and accrued leave. Each authorizes up to four percent of total annual income to be retained as a reserve for acquisition of capital equipment and enhancement of support systems, with any excess to be transferred to the Treasury. The Interior, EPA, and FAA statutes mandate payment in advance;

[31]Susan Spurling, So VA Has a Franchise . . . What Does It Mean?, reprinted in 7 JFMIP News 13 (No. 4, 1996).

advance payment is permissible but not mandatory in the Treasury and VA statutes.

C. Revolving Funds

1. Introduction

a. Concept and Definition

A recurrent theme throughout much of this publication is the attempt to balance the legitimate need for executive flexibility with the constitutional role of the legislature as controller of the purse. While this theme underlies much of federal fiscal law, it is perhaps nowhere as clear as in the area of revolving funds.

Most Treasury accounts are either receipt accounts or expenditure accounts, but not both. Under the typical or "traditional" funding arrangement, any money an agency receives from any source outside of its congressional appropriations must, unless Congress has provided otherwise, be deposited in the Treasury to the credit of the appropriate general fund receipt account. 31 U.S.C. § 3302(b). Absent an appropriation, you do not withdraw money from a receipt account. Congress provides the agency's operating funds by making direct appropriations from the general fund of the Treasury. These are carried on Treasury's books in the form of general fund expenditure accounts. It is possible to credit money to an appropriation (expenditure) account—if specifically authorized by statute or if the money qualifies as a "repayment," such as the recovery of an erroneous payment, but the money is subject to the same limitations as the appropriation to which credited. Most importantly, its obligational availability expires along with the rest of the appropriation, and if the appropriation has already expired for obligational purposes at the time of the deposit, the funds deposited have only the limited availability of expired balances.[32] It should be

[32]Congress can, of course, authorize reimbursements to be made to appropriations "currently available" or "then current and chargeable." See B-75345, May 20, 1948. While this affects the agency's ability to re-use the money, the reimbursement still cannot remain available beyond the appropriation to which credited.

apparent that a key element of congressional control is the ability to control the disposition and use of receipts.

A revolving fund, while classified as an expenditure account, combines elements of both receipt and expenditure account types. The term "revolving fund" may be defined as "a fund established by the Congress to finance a cycle of operations through amounts received by the fund." Revolving Funds: Full Disclosure Needed for Better Congressional Control, GAO/PAD-77-25, 2 (August 30, 1977). See section 2-1520 of the Treasury Financial Manual (defining revolving funds). See also 38 Comp. Gen. 185, 186 (1958) (quoting an almost identical definition from an obsolete Budget-Treasury regulation, the apparent source of the Treasury definition). As this definition implies, the concept of a revolving fund is to permit the financing of some entity or activity on what is regarded as a more "business-like" basis. GAO's 1977 report explained this as follows:

> "In concept, expenditures from the revolving fund generate receipts which, in turn, are earmarked for new expenditures, thereby making the Government activity a self-sustaining enterprise. The concept is aimed at selected Government programs in which a buyer/seller relationship exists to foster an awareness of receipts versus outlays through business-like programming, planning, and budgeting. Such a market atmosphere is intended to create incentives for customers and managers of revolving funds to protect their self-interest through cost control and economic restraint, similar to those that exist in the private business sector." GAO/PAD-77-25 at 2.

By authorizing the agency to retain receipts and deposit them back into the fund, a revolving fund provides the authority necessary to avoid the miscellaneous receipts requirement of 31 U.S.C. § 3302(b).

Revolving funds in the federal government appear to have developed in the latter part of the 19th century. Although, we have not been able to identify the first revolving fund, the Navy is said to have had one as far back as 1878. GAO/PAD-77-25 at 11. Some years later, as part of the Navy's 1894 appropriation act, Congress created a permanent naval supply fund for the purchase of "ordinary commercial supplies . . ., to be reimbursed from the proper naval appropriations whenever the supplies purchased under said fund are issued for use." Act of March 3, 1893, 27 Stat. 715, 723-24. The term "revolving fund" does not appear in the early statutes, but seems to have come into use in the early 1900s. Thus, the Comptroller of the Treasury observed in a 1919 decision:

"The Congress has at times barred the application of [31 U.S.C. § 3302(b)] by authorizing expenditures under appropriations to be reimbursed such appropriations, and in recent years has used the term revolving fund for such purpose and the further purpose generally of permitting the use of the moneys without the fiscal year limitations which usually attend appropriations."
26 Comp. Dec. 295 (1919).

Within just a few more years, the term could be said to have an established meaning as a fund which (1) functioned as both a receipt account and an expenditure account and (2) continued available without fiscal year limitation. 1 Comp. Gen. 704 (1922). These, then, are the two key features of a revolving fund:

- A revolving fund is a single combined account to which receipts are credited and from which expenditures are made. Treasury does not establish separate "receipt" and "appropriation" accounts.
- The generated or collected receipts are available for expenditure for the authorized purposes of the fund without the need for further congressional action and without fiscal year limitation.

Thus, a revolving fund amounts to "a permanent authorization for a program to be financed, in whole or in part, through the use of its collections to carry out future operations." GAO/PAD-77-25 at 47. The fund's continuing availability is what distinguishes a revolving fund from a reimbursable appropriation. In the case of a reimbursable appropriation, the reimbursements are available only during the same period that the appropriation itself is available, whereas in a revolving fund, "monies are paid in and out over and over again for the same purpose." B-75345, May 20, 1948.

Proponents of revolving funds cite several advantages. See Senate Committee on Government Operations, Financial Management in the Federal Government, S. Doc. No. 87-11 (1961), at 267-68.

Since it involves only one "pocket," a revolving fund provides a simpler funding structure. A revolving fund presents a clearer picture of an activity's profit or loss. Also, reflecting expenditures in budget totals on a net basis, as is done with revolving funds, helps reduce budget distortion. Most important from the perspective of the spending agency is the increased flexibility under a revolving fund since the agency does not have to ask Congress for the money. For these reasons, particularly the last, most executive agencies, naturally and understandably, will take all the revolving funds they can get.

b. Types

There are three broad categories of revolving funds—public enterprise, intragovernmental, and trust.[33] Since they are all revolving funds, they share the common elements of revolving funds: they are created by act of Congress (more on this later), they operate as combined receipt and expenditure accounts, and they authorize use of the receipts without further congressional action.

(1) Public enterprise revolving fund

A public enterprise revolving fund is a revolving fund which derives most of its receipts from sources outside of the federal government. It usually involves (1) a business-type operation, (2) which generates receipts, (3) which are in turn used to finance a continuing cycle of operations. Although not a legal requirement, the fund should be self–sustaining or nearly so. GAO/PAD-77-25 at 7, 51.

Most government corporations are financed by public enterprise revolving funds. They are also commonly used for credit programs (direct loan, loan guarantee) of agencies such as the Department of Housing and Urban Development and the Small Business Administration. Although not necessary, the governing legislation sometimes explicitly designates the fund as a "public enterprise" fund. An example is 31 U.S.C. § 5136, the United States Mint Public Enterprise Fund. Either way, if it meets the criteria, Treasury will assign it an account symbol from the 4000-4499 group reserved for public enterprise revolving funds.[34]

(2) Intragovernmental revolving fund

An intragovernmental revolving fund (Treasury accounts 4500–4999) is, as the name implies, a revolving fund whose receipts come primarily from other government accounts. It is designed to carry

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[33]Our definitions are culled from several sources: Budget Glossary Exposure Draft, supra note 15 at 5-6; GAO/PAD-77-25 at 4-6; Treasury Financial Manual, § 2-1520; OMB Circular No. A-34, § 21.1 (1994).

[34]In most cases, the type of fund should be apparent from the statutory language and context. If not, the account symbol will at least tell you how Treasury regards it.

out a cycle of business-type operations with other federal agencies or separately funded components of the same agency. Examples of funds designed to finance dealings with other agencies are the various revolving funds available to the General Services Administration—the General Supply Fund and the Federal Buildings and Information Technology Funds. Another example is 5 U.S.C. § 1304(e), the revolving fund used by the Office of Personnel Management for training, background investigations, and other reimbursable functions.

Examples of intra-agency revolving funds are the working capital funds available in most larger agencies and several smaller ones to finance the centralized provision of common services. A working capital fund is—

"[a] revolving fund that operates as an accounting entity [in which] the assets are capitalized and all income is in the form of offsetting collections derived from the fund[s] operations and available in their entirety to finance the fund[s] continuing cycle of operations without fiscal year limitation."[35]

A typical example is the Commerce Department's working capital fund, 15 U.S.C. § 1521:

"There is hereby established a working capital fund of $100,000, without fiscal year limitation, for the payment of salaries and other expenses necessary to the maintenance and operation of (1) central duplicating, photographic, drafting, and photostating services and (2) such other services as the Secretary, with the approval of the Director of the [Office of Management and Budget], determines may be performed more advantageously as central services; said to be reimbursed from applicable funds of bureaus, offices, and agencies for which services are performed on the basis of rates which shall include estimated or actual charges for personal services, materials, equipment (including maintenance, repairs, and depreciation) and other expenses: . . . Provided further, That a separate schedule of expenditures and reimbursements, and a statement of the current assets and liabilities of the working capital fund as of the close of the last completed fiscal year, shall be included in the annual Budget."

[35] Budget Glossary Exposure Draft, supra note 15, at 86.

Note the common elements of a working capital fund law, most of which are exhibited in 15 U.S.C. § 1521.[36] Specifically:

- It may, as the Commerce Department statute does, fix the fund's capital. Many similar statutes do this; some, such as 20 U.S.C. § 3483, do not.
- The funds are available without fiscal year limitation.
- The statute will address the services to be covered in one of three ways: it may list the services (e.g., 42 U.S.C. § 3513), leave it to the agency's discretion (e.g., 42 U.S.C. § 3535(f)), or, like the Commerce statute, provide some combination. Discretion is not unbridled, but must remain within the scope of the fund statute. 6 Op. Off. Legal Counsel 384, 386 n.8 (1982).
- It will require payment at least by reimbursement. It may also authorize advance payments. An advance payment provision may limit the advance's availability to that of the paying appropriation. E.g., 7 U.S.C. § 2235.
- It may require some form of budgetary disclosure.
- Every statute we reviewed includes some direction on determining the amount of reimbursement, the inclusion of depreciation being the most common.

Another common element, this one not included in 15 U.S.C. § 1521, is a provision requiring periodic return of excess amounts to the general fund of the Treasury. E.g., 15 U.S.C. § 278b(f).

As the Justice Department has pointed out, a working capital fund statute like 15 U.S.C. § 1521 provides the necessary authority to tap the appropriations of the component bureaus to pay for the services, regardless of whether they were previously funded on a centralized or decentralized basis. 6 Op. Off. Legal Counsel 384 (1982). The Justice opinion also notes several services which an agency could

[36] Other working capital funds include 7 U.S.C. § 2235 (Agriculture); 15 U.S.C. § 278b (National Institute of Standards and Technology); 20 U.S.C. § 3483 (Education); 22 U.S.C. § 2684 (State); 28 U.S.C. § 527 (Justice); 29 U.S.C. §§ 563, 563a (Labor); 31 U.S.C. § 322 (Treasury); 40 U.S.C. § 293 (General Services Administration); 42 U.S.C. § 3513 (Health and Human Services); 42 U.S.C. § 3535(f) (Housing and Urban Development); 43 U.S.C. § 1467 (Interior); 43 U.S.C. § 1472 (Bureau of Reclamation); and 49 U.S.C. § 327 (Transportation). The Defense Department legislation (10 U.S.C. §§ 2208, 2216a) is covered separately later. Further discussion of the Labor, Justice, and GSA funds may be found in GAO's report Working Capital Funds: Three Agency Perspectives, GAO/AIMD-94-121 (May 1994).

legitimately place under its working capital fund: stockroom, health unit, fiscal, travel, audio-visual, messenger, and laundry services. Id. at 386-387 and n.8.

Other types of intragovernmental revolving funds are stock funds, industrial funds, and supply funds. Stock funds are used to finance inventories of consumable items. Industrial funds are used to finance industrial- and commercial-type activities. See Financial Management in the Federal Government, cited above, at 171. Both are found primarily within the Defense establishment. A supply fund is largely self-explanatory and is used to finance the operation and maintenance of an agency's supply system, plus whatever else the governing legislation may specify. Examples are 38 U.S.C. § 8121, establishing a revolving supply fund for the Department of Veterans Affairs, and 14 U.S.C. § 650, the Coast Guard Supply Fund.

(3) Trust revolving fund

A trust revolving fund (Treasury accounts 8400-8499) is similar to the other types—a fund permanently established to finance a continuing cycle of business-type operations—except that it is used for specific purposes or programs in accordance with a trust agreement or statute under which the government has essentially a fiduciary relationship with respect to amounts credited to the fund. An example is the Federal Deposit Insurance Corporation's Bank Insurance Fund (12 U.S.C. § 1821), into which are deposited the FDIC's assessments collected from member banks. Other examples are found in employee benefit programs which involve employee contributions. E.g., 5 U.S.C. § 8348 (Civil Service Retirement and Disability Fund), 5 U.S.C. § 8714 (Employees' Life Insurance Fund), 5 U.S.C. § 8909 (Employees Health Benefits Fund).

c. Congressional Control

There are no rules of law that either mandate or prohibit the creation of revolving funds in particular contexts. Accordingly, whether to create a revolving fund or not is a policy matter for Congress to decide. However, GAO has suggested that the normal budget and appropriation process is the best means for effective congressional control, and that when Congress creates a revolving fund it should be aware that it is yielding a portion of this control to the executive branch. E.g., B-139412, May 29, 1959; B-137458, October 10, 1958. See also Revolving Funds: Full Disclosure Needed for Better Congressional Control, GAO/PAD-77-25, 59-60 (August 30, 1977).

GAO has also taken the position that revolving funds should be created only upon a clear demonstration of need. Thus:

"[D]epartures from [the normal budget and appropriation process] should be permitted only on a clear showing that an activity cannot be successfully operated in the public interest within this framework. Any contemplated change in funding methods which may diminish this congressional control should be carefully considered as to its need. All practical means available within the framework of the regular financing structure should be fully explored. In the absence of special circumstances, we believe that the revolving fund method should be adopted only if its demonstrable merits in terms of more efficient operation of the activity clearly outweigh the disadvantages of reduced congressional control." B-137458, August 31, 1959.

There is even less justification for a revolving fund where the fund is not intended to be self-sustaining. B-142952, June 13, 1960.

The reduced visibility of a revolving fund activity "leaves the door open for management to embark on programs which may not have been contemplated and for which funds may not have been granted if requested." B-137458, October 10, 1958. Once established, the program can effectively develop a life of its own and continue to exist beyond the point where Congress might have chosen to abolish it had it been more visible. B-150004, June 17, 1966.

One device GAO has frequently recommended is the inclusion of a provision making funds available only to the extent provided annually in appropriation acts. E.g., B-143181, March 27, 1967; B-141651, June 13, 1960; B-140602, September 14, 1959. This, of course, deprives the fund of one of the key features of its "revolving" status.[37] An alternative approach in appropriate circumstances, which would allow flexibility while retaining congressional control over normal operations, might be the enactment of a permanently available, separate emergency fund to be replenished by annual

[37] A provision in the 1996 Legislative Branch Appropriations Act subjected several House of Representatives revolving funds to such a requirement. The House Appropriations Committee described the action as "abolishing" the funds. H.R. Rep. No. 104-141, at 17 (1995). This is arguably a bit too strong. See B-272197, June 27, 1996.

appropriations as and to the extent disbursed. National Flood Insurance Program—Major Changes Needed If It Is To Operate Without a Federal Subsidy, GAO/RCED-83-53, 36 (January 3, 1983); B-120047, September 10, 1959. GAO has also recommended that monetary ceilings be imposed on revolving supply funds. B-128197, June 26, 1956.

Despite the impression some of these documents might create, GAO's attitude towards revolving funds is not one of unyielding hostility. More recent reports recognize that public enterprise revolving funds may be appropriate when three criteria are met: (1) a continuing cycle of operations generates receipts, mostly from nonfederal sources; (2) the fund will be substantially self-sustaining over a period of several years; and (3) there is a substantial and continuing need for flexibility to meet unforeseen requirements. Proposed National Technical Information Service Revolving Fund, GAO/RCED-83-218, 5, 9 (August 25, 1983); GAO/RCED-83-53, at 36. In the case of the United States Mint's numismatic programs, GAO has gone so far as to recommend the establishment of a public enterprise revolving fund. Financial Management: The U.S. Mint's Accounting and Control Problems Need Management Attention, GAO/AFMD-89-88 (July 1989).

Even when looking favorably on a revolving fund proposal, GAO's reports and comments always recommend the retention of congressional controls. These include such things as periodic reauthorization; annual submission of business-type financial statements and budgets to Congress; limiting activities to those which have been reported to Congress in advance; and the return to the Treasury of net income, after prior-year adjustments, in excess of the amount needed to meet approved activities. GAO/RCED-83-218, at 6, 11. And, in its report on the Mint's numismatic programs, GAO recommended that the operations to be financed through the proposed revolving fund "be reviewed and approved through the annual appropriations process." GAO/AFMD-89-88, at 49.

To sum up GAO's position, revolving funds automatically and unavoidably diminish the congressional spending power. Nevertheless, where the advantages of revolving funds can be clearly demonstrated, GAO has not viewed them unfavorably, particularly where safeguards are available to assure congressional oversight.

2. Creation/Establishment

Perhaps the most fundamental rule relating to revolving funds is that a federal agency may not establish a revolving fund unless it has specific statutory authority to do so. 44 Comp. Gen. 87, 88 (1964); A-68410, January 20, 1936; A-65286, October 1, 1935; GAO/PAD-77-25, at 46. The reason is that 31 U.S.C. § 3302(b), the so-called "miscellaneous receipts statute," requires that any money a federal agency receives from any source outside of its congressional appropriations be deposited in the general fund of the Treasury unless otherwise provided. Since this requirement is statutory, exceptions must be statutory. Thus, agencies have no authority to administratively establish revolving funds even within a single fiscal year, let alone without fiscal year limitation.

The legislative authority creating a revolving fund must be explicit. Authority to reimburse an appropriation does not authorize the creation of a revolving fund. See 38 Comp. Gen. 185 (1958); B-75345, May 20, 1948. The authority to establish a revolving fund may, of course, be contained in an appropriation act. The National Technical Information Service revolving fund, for example, was created in the 1993 appropriation act for the Departments of Commerce, Justice, and State. See Pub. L. No. 102-395, tit. II, 106 Stat. 1828, 1853. See also B-127121, April 3, 1956 (appropriation act riders used over long period of time to modify restrictive provision in the Alaska Railroad's revolving fund).

While the authority must be explicit, there is no prescribed formula. Certainly the words "revolving fund" help. As noted earlier, there is a long-established congressional pattern of using the term "revolving fund" to mean the authority to retain specified receipts and to use them for authorized purposes without further congressional action and without fiscal year limitation. 1 Comp. Gen. 704 (1922); 26 Comp. Dec. 295 (1919); B-209680, February 24, 1983. However, as long as the statute contains the required elements, use of the words "revolving fund" is not necessary and failure to use them is not controlling. GAO/PAD-77-25, at 6; B-135037-O.M., June 19, 1958.

In order to create a revolving fund, a statute must, at a minimum, do the following:

- It must specify the receipts or collections which the agency is authorized to credit to the fund (user charges, for example).
- It must define the fund's authorized uses, i.e., the purpose or purposes for which the funds may be expended.
- It must authorize the agency to use those receipts for those purposes without fiscal year limitation.

A statute illustrating this is 15 U.S.C. § 1527a, the Commerce Department's Economics and Statistics Administration Revolving Fund:

> "There is hereby established the Economics and Statistics Administration Revolving Fund which shall be available without fiscal year limitation. For initial capitalization, there is appropriated $1,677,000 to the Fund: Provided, That the Secretary of Commerce is authorized to disseminate economic and statistical data products as authorized by [15 U.S.C. §§ 1525-1527] and charge fees necessary to recover the full costs incurred in their production. Notwithstanding [31 U.S.C. § 3302], receipts received from these data dissemination activities shall be credited to this account as offsetting collections, to be available for carrying out these purposes without further appropriation."

First, it specifies the receipts for credit to it—the fees charged to recover the costs in production of the data products to be disseminated. Second, it defines the authorized uses of the fund—to carry out the purposes of 15 U.S.C. §§ 1525-1527. Third, the statute uses the term "revolving fund" and states it "shall be available without fiscal year limitation." Statutes creating revolving funds often specify additional features that exceed the "minimum" requirements we have identified. This one, for example, provides the initial working capital and its treatment of receipts as "offsetting collections" insures—although it would have happened even without the language—that the fund will be presented in the budget totals on a net basis. In addition, such statutes may fix the amount of the fund's capital; authorize the fund to be maintained at the desired level by periodic appropriations as needed; direct that the fund be self-sustaining, or substantially so; require the return of excess amounts to the Treasury or, alternatively, authorize investment of these funds; or impose reporting requirements or other congressional control devices.

A statute which does not use the words "revolving fund" is 12 U.S.C. § 1755, the National Credit Union Administration's operating fund. However, it contains the attributes of a revolving fund, and the

Treasury Department's Federal Account Symbols and Titles in fact classifies it as a public enterprise revolving fund.

Examples of statutes requiring the return of excess amounts to the Treasury are cited later under the Augmentation and Impairment heading. Examples of the alternative approach—authorizing investment of funds not needed for current operations—are 12 U.S.C. § 1755(e), the revolving fund of the National Credit Union Administration, and 42 U.S.C. § 2000e-4(k)(3), the Equal Employment Opportunity Commission's Education, Technical Assistance, and Training Revolving Fund. Typically, as in these two instances, the statute authorizes investment only in obligations of, or whose principal is guaranteed by, the United States, and authorizes income from the investment to be retained by the fund.

The requirement for specific statutory authority applies to federal agencies. It does not apply to the use of revolving fund financing by grantees or contractors unless prohibited by the relevant grant agreement or contract. The question in 44 Comp. Gen. 87 (1964) was whether an educational institution funded by a State Department grant could use a revolving fund to finance the printing and sale of publications. The answer was yes, because nothing in the grant documents prohibited it and the miscellaneous receipts statute does not apply to funds in the hands of a grantee. A 1974 case, B-164031(1)-O.M., October 3, 1974, applied the same result to the publishing activities of a contractor. A requirement in the contract that unexpended funds be returned to the government upon completion did not stand in the way; the contractor's accountability upon completion of the contract did not alter its discretionary authority during the course of performance.

If it takes a statute to create a revolving fund, it logically follows that it also takes a statute to terminate one, unless the law establishing the fund includes some sort of built-in termination mechanism. Legislation terminating a revolving fund should address the payment of existing debts if any remain, and the disposition of the fund's balance and future receipts.[38]

[38] See Revolving Funds: Office of the Attending Physician Revolving Fund Can Be Terminated, GAO/AFMD-89-29, 2-3 (December 1988).

3. Receipts and Reimbursements

Since a revolving fund is a creature of statute, the statute which established the fund (or subsequent amendments or appropriation acts) will determine what may go into the fund. Receipts may be lumped generally into two categories, initial and ongoing or operational.

The typical revolving fund receives an initial infusion of working capital (called the fund's "corpus") to enable it to finance operations until the "operational receipts" start coming in. This initial capitalization, which the fund may be required to repay, is normally furnished as part of the legislation establishing the fund. It may be in the form of an initial lump-sum appropriation, a transfer of balances from some existing appropriation or fund, a transfer of property and/or equipment, borrowing authority, or some combination of these.

An example of a fund capitalized by a direct appropriation is the Economics and Statistics Administration Revolving Fund, 15 U.S.C. § 1527a ("For initial capitalization, there is appropriated $1,677,000 to the Fund"). Capitalization by transfer is illustrated by the Equal Employment Opportunity Commission Education, Technical Assistance, and Training Revolving Fund, which received its initial working capital by a transfer of $1,000,000 from the Commission's Salaries and Expenses appropriation. 42 U.S.C. § 2000e-4(k)(4). The Corps of Engineers Civil Revolving Fund authorized the Secretary of the Army "to provide capital for the fund by capitalizing the present inventories, plant and equipment of the civil works functions of the Corps of Engineers." 33 U.S.C. § 576. An example of one form of borrowing authority to capitalize a fund is 31 U.S.C. § 5136, the United States Mint Public Enterprise Fund, which authorized the Secretary of the Treasury, subject to reimbursement within one year, to "borrow such funds from the General Fund as may be necessary to meet obligations incurred prior to the receipt of revenues into the Fund."

After the initial capitalization, the defining feature of a revolving fund is, as we have seen, its ability to retain and use receipts. Normally, the receipts will be those generated by the fund's operations as this is the very concept of a revolving fund. See, e.g., B-124995, September 27, 1955; B-112395, October 20, 1952; B-105693, October 22, 1951.[39] This is not a firm legal requirement, however, and a revolving fund can mean "a fund which when reduced is replenished by new funds from specified sources," whether or not generated by the fund's operations. 23 Comp. Gen. 986, 988 (1944).

Either way, the authority to retain receipts is an exception to 31 U.S.C. § 3302(b). E.g., 19 Comp. Gen. 791 (1940), amplified, 20 Comp. Gen. 280 (1940). When describing 31 U.S.C. § 3302(b), we usually say that it requires that all receipts be deposited in the Treasury as miscellaneous receipts absent statutory authority for some other disposition. From the revolving fund perspective, it is more accurate to restate this a bit and to say that the statute requires that receipts be deposited in the Treasury either to the credit of an appropriation or fund where specifically authorized, or, where not so authorized, to the general fund as miscellaneous receipts. Thus, a revolving fund is an exception to the miscellaneous receipts requirement of 31 U.S.C. § 3302(b), but does not render the entire statute inapplicable. The portion of the statute requiring that receipts be deposited in the Treasury promptly and without deduction applies fully to revolving fund deposits. B-72105, November 7, 1963.

The statute will prescribe the types of receipts which may be credited to the fund and, where contextually appropriate, the method of payment. The prescription of sources is found in varying degrees of specificity, depending on the purpose of the fund. A fund intended to finance an entity rather than a particular activity tends to have broader language, an example being the Bonneville Power Administration's provision, 16 U.S.C. § 838i(a) ("all receipts, collections, and recoveries from all sources"). Some funds expressly authorize the crediting of receipts from the sale or exchange of, and payments for loss or damage to, fund property. E.g., 5 U.S.C. § 1304(e)(3) (OPM investigation/training fund); 44 U.S.C. § 309(b) (GPO revolving fund). Unlike an activity funded by direct appropriations, a revolving fund would, even without this explicit

[39]These three cases involve the Vessels Operations Revolving Fund, 46 U.S.C. App. § 1241a. While the scope of the fund was later expanded (46 U.S.C. App. §§ 1241b and 1241c) so that the specific result in at least two of the three cases would now be different, the relationship of receipts to fund operations remains.

authority, be able to retain payments for loss or damage to fund property. 50 Comp. Gen. 545 (1971).

The specification of authorized receipts operates, as one might expect, as a limitation as well as an authorization, although this principle should not be applied to the exclusion of common sense. Thus, a provision of the Agricultural Marketing Act providing that payments of principal or interest on loans be deposited in a revolving fund (12 U.S.C. § 1141f(b)) includes sale proceeds obtained in a foreclosure proceeding as well as voluntary payments. 12 Comp. Gen. 553 (1933).

Revolving fund legislation will also commonly address method of payment. At a minimum, payment by reimbursement is usually authorized. The statute also may or may not authorize advance payments. If the statute specifies reimbursement and is silent as to advances, advances are not authorized. 32 Comp. Gen. 99 (1952). But see 32 Comp. Gen. 45 (1952), in which legislative history was used to conclude that reimbursement did not preclude payment in advance. While the approach in 32 Comp. Gen. 45 appears questionable as a general proposition, the apparent congressional intent in that case was buttressed by a separate provision in the same appropriation act which made the appropriations of the client agencies available "for advances or reimbursements" to the fund.[40] An interesting linguistic variation found in several of the working capital fund statutes is "reimbursed in advance." E.g., 20 U.S.C. § 3483(b) (Department of Education); 42 U.S.C. § 3513 (Health and Human Services); 49 U.S.C. § 327(d) (Transportation).

Customer agencies receiving goods or services from the Government Printing Office's revolving fund are required to pay promptly upon the Public Printer's written request, "either in advance or upon completion of the work, all or part of the actual or estimated cost, as the case may be, and bills rendered by the Public Printer are not subject to audit or certification in advance of payment." 44 U.S.C. § 310. Under this provision, regardless of the status of the work, "[p]ayment of an acceptable invoice may not be

[40]The statute in that case, the Office of Personnel Management revolving fund, was subsequently amended to specifically include advances.

delayed in order to complete a prepayment audit." 56 Comp. Gen. 980, 981 (1977).

Where receipts are based on the cost of work or services, such as the typical working capital fund, the statute will generally require the recovery of indirect costs (overhead) as well as direct costs. For example, the Corps of Engineers Civil Revolving Fund, 33 U.S.C. § 576, requires payment "at rates which shall include charges for overhead and related expenses, depreciation of plant and equipment, and accrued leave." In B-167790, December 23, 1977, an agency whose regulations precluded reimbursement of administrative overhead nevertheless entered into an agreement with the Corps for revolving fund work. Since the requirement to charge for overhead was statutory, it had to prevail over the contrary provision in the customer agency's regulations. The burden properly fell upon the agency which had violated its own regulations, even if it did not fully understand that the Corps would be using its revolving fund. A more recent decision involving the same revolving fund, advised that the fund could recover its costs for "idle time" where fund property was forced to remain idle as the result of a congressional enactment, even though the effect may be that the reimbursing appropriations are paying for periods of non-use. B-257064, April 3, 1995. Precisely how to account for these costs (allotments, rate adjustments, etc.) is within the Corps's discretion.

The statutory language may be less explicit, providing merely for recovery on an "actual cost" basis, an example being the Office of Personnel Management revolving fund, 5 U.S.C. § 1304(e)(1). GAO has construed this language to include indirect costs, consistent with similar language in the Economy Act. B-206231-O.M., September 12, 1986. See also 72 Comp. Gen. 159 (1993) (similar interpretation of term "reimbursable basis"). GAO also encourages the administering agency to establish a clear definition of general terms like these. See OPM's Revolving Fund Policy Should Be Clarified and Management Controls Strengthened, GAO/GGD-84-23 (October 13, 1983).

It is not uncommon for revolving funds to enter into contracts with private parties as part of their performance. If a customer agency cancels an order and the revolving fund is forced to terminate the commercial contract for the convenience of the government and bear the resultant termination costs, it may recover these costs from the customer agency. 60 Comp. Gen. 520 (1981). However, the fund itself should bear the loss if it terminates a contract it entered into merely to build up its inventory in anticipation of customer orders. Id. at 523. In accord is 69 Comp. Gen. 112 (1989), holding that the General Services Administration may assess termination charges, payable to its Information Technology revolving fund, against an agency which had withdrawn from GSA's telecommunications system. The alternative in both cases would have been to pass those costs on to other customers.

We should note one final potential source of capital for a revolving fund—the United States Treasury. If a fund is falling behind its goal of self-sufficiency, or if there has been a significant impairment of capital, or if Congress wishes to increase the fund's capital, it can provide additional appropriations. Some revolving fund statutes expressly recognize this possibility (for example, 31 U.S.C. § 5142, the Bureau of Engraving and Printing Fund), although, subject to a possible point of order, absence of the language can't stop Congress from making the appropriation. Also, some revolving funds have borrowing authority, one example being the Rural Electrification and Telephone Revolving Fund, 7 U.S.C. § 931.[41]

4. Expenditures/Availability

a. Status as Appropriation

There are perhaps two "foundation rules" of revolving funds from which all else flows. One, discussed earlier, is that specific statutory authority is necessary to create a revolving fund. The second is that a revolving fund is an appropriation. Hence, funds in a revolving fund are appropriated funds. The significance of this rule is twofold. First, except as may be otherwise specified by statute, a revolving fund is available for expenditure without further appropriation action by Congress. It "is in no way dependent on the existence of [a separate] appropriation for the same purpose." B-209680, February 24, 1983. Second, unless specifically exempted, funds in a revolving fund are subject to the various limitations and restrictions applicable to appropriated funds.

[41] For a detailed analysis of borrowing authority, see Spending Authority Recordings in Certain Revolving Funds Impair Congressional Budget Control, GAO/PAD-80-29 (July 2, 1980).

The rationale for the rule that revolving funds are appropriated funds follows from the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), and the Appropriations Clause. U.S. Const., art. I, § 9, cl. 7.

In addition, 31 U.S.C. §§ 701(2) and 1101(2) define "appropriations" as including "other authority making amounts available for obligation or expenditure." A revolving fund certainly fits this definition. Discussing a now-obsolete fund called the "Farm Labor Supply Revolving Fund," the Comptroller General set forth the principle in these terms:

"The payments received from the growers who make use of the workers represent moneys collected for the use of the United States and in the absence of specific statutory authority would be required to be deposited into the general fund of the Treasury as miscellaneous receipts under [31 U.S.C. § 3302(b)]. In this case, the specific statutory authority to use the moneys is supplied by the referred-to legislation establishing the Fund. The result of such legislation is to continuously appropriate such collections for the authorized expenditures for which the Fund is available . . . . Thus, we conclude that the 'Farm Labor Supply Revolving Fund' does represent an 'appropriation' . . . ." 35 Comp. Gen. 436, 438 (1956).

GAO has expressed this principle on numerous occasions. E.g., 63 Comp. Gen. 31 (1983), aff'd on recons., B-210657, May 25, 1984 (operating fund of National Credit Union Administration is an appropriation and thus subject to certain employee compensation provisions in title 5 of the United States Code; the 1984 decision includes the more detailed discussion of the appropriation issue); 60 Comp. Gen. 323 (1981) (Federal Prison Industries revolving fund is an appropriated fund for purposes of surplus personal property provisions of Federal Property and Administrative Services Act); 35 Comp. Gen. 615 (1956) (statutory restriction on use of appropriated funds applies to operating fund of National Credit Union Administration's predecessor); B-204078.2, May 6, 1988 (Panama Canal Revolving Fund); B-217281-O.M., March 27, 1985 (revolving funds of Pension Benefit Guaranty Corporation subject to federal procurement laws and regulations); B-148229-O.M., May 15, 1962 (General Services Administration's General Supply Fund is an appropriated fund for purposes of administrative payment under Federal Tort Claims Act). The decisions have consistently rejected the suggestion that revolving funds should be regarded as nonappropriated funds. E.g., 60 Comp. Gen. at 327; B-210657, May 25, 1984.

The fact that the initial capitalization has been paid back to the general fund of the Treasury and the revolving fund has thereafter become fully self-sustaining through collections from private parties does not change the fund's character as an appropriation. 60 Comp. Gen. at 326; 35 Comp. Gen. at 438.

Most of the cases involve public enterprise revolving funds because it is there that the miscellaneous receipts statute comes into play. It is much harder to try to suggest that an intragovernmental revolving fund is not an appropriated fund, in effect, that moving money from one government pocket to another changes its status. E.g., 31 Comp. Gen. 7 (1951) (Navy Management Fund is an appropriation).[42] See also Pulsar Data Systems, Inc. v. General Services Administration, GSBCA No. 13223, 96-2 B.C.A. ¶ 28,407 (1996), a case involving a lease funded under GSA's working capital fund in which there is not the slightest suggestion that the monies are anything but appropriated funds.

The Court of Appeals for the District of Columbia Circuit is in agreement. Holding a military stock fund subject to certain procurement laws, the court stated that the revolving fund legislation "eliminated the need for a new appropriation each fiscal year by creating what was, in effect, an on-going appropriation." United Biscuit Co. v. Wirtz, 359 F.2d 206, 212 (D.C. Cir. 1965). Indeed, the court went on to note, in view of the Appropriations Clause of the Constitution, if a revolving fund is not an appropriation, its constitutionality is cast into doubt. Id. at 213 n.14. See also B-67175, July 16, 1947.

b. Purpose

Since funds in a revolving fund are appropriated funds, they are fully subject to 31 U.S.C. § 1301(a) which restricts the use of appropriated funds to their intended purpose(s). 63 Comp. Gen. 110, 112 (1983); 37 Comp. Gen. 564 (1958); B-203087, July 7, 1981. The purpose requirement, as discussed in detail in Chapter 4, applies to revolving funds in exactly the same manner that it applies to direct appropriations.

[42]A management fund may or may not be a revolving fund. See, e.g., 10 U.S.C. § 2209.

You look first and foremost to the statute creating the fund—in effect, the "appropriation"—to identify the fund's authorized purposes. Since revolving funds are by definition creatures of statute, this step is of paramount importance. The governing legislation may be somewhat general, or it may be painstakingly specific. Either way, the rule is the same: the terms of the statute, in conjunction with other applicable statutory provisions, circumscribe the fund's availability. Thus, for example, revolving funds for the Senate recording and photographic studios may not, without further statutory authority, be invested in short-term certificates of deposit since this is not a specified purpose under the enabling legislation (2 U.S.C. §§ 123b(g) and (h)). B-203087, July 7, 1981. Similarly, the General Services Administration's Working Capital Fund, which is available for the expenses of operating "a central blueprinting, photostating, and duplicating service" (40 U.S.C. § 293), may not be used to finance the agency's central library or travel office. B-208697, September 28, 1983. While reimbursing the Working Capital Fund from the appropriations which should have been charged in the first instance will avoid an Antideficiency Act violation, use of the Fund for unauthorized items was nevertheless improper. Id.

While the statute is the first and most important source for determining purpose availability, it cannot be expected to spell out every detail. If the statute does not directly address the item in question one way or the other, the next step is to apply the "necessary expense" rule the same as with a direct appropriation. E.g., 63 Comp. Gen. 110, 112 (1983); B-230304, March 18, 1988; B-216943, March 21, 1985. This means that a revolving fund is available for expenditures which are directly related to, and which materially contribute to accomplishing an authorized purpose of, the fund and which are not otherwise specifically provided for or prohibited.

One revolving fund whose purpose statement is quite general is the Bureau of Engraving and Printing Fund, 31 U.S.C. § 5142. The Fund is available "to operate the Bureau of Engraving and Printing" (31 U.S.C. § 5142(a)(1)) or, in the original language, "for financing all costs and expenses of operating and maintaining the Bureau" (64 Stat. 409). Under this language, the Fund has been held available for various alterations and improvements to the Bureau's real property (replacements and additions of elevators, air conditioning, electrical, plumbing and heating equipment, partitions, flooring, etc.), as these are clearly necessary costs of operating and maintaining the Bureau. B-104492, October 4, 1951. It may be used to send representatives to meetings of societies of coin collectors as this is sufficiently related to the Bureau's activities for purposes of 5 U.S.C. § 4110. B-152624, February 18, 1965. And, in view of legislative history strongly indicating an intent that the language be broadly construed, it satisfies the requirement of 5 U.S.C. § 3109(b) that the procurement of experts and consultants be "authorized by an appropriation or other statute." B-122562, May 26, 1955. However, GAO concluded in 43 Comp. Gen. 564 (1964) that the revolving fund was not available to compile and publish a 100-year history of the Bureau. The publication's relationship to the operations of what was essentially a manufacturing establishment were rather tenuous and the Bureau lacked authority to disseminate information.

Another illustration is the Rural Housing Insurance Fund, 42 U.S.C. § 1487, which, under subsection (j)(3), is available for "servicing of loans, and other related program services and expenses." One "related expense" chargeable to the fund is the purchase of surety bonds needed to obtain the release of deeds of trust for borrowers where the Farmers Home Administration could not find, and therefore could not deliver, the original canceled promissory note. B-114860, December 19, 1979. GAO also regards the fund as available to pay the pro rata share of developing and installing a new computerized program accounting system, intended in part to permit prompter and more accurate loan servicing. B-226249, March 2, 1988 (internal memorandum).

A somewhat more specific purpose statement was contained in the now-defunct Farm Labor Supply Revolving Fund. The Agricultural Act of 1949 authorized the Department of Labor to incur, on a reimbursable basis, certain expenses incident to the transportation and subsistence of farm workers. The revolving fund was available "for payment of transportation, subsistence, and all other expenses" which were reimbursable under the Agricultural Act (65 Stat. 741). One decision concluded that the fund was available for the cost of physical examinations because they could be regarded as directly connected with the transportation of the workers into the country. Of course this also meant that the costs were reimbursable and would ultimately be borne by the employers of the imported workers and not the taxpayers. 33 Comp. Gen. 425 (1954). However, the "necessary expense" rationale could not be stretched far enough to justify charging the revolving fund for the cost of a management survey of the program. B-119354, March 30, 1959.

An example of an expenditure which is otherwise provided for is B-230304, March 18, 1988, concluding that the Federal Prison Industries' revolving fund was not available to construct a prison camp because Congress had provided statutory procedures and specific appropriations for prison construction. An expenditure which is otherwise prohibited is illustrated in B-67175, July 16, 1947, finding a revolving fund unavailable for the purchase of motor vehicles without the specific authority required by 31 U.S.C. § 1343(b). By way of contrast, in B-122562, May 26, 1955, one of the Bureau of Engraving and Printing cases noted above, explicit legislative history combined with sufficiently broad statutory language were found to supply the necessary authority.

In analyzing the purpose availability of a revolving fund, as with a direct appropriation, the agency has reasonable discretion in selecting means of implementation, as long as its exercise is consistent with the statutory objectives. Since the 1970s, the Department of Housing and Urban Development had a revolving fund to finance something called the New Community Development Program. The fund was available for specified forms of credit and other financial assistance, and for "any other program expenditures." When the program failed and the incipient new communities raced toward insolvency, HUD was faced with a variety of options. In one decision, GAO advised that, under the statute, HUD could acquire the property by foreclosing on its security and undertake a variety of expenditures incident to engaging a new builder. Actions specifically authorized by the statute had to be regarded as "program expenditures," and nothing in the law required HUD to choose the option which would minimize the government's loss. B-170971, July 9, 1976. The discretion was not open-ended, however. Another decision, cautioning that "program expenditures" means "expenses of the program established by other sections" of the statute, found no basis for using the revolving fund to, in effect, step into the developer's shoes and maintain and operate a development, except pursuant to a bona fide determination to acquire a given security. B-170971, January 22, 1976.

The desirability of a proposed expenditure is not enough to supply legal authority which is otherwise lacking. In 40 Comp. Gen. 356 (1960), for example, the Veterans Administration proposed using its revolving supply fund to finance a program to recover silver from X-ray developing solutions. There was no question that the proposal was a good idea. The problem was that recovering silver was more of an industrial-type operation than the furnishing of supplies and the reclaimed silver was apparently of no benefit to any of the appropriations which supported the supply fund. Therefore, GAO was forced to conclude that the proposal was not an authorized revolving fund activity, but urged the VA to seek an amendment to its statute. This was done, and the statute now specifically includes the "reclamation of used, spent, or excess personal property." 38 U.S.C. § 8121(a).

Chapter 4 uses over a dozen broad subject areas to illustrate different aspects of purpose availability. The same authorities and limitations apply to revolving funds. For example:

- Statutes dealing with the use of appropriated funds to pay the expenses of attendance at meetings apply to revolving funds. 34 Comp. Gen. 573 (1955) (37 U.S.C. § 412 (DOD)); B-152624, February 18, 1965 (5 U.S.C. § 4110).
- Employees paid from revolving funds are subject to the statutory restriction on payment of compensation to noncitizens. 50 Comp. Gen. 323 (1970);[43] B-161976, August 10, 1967.
- Like direct appropriations, revolving funds are not available for entertainment without statutory authority. B-170938, October 30, 1972.
- Revolving fund may be used to subsidize employee cafeteria if properly justified under the "necessary expense" rule. B-216943, March 21, 1985.

[43]Technically, 50 Comp. Gen. 323 involved a "special deposit account," but the decision points out that it was similar to a revolving fund in that it authorized the crediting of receipts and their use for specified purposes.

- Revolving funds are subject to the prohibition in 31 U.S.C. § 1348(a)(1) on providing telephone service to private residences. 35 Comp. Gen. 615 (1956).

An intragovernmental revolving fund presents a further complication. Its uses are, of course, governed by the statute which created it. See, e.g., 40 Comp. Gen. 356, holding that a revolving supply fund is available to finance a supply operation and not an industrial-type program. In addition, it is necessary to consider the purpose availability of the supporting appropriations, i.e., the appropriations from which the revolving fund is advanced or reimbursed. A decision addressing the Navy Industrial Fund stated the rule that the Fund is "available only for the purposes permissible under [the] source appropriation, and subject to the source restrictions." 63 Comp. Gen. 145, 150 (1984). See also, e.g., 18 Comp. Gen. 489, 490-91 (1938); B-106101, November 15, 1951. Statements like this must be read with caution. They do not mean that purpose restrictions on the source appropriation follow the money into the grave. If, for example, the Office of Personnel Management conducts a background investigation from its revolving fund and is reimbursed from the client agency's Salaries and Expenses appropriation, the fact that the client agency's appropriation may be subject to a restriction on, say, some form of lobbying has no relevance once the money is in OPM's account. What the rule does mean is that revolving fund financing cannot be used to permit the customer agency to evade restrictions on its funds or to accomplish some purpose it is not authorized to do directly. E.g., 30 Comp. Gen. 453 (1951) (working capital fund not available for construction where customer agency lacks the authority required by 41 U.S.C. § 12). See also 34 Comp. Gen. 573 (1955); B-161976, August 10, 1967. For related material, see the "Applicability of limitations and restrictions" heading in the Economy Act section of this chapter.

c. Time

If purpose availability illustrates a revolving fund's strongest resemblance to a direct appropriation, time availability highlights perhaps the clearest divergence. As pointed out earlier in this discussion, one of the key features of a revolving fund is that it is available without further congressional action and without fiscal year limitation. This continuing availability has long been recognized as an inherent characteristic of a revolving fund, at least as that term is used in statutes enacted by the United States

Congress. While the more modern statutes tend to include explicit language such as "without fiscal year limitation," without more, the term "revolving fund" alone would be construed to mean the same thing. 1 Comp. Gen. 704 (1922); 26 Comp. Dec. 295 (1919).

Thus, the various rules discussed in Chapter 5 governing the obligation and expenditure of fixed-year appropriations with respect to time do not apply to revolving funds. For purposes of comparison, the time availability of a revolving fund, unless otherwise restricted by statute, is similar to that of a no-year appropriation—the money is "available until expended." This being the case, the rules for no-year appropriations provide a useful analogy. Under a no-year appropriation—and therefore a revolving fund as well—"all statutory time limits as to when the funds may be obligated and expended are removed." 40 Comp. Gen. 694, 696 (1961). Amounts credited to the fund are treated as unobligated balances and are available for obligation the same as any other unobligated money in the fund. Id. at 697. Deobligated funds are treated the same way. B-200519, November 28, 1980.

A question which appears to have drawn little attention is whether 31 U.S.C. § 1555 applies to revolving funds. That statute requires that a no-year account be closed if the agency head determines that the purposes of the appropriation have been carried out and if there have been no disbursements from the account for two consecutive fiscal years. In a 1979 memorandum, GAO's General Counsel took the position that the statute would apply to uranium enrichment revenues which the Department of Energy was authorized under 42 U.S.C. § 5821(h) to retain and use for program expenses without fiscal year limitation. B-159687-O.M., October 25, 1979. The only difference between this and a true revolving fund was that the authority to retain and use the revenues was not permanent but had to be implemented in annual appropriation acts. In 72 Comp. Gen. 295 (1993), the Treasury Department had invoked 31 U.S.C. § 1555 to terminate the Check Forgery Insurance Fund, a revolving fund. GAO found closure improper because the reasons the fund had been created continued to exist. While the issue was not directly raised in the decision, both Treasury and GAO regarded 31 U.S.C. § 1555 as applicable to the revolving fund without question.

The apparent purpose of 31 U.S.C. § 1555 is to encourage the closing of inactive accounts (39 Comp. Gen. 244, 245 (1959)), and there is no reason this should not apply to a revolving fund whose inactivity legitimately suggests that it is no longer needed. If for whatever reason the period of inactivity does not indicate that the account should be closed, the agency administering the fund has the power to ward off closure by simply declining to make the "purposes served" determination.

With the limitations of a fixed-year appropriation out of the picture, there is little left to the bona fide needs rule as applied to a revolving fund, except perhaps a simple affirmation that the fund should be used only for valid purposes. E.g., 57 Comp. Gen. 865, 868-869 (1978). Of course, use of a revolving fund to liquidate obligations incurred prior to its creation would be improper unless expressly authorized. In this connection, it is not uncommon for legislation to authorize a newly created revolving fund to assume both the assets and the liabilities of specified existing accounts. An example is the Corps of Engineers Civil Revolving Fund, 33 U.S.C. § 576.

A common manifestation of the absence of bona fide need concerns is the use of revolving funds for multi-year contracts. As long as considerations of purpose and amount are satisfied, a number of decisions have sanctioned the use of multi-year contracts under revolving funds. E.g., 57 Comp. Gen. at 869 (lease of computer equipment); 48 Comp. Gen. 497, 502 (1969); 45 Comp. Gen. 59, 66 (1965) (purchase of supplies under stock fund).

As with the purpose arena, the intragovernmental revolving fund introduces an additional complication because it implicates the appropriations of the customer agency. When entering into a transaction with a revolving fund, the customer agency must apply the various time rules to its own appropriation. Thus, the freedom from time limitations most evident in the case of a public enterprise revolving fund is, in an intragovernmental fund, necessarily circumscribed by the nature and status of the supporting (customer) appropriations. Specifically, the customer agency must obligate its appropriation within its specified period of availability and for a bona fide need attributable to that period. With respect to performance, the revolving fund is in the same position as any other contractor unless the transaction is governed by a deobligation requirement like that found in the Economy Act. 31 Comp. Gen. 83 (1951).

To restate the thrust of the preceding paragraph, use of a revolving fund does not change the period of availability of the customer agency's appropriation. It is improper, for example, for a customer funded by fiscal-year appropriations to place orders with an industrial fund in excess of legitimate needs, thereby using the revolving fund to extend the life of the appropriation. Improper Use of Industrial Funds by Defense Extended the Life of Appropriations Which Otherwise Would Have Expired, GAO/AFMD-84-34 (June 5, 1984). It is equally improper to amend a properly placed order so as to increase the scope of the work in the subsequent fiscal year and to charge the amendment to expired funds of the prior year. Id. at 9. In 55 Comp. Gen. 1012, 1017 (1976), GAO approved a proposal by the General Services Administration to lease computer equipment on a multi-year basis, the lease to be assigned to a user agency which would agree to reimburse GSA's revolving fund, as long as the user agency was not obligating fiscal-year money to reimburse GSA. Similarly, advancing money to a revolving fund does not transform a fixed-year appropriation into no-year money. 23 Comp. Gen. 668 (1944).

d. Amount

As with direct appropriations, authorities and limitations relating to the amount that can be obligated or expended apply to revolving funds unless specifically exempted. Limitations fall into three categories. First are governmentwide limitations. An example is 35 Comp. Gen. 436 (1956), finding a revolving fund bound by the statute, since repealed, limiting obligations or expenditures for improvements to real property to 25 percent of the first year's rent. The only real issue was whether the revolving fund constituted an appropriation; if it did—and, of course, it did—the statute applied.

Next are limitations or restrictions specific to the particular fund. An unusual situation occurred in 46 Comp. Gen. 198 (1966). Hurricane Betsy caused considerable damage in several southern states in 1965. Part of the congressional response was a law authorizing the Small Business Administration to cancel portions of outstanding indebtedness. The indebtedness to be forgiven stemmed from loans financed by a revolving fund. The law authorized the appropriation of $70 million. Congress subsequently appropriated half that amount, $35 million. The SBA asked if it could grant relief in excess of $35 million, noting quite logically that forgiving an obligation does not require an appropriation. "You may not have needed one," the decision concluded, "but you got one and it can't be ignored." The authorization and appropriation reflected the congressional determination to maintain the revolving fund for future program use. (The alternative would have been to let the fund dwindle and pump more money into it later.) Congress chose to enact the limitation, and the agency could not disregard it.

The final category, applicable in the case of intragovernmental revolving funds, consists of limitations on the appropriation from which the fund will be reimbursed. For example, Defense Department industrial funds can finance authorized military construction, reimbursable from Operation and Maintenance appropriations. "Minor military construction" projects may be charged to O&M appropriations up to a monetary ceiling set by 10 U.S.C. § 2805. It is improper to use the industrial fund for a construction project whose cost has been split to evade the ceiling. B-234326.15, December 24, 1991. Similarly improper is the use of revolving fund financing to exceed a ceiling on travel expenses applicable to the reimbursing appropriation. B-120480, September 6, 1967.

Of course, the most important law relating to amount is the Antideficiency Act, which by its terms applies to an "appropriation or fund." 31 U.S.C. § 1341(a)(1)(A). It is clear that the statutory prohibition against overobligating applies to revolving funds. E.g., 72 Comp. Gen. 59 (1992). It also applies to annual obligation limitations on revolving funds. B-248967.2, April 21, 1993 (Antideficiency Act applies "to any fund administered by a federal employee").

The law is violated by creating an obligation in excess of available budgetary resources. 60 Comp. Gen. 520, 522 (1981). For a revolving fund, available budgetary resources include (a) orders from other government accounts that represent valid obligations of the ordering account, and (b) orders from the public, but only to the extent accompanied by an advance. OMB Circular No. A-34, § 11.2 (1995). However, the concept does not include inventory. 60 Comp. Gen. 520. Nor does it include anticipated receipts from transactions that have not yet occurred. The Air Force Has Incurred Numerous Overobligations in Its Industrial Fund, GAO/AFMD-81-53 (August 14, 1981); B-195316-O.M., January 30, 1980; OMB Circular No. A-34, § 21.4. A statutory exception is 10 U.S.C. § 2210(b), which authorizes Defense Department stock funds (but not industrial funds) to obligate against anticipated reimbursements if necessary to maintain stock levels planned for the next fiscal year. The Coast Guard Supply Fund has similar authority. 14 U.S.C. § 650(b). The rules relating to indemnification discussed in detail in Chapter 6 apply fully to revolving funds. 63 Comp. Gen. 145 (1984).

A revolving fund can also violate the Antideficiency Act by overspending a specific monetary limitation. B-120480, September 6, 1967. If an overobligation or overexpenditure would have been authorized under some other appropriation or fund available at the time of the overobligation or overexpenditure, reimbursement from the proper source—assuming it is still available—cures the violation. B-208697, September 28, 1983.

As discussed in Chapter 6, a violation can also occur if an agency charges an obligation or expenditure to an appropriation which is not legally available for that item, regardless of how much money is in the account. The same is true if the proper funding source does not contain adequate budgetary resources to cover the obligation or expenditure when the accounts are adjusted. A problem of this sort arose when the Defense Supply Agency charged the Defense Stock Fund with a renewal option on a multi-year fuel storage service contract. The contractor argued that exercise of the option violated the Antideficiency Act because a Defense Department Directive required that supply administration contracts be charged to Operation and Maintenance appropriations and not to stock funds. There was no question that charging the stock fund was unauthorized. The Armed Services Board of Contract Appeals, however, found that the Defense Directive was merely an "in-house accounting [measure] not relevant to determining the availability of appropriated funds." Therefore, and since there was no statutory limitation on using stock funds for otherwise authorized fuel storage contracts, there was no Antideficiency Act violation. The Board further noted that, even if the stock fund was considered to be legally unavailable, there would be no violation as long as a funding adjustment could be made. New England Tank Industries of New Hampshire, Inc., ASBCA No. 26474, 88-1 B.C.A. ¶ 20,395, at 103,169 and n.23 (1987). While vacating and remanding the Board's decision on other grounds, the Court of Appeals for the Federal Circuit expressly agreed that using the stock fund, although unauthorized, did not violate the Antideficiency Act. New England Tank Industries of New Hampshire, Inc. v. United States, 861 F.2d 685, 692 n.15 (Fed. Cir. 1988).

Another part of the Antideficiency Act requires the apportionment of appropriations (defined to include "funds") by the Office of Management and Budget. 31 U.S.C. §§ 1511(a), 1512, 1513. While fixed-year appropriations are generally apportioned by time, appropriations for an indefinite period are apportioned "to achieve the most effective and economical use." 31 U.S.C. § 1512(a). Overobligating or overspending an apportionment is just as illegal as overobligating or overspending the appropriation itself. 31 U.S.C. § 1517(a). That the apportionment statutes apply to revolving funds is reinforced by 31 U.S.C. § 1516(2), which authorizes OMB to exempt from apportionment "a working capital fund or a revolving fund established for intragovernmental operations."

The applicability of the apportionment laws to revolving funds is reflected in OMB Circular No. A-34. OMB's illustration of the Standard Form 132 Apportionment Schedule (Exhibit 35G) expressly specifies both public enterprise and intragovernmental revolving funds, while section 30.2 restates OMB's authority to exempt particular intragovernmental funds. For purposes of assessing violations, the fact that the fund includes unapportioned budgetary resources greater than the amount of the deficiency is irrelevant. Id. § 22.4. The authority of 10 U.S.C. § 2210(b), mentioned above, can be exercised only "with the approval of the President." This means OMB apportionment. B-179708-O.M., July 10, 1975.

An important concept covered in Chapter 4 is the agency's spending discretion under a lump-sum appropriation, illustrated in decisions such as 55 Comp. Gen. 307 (1975) and 55 Comp. Gen. 812 (1976). The same discretion applies under a revolving fund. In one year, for example, committee reports expressed the view that the Economic Development Administration not make any direct loans in the upcoming fiscal year. Since this desire did not find its way into any statutory language, the agency's revolving fund was legally available to make the loans. Of course, the agency was also within its discretion to comply with the committee preference and not make any direct loans. B-209680, February 24, 1983.

e. Obligation Requirement

Nothing exempts revolving funds from the obligation recording provisions of 31 U.S.C. § 1501. When a revolving fund does something that meets one of the statutory recording criteria, it must, just like a direct appropriation, record an obligation. 72 Comp.

Gen. 59 (1992) (entering into contract to procure equipment). See also 60 Comp. Gen. 700, 703 (1981); 51 Comp. Gen. 631 (1972).[44]

Under a multi-year contract, the amount to be recorded as an obligation depends on the nature and extent of the government's commitment. If the contract does not restrict the government's obligation to less than the full contract amount, then the full contract amount is the amount of the obligation. B-104492, April 23, 1976 (internal memorandum). If the contract consists of a basic period plus renewal options, the obligation is the cost of the base period plus any amounts payable for failure to exercise the options (termination costs), this being the least amount of the government's potential liability. 62 Comp. Gen. 143 (1983); 48 Comp. Gen. 497, 502 (1969).

Congress can, of course, vary the above treatment by statute. Statutory exceptions have tended to involve multi-year contracts under the rather large Defense Department revolving funds where the chances of premature termination are, from practical and political perspectives, remote. Under a Navy ship-leasing program financed by the Navy industrial fund, for example, Congress enacted a provision authorizing the Navy to obligate only 10 percent of the outstanding gross termination liability. See B-174839, March 20, 1984. A case several years earlier considered a recurring Defense appropriation act provision which authorized Defense working capital funds to maintain cash balances only to the extent necessary to cover cash disbursements at any time, and further authorized transfers between such funds when and if necessary.[45] This provision amounted to an exception to the requirement to obligate for termination liability. 51 Comp. Gen. 598 (1972).

Under an intragovernmental revolving fund, it is also necessary to consider the obligational treatment of the supporting

[44]Both cases discuss the recording of obligations under credit programs financed by revolving funds. While some of the specifics have been superseded by the Federal Credit Reform Act of 1990, 2 U.S.C. §§ 661, et seq., in neither case was the applicability of the recording statute called into question.

[45]The fiscal year 1997 version of this provision is section 8006 of the Department of Defense Appropriations Act, which is found in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(b), 110 Stat. 3009, 3009-88 (1996).

appropriations. That treatment generally is determined by applying the appropriate recording standard of 31 U.S.C. § 1501—either subsection (a)(1) (binding agreement in writing) or subsection (a)(3) (order required by law to be placed with another agency). For example, when an agency places an order with the General Services Administration for work to be financed from one of GSA's revolving funds, placing the order obligates the customer agency's appropriations if the order is one which is required by law—including GSA's statutory regulations—to be placed with GSA. If the order is not required by law to be placed with GSA, the job order itself does not obligate the customer's funds. The obligation occurs as and when GSA performs or enters into a contract for performance. 34 Comp. Gen. 705 (1955). See also 23 Comp. Gen. 88, 90 (1943) (similar principle prior to enactment of 31 U.S.C. § 1501).

An application of 34 Comp. Gen. 705 occurred just a few weeks after the decision was issued. The Social Security Administration placed a job order with GSA for alterations to a building late in fiscal year 1954, but GSA was not able to do the work until the following fiscal year. Since the Social Security Administration was required by law to have the work done by GSA, the obligation of SSA funds occurred when SSA placed the job order and was chargeable to that year. The obligation was governed by subsection (a)(3) rather than (a)(1), and there was therefore no need for SSA to deobligate the funds at the end of fiscal year 1954. None of this was affected by the fact that GSA was financing the work under a revolving fund. 35 Comp. Gen. 3 (1955).

Obligating for purchases from stock or supply funds (Defense Department stock funds or GSA's General Supply Fund, for example) has its own set of rules. For common-use stock items which are on hand or on order and expected to be delivered promptly, placing the order obligates the customer agency's appropriation. 34 Comp. Gen. 705, 707 (1955); 34 Comp. Gen. 418, 422 (1955); 32 Comp. Gen. 436 (1953). For other orders of items which are part of the stock fund system, there is a measure of discretion. The fund can develop a system—for example, a list of items which constitutes an offer to sell at the published prices—under which placing the order "accepts" the offer and creates the recordable obligation. See Criteria for Recording Obligations for Defense Stock Fund Purchases Should Be Changed, GAO/AFMD-83-54 (August 19, 1983); B-208863, April 11, 1983 (internal memorandum). Otherwise, if the customer's order is the offer, a recordable obligation requires acceptance by the revolving fund unless the order is required by law to be placed with the fund. 34 Comp. Gen. at 707-708; 34 Comp. Gen. at 422; 32 Comp. Gen. 436. For items which are not part of the stock fund system, the order must be accepted before an obligation can be recorded. GAO/AFMD-83-54, at 5.

It is also possible to program an industrial fund to automatically accept certain orders resulting in a recordable obligation even where subsection (a)(3) of 31 U.S.C. § 1501 (requiring documentary evidence of an order required to be placed with the performing agency) does not apply. B-208863, May 23, 1983 (internal memorandum). Modern electronic technologies can satisfy the requirement of 31 U.S.C. § 1501(a)(1)(A) that the agreement be "in writing." Id.

If a revolving fund finds that it has undercharged the supporting (customer) appropriations, and those appropriations have expired for obligational purposes, the restoration authority of 31 U.S.C. § 1553(a) may be used to reimburse the revolving fund. Use of this authority merits close scrutiny, however, because it has the effect of reviving expired budget authority and giving it no-year status. For this reason, GAO has taken the position that any such restoration should be supported by adequate documentation of the underlying obligations. Use of statistical methods is not sufficient where the agency cannot identify the underlying transactions. B-236940, October 17, 1989; Financial Management: Defense Accounting Adjustments for Stock Fund Obligations Are Illegal, GAO/AFMD-87-1 (March 1987).[46] Presumably, although we have found no published decision, if the customer account has been closed pursuant to 31 U.S.C. § 1552(a), a validly supported reimbursement could be charged to current appropriations in accordance with, and subject to the limitations of, 31 U.S.C. § 1553(b).

Any statement of obligations an agency furnishes either to the Office of Management and Budget in connection with an appropriation

[46]The report and legal opinion cited in the text both predated the current statutory account closing structure, but the principle should remain valid.

request, or to the Congress or a congressional committee, is required to be consistent with the obligational criteria of 31 U.S.C. § 1501(a). 31 U.S.C. §§ 1108(c), 1501(b). GAO has recognized that, at least prior to the Federal Credit Reform Act of 1990, applying this requirement to guaranteed and insured loans financed by revolving funds sometimes results in a "square peg in a round hole" situation, and has suggested that reporting can depart from an exact obligation basis if acceptable to OMB. However, in the case of direct outlays such as direct loans or administrative expenses payable from the revolving fund, similar departure is not justified. 51 Comp. Gen. 631, 634 (1972).

5. Augmentation and Impairment

One of the cornerstones of congressional control of the purse is the rule, covered extensively in Chapter 6, that an agency may not augment its appropriations without authority of law, or, in other words, may not retain for credit to its own appropriations anything Congress has not expressly authorized. The primary statutory manifestation of this rule is the miscellaneous receipts requirement of 31 U.S.C. § 3302(b). We have previously noted that a revolving fund is an exception to the miscellaneous receipts requirement. While this is certainly true, it is not a blanket exemption but goes only so far as the governing legislation specifies. The improper augmentation of a revolving fund can occur in either of two ways: (1) putting something in the fund which Congress has not authorized to be put there, or (2) leaving something in the fund, regardless of the propriety of the original deposit, beyond the point Congress has said to take it out. The presence or absence of a fixed dollar ceiling on the fund's capital is irrelevant.

GAO has frequently used the following formulation of the anti-augmentation rule:

> "[W]hen Congress specifies the source of money and property that go to make up the permanent working capital of revolving funds there may not be added additional sources which serve to increase the working capital in the absence of specific statutory authority therefor." B-149858-O.M., August 15, 1968.

The legislation establishing a revolving fund will prescribe what may go into the fund. Depositing anything not expressly authorized by the statute is an improper augmentation. E.g., 23 Comp. Gen. 986 (1944); 20 Comp. Gen. 280 (1940); 19 Comp. Gen. 791 (1940). In these cases, all related and dealing with the same fund, a statute authorized an agency to use, as a revolving fund, income derived from operations of a particularly special fund. It did not authorize the agency to retain and re–use income from any other source, including operations of the revolving fund itself (as opposed to the special fund from whose income the revolving fund was derived), and this income therefore had to be treated as miscellaneous receipts. The situation was admittedly unusual in that the typical revolving fund does depend on self-generated receipts, but in this case Congress had chosen a different approach. "The statute thus having expressly specified the sources of the money that comprise the revolving fund, other sources may not be added by construction." 23 Comp. Gen. at 988.

The lesson of the preceding paragraph is simple: the precise terms of the statute control. Another illustration, closely related to the cases cited above, is the treatment of interest income. Interest income earned on revolving fund operations can be added to the fund if and only if the statute says so. An example is the revolving fund created by the Agricultural Marketing Act, 12 U.S.C. § 1141d. Payments of "principal or interest" on authorized loans "shall be covered into the revolving fund." 12 U.S.C. § 1141f(b). Another example is interest on rural electrification loans. 7 U.S.C. § 931(a)(3). Of course, general language which is sufficiently inclusive will also do the job, e.g., the Bonneville Power Administration's authority in 16 U.S.C. § 838i(a) to retain "all receipts, collections, and recoveries from all sources." Alternatively, Congress may authorize interest to be deposited to a revolving fund and later paid over to the general fund in whole or under some statutory formula. See, e.g., 15 U.S.C. § 633(c) (Small Business Administration Business Loan and Investment Fund). If the statute does not include authority of the types noted, interest income must be deposited in the Treasury as miscellaneous receipts. 26 Comp. Dec. 295 (1919); A-96531, October 24, 1940. See also 1 Comp. Gen. 656 (1922) (same principle applies to reimbursable appropriation as opposed to revolving fund). Contrary to the impression a superficial look might give, this is not an example of logic versus the law. It is a matter of the choices Congress has made as to the scope and purposes of the revolving fund.

Some further examples of unauthorized augmentations are:

- Increasing a revolving fund's working capital by transferring funds to it from other revolving funds (or non-revolving appropriation accounts, for that matter) either without statutory authority or in excess of applicable statutory authority. See Operations of General Services Administration's General Supply Fund, GAO/LCD-76-421 (March 19, 1976).
- Retention of funded reserve for accrued annual leave after the employees have transferred to another agency. B-149858-O.M., August 15, 1968.
- Retention of jury service fees remitted by an employee paid from a revolving fund. B-113214-O.M., January 16, 1953.

Our discussion thus far has emphasized the need to follow the precise statutory language. In addition, there are, as discussed in Chapter 6, certain nonstatutory exceptions to the miscellaneous receipts requirement, and these apply to revolving funds just as to direct appropriations. For example, receipts which qualify as "refunds," such as the recovery of overpayments or erroneous payments, may be credited to a revolving fund even though not specified in the governing legislation. 69 Comp. Gen. 260 (1990). That decision held that the Federal Emergency Management Agency could deposit in its revolving fund recoveries under the False Claims Act sufficient to reimburse the fund for losses suffered as a result of the false claim, including administrative expenses incurred in investigating and prosecuting the case, but must deposit any recoveries in excess of those amounts (treble damages, for example) in the Treasury as miscellaneous receipts.

Similarly, although we do not have a case precisely on point, a revolving fund may retain excess reprocurement costs recovered from a defaulting contractor, at least to the extent necessary to fund the reprocurement or corrective work, regardless of whether the recovery occurs before or after the fund has incurred the additional costs. As discussed in Chapter 6, this is the case where the procurement is funded under a no-year appropriation. If it is true for a no-year appropriation, it is true for a revolving fund.[47]

[47]One older case seemingly to the contrary, 14 Comp. Gen. 106 (1934), must be regarded as overruled by 62 Comp. Gen. 678 (1983). See 65 Comp. Gen. 838, 841 (1986), and the detailed coverage in Chapter 6.

A variation on this principle is illustrated in two cases involving the Corps of Engineers Civil Revolving Fund, 33 U.S.C. § 576. When supervising military construction under 10 U.S.C. § 2851, the Corps charges its "customer" a flat percentage (5.5 percent in the cases discussed here) of the contract price for "supervision and administration." The charge is designed to enable the revolving fund to break even over the long term. In one case, faulty design caused the Air Force to incur additional construction costs, which in turn increased the Corps's "S&A" charge. GAO advised the Air Force that it could retain the money recovered from the architect to cover its increased construction costs and the S&A fees actually paid to the revolving fund. However, the portion of the recovery representing S&A expenses over and above the 5.5 percent, which the revolving fund had absorbed, had to go to the Treasury as miscellaneous receipts. Had the fund been charging its customers on an actual cost basis, it could have been reimbursed the entire amount of S&A expenses actually incurred. However, since the percentage fee was designed to recover actual costs over time, and the Corps had already received this from the Air Force, any additional reimbursement would amount to an unauthorized augmentation of the fund. 65 Comp. Gen. 838 (1986). On the other hand, the fund can be reimbursed for expenses actually incurred which are not covered by the flat rate. B-237421, September 11, 1991 (additional "supervision and administration" costs resulting from contractor delay can be reimbursed from recovery of liquidated damages since delay costs are not factored into uniform rate).

The cases cited in the preceding paragraph point to a common feature of most revolving funds—they are intended to operate on a break-even basis or reasonably close to it, at least over the long term. One thing this means is that the fund should not augment its working capital by retaining excess profits. To nudge this process along, revolving fund statutes frequently include the requirement for the periodic payment of surplus amounts to the general fund of the Treasury. We quote three variations:

(1) General Services Administration's General Supply Fund, 40 U.S.C. § 756(e)(1):

> "As of September 30 of each year, there shall be covered into the United States Treasury as miscellaneous receipts any surplus in the General Supply Fund, all assets, liabilities, and prior losses considered, above the amounts transferred or appropriated to establish and maintain said fund."

(2) Bureau of Engraving and Printing Fund, 31 U.S.C. § 5142(d):

"The Secretary shall deposit each fiscal year, in the Treasury as miscellaneous receipts, amounts accruing to the Fund in the prior fiscal year that the Secretary decides are in excess of the needs of the Fund. However, the Secretary may use the excess amounts to restore capital of the Fund reduced by the difference between the charges for services of the Bureau and the cost of providing those services."

(3) Office of Personnel Management Revolving Fund, 5 U.S.C. § 1304(e)(4):

"Any unobligated and unexpended balances in the fund which the Office determines to be in excess of amounts needed for activities financed by the fund shall be deposited in the Treasury . . . as miscellaneous receipts."

The General Supply Fund provision is the most restrictive, at least on its face.[48] The other two examples confer more discretion. The OPM provision is the most discretionary and permits OPM to reduce retained earnings by freezing or reducing fees, purchasing equipment, or using the money essentially for any authorized purpose, or depositing surplus as miscellaneous receipts. B-206231-O.M., September 12, 1986. While this provision clearly does not require the OPM fund to operate on a break-even basis each year, GAO has voiced the opinion that operating with deficits or surpluses for periods of several years is not consistent with the statutory objective. OPM's Revolving Fund Policy Should Be Clarified and Management Controls Strengthened, GAO/GGD-84-23, 9 (October 13, 1983).

The absence of a provision requiring periodic payments of surplus to the Treasury does not eliminate augmentation as a concern. For example, the Defense Department working capital fund authority, 10 U.S.C. § 2208, contains no such provision. It nevertheless remains the case that the fund should try to minimize annual gains or losses. Absence of statutory limitation merely means that the fund has more discretion in adjusting its charges periodically to recover losses or offset profits of prior periods. B-181714-O.M., January 3, 1975.

[48]A separate provision, 40 U.S.C. § 756a, authorizes GSA to retain surplus to the extent necessary to maintain a sufficient level of inventory.

The provisions quoted above for the General Supply Fund and Bureau of Engraving and Printing Fund expressly authorize reductions from surplus for certain capital restoration, with the net amount then to be paid over to the Treasury. This introduces a concept which does not exist in the case of direct appropriations—the concept of capital impairment. If the objective is to maintain a revolving fund at a certain level, then impairment—diminution of fund capital—is as important to guard against as augmentation.

This concern manifests itself in the statutes in various ways. The revolving fund of the National Institute of Standards and Technology, for example, directs that earned net income be paid over to the general fund of the Treasury at the close of each fiscal year, but may first be applied "to restore any prior impairment of the fund." 15 U.S.C. § 278b(f). GAO considered the meaning of this provision in 58 Comp. Gen. 9 (1978). The decision first noted that "impairment" is not a term of art with an established meaning in the accounting world. Id. at 10. Then, after reviewing legislative history and similar provisions in other laws, GAO concluded that impairment in the context of a revolving fund statute means operating losses, specifically, losses sustained by providing services at prices which do not recover costs. Id. at 12. The term does not include losses caused by inflation. Under the language of the statute as it then existed, the fund could not retain profits to offset increased equipment replacement costs. (The statute was subsequently amended to permit this.) Two of the statutes GAO reviewed in the course of reaching its conclusion were the Bureau of Engraving and Printing and the General Supply Fund provisions, linguistic variations of the anti-impairment concept.

The original version of the OPM statute included anti–impairment language similar to 15 U.S.C. § 278b, but it was deleted in the 1969 amendment which recast the provision in the form quoted above. In view of the discretionary language used, the amendment in no way diminished OPM's ability to restore capital impairment. Rather, it expanded OPM's authority to use surplus: from the limited purpose of the restoration of impairment, to any authorized fund purpose. See B-110497, May 10, 1968 (GAO's comments on the proposed amendment); B-206231-O.M., September 12, 1986.

6. Property Management and Utilization

A few revolving funds consist only of money. These amount to little more than devices to permit the retention and use of user fees without congressional involvement. Most revolving funds, however, include various types of property and equipment used in their operations. To be sure, it would be possible to structure even this type of revolving fund to include only money, with the property handled under the operating appropriations of the administering agency. While this approach might boast the advantage of simplicity, it would significantly understate the costs of the program the fund was intended to finance, and, at least to the extent a more businesslike operation was envisioned, would defeat one of the purposes of having a revolving fund. Therefore, consistent with the theory of a revolving fund, items of property and equipment are typically treated as assets of the fund itself.[49] This in turn raises issues which implicate augmentation and impairment concerns.

One type of cost the fund will necessarily incur is the cost of equipment replacement. The fund anticipates this by including depreciation in its charges and fees, and establishing a reserve for this purpose. E.g., B-75212, June 16, 1955. The problem is that inflationary pressures drive prices up over time, and a piece of replacement equipment will almost certainly cost more than the original equipment did, sometimes a lot more. Simple enough, you say, just raise prices. The obstacle here is that statutory authority is needed in order to avoid an augmentation. The agency had no such authority in 58 Comp. Gen. 9 (1978), the impairment case discussed above. The decision explained:

> "We believe that the term 'cost,' absent something in the law or its legislative history indicating otherwise, means historical cost, and not replacement cost. Thus, when capitalizing fixed assets in the fund, the value of the asset is determined by historical cost (e.g., acquisition cost) and it is this value that depreciation allocates over the useful life of the asset." Id. at 14.

See also B-151204-O.M., December 9, 1971. Since the agency could not base depreciation on replacement cost, its next thought was to

[49]There are also situations in which property acquired by some other operating appropriation should nevertheless be recorded as an asset on a revolving fund's financial statements, with an appropriate explanatory footnote. For a discussion of the criteria an item must meet in order to qualify as a reportable asset, see GAO/AIMD-94-107R (B-256562, May 3, 1994).

treat the difference between the depreciation reserve and replacement cost as an impairment of capital and to take the difference from surplus before turning it over to the Treasury. It was in this context that the decision defined "impairment."

In some cases, the rule that depreciation refers to historical cost and not replacement cost is expressed in the statute. For example, the Bureau of Engraving and Printing is directed to provide for equipment replacement "by maintaining adequate depreciation reserves based on original cost or appraised values." 31 U.S.C. § 5141(b)(1)(C). In view of this language, and the rule that would have been applied even without it, the Bureau had no authority to augment its depreciation reserve through a surcharge. B-104492, April 23, 1976 (internal memorandum).

One solution is to amend the statute. The statute in 58 Comp. Gen. 9, 15 U.S.C. § 278b(f), was later amended to authorize the application of net income "to ensure the availability of working capital necessary to replace equipment and inventories." The Bureau of Engraving and Printing statute also received a legislative solution with the 1977 enactment of 31 U.S.C. § 5142(c)(3), which permits it to adjust its prices "to permit buying capital equipment and to provide future working capital." Under this amendment, the Bureau can now levy a surcharge, or it can simply raise its prices. B-114801-O.M., November 19, 1979. Similarly, at one time, the General Services Administration could not charge using agencies the replacement cost of motor pool vehicles as it would have amounted to an unauthorized augmentation of the General Supply Fund. B-158712-O.M., October 4, 1976. Legislation was enacted in 1978 (40 U.S.C. § 491(d)(2)) to authorize GSA to charge for estimated replacement costs and to retain those increments in the fund, but only for replacement purposes. Still another statutory approach is to require payment to the Treasury at the end of a fiscal year of any balance "in excess of the estimated requirements for the ensuing fiscal year." See B-100831-O.M., March 1, 1951. In addition, the exchange/sale authority of 40 U.S.C. § 481(c) is available to a revolving fund. See B-149858-O.M., February 25, 1963. If none of these approaches affords a solution, the fund has little choice but to seek additional appropriations from Congress. 58 Comp. Gen. at 14.

It has also been stated as a general proposition that "the corpus of [a] revolving fund should not be impaired by the transfer of assets."

B-121695, February 3, 1955. Of course, transfers authorized by law to be made without reimbursement are an exception. Id.; B-149858-O.M., February 25, 1963. Property can become excess to a revolving fund just as it can to any other entity. Unless the fund's own legislation provides specific authority, the disposal of excess property should be handled under authority of the Federal Property and Administrative Services Act and the implementing regulations of the General Services Administration. 56 Comp. Gen. 754 (1977); B-121695, February 3, 1955.

One section of the Federal Property Act, 40 U.S.C. § 485(c), provides that transfers shall be reimbursable when "the property transferred or disposed of was acquired by the use of funds either not appropriated from the general fund of the Treasury or appropriated therefrom but by law reimbursable from assessment, tax, or other revenue or receipts." This language includes revolving funds. 56 Comp. Gen. at 757; B-116731, November 4, 1953. Another section of the Federal Property Act, 40 U.S.C. § 483(a)(1), states that reimbursement of the fair value of transferred excess property is required "whenever net proceeds are requested pursuant to section 485(c)." In view of these provisions, unless the revolving fund legislation itself requires reimbursement, the rule is that the transfer of excess property from a revolving fund is reimbursable if and when requested by the transferring agency. The agency has discretion in the matter. 35 Comp. Gen. 207 (1955); B-233847, April 14, 1989. The same rationale authorizes a military department to credit to its industrial fund the proceeds from the sale of scrap and salvage generated by fund operations, regardless of the potentially large amounts of money involved. B-162337-O.M., October 2, 1967.

Some revolving fund statutes require reimbursement. An example is the Veterans Affairs Supply Fund which provides that the fund "shall be . . . credited with . . . all other receipts resulting from the operation of the fund, including . . . the proceeds of disposal of scrap, excess or surplus personal property of the fund." 38 U.S.C. § 8121(a)(3). Under this type of legislation, the disposal would still be done under the authority and procedures of the Federal Property Act and GSA regulations, except that the agency no longer has the discretion to decline reimbursement. The mandatory language of the statute overcomes the discretionary language of 40 U.S.C. § 483(a) and the statement now codified in 41 C.F.R. § 101-36.285

that "[i]t is the current executive branch policy that working capital fund property shall be transferred without reimbursement."

If the authorized transfer of excess property from a revolving fund without reimbursement is not an impairment of the fund, it is equally true that the transfer of excess property to a revolving fund without reimbursement, when authorized by law, is not an improper augmentation. B-110497, August 28, 1952.

Thus far, we have been talking about fund property as opposed to property purchased by the fund on behalf of a customer. Property in the latter category no longer needed by the customer agency, apart from transactions which may be authorized under the Federal Property Act, does not revert to the revolving fund simply because it was initially purchased by the fund; converting the property to cash and then retaining and using those proceeds improperly augments the revolving fund because it would credit the revolving fund with amounts supplied by the customer. 40 Comp. Gen. 356 (1960). Somewhat similarly, if an agency using fund property has paid the full cost of the item and then no longer needs it, nothing prevents the fund from making the property available to a second user at rates based on fair market value. The income should not be used to augment the fund's capital, however, but should, to the extent it exceeds costs, be treated as net income subject to a "transfer to Treasury" provision if there is one. B-151204-O.M., December 9, 1971.

An unusual provision of law is found in 22 U.S.C. § 2358(a), which authorizes the Agency for International Development to receive excess property from other agencies for foreign assistance purposes, and to stockpile that property "in advance of known requirements therefor," up to a specified monetary ceiling. In determining compliance with the ceiling, AID may properly deduct the amount of unfilled orders received from overseas missions since the receipt of an order represents a known requirement. B-160485-O.M., January 17, 1967.

The Federal Property and Administrative Services Act does not apply to the Senate or House of Representatives. However, they may purchase services under the act from GSA, if they choose. 40 U.S.C. § 474. Therefore, when a revolving fund of the Senate or House of Representatives has excess property, it may either request

GSA's assistance or dispose of the property through the official or body with operational control of the particular fund. B-205013, January 27, 1982 (Senate); B-114842, October 17, 1979 (House).

In Chapter 12, we discuss the principle that, at least in situations governed by direct appropriations, a federal agency is not liable for damage it causes to the personal property of another agency unless it has consented to such liability in an agreement under the Economy Act or comparable authority. Where the property is "owned" by a revolving fund, the rules are different. A 1986 decision, 65 Comp. Gen. 910, held that a revolving fund which had loaned vehicles to another agency for use on a project unrelated to the fund's purpose should be reimbursed for damage which occurred while the vehicles were in the borrower's custody. Although the decision specifically notes that the vehicles were not being used for fund work at the time of the damage, this factor does not appear necessary to the decision. Acknowledging the general prohibition on interagency damage liability, the decision states:

> "It is our opinion, however, that even in the absence of an Economy Act or similar agreement, the prohibition should not apply where the fund that would be charged with the cost of repair if reimbursement were not permitted is a reimbursable or revolving fund." Id. at 911.

The decision further pointed out that the fund in that case, the Air Force Industrial Fund, treated repair costs as an indirect cost factored into its charges, but it is assumed that this referred to damage which occurred while the property was being used by the Air Force on fund work, not damage caused by another agency.

The view that a revolving fund should be reimbursed for damage to fund property caused by another agency is supported by the approach taken in 59 Comp. Gen. 515 (1980). The regulations of the General Services Administration provide that GSA will charge the using agency for damage to motor pool vehicles which occurs while the vehicle is assigned or issued to that agency, unless the damage can be attributed to the fault of an identifiable party other than the using agency or its employee. 41 C.F.R. § 101-39.406(a). Motor pool vehicles (it is probably more politically correct to use the less greasy term "fleet management vehicles") are financed under GSA's General Supply Fund. Reviewing an earlier (but not substantially different in principle) version of the regulations, GAO agreed that GSA was well within its discretion because repair cost is certainly a cost of maintaining the service. The decision further noted:

"In addition, since the GSA revolving fund is intended to be operated on a businesslike basis, it is inequitable to impose upon the revolving fund a loss for which the managing agency is in no way responsible." 59 Comp. Gen. at 518.

The two cases discussed above involve damage caused by a using agency. A related issue is loss or damage caused by some nonuser such as a carrier. In 50 Comp. Gen. 545 (1971), GAO advised the National Credit Union Administration that it could credit to its revolving fund recoveries for property lost or damaged in transit. The fund consists of fees paid by member credit unions, and the decision emphasized legislative history expressing the intent that "the Administration will not cost the taxpayers a single penny." Id. at 546. Several revolving fund statutes—mostly intragovernmental funds where the "not cost the taxpayers a penny" rationale has no meaning—expressly authorize the retention of payments for loss or damage to fund property. E.g., 5 U.S.C. § 1304(e)(3)(B) (OPM revolving fund); 38 U.S.C. § 8121(a)(3) (VA Supply Fund); 40 U.S.C. § 756(c) (General Supply Fund); 44 U.S.C. § 309(b)(2) (GPO revolving fund).

7. Revolving Funds in the Department of Defense

At the outset of our discussion, we noted that revolving funds in the federal government appear to have originated within the defense establishment. Their use in that establishment has grown over the course of the past century so that they now play a highly significant role in financing defense operations.

The most important piece of legislation was section 405 of the National Security Act Amendments of 1949, which enacted what is now 10 U.S.C. § 2208. Pleased with the success of the Navy's working capital funds through two World Wars, Congress decided to expand the concept and extend it to all of the military departments. The objectives Congress sought to achieve were—

"most effectively to control and account for the cost of the programs and work performed, to provide adequate, accurate, and current cost data which can be used as a measure of efficiency, and to facilitate the most economical administration and operation of the military departments." S. Rep. No. 81-366, at 17 (1949), reprinted in 1949 U.S.C.C.A.N. 1771, 1788.

Subsection (a) of 10 U.S.C. § 2208 authorizes the Secretary of Defense to create working capital funds to:

"(1) finance inventories of such supplies as he may designate; and

"(2) provide working capital for such industrial-type activities, and such commercial-type activities that provide common services within or among departments and agencies of the Department of Defense, as he may designate."

These are known as, respectively, stock funds and industrial funds. The stock fund concept was intended to standardize procurement, storage, and issue policies and thereby encourage interservice utilization; reduce over-all inventory requirements; facilitate procurement of seasonal items at times when the market is most favorable; facilitate cost control; and permit standard pricing. S. Rep. No. 81-366 at 19, 1949 U.S.C.C.A.N. at 1791. The Senate report described the intended operation of industrial funds as follows:

"All costs of the operation of [the] industrial-type or commercial-type activity would be paid from the working capital fund, utilizing standard, accepted, and approved commercial practices for the distribution of direct and indirect costs to jobs in process. The activity which places a work order with the industrial-type or commercial-type activity would establish proper commitments and obligations against moneys appropriated to it—generally in the same manner as would be followed if the order were placed for the work to be done by a private concern. The industrial plant would enter the order and distribute the work in the plant by its own job orders—a fundamentally sound procedure. When the work is completed and the cost of the job ascertained, the plant will invoice or bill the cost to the ordering military agency and its proper appropriation or budget program . . . . The invoice charges would include items of cost for labor, material, and current operating expense." Id. at 20-21, 1949 U.S.C.C.A.N. at 1793.

Subsection (b), 10 U.S.C. § 2208(b), directs the Secretary of the Treasury to establish the appropriate accounts on Treasury's books upon request of the Secretary of Defense. Subsection (c) "provides legal authority for the operation of the funds" (S. Rep. No. 81-366 at 17, reprinted in 1949 U.S.C.C.A.N. at 1789) by authorizing the funds to be charged with the cost of supplies and services, including administrative expenses, and to be reimbursed from available appropriations.

Subsection (d) authorizes the capitalization of existing inventories and the appropriation of necessary amounts. Subsection (e) authorizes internal reorganization of military departments in order to take maximum advantage of the revolving funds. Subsection (f), described as a congressional control provision (S. Rep. No. 81-366 at 18, reprinted in 1949 U.S.C.C.A.N. at 1790), prohibits a requisitioning agency from incurring costs for supplies or services from any of the revolving funds in excess of "the amount of appropriations or other funds available for those purposes."

Under subsection (g), supplies returned to inventory are charged to the applicable revolving fund and the proceeds credited to "current applicable appropriations" of the customer agency. Where the return takes place in a subsequent fiscal year, this amounts to an augmentation of the current appropriation (B-132900-O.M., February 1, 1974), but it is expressly authorized. This procedure is intended to encourage the return of materials found not to be immediately needed and to "reduce the temptation to overbuy." S. Rep. No. 81-366 at 18, 1949 U.S.C.C.A.N. at 1790. Subsection (h) authorizes implementing regulations. The remaining portions of the statute were added in later amendments.

According to one commentator, performance of the military revolving funds "is not well documented." Although there is "some evidence" that they are achieving the desired benefits, the evidence is "mixed." Patricia E. Byrnes, Defense Business Operating [sic] Fund: Description and Implementation Issues, 13 Public Budgeting & Finance 29, 32 (No. 4, 1993). According to Byrnes:

> "Revolving funds are intended to provide at least three important benefits. First, in contrast to the services budgeted and financed through the appropriation process, the contractual relationship between the fund activity (supplier) and the customer improves supplier incentives for efficient, demand-driven production. Second, because revolving funds are intended to operate across organization boundaries, economies of scale can be achieved in procurement and use of facilities. Finally, in addition to reduced rates from more efficient provision of services, the customers should also realize advantages of stabilized rates typical of contractual arrangements." Id. at 31-32.

While, as Byrnes points ont, the measure of success of an activity intended to be businesslike is how closely it resembles a commercial activity, the goal of a government revolving fund, in sharp contrast with a private business's goal of profit maximization, is "a zero fund balance." Id. at 32.

In any event, after operating under the structure established by the 1949 legislation for over four decades, the next major development took place in late 1991 with the introduction of the "DBOF"—the Defense Business Operations Fund. The Defense Department had proposed the DBOF as a consolidation of the various stock and industrial funds already in existence, together with other activities, such as the Defense Commissary Agency and the Defense Finance and Accounting Service, which would be converted to revolving fund status. Considering the proposal as part of Defense's 1992 appropriations package, the congressional reception was cautious. The Senate Appropriations Committee reported:

"The DBOF proposal has been met with both antipathy and confusion. The antipathy arises, for the most part, from the perception of Congress losing influence on and oversight of programs to be subsumed in the fund. The confusion arises from several factors; probably the most important of these was the Department having not clearly defined the advantages of establishing DBOF when the proposal was first made to Congress." S. Rep. No. 102-154, at 354 (1991).

The conference committee shared the concern over the potential loss of oversight. H.R. Conf. Rep. No. 102-328, at 176 (1991). These concerns notwithstanding, Congress gave the DBOF its initial statutory basis in section 8121 of the 1992 Department of Defense Appropriations Act, Pub. L. No. 102-172, 105 Stat. 1150, 1204 (1991), as "a working capital fund under the provisions of" 10 U.S.C. § 2208.

To call the DBOF "big" would be somewhat of an understatement. Testifying before a congressional subcommittee only six months after the DBOF was established, a GAO official noted that for fiscal year 1993, when compared with the "Fortune 500," the DBOF's sales "would make the Fund equivalent to the fifth largest corporation in the world."[50] The Fund experienced a number of management problems, and GAO issued a steady stream of reports over the next few years.[51]

[50]Financial Management: Defense Business Operations Fund Implementation Status, GAO/T-AFMD-92-8, 2 (1992) (Statement of Assistant Comptroller General Donald H. Chapin before the Subcomm. on Readiness, House Comm. on Armed Services).

[51]E.g., Defense Business Operations Fund: DOD Is Experiencing Difficulty in Managing the Fund's Cash, GAO/AIMD-96-54 (April 1996); Defense Business Operations Fund: Management Issues Challenge Fund Implementation, GAO/AIMD-95-79 (March 1995); Financial Management: Status of the Defense Business Operations Fund, GAO/AIMD-94-80 (March 1994).

In 1996, as part of the National Defense Authorization Act for Fiscal Year 1996 (Pub. L. No. 104-106, § 371, 110 Stat. 186, 277), Congress repealed the 1991 provision and codified the DBOF in more detailed legislation, 10 U.S.C. § 2216a, which restricts the DBOF to a list of specified funds and activities. Later that year Congress directed the Secretary of Defense to prepare and submit a comprehensive plan to improve the management and performance of the DBOF. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 363, 110 Stat. 2422, 2493 (1996). In December 1996, the Defense Department initiated a reorganization, and in effect a "de-consolidation," of the DBOF and created four new working capital funds—Army, Navy, Air Force, and Defense-wide.[52]

The funds' various permutations notwithstanding, the legal issues they raise and the analytical approach used in resolving them are not fundamentally different from other revolving funds, and cases and reports dealing with the military funds have been included in the various topics throughout our discussion. While the funds are certainly here to stay in one form or another, their precise scope and direction will almost certainly continue to evolve.

D. User Charges

This section, like our earlier coverage of the Economy Act, deals with the authority of federal agencies to charge for goods and services they provide—to other federal entities in the case of the Economy Act; to mostly private parties under the authorities discussed in this section.

1. Providing Goods or Services to Private Parties

We start with a principle regarded as so elementary that references to it invariably include the word "fundamental," as in the following statement from 28 Comp. Gen. 38, 40 (1948):

> "It is fundamental that Federal agencies cannot make use of appropriated funds to manufacture products or materials for, or otherwise supply services to, private parties, in the absence of specific authority therefor."

[52]Memorandum from the Under Secretary of Defense (Comptroller), Subject: Working Capital Funds for Defense Support Organizations, December 11, 1996 (copy on file with editors). The reorganization is noted in Navy Ordnance: Analysis of Business Area Price Increases and Financial Losses, GAO/AIMD/NSIAD-97-74 (March 1997).

This simple-sounding principle goes to the essence of the relationship between the federal government and the taxpayers. When Congress creates and funds a department or agency, it does so to serve one or more public purposes. If accomplishing these public purposes produces incidental benefit to some private interest, no harm is done. If the roles become reversed, however, and the public purpose becomes incidental to the private benefit, or the private benefit exists independent of any public purpose, closer scrutiny is warranted. The theory, abetted by the statutory bar on using appropriated funds for unauthorized purposes (31 U.S.C. § 1301(a)), is that the activity should be undertaken only if it has been explicitly authorized by the elected representatives of the taxpayers. The miscellaneous receipts statute, 31 U.S.C. § 3302(b), discourages violations by prohibiting agencies from keeping any proceeds they may receive from the private parties.

The earliest administrative decisions dealt with the sale of commodities. In 15 Comp. Dec. 178 (1908), the Army, which manufactured hydrogen for use in aviation balloons, asked if it could sell hydrogen to private individuals. Can't sell it to private parties "at any price or for any purpose," the Comptroller of the Treasury responded. Since the miscellaneous receipts act would require the proceeds to go into the general fund of the Treasury, the practical effect would be to deplete the Army's appropriation for the manufacture of hydrogen on purposes not contemplated by Congress. Id. at 179. However, the manufacturing process produced oxygen as a by-product, for which the Army had no use. This could be sold to the private sector, the Comptroller continued, but the proceeds would have to be deposited as miscellaneous receipts. Id. at 181.

Restated, 15 Comp. Dec. 178 said two things. First, a government agency has no authority, on its own initiative, to produce something in order to sell it to a private interest. Second, an agency, which in the ordinary course of its operations, necessarily produces a surplus of any commodity may sell that surplus, but must account for the proceeds as miscellaneous receipts unless it has statutory authority for some other disposition. The portion of the rule dealing with the sale of surplus commodities has been applied to surplus electric power produced by government-owned generating plants (28 Comp. Gen. 38 (1948); 5 Comp. Gen. 389 (1925)); excess water produced by a Veterans Administration hospital water filtration plant (55 Comp.

Gen. 688 (1976)); and surplus steam from a government power plant (A-34549, December 19, 1930). As several of these cases point out (e.g., 5 Comp. Gen. at 391), the alternative would be to let the surplus commodity go to waste.

Turning from goods to services, the concept of "surplus" of course has no relevance (notwithstanding the reference to "surplus services" in 55 Comp. Gen. at 690), and we are left with the prohibitory rule as quoted above and as applied in the first portion of 15 Comp. Dec. 178. It makes no difference that the recipient is willing to reimburse the government. B-69238, July 13, 1948.[53] Nor does it matter that the proposed reimbursement is in the form of credits rather than cash. 28 Comp. Gen. 38, 41 (1948) (pointing out that even where the service or sale is authorized, the agency would have to transfer the value of the credit from its appropriations to miscellaneous receipts). The rule is not limited to private interests, but applies as well to units of state or local government. 31 Comp. Gen. 624 (1952). Applications of the rule include 34 Comp. Gen. 599 (1955) (construction of a sewerage system in excess of the government's needs so that it may be shared with a local government) and 62 Comp. Gen. 323, 334-335 (1983) (use of military personnel as chauffeurs and personal escorts at presidential inaugural and pre-inaugural activities).

A judicial application of the rule may be found in the case of National Forest Preservation Group v. Volpe, 352 F. Supp. 123 (D. Mont. 1972), recons. denied, 359 F. Supp. 136 (D. Mont. 1973), in which the court, holding that the designation of an access road as a "Federal-aid primary highway" exceeded the Department of Transportation's statutory authority, enjoined federal funding of the construction. The road would primarily have served the interests of private corporations who wanted to develop recreational property. The court stated:

"There is no rationale for the expenditure of federal funds which serve to benefit directly this type of private business venture without explicit congressional authorization. To allow the primary highway designation to stand would have the

[53]The result in B-69238 was modified by B-69238, September 23, 1948, upon a showing that the services in question were in fact authorized, although GAO continued to emphasize that receipts had to go to the Treasury's general fund as miscellaneous receipts.

effect of holding that the [Federal Highway Administration] may become a partner in private enterprise without explicit statutory authority." 352 F. Supp. at 130.

To sum up, regardless of who pays or what happens to the money, a government agency needs statutory authority in order to provide goods or services to nongovernment parties. Fiscal issues come into play only after this authority has been established.

2. The Concept of User Charges

When Congress authorizes a program or activity that will benefit private interests, it must also decide how to finance that program or activity. Basically, the choices are subsidization, user financing, or some combination of the two. Subsidization means funding the activity from appropriated funds, thus spreading the cost among all taxpayers. The user financing option involves some form of user charge or fee, under which part or all of the cost is borne by the recipients of the benefit. A user fee may be defined as "a price charged by a governmental agency for a service or product whose distribution it controls,"[54] or "any charge collected from recipients of Government goods, services, or other benefits not shared by the public."[55]

We all pay a variety of user fees. When you buy postage stamps at your local post office, buy a fishing license, or pay highway tolls, you are paying a user fee. These common examples show some of the different types of user fees. You pay the toll only when you use the highway; if you never use the highway, you never need to pay the toll. Similarly, if you have no intention of going fishing, you don't need to buy a fishing license. Once you buy the license, however, whether you ever use it or not is irrelevant to the issuing authority. You can use it as often as you like during the fishing season, but it becomes worthless once the season or specified time period is over, and even if you've never used it you can't get your money back. You can use the postage stamp for its intended purpose, or you can save

[54]Clayton P. Gillette and Thomas D. Hopkins, Federal User Fees: A Legal and Economic Analysis, 67 B.U.L. Rev. 795, 800 (1987). This is a comprehensive and valuable reference on the subject.

[55]The Congress Should Consider Exploring Opportunities to Expand and Improve the Application of User Charges by Federal Agencies, GAO/PAD-80-25 (March 28, 1980), at 1.

it. Although you can't sell it back to the post office, it never loses its face value as long as it remains unused.[56]

The advantages and disadvantages of user financing are much discussed and debated in the public financing literature. Supporters of user fees regard them as equitable because they place the economic burden on those receiving the benefit. They are also politically and "budgetarily" attractive as an alternative to general tax increases. This was especially true during the budgetary shortfalls of the 1980s and early 1990s. CBO has noted that

"[m]ost of the new and increased [user fee] charges of the 1980s followed the passage of the Balanced Budget Act of 1985. As the search for new sources of funds intensified, changes in law and budget processes helped assure the enactment of new user charges." CBO, The Growth of Federal User Charges xi (August 1993).

Moreover, the legal basis for setting user charges expanded from reimbursing an agency's costs of providing services, to financing all or specified portions of the agency's budget. Id.

While user fees at the federal level are not new,[57] they received relatively little attention prior to the final third of the 20th century. In March 1980, GAO issued its report The Congress Should Consider Exploring Opportunities to Expand and Improve the Application of User Charges by Federal Agencies, GAO/PAD-80-25, the thrust of which is evident from its title. Page 1 of that report stated:

"Both individuals and businesses are concerned with tax burdens. Businesses are also concerned with the fact that compliance with Federal regulations is often expensive. Both concerns can be addressed by the Government's promotion of economy and efficiency through actively employing user charges. [Footnote omitted.]

"User charges can reduce Federal taxes, as well as the costs of certain types of regulation. They are a source of revenue that can partially replace general taxation

[56] The further categorization of user fees is beyond our scope. Two approaches may be found in studies by the Congressional Budget Office—Charging for Federal Services 10 (December 1983) and The Growth of Federal User Charges 3-7 (August 1993).

[57] See, e.g., United States v. Grimaud, 220 U.S. 506, 521-522 (1911), to the effect that a statute addressing the use or disposition of fees implicitly authorizes imposition of the fees.

of individuals and businesses. They also reduce the amount of taxes needed to finance the production of goods and the delivery of services to the extent that charging higher prices reduces recipient demand."

In addition, GAO has issued a minor deluge of reports analyzing, and encouraging optimum use of, user fees in specific contexts.[58] The fever spread to Congress generally as well as the Office of Management and Budget and the rest of the executive branch, with the result that the growth of user fees mushroomed. Between 1980 and 1991, CBO found, user charges increased by 54% in constant dollars, and financed much larger shares of many agencies' budgets. CBO, Growth of Federal User Charges (1993). A later GAO report supports the notion that this trend continued during the 1990s, as many agencies became increasingly more reliant upon user fees, over general tax revenues, to fund their programs and operations, Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues, GAO/AIMD-98-11 (December 1997).

Political attractions aside, levying user fees is not simply a question of raising revenue, but can implicate a variety of other economic and public policy issues as well. For example, increasing a user fee can result in capital losses in the form of decreased asset values. This in turn raises questions as to the desirability of some form of compensation for these losses. A GAO analysis of these issues can be found in Congressional Attention Is Warranted When User Charges or Other Policy Changes Cause Capital Losses, GAO/PAD-83-10 (October 13, 1982). The case study presented in that report is the use of water in the Columbia Basin Project in the Pacific Northwest. The study showed that, if the price charged for water provided to farmers for irrigation purposes were raised to market levels, water would be diverted from farming to the production of electricity, and the value of farmland would drop significantly.

[58]A few examples are U.S. Forest Service: Fees for Recreation Special-Use Permits Do Not Reflect Fair Market Value, GAO/RCED-97-16 (December 1996); Federal Lands: Fees for Communications Sites Are Below Fair Market Value, GAO/RCED-94-248 (July 1994); INS User Fees: INS Workinq to Improve Management of User Fee Accounts, GAO/GGD-94-101 (April 1994); USDA Revenues: A Descriptive Compendium, GAO/RCED-93-19FS (November 1992); and Parks and Recreation: Recreational Fee Authorizations, Prohibitions, and Limitations, GAO/RCED-86-T49 (May 1986). In addition, GAO/PAD-80-25 includes a 4-page appendix listing reports issued in the 1969-1978 period.

3. The Independent Offices Appropriation Act

a. Origin and Overview

In 1950, the Senate Committee on Expenditures in the Executive Departments (the forerunner of the Committee on Governmental Affairs) conducted a study of user fees in the federal government, and issued a report entitled "Fees for Special Services," S. Rep. No. 81–2120 (1950). The committee's governing philosophy was that "those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof." Id. at 3. The report concluded:

> "On the basis of the limited study reported upon herein, the committee has established conclusively that opportunity exists for the equitable transfer of many financial burdens from the shoulders of the taxpaying general public to the direct and special beneficiaries." Id. at 15.

The report did not recommend any particular legislation, but left it to the jurisdictional committees to consider and develop legislative proposals within their respective areas of responsibility.

Several committees then began their own studies. The following year, while many of these studies were in process, Congress enacted general user fee authority to fill in the gaps. Its intent, the House Appropriations Committee reported, was to

> "provide authority for Government agencies to make charges for . . . services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made." H.R. Rep. No. 82–384, at 3 (1951).

The new legislation was Title V of the Independent Offices Appropriation Act, 1952, Pub. L. No. 82-137, 65 Stat. 268, 290, known as the "IOAA" or the "User Charge Statute."[59] Codified at 31 U.S.C. § 9701, the law provides in part as follows:

> "(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed ownership Government corporation) to a person (except a

[59]For a judicial summary of the history outlined in the text, see Beaver, Bountiful, Enterprise v. Andrus, 637 F.2d 749, 754-55 (10th Cir. 1980).

person on official business of the United States Government) is to be self-sustaining to the extent possible.

"(b) The head of each agency (except a mixed ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

"(1) fair; and

"(2) based on—

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts."

Although enacted as an appropriation act rider, the IOAA is permanent legislation and applies to all agencies, not just those funded by the act in which it originally appeared. B-178865, April 19, 1974. The statute is permissive rather than mandatory. It authorizes fees; it does not require them. Aeronautical Radio, Inc. v. United States, 335 F.2d 304, 307 (7th Cir. 1964), cert. denied, 379 U.S. 966; 42 Comp. Gen. 663 (1963); B-128056, July 8, 1966. Thus, while the law encourages uniformity, an agency's authority to charge a fee under the IOAA is not diminished by the fact that other agencies may choose not to charge for similar services. Ayuda, Inc. v. Attorney General, 661 F. Supp. 33, 36 (D.D.C. 1987), aff'd, 848 F.2d 1297 (D.C. Cir. 1988); B-167087, July 25, 1969. Nor is failing to charge a fee where one could have been charged a violation of law. B-130961-O.M., September 10, 1976; B-114829-O.M., June 11, 1975.[60] Guidance for the executive branch is found in Office of Management and Budget Circular No. A-25 (1993), entitled "User Charges."

[60]One occasionally encounters a description in mandatory terms. E.g., Bunge Corp. v. United States, 5 Cl. Ct. 511, 515 (1984) ("The IOAA directs all federal agencies to charge fees . . ."), aff'd, 765 F.2d 162 (Fed. Cir. 1985). However, no one has ever actually applied it that way.

It is also important to note that the IOAA merely provides authority to charge fees, not authority to provide the underlying services. The legal basis for the services-which, as noted at the outset of this section, must exist before you ever get to the question of fees—must be found elsewhere. 62 Comp. Gen. 262, 263 (1983).

The IOAA is not free from difficulty or controversy. Gillette and Hopkins offer the following rather harsh assessment:

> "[T]he IOAA does not constitute a model of clarity and precision. To the contrary, the statute uses vague terms and invokes ephemeral principles that demand substantial interpretation. The statute provides little guidance concerning the constituents of a 'service or thing of value' and leaves fairly open the appropriate mechanisms for computing a proper charge. Instead, the statute recites considerations that are, at best, inconclusive, and, at worst, inherently conflicting." Gillette and Hopkins, supra note 54, at 826-27 (footnote omitted).

b. Fees v. Taxes

The government has many ways to get money. In National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), the Supreme Court distinguished two of them, fees and taxes. A fee is something you pay incident to a voluntary act on your part, for some benefit the government has bestowed or will bestow on you which is not shared by other members of society, examples being "a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." Id. at 340. Taxes, on the other hand, need not be related to any specific benefits. Congress can take your money by taxation merely because you have it to be taken. Id. at 340-41. The distinction had lurked in the bushes since shortly after the IOAA was enacted. In B-108429, March 24, 1952, for example, GAO advised a Member of Congress that "in the absence of clear and convincing evidence to the contrary," GAO would be unwilling "to assume that [any government agency] would attempt to levy a tax . . . under the guise of a fee" as authorized by the IOAA.

The issue remained largely dormant until the National Cable Television decision, in which the Supreme Court held that the IOAA authorizes fees but not taxes. In that case, the cable TV industry challenged fees assessed by the Federal Communications Commission, which had been under pressure from both Congress and the Office of Management and Budget to recoup its full costs from the highly profitable industry it regulated. After drawing the distinction noted above, the Court added that the primary measure of a fee under the IOAA is the "value to the recipient" standard of

31 U.S.C. § 9701(b)(2)(B). An attempt to recoup total cost would go beyond this by charging recipients for the public as well as private benefits of the FCC's regulatory activities,[61] which would at least arguably amount to levying a tax. Holding that the FCC could not do so, the Court considerably narrowed the scope of the IOAA, stating:

"It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read [the IOAA] narrowly as authorizing not a 'tax' but a 'fee'." 415 U.S. at 341.

By adopting this narrower interpretation, the Court was able to avoid having to directly confront the constitutional issue of the extent to which Congress could delegate its power to tax.

In determining the proper scope of the IOAA's fee-setting authority, the Court suggested extreme caution in applying the criteria of 31 U.S.C. §§ 9701(b)(2)(C) and (D)—"public policy or interest served" and "other relevant facts—which tend to indicate assessments more in the nature of taxes." 415 U.S. at 341. As lower courts have recognized, National Cable Television effectively "read [these two criteria] out of the statute." E.g., Seafarers Internat'l Union v. Coast Guard, 81 F.3d 179, 183 (D.C. Cir. 1996); Bunge Corp. v. United States, 5 Cl. Ct. 511, 515 (1984), aff'd mem., 765 F.2d 162 (Fed. Cir. 1985)."

On the same day it decided National Cable Television, the Court also decided the companion case of FPC v. New England Power Co., 415 U.S. 345 (1974), applying National Cable Television to invalidate annual assessments levied on pipeline companies by the Federal Power Commission. The Court agreed with the Court of Appeals for the District of Columbia Circuit (467 F.2d 425) that the IOAA does not authorize assessments on whole industries, but applies only with respect to "specific charges for specific services to specific individuals or companies." 415 U.S. at 349. The Court noted with approval portions of OMB Circular No. A-25, now found at sections 6 (agencies should assess user charges to "identifiable recipients"),[62] and 6a(4) (agencies should not assess fees "when the identification

[61]"Certainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume." 415 U.S. at 343.

[62]The 1993 revision of OMB Cir. No. A-25 changed "should" to "will."

of the beneficiary is obscure"). This, said the Court, "is the proper construction of the [IOAA]" and helps to restrain it from crossing the line into the realm of taxes. 415 U.S. at 351.

Notwithstanding overbroad language occasionally encountered in some lower court decisions,[63] National Cable Television and New England Power do not stand for the proposition that Congress may not delegate the authority to assess charges which are more appropriately categorized as taxes. Indeed, as we will see later under the Other Authorities heading, it is now settled that Congress can do so as long as the statutory delegation is sufficiently explicit and provides intelligible guidelines. Rather, these cases hold merely that Congress did not do so in the IOAA.

c. Establishing the Fee

(1) Need for regulations

In order to assess fees under the IOAA, an agency must first issue regulations. Sohio Transportation Co. v. United States, 766 F.2d 499, 502 (Fed. Cir. 1985); A1yeska Pipeline Service Co. v. United States, 624 F.2d 1005, 1009 (Ct. Cl. 1980); Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723, 732-733 (1986), aff'd, 831 F.2d 1043 (Fed. Cir. 1987) (issuance of regulations a "condition precedent"). All of these cases applied the original language of the IOAA (each agency "is authorized by regulation to prescribe" fees, 65 Stat. 290), under which the requirement was clear beyond question. The 1982 recodification into 31 U.S.C. § 9701 as quoted above ("each agency . . . may prescribe regulations") muddied the water somewhat, although the substance is not supposed to change.

A simple policy statement to the effect that fees will be charged for special services has been held too vague to support fee assessment. Diapulse Corp. of America v. FDA, 500 F.2d 75, 79 (2d Cir. 1974). Rather, since rulemaking under the Administrative Procedure Act must provide the opportunity for public comment, the agency's notice must include, or make available on request, a reasonable explanation of the basis for the proposed fee. This, one court has held, must be one that "the concerned public could understand." Engine Manufacturers Association v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994). In that case, the court rejected as inadequate an agency

[63] See Gillette and Hopkins, supra note 54, at 823.

cost analysis which, according to the court, "contains page after page of impressive looking but utterly useless tables" and some "complete gibberish." Id. It is probably impossible to predict what would be acceptable to any given court at any given time, but cases like this demonstrate the need for the agency to observe at least some minimal level of clarity and provide its explanation "in intelligible if not plain English." Id. at 1183. The Court of Appeals for the District of Columbia Circuit has also stressed the need for the agency to make a clear public statement of the basis for its fees so that a reviewing court can measure the agency's action against the Supreme Court's standards. National Cable Television Association v. FCC, 554 F.2d 1094, 1100, 1104-05 (D.C. Cir. 1976).

(2) Benefit under the IOAA

The first step in establishing a fee or fee schedule under the IOAA is to "identify the activity which justifies each particular fee" the agency wishes to assess. National Cable Television Association v. FCC, 554 F.2d at 1100. Thus, the threshold question is what kinds of government services or activities are regarded as conferring special benefits for purposes of the IOAA?[64] The statute itself refers merely to "a service or thing of value provided by the agency." 31 U.S.C. § 9701(b). That this phrase should be construed broadly[65] is made clear by comparing the source language, 65 Stat. 290, which authorized fees for:

> "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency to or for any person (including groups, associations, organizations, partnerships corporations or businesses). . . ."

OMB Circular No. A-25, section 6a, provides further guidance.

[64]Some of the examples in the text are now covered by specific statutory authority and thus reliance on the IOAA may no longer be necessary. Our examples are intended merely to illustrate the types of services or activities which have been regarded as within the IOAA's scope.

[65]Ayuda, Inc. v. Attorney General, 848 F.2d 1297 1300 (D.C. Cir. 1988).

One area in which the issue has arisen with some frequency is the government's regulatory activities. On the one hand, the mere fact of regulation is not enough to justify a fee. Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1180 (D.C. Cir. 1994); Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985). On the other hand, however, the granting of a license or similar operating authority clearly is enough. Seafarers International Union v. United States Coast Guard, 81 F.3d 179 (D.C. Cir. 1996) (merchant marine licensing by Coast Guard); Engine Manufacturers Ass'n, 20 F.3d at 1180 (EPA certificate of approval for motor vehicles); Mississippi Power & Light Co. v. United States Nuclear Regulatory Commission, 601 F.2d 223, 229 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (license from NRC to operate nuclear facility); National Cable Television, 554 F.2d at 1103 (grant of operating authority by FCC); B-217931-O.M., April 2, 1985 (drug and antibiotic review and approval by Food and Drug Administration).

Where an application is voluntarily withdrawn before final agency action, the First Circuit has held that the agency can charge a fee for work done prior to withdrawal. New England Power Co. v. United States Nuclear Regulatory Commission, 683 F.2d 12 (lst Cir. 1982). The agency's intent to do so must be specified in its regulations. Id. If failure to process is attributable to the government, e.g., a change in program requirements, no fee should be charged and any amounts collected should be refunded to the applicants. 53 Comp. Gen. 580 (1974).

An agency may also charge a fee under the IOAA for services which assist regulated entities in complying with statutory duties. Electronic Industries Ass'n v. FCC, 554 F.2d 1109, 1115 (D.C. Cir. 1976) (tariff filings, equipment testing and approval); Raton Gas Transmission Co. v. FERC, 852 F.2d 612, 617 (D.C. Cir. 1988) (rate reduction application); Phillips Petroleum Co. v. FERC, 786 F.2d 370, 376 (10th Cir. 1986), cert. denied, 479 U.S. 823; Mississippi Power & Light, 601 F.2d at 231 (routine safety inspections of nuclear facilities); B-216876, January 30, 1985 (internal memorandum) (pipeline safety inspection). This is particularly true where the statute was enacted "in large measure for the benefit of the individuals, firms, or industry upon which the agency seeks to impose a fee." Central & Southern Tariff Ass'n, 777 F.2d at 734 (tariff filing requirement of Interstate Commerce Act and Motor Carrier Act).

Use of government property is another activity for which fees may be charged under the IOAA. A common example is the granting of a right-of-way over public lands. B-118678, May 11, 1976. Rights-of-way are sought for such things as the construction of power transmission facilities and energy pipelines. E.g., Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983) (electricity transmission lines); Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723 (1986), aff'd, 831 F.2d 1043 (Fed. Cir. 1987) (gas pipeline); Sohio Transportation Co. v. United States, 5 Cl. Ct. 620 (1984), aff'd, 766 F.2d 499 (Fed. Cir. 1985) (oil pipeline). Other examples are nonfederal use under a revocable license (B-180221, August 20, 1976), and commercial leasing by the Alaska Railroad (B-124195-O.M., April 12, 1977). This category also illustrates the point that those liable for fees under the IOAA can, in appropriate circumstances, include government employees. E.g., B-148736, April 6, 1976 (use of facilities at certain national parks as "guest houses" for federal officials); B-212397-O.M., July 13, 1984 (locker room facilities in government building).

Information is certainly a "thing of value." Accordingly, the dissemination or distribution of information is another area subject to the IOAA to the extent not governed by some other statute such as the Freedom of Information Act. IOAA user fees have been held appropriate for such things as subscriptions to government publications (B-110418, July 8, 1952), subscription to a Department of Agriculture market news wire service (B-128056, July 8, 1966), and international flight documentation provided to aviation interests by the National Weather Service (B-133202-O.M., September 17, 1976). Examples from the procurement arena are B-209933, June 6, 1983 (fee for solicitation documents) and B-184007, September 24, 1975 (fee for copy of bid abstract). The statute applies even to requests for information directly about the requester. Reinoehl v. Hershey, 426 F.2d 815 (9th Cir. 1970) (pre-indictment request for documents from Selective Service file).

Starting in the 1980s, emphasis began to shift to electronic dissemination. A 1986 congressional study found the IOAA not particularly suited to information services but still better than nothing, and told agencies to do the best they could under it until something better comes along.[66] Some of the complexities are illustrated in B-219338, June 2, 1987, discussing a Department of Agriculture system established under a statute (7 U.S.C. § 2242a) which mandates consistency with the IOAA.

An agency may permit a contractor to provide information to the public, with the contractor assessing and retaining the fees, but the fees may not exceed what the agency could have charged had it provided the information directly. 61 Comp. Gen. 285, 287 (1982); B-166506, October 20, 1975. See also Chapter 3 of GAO's report ADP Acquisition: SEC Needs to Resolve Key Issues Before Proceeding With Its EDGAR System, GAO/IMTEC-87-2 (October 1986).

Another activity susceptible to IOAA fees is adjudicatory services by an administrative agency. The services may or may not be incident to a regulatory program. An example of the former is Federal Energy Regulatory Commission review of administrative appeals of remedial orders. B-224596, August 21, 1987. An example of the latter is the range of adjudicatory services rendered to aliens by the Immigration and Naturalization Service. Ayuda, Inc. v. Attorney General, 661 F. Supp. 33 (D.D.C. 1987), aff'd, 848 F.2d 1297 (D.C. Cir. 1988); B-125031-O.M., July 23, 1974. As the Ayuda appellate court stressed, the procedures "are triggered only at the instance of the individual who seeks, obviously, to benefit from them." 848 F.2d at 1301. Another example is B-167062, June 13, 1969 (IOAA reimbursement to former Civil Service Commission for advisory opinions rendered at request of foreign military representatives in United States).

Fees incident to litigation in the courts are also commonplace, but they implicate certain constitutional considerations and are prescribed under statutes other than the IOAA. See 28 U.S.C. §§ 1911 (Supreme Court), 1913 (courts of appeals), 1914 (district courts), 1926 (Court of Federal Claims), 1930 (bankruptcy fees). The rule is that, with the exception of certain indigent situations, reasonable fees may be charged to those seeking access to the courts. E.g., Lumbert v. Illinois Department of Corrections, 827 F.2d 257 (7th Cir. 1987). Fees may be charged even to involuntary

[66] Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview, H.R. Rep. No. 99-560, at 37-38 (1986).

litigants provided they do not unduly burden access to the judicial process, determined by balancing the litigant's interest against the government's interest in assessing the fee. Otasco, Inc. v. United States, 689 F.2d 162 (10th Cir. 1982), cert. denied, 460 U.S. 1069; In re Red Barn, Inc., 23 B.R. 593 (Bankr. D. Me. 1982).

Still another example is transportation services. Thus, if local services are not available, the National Park Service may provide transportation to injured or ill visitors in national parks, but should attempt to recover its costs under the IOAA. B-198032, June 3, 1981. A case analogous to the "information contractor" cases noted above is 46 Comp. Gen. 616 (1967). Public transportation to a Veterans Administration hospital in an isolated area had been discontinued due to a low level of usage. Aware that visits by family members often have significant therapeutic value to patients, GAO agreed that the VA could use its appropriated funds to remedy the situation. One approach would have been for the VA to furnish transportation directly, presumably charging the riders under authority of the IOAA. However, the VA found it would be substantially less expensive to enter into a "subsidy contract" with a private carrier under which the carrier would be paid a guaranteed annual amount less fares collected, the fares to be comparable to commercial common carrier fares. GAO concurred, advising that payment should be on a net balance basis and that the contract should include adequate controls to insure proper accounting of the fares collected.

While it is possible to categorize a great many of the user fee situations as we have tried to do here—regulatory activities, use of government property, dissemination of information, adjudicatory services, transportation services-there are also many situations which defy further generalization, the test being simply whether an activity fits the terms of the statute as the courts have construed it. Thus, GAO has regarded the IOAA's authority as extending to the following:

- Fees charged to nonfederal participants in government-sponsored conference. B-190244, November 28, 1977.

- Surcharge for expedited processing of passport applications. B-118682, June 22, 1970.[67] (The basic fee is authorized by 22 U.S.C. § 214.)
- Fees for certain allotments from the pay of civilian employees under 5 U.S.C. § 5525. 42 Comp. Gen. 663 (1963) (state income tax where withholding is not required); B-152032, August 1, 1963 (private disability income insurance).[68] OPM's regulations implementing 5 U.S.C. § 5525 are found at 5 C.F.R. Part 550, Subpart C.

(3) Public v. private benefit

The Supreme Court, in its National Cable Television decision discussed earlier, cautioned that an attempt by a regulatory agency to recover its full operating costs would amount to charging the regulated entities for those portions of the program that benefit the public as a whole. This would go beyond the concept of a "fee," which is all the IOAA authorizes. Implicit in this is the recognition that a government activity which benefits a private party also to greater or lesser extent includes an element of public benefit, and it may not always be possible to draw a clear line of demarcation.

Although the Supreme Court has not revisited the IOAA since its two 1974 decisions, two important principles have emerged from the body of lower court jurisprudence:[69]

1. When establishing a fee for a specific benefit conferred on an identifiable beneficiary, the agency must exclude expenses incurred in serving some independent public interest.

[67] The State Department's 1995 appropriation act provided permanent authority to credit these charges to the Administration of Foreign Affairs account as an offsetting collection. Pub. L. No. 103-317, 108 Stat. 1724, 1760 (1994).

[68] GAO had also held that a reasonable fee could be charged to unions for the payroll deduction of union dues (42 Comp. Gen. 342 (1963)), but legislation now prohibits charging either the union or the employee. 5 U.S.C. § 7115(a).

[69] Mississippi Power & Light Co. v. United States Nuclear Regulatory Commission, 601 F.2d 223, 229-230 (5th Cir. 1979), cert. denied, 444 U.S. 1102; Phillips Petroleum Co. v. Federal Energy Regulatory Commission, 786 F.2d 370 (10th Cir. 1986), cert. denied, 479 U.S. 823; National Cable Television Ass'n v. FCC, 554 F.2d 1094, 1104 (D.C. Cir. 1976); Electronic Industries Ass'n v. FCC, 554 F.2d 1109, 1114-15 (D.C. Cir. 1976); Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1180 (D.C. Cir. 1994); OMB Circ. No. A-25, section 6a(3).

2. Once it is established that a given activity confers a specific benefit on an identifiable beneficiary. The agency may charge its full costs of providing the service, regardless of the fact that the service may incidentally benefit the general public as well.

The D.C. Circuit has offered the following test:

"If the asserted public benefits are the necessary consequence of the agency's provision of the relevant private benefits, then the public benefits are not independent, and the agency would therefore not need to allocate any costs to the public." Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 732 (D.C. Cir. 1985).

More recently, the D.C. Circuit has come to view the term "private benefit" with disfavor because it can mislead parties into attempting to weigh the "public" versus "private" benefits of a given government activity. The correct principle, said the court, is simply that the IOAA authorizes an agency to charge the full cost of a service which confers a specific benefit on an identifiable beneficiary, notwithstanding any incidental benefit to the general public. There is no need to weigh the relative public and private interests. Seafarers Internat'l Union v. Coast Guard, 81 F.3d 179, 183-185 (D.C. Cir. 1996). The Seafarers decision also contains an illustration of an "independent" public benefit although the court uses a slightly different characterization. If, as part of the process of issuing merchant marine licenses to qualified individuals, the Coast Guard chooses to conduct boat inspections, it cannot include the cost of the boat inspections in the fee charged to the applicants because those costs are not "materially related" to the statutory license requirements. Id. at 186.

One issue which has provided a battleground for these concepts is whether a fee authorized by the IOAA can include the cost of preparing an environmental impact statement (EIS) required by the National Environmental Policy Act. In 1976, in an opinion to a Member of Congress, GAO expressed what would later become the established rule:

"[W]here an impact statement is required to be prepared in connection with the processing of a right-of-way, we believe that the agency may include its cost as a direct cost attributable to the special benefit represented by the right-of-way which is chargeable to the applicant under 31 U.S.C. § [9701]." B-118678, May 11, 1976.

In view of the substantial sums involved, however, it was inevitable that the issue would find its way to the courts—again and again. The first published court decision to consider the question was Public Service Company v. Andrus, 433 F. Supp. 144 (D. Colo. 1977), in which the plaintiffs had sought rights-of-way over federal lands for electric power transmission lines. The plaintiffs argued—as they would in every case—that the National Environmental Policy Act was enacted for the primary benefit of the general public, not them. The court agreed, holding that EIS costs "are not of primary benefit to the right of way applicant, and thus cannot properly be charged as fees" under the IOAA. Id. at 153.

While Public Service has never been directly overruled,[70] this portion of it has been effectively repudiated. The Fifth Circuit considered the issue in connection with Nuclear Regulatory Commission licensing fees, holding that the NRC could include the EIS costs notwithstanding the "obvious public benefit" because they are a mandatory prerequisite to the issuance of a license and hence properly chargeable as part of the full cost of conferring the benefit. Mississippi Power & Light Co. v. NRC, 601 F.2d 223, 231 (5th Cir. 1979), cert. denied, 444 U.S. 1102. A few years later, the Tenth Circuit, the governing circuit of the Colorado court which decided the Public Service case, said the same thing. Nevada Power Co. v. Watt, 711 F.2d 913, 933 (10th Cir. 1983).[71] Other cases reaching the same result are Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723 (1986), aff'd, 831 F.2d 1043 (Fed. Cir. 1987), and Sohio Transportation Company v. United States, 5 Cl. Ct. 620 (1984), aff'd, 766 F.2d 499 (Fed. Cir. 1985).

[70]An article written by an Interior Department attorney explains that Public Service was not appealed because the Bureau of Land Management thought that the newly enacted Federal Land Policy and Management Act provided the necessary authority. Kristina Clark, Public Lands Rights-of-Way: Who Pays for the Environmental Studies? 2 Natural Resources & Environment 3, 4 (1986).

[71]Nevada Power also held that EIS costs can be assessed under the Federal Land Policy and Management Act, but only to the extent warranted by a consideration of the reasonableness factors listed in 43 U.S.C. § 1734(b). 711 F. 2d. at 933. See also Alumet v. Andrus, 607 F.2d 911 (10th Cir. 1979).

(4) Calculation

Up to this point, we have established that the agency must identify its activities which provide specific services within the scope of the IOAA, and must be able to identify specific beneficiaries; having done this, it may charge those beneficiaries the full cost of providing the services, any incidental benefits to the general public notwithstanding, but excluding the cost of independent public benefits. It remains to translate this into dollars and cents.

The agency must first separate its beneficiaries into "recipient classes" (applicants, grantees, carriers, etc.), among which costs will be allocated. Each recipient class should be "the smallest unit that is practical." Electronic Industries Ass'n v. FCC, 554 F.2d 1109, 1116 (D.C. Cir. 1976). The agency then proceeds to calculate the cost basis for each fee assessed against each recipient class.

Full cost for purposes of the IOAA includes both direct and indirect costs. Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994); Electronic Industries Ass'n, 554 F.2d at 1117; Public Service Co. v. Andrus, 433 F. Supp. 144, 155 (D. Colo. 1977); OMB Circ. No. A-25, sec. 6d; B-237546, January 12, 1990. As GAO points out, the original version of the IOAA specified direct and indirect costs (65 Stat. 290), but the 1982 recodification into 31 U.S.C. § 9701 dropped the words as unnecessary. B-237546, January 12, 1990. Indirect costs include administrative overhead. 55 Comp. Gen. 456 (1975). They also include depreciation of plant and equipment. 38 Comp. Gen. 734 (1959), amplified, 56 Comp. Gen. 275, 277 (1977). The Fifth Circuit has offered the following explanation:

"The cost of performing a service, such as granting a license to construct a nuclear reactor, involves a greater cost to the agency than merely the salary of the professional employee who reviews the application. The individual must be supplied working space, heating, lighting, telephone service and secretarial support. Arrangements must be made so that he is hired, paid on a regular basis and provided specialized training courses. These and other costs such as depreciation and interest on plant and capital equipment are all necessarily incurred in the process of reviewing an application. Without these supporting services, professional employees could not perform the services requested by applicants.

"Such costs may be assessed against an applicant as part of the total cost of processing and approving a license; we emphasize again that the Commission may recover the full cost of providing a service to a beneficiary." Mississippi Power &

Light Co. v. United States Nuclear Regulatory Commission, 601 F.2d 223, 232 (5th Cir. 1979), cert. denied, 444 U.S. 1102.

The agency is not required to calculate its costs with "scientific precision." Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 736 (D.C. Cir. 1985). Reasonable approximations will suffice. Id.; Mississippi Power & Light, 601 F.2d at 232; National Cable Television Ass'n v. FCC, 554 F.2d 1094, 1105 (D.C. Cir. 1976); 36 Comp. Gen. 75 (1956). Thus, it was "entirely sensible and reasonable" for an agency to use the governmental fringe benefit cost percentage from OMB Circular No. A-75 rather than conduct its own probably duplicative study. Central & Southern Tariff Ass'n, 777 F.2d at 736.

The final step is for the agency to "divide that cost among the members of the recipient class . . . in such a way as to assess each a fee which is roughly proportional to the 'value' which that member has thereby received." National Cable Television Ass'n, 554 F.2d at 1105-06.

The fee cannot exceed the agency's cost of rendering the service. Central & Southern Tariff Ass'n, 777 F. 2d. at 729; Mississippi Power & Light, 601 F.2d at 230; Electronic Industries Ass'n, 554 F.2d at 1114. The fee must also be reasonably related to the value of the service to the recipient, and may not unreasonably exceed that value. Central & Southern Tariff Ass'n, 777 F.2d at 729; National Cable Television Ass'n, 554 F.2d at 1106. This is because the IOAA requires that the fee be based on both factors and that it be "fair." 31 U.S.C. §§ 9701(b)(1),(b)(2)(A) and (B). While the courts have not suggested that the agency must engage in a separate calculation of "value to the recipient" in order to compare it to the government's costs, neither have they furnished instruction on how to measure that value. The D.C. Circuit, in a 1996 case, tried to simplify matters by stating that "the measure of fees is the cost to the government of providing the service, not the intrinsic value of the service to the recipient," but acknowledged that this would still be subject to the statutory fairness prescription. Seafarers Internat'l Union v. Coast Guard, 81 F.3d 179, 185 and n.4 (D.C. Cir. 1996). Thus, the agency must calculate its fee on the basis of its actual or estimated costs. Nonetheless, the law seems to require that "value to the recipient" be taken into consideration. Perhaps it can be said that cost to the government can be presumptively regarded as reflecting value to the recipient, unless considerations of "fairness" dictate otherwise.

Applying these principles, assuming one could hypothesize a high-cost but low-value service, the agency might well not be able to recover its full costs.[72] Conversely, in a situation where the value to the recipient may substantially exceed the cost to the government, the agency will be able to recover its full costs but no more. It is improper, for example, to look to the value the recipient may derive from the service, such as anticipated profits. National Cable Television Ass'n, 554 F.2d at 1107. In the cited case, the fee charged to cable operators was based on the number of subscribers. The court recognized the possibility that increased numbers of subscribers could produce increases in agency regulatory costs, but required evidence of that linkage to avoid concluding that the fee was based on revenues, which the IOAA does not authorize. Id. at 1108. Similarly, the IOAA does not authorize an agency to levy a surcharge over and above its costs, or to vary its fees among beneficiaries. B-237546, January 12, 1990; Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1138 (D.C. Cir. 1976). Of course there is no objection to use of a sliding scale if the graduated fees in fact reflect graduated costs. B-237546, supra; Electronic Industries Ass'n, 554 F.2d at 1116.

Depending on the circumstances, a fee system which permits deviation from established schedules may be acceptable. The case of Phillips Petroleum Co. v. Federal Energy Regulatory Commission, 786 F.2d 370 (10th Cir. 1986), cert. denied, 479 U.S. 823, provides an illustration. The agency had a fee schedule for regulatory filings, but occasionally received filings which were much more extensive than average. Factoring the extraordinary cases into the regular schedule would have meant that the average filings would be subsidizing the extensive ones. To avoid this,the agency developed a system, published in its orders, whereby an extraordinary filing would be billed not under the schedules but on the basis of the direct and indirect costs associated with that specific filing. The court found

[72]Gillette and Hopkins conclude that "[i]n effect courts limit fees to either cost to the government or value to the beneficiary, whichever is lower." Gillette and Hopkins, supra note 54, at 839.

this system in accord with the IOAA and a reasonable exercise of the agency's discretion, not just a pretext to avoid work. Id. at 378-379.

If any of this sounds easy, it is not. The D.C. Circuit conceded the "extreme difficulty" of the task, which, it said in an oft-quoted passage, "resembles unscrambling eggs." Electronic Industries Ass'n, 554 F.2d at 1117. GAO in its many reports on the IOAA also acknowledges the difficulty of the task but regards the obstacles as not insurmountable. B-201667-0.M., May 5, 1981. A more detailed discussion may be found in Establishing a Proper Fee Schedule Under the Independent Offices Appropriation Act, 1952, GAO/CED-77-70 (May 6, 1977).

The foregoing discussion has all been in the context of providing services. The same rules do not necessarily apply when the government is selling goods or property. In this connection, OMB Circular No. A-25, sec. 6a(2)(b), provides:

> "[U]ser charges will be based on market prices (as defined in Section 6d) when the Government, not acting in its capacity as sovereign, is leasing or selling goods or resources, or is providing a service (e.g., leasing space in federally owned buildings). Under these business-type conditions, user charges need not be limited to the recovery of full cost and may yield net revenues."

The Court of Claims has upheld this approach. Yosemite Park and Curry Co. v. United States, 686 F.2d 925 (Ct. Cl. 1982). That case involved a contract for the sale of electricity by the National Park Service to a concessioner at Yosemite. The court found that the cost-based system stemming from the two 1974 Supreme Court decisions was not required in the situation presented, and that the government could use the comparative-rate system derived from the OMB circular.

d. Refunds

It would seem an elementary proposition that money collected in excess of what is due should be refunded, and there is no reason this should not apply to fees under the IOAA. After the Supreme Court handed down its decision in National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), holding that the IOAA authorized only fees, not taxes, the Federal Communications Commission refunded the cable television fees it had collected under the schedule the Court struck down.[73] Shortly thereafter, other regulated entities which had paid fees under the same schedule sued the FCC to have their fees refunded. In National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976), the court held that the FCC's broadcast system fees were vulnerable under the Supreme Court's interpretation the same as its cable television fees. It did not follow, however, that the entire fee was invalid. Noting what it called the "mandate" of the IOAA that government services to identifiable beneficiaries should be self-sustaining to the extent possible (31 U.S.C. § 9701(a)), the court said:

> "It is our interpretation of this mandate that the Commission should retain the maximum portion of the fees collected that would be permissible under the principles announced in [the 1974 Supreme Court decisions] and the statute."
> 554 F.2d at 1133.

Accordingly, the court remanded the case to the FCC to calculate a proper fee under the court's guidelines and to then "refund that portion of the money which was collected in excess thereof." Id.

The court was careful to point out that it was not asking the agency to engage in "retroactive rulemaking." Id. at 1133 n.42. The D.C. Circuit revisited this concept several years later in Air Transport Ass'n of America v. Civil Aeronautics Board, 732 F.2d 219 (D.C. Cir. 1984). The defendant agency had revised its fee schedules following the fee/tax refund litigation of the mid-1970s and announced a refund policy under which it would offset the total amount of fees a claimant had paid during a calendar year against the total amount of recalculated fees the agency could have charged, and actually pay a refund only if and to the extent the former exceeded the latter. Finding that this "offset" policy amounted to unlawful retroactive rulemaking, the court emphasized that the principle of National Association of Broadcasters must be applied on an individual fee basis. Id. at 226-28. The court also flatly rejected a claim for the refund of the full amount of the fees as "irreconcilable" with National Association of Broadcasters. Id. at 228 n.17.

If the principle of National Association of Broadcasters—that the agency may retain what it could have charged under a properly

[73] National Cable Television Ass'n v. FCC, 554 F.2d 1094, 1098 n.9 (D.C. Cir. 1976).

established fee and must refund only the excess—is circumscribed by considerations of retroactive rulemaking, one situation in which refund of the entire fee would appear appropriate is where the agency did not have regulations to begin with. The Court of Claims reached this result in A1yeska Pipeline Service Co. v. United States, 624 F.2d 1005 (Ct. Cl. 1980). See also B-145252,November 12, 1976 (internal memorandum).

If an agency is refunding fees which were improperly assessed under IOAA guidelines, and if those fees were deposited in the Treasury as miscellaneous receipts as the IOAA requires, then the refund is chargeable to the permanent, indefinite appropriation entitled "Refund of Moneys Erroneously Received and Covered," established by 31 U.S.C. § 1322(b)(2). 55 Comp. Gen. 243 (1975);[74] B-181025, July 11, 1974. If the agency has been authorized to credit the fee to some other appropriation or fund, the refund is chargeable to the appropriation or fund to which the fee was credited. See, e.g., 55 Comp. Gen. 625 (1976).

Absent statutory direction to the contrary, the rules of the preceding paragraph apply equally to refunds of fees collected under statutes other than the IOAA. For example, fees under the Federal Land Policy and Management Act are deposited in a "special account" from which they are authorized to be appropriated. 43 U.S.C. § 1734(b). Erroneous or excessive fees may be refunded "from applicable funds." 43 U.S.C. § 1734(c). Where an appropriation from the special account has actually been made, that appropriation is the "applicable fund." 61 Comp. Gen. 224 (1982). If the statute is silent as to disposition, the fees are properly treated as miscellaneous receipts, in which event refunds of erroneous or excessive fees are chargeable to the "Erroneously Received and Covered" account. Id.

OMB Circular A-25, sec. 6a(2)(c), tells agencies to collect user fees "in advance of, or simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services." An agency collecting a fee in advance

[74]The question of the amount to be refunded was not raised in the GAO decision. In any event, to the extent 55 Comp. Gen. 243 implies that the entire fee should be refunded, it is of course to that extent superseded by the subsequent D.C. Circuit precedent.

should use common sense to avoid depositing the money in the general fund prematurely. In 53 Comp. Gen. 580 (1974), for example, fees for certain permits had been deposited as miscellaneous receipts when a change in the law authorized transfer of permit issuance to the states but made no provision for transfer of funds. When the state also charged a fee, applicants naturally sought refund of the fees they had already paid to the federal government and for which they had received nothing. Although not discussed in the decision, the “Erroneously Received and Covered” appropriation presumably was not available because the receipt of the fees had been entirely proper. The solution was a two-step procedure—make an adjustment from the receipt account to the agency’s suspense account to correct the erroneous deposit, then make the refund from the suspense account. The proper accounting treatment should have been to retain the fees in the suspense account or a trust account until they were “earned” by performance, then transferred to the appropriate general fund receipt account. See, e.g., A-44005, April 24, 1935.

For refund purposes, whether or not the fees were paid under protest is immaterial. Alyeska Pipeline Service Co., 624 F.2d at 1018; 55 Comp. Gen. at 244. However, waiting too long to assert a claim could be fatal under the doctrine of laches if, for example, through no fault on the part of the agency, records are no longer available from which the fees could be recalculated. Air Transport Ass’n of America, 732 F.2d at 225-226. Laches will not help an agency which fails to retain adequate records if it is on notice of a challenge to its fee schedule. Id. at 226 n.14. Whether a simple payment under protest will serve this purpose is not clear.

4. Other Authorities

a. Subsection (c) of the IOAA

For approximately 35 years, although there were other fee statutes on the books, the IOAA was the predominant federal user fee statute, and it remains the only governmentwide authority. In the mid-1980s, however, as the need to attack the growing budget deficit took center stage, and general tax increases were not forthcoming, congressional attention turned increasingly to user fees as a revenue source. Starting in 1986, Congress enacted dozens of fee provisions directed at particular agencies or activities.[75]

The relationship between the IOAA and these other statutes is addressed in the IOAA itself, specifically 31 U.S.C. § 9701(c):

"(c) This section does not affect a law of the United States—

> "(1) prohibiting the determination and collection of charges [or directing] the disposition of those charges; and
>
> "(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases."[76]

This is largely a codification of the canon of construction that a general statute must yield to the terms of a specific statute addressing the same subject matter.

Perhaps the simplest application of subsection (c) is the prohibitory statute, in which case the IOAA is knocked out of the picture. An example is 21 U.S.C. § 695 which provides that, except for certain overtime services, the "cost of inspection . . . under the requirements of laws relating to Federal inspection of meat and meat food products shall be borne by the United States." Enacted in 1948, this statute replaced an unsuccessful one-year experiment in financing federal meat inspections through user fees. See S. Rep. No. 81–2120, supra, at 5; Combs v. United States, 98 F. Supp. 749 (D. Vt. 1951). Unlike the broad proscription of the meat inspection statute, a prohibitory statute may simply have the effect of barring reliance on

[75]They tend to be found in omnibus legislation. Several important provisions appeared in the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. No. 99-272, 100 Stat. 82), the Omnibus Budget Reconciliation Act of 1986 (Pub. L. No. 99-509, 100 Stat. 1874), and the Omnibus Budget Reconciliation Act of 1990 (Pub. L. No. 101-508, 104 Stat. 1388). For more detail, see CBO, The Growth of Federal User Charges 19-22 (August 1993), and The Growth of Federal User Charges: An Update (October 1995).

[76]In the recodified version carried in the U.S. Code, the word "and" appears in place of the words bracketed in the text, which is clearly erroneous. The meaning is clarified by resort to the source provision: the IOAA shall not "modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge, or price" (65 Stat. 290). The conjunctive "and" is meaningless because a statute which prohibits charging a fee would have no occasion to then address, much less prohibit, disposition.

the IOAA, effectively requiring more explicit authority. A proviso in the Food and Drug Administration's 1996 appropriation, for example, prohibits use of the FDA's Salaries and Expenses money "to develop, establish, or operate any program of user fees authorized by 31 U.S.C. 9701." Pub. L. No. 104-37, 109 Stat. 299, 327 (1995). The origin of this proviso is discussed in B-217931, July 31, 1985. The FDA does have a user fee system, but it is authorized under the FDA's own detailed and specific legislation (21 U.S.C. § 379h), not the IOAA.

GAO stated its approach to subsection (c) vis-a-vis other fee statutes in 55 Comp. Gen. 456, 461 (1975):

> "[I]t has consistently been our view that . . . 31 U.S.C. § [9701(c)] preclude[s] the imposition of additional user charges under that section only to the extent that another statute expressly or by clear design constitutes the only source of assessments for a service."

b. IOAA Incorporated by Reference

One form of user fee statute is based directly on the IOAA and makes explicit reference to it. An example is 14 U.S.C. § 664(a):

> "A fee or charge for a service or thing of value provided by the Coast Guard shall be prescribed as provided in section 9701 of title 31."

Another very similar Coast Guard statute is 46 U.S.C. § 2110(a)(1). The main thrust of statutes like these is to remove the discretionary aspect of the IOAA and to make the authority mandatory. The reference to the IOAA also serves as a check against excessive fees. See Boat Owners Ass'n of the United States v. United States, 834 F. Supp. 7, 12 (D.D.C. 1993). A statute of this type may include its own limitations on use of the authority. For example, the Coast Guard legislation prohibits charging a fee for any search or rescue service. 46 U.S.C. § 2110(a)(5).

Another example is 42 U.S.C. § 2214(b), applicable to the Nuclear Regulatory Commission, enacted as part of the 1990 OBRA:

> "Pursuant to section 9701 of Title 31, any person who receives a service or thing of value from the Commission shall pay fees to cover the Commission's costs in providing any such service or thing of value."

Like the Coast Guard statutes, use of the word "shall" makes mandatory what would otherwise be discretionary under the IOAA.

One step removed from these is a statute which authorizes or directs the charging of fees, with the link to the IOAA appearing in legislative history rather than the statute itself. An example is the original version of the Freedom of Information Act which specified merely "fees to the extent authorized by statute." Committee reports made it clear that the IOAA was the statute Congress had in mind. See Diapulse Corp. v. Food and Drug Administration, 500 F.2d 75, 78 (2d Cir. 1974); B-161499-O.M., August 13, 1971. The Freedom of Information Act now includes its own detailed fee provisions.

A variation is 7 U.S.C. § 2242a. Subsection (a) authorizes the Department of Agriculture to charge reasonable user fees for departmental publications or software. Subsection (b) then goes on to state that "[t]he imposition of such charges shall be consistent with section 9701 of title 31." GAO analyzed USDA's authority under this provision in B-219338, June 2, 1987. Finding no legislative history to explain what Congress intended by the "consistent with" terminology, GAO concluded that the agency was not required to adopt every wrinkle of judicial interpretation under the IOAA. GAO advised:

> "At a minimum . . . we take it to mean that the charges may be cost-related under any of the various formulations sanctioned by the decisions of the courts, or, in the absence of a cost-based fee schedule, reasonable. Also, the requirement that fees be 'consistent' with section 9701 fees clearly does not mean that they must be identical to those that would be imposed under section 9701 or that they must have been promulgated in accordance with all the procedural requirements [of the IOAA]." Id.

c. Statutes "In Pari Materia"

Another type of user fee statute one encounters is a statute which authorizes or directs an agency to charge a fee or to recover costs in general terms, without making specific reference to the IOAA. The statute may apply to a specific type of activity or to a broader range. Unless there is something in the statute or its legislative history to compel a different result, the approach is to regard it as being "in pari materia" with the IOAA—i.e., statutes dealing with the same subject matter or having a common purpose (Black's Law Dictionary 791 (6th ed. 1990))—and to construe them together as part of an overall statutory scheme. Where this principle applies, it is legitimate to look to the body of law developed under the IOAA for guidance in construing the other statute. This includes the guidance under OMB Circular A-25. See OMB Cir. No. A-25, sec. 4.b.

For example, the National Park Service is authorized to furnish utility services to concessioners "on a reimbursement of appropriation basis." 16 U.S.C. § lb(4). In Yosemite Park and Curry Co. v. United States, 686 F.2d 925 (Ct. Cl. 1982), a concessioner at Yosemite National Park who had been purchasing electricity from the Park Service challenged the Park Service's rate structure, which was based on the average of rates charged by other area utilities rather than cost reimbursement. Viewing 16 U.S.C. § lb(4) and the IOAA as being "in pari materia," the court analyzed the propriety of the fee structure under the IOAA, as implemented by OMB Circular No. A-25, and found it authorized under both statutes.

Another illustration is 30 U.S.C. § 185(1), part of the Mineral Leasing Act:

"The applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application, and the holder of the right-of-way or permit shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way or permit area . . . ."

This provision does not supersede or override the requirement of the IOAA that fees be assessed only pursuant to regulations. A1yeska Pipeline Service Co. v. United States, 624 F.2d 1005 (Ct. Cl. 1980); Sohio Transportation Co. v. United States, 5 Cl. Ct. 620 (1984), aff'd, 766 F.2d 499 (Fed. Cir. 1985). The lower court in the Sohio litigation also looked to precedent under the IOAA to determine that the Bureau of Land Management's pipeline right-of-way fees were not taxes. 5 Cl. Ct. at 628.

The Communications Satellite Act of 1962 directs the National Aeronautics and Space Administration to furnish satellite launching and associated services to the Communications Satellite Corporation upon request and "on a reimbursable basis." 47 U.S.C. § 721(b)(3). Reimbursement under this provision should be determined in accordance with the IOAA, GAO has concluded, since nothing in the language or legislative history of the Communications Satellite Act suggests the contrary. B-168707-O.M., May 11, 1970. The same applies to 22 U.S.C. § 2661, which requires the State Department to obtain reimbursement for certain expenses incurred in procuring information for private parties. See 36 Comp. Gen. 75 (1956). Another example might be 13 U.S.C. § 8(b), which authorizes the Secretary of Commerce to provide statistical information to, or to make special statistical compilations and surveys for, any public or private person "upon payment of the actual or estimated cost of such work."

A final illustration is the legislation governing the Comptroller of the Currency's assessments against national banks. At one time, the law directed the Comptroller to recover the expense of required examinations by assessments on the national banks in proportion to their assets or resources. 12 U.S.C. § 482 (1988 ed.). Applying the "pari materia" concept in effect if not in terms, one court sustained the Comptroller's assessment regulations, concluding that "the Comptroller is directed, to the fullest possible extent, to assess fees reflective of the actual cost of examination while adhering to the statutory guideline of asset and resource size." First National Bank of Milaca v. Smith, 445 F. Supp. 1117, 1123 (D. Minn. 1977), aff'd sub nom., First National Bank of Milaca v. Heimann, 572 F.2d 1244 (8th Cir. 1978). The district court rejected the bank's argument that 31 U.S.C. § 9701(c) rendered the IOAA inapplicable; 12 U.S.C. § 482 did not fix the amount of the fee but merely provided a basis for calculation, in which event section 9701(c) encourages fee recalculation to more fully achieve, or at least approach, self-sufficiency. 445 F. Supp. at 1123. A 1991 amendment to 12 U.S.C. § 482 deleted the asset/resource size requirement and the statute now merely provides a general assessment requirement. The amendment does not appear to affect the relationship of section 482 to the IOAA.

d. Statutes Entirely Independent of the IOAA

Once you eliminate those user fee statutes that are tied in to the IOAA either expressly or by a "pari materia" rationale, those that are left have little in common other than their independence of the IOAA by virtue of 31 U.S.C. § 9701(c). The only safe generalization is that each statute stands alone and its own terms determine its coverage and limitations. Many of the laws stem from the post-1985 period and there is little interpretive case law. Accordingly, our objective here is essentially to present a typology to illustrate the different kinds of user fee laws and the different things Congress has tried to do with them.

Perhaps the simplest type is a provision that directly fixes the amount of the fee. An example is 8 U.S.C. § 1356(d):

"In addition to any other fee authorized by law, the Attorney General shall charge and collect $6 per individual for the immigration inspection of each passenger arriving at a port of entry in the United States, or for the preinspection of a passenger in a place outside of the United States prior to such arrival, aboard a commercial aircraft or commercial vessel."

Subsection (e) sets forth limitations. While this type of statute may generate other questions of interpretation, it eliminates the calculation nightmare. Of course, a fixed-fee approach is not always viable. Conceptually similar is a statute which fixes the amount of the fee and provides a mechanism for periodic adjustment by the administering agency. An example is 47 U.S.C. § 158 (Federal Communications Commission application fees).

Another simple type, at least simple to administer, is a fee set as a percentage of some reference amount. Congress enacted legislation in 1985 directing the Federal Reserve Bank of New York to deduct 1-1/2 percent of the first $5 million and 1 percent of any amount over $5 million from every award by the Iran-United States Claims Tribunal in favor of a United States claimant. The deduction was intended to reimburse the government for expenses of its participation in the claims program. Pub. L. No. 99-93, § 502, 99 Stat. 405, 438, 50 U.S.C. § 1701 note. In United States v. Sperry Corp., 493 U.S. 52 (1989), the Supreme Court upheld the deduction against a variety of challenges, one of which was that the government had failed to demonstrate the relationship of the amount of the deduction to the costs presumably being reimbursed. The Court responded:

"This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a 'fair approximation of the cost of benefits supplied.' Massachusetts v. United States, 435 U.S. 444, 463, n.19 (1978)." 493 U.S. at 60.

The statute declared the deduction to be a user fee, and it is the claimant's burden to demonstrate otherwise. Id. Of course there are limits to this rationale. The Court continued:

"The deductions authorized by § 502 are not so clearly excessive as to belie their purported character as user fees. This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee. . . . We need not state what percentage of the award would be too great a take to qualify as a user fee, for we are convinced that on the facts of this case, 1-1/2% does not qualify as a 'taking' by any standard of excessiveness." Id. at 62.

There is no apparent reason why the Court's approach in Sperry would not apply equally to a fee in the form of a fixed dollar amount. Also, as the statute in Sperry illustrates, a fixed-amount fee or a fixed-percentage fee can be in the form of a sliding scale.

Most user fee statutes are not this simple. Rather than fixing the amount of the fee, they tend to prescribe the basis for determining the fee and vary greatly in their level of detail. At one end of the spectrum are laws that prescribe a cost basis and include some additional detail, basically enough to escape the aegis of the IOAA. Section 304 of the Federal Land Policy and Management Act, for example, 43 U.S.C. § 1734, authorizes fees "with respect to applications and other documents relating to the public lands" and lists several factors to be considered in determining reasonableness. See Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983). Additional examples are the fee provisions of the Grain Standards Act, 7 U.S.C. §§ 79(j) (inspection) and 79a(1) (weighing). In holding the IOAA inapplicable to these statutes, the Claims Court noted that "accepted principles of statutory construction require that a specific legislative enactment be given effect to the exclusion of a more general one." Bunge Corp. v. United States, 5 Cl. Ct. 511, 516 (1984), aff'd mem., 765 F.2d 162 (Fed. Cir. 1985).

At the other end of the spectrum are statutes containing a complex fee-setting mechanism set forth in considerable detail, often including waiver authority. One example is 7 U.S.C. § 136a-1, prescribing fees for pesticide registration under the Federal Insecticide, Fungicide, and Rodenticide Act. The law combines fixed fees for certain pesticides, fees set administratively within limits for other pesticides, and formula fees for reregistration. The law also includes annual ceilings per registrant and an aggregate target revenue amount.

Another example is 21 U.S.C. § 379h, fees for the Food and Drug Administration. The law authorizes three fees—drug application fees, establishment fees, and product fees. The fees are fixed dollar amounts subject to an adjustment mechanism. The law also specifies aggregate fee revenue amounts which must be specified in advance in appropriation acts. Subsection (f)(1) of the law prohibits the FDA from assessing fees in any fiscal year unless it has received a Salaries and Expenses appropriation for that year not less than its 1992 appropriation.

A well-known user fee is the fee prescribed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4), which illustrates still a different fee-setting approach. Fees are based on "reasonable standard charges" and are set at three levels. The highest level is commercial-use requesters, who pay for search, duplication, and review. The lowest level includes educational or noncommercial scientific institutions and the news media, who pay only for duplication. All others are charged for search and duplication. Each agency is to issue its own fee regulations, but in the interest of uniformity they must conform to Office of Management and Budget guidelines. OMB's guidelines are found in 52 Fed. Reg. 10012 (March 27, 1987). An agency's own regulations may simply adopt the OMB guidelines. Media Access Project v. FCC, 883 F.2d 1063 (D.C. Cir. 1989).

Several user fee provisions were included in the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82—"COBRA." The Congressional Budget Office has observed that if the IOAA was the first turning point in user fee legislation in the post-World War II era, COBRA was the second. The Growth of Federal User Charges 19 (1993). This is because several of the COBRA provisions departed from the traditional approach of basing fees on the cost of specific benefits, and instead linked fees to recovering part or all of an agency's operating budget.

One provision of COBRA, the amended version of which is found at 42 U.S.C. § 2213, directed the Nuclear Regulatory Commission to assess annual charges on its licensees so that the annual charges, when added to the fees the NRC was already assessing under the IOAA, would approximate 33 percent of the NRC's operating budget. The annual charges "shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." 42 U.S.C. § 2213(1)(B). A group of licensees sued, arguing that the COBRA provision must be read as incorporating the limitations of the IOAA, otherwise it would amount to an unconstitutional delegation by Congress of its power to tax. The challenge was rejected in Florida Power & Light Co. v. United States, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045. The court first held that COBRA was intended to go beyond the IOAA by authorizing the NRC to recover "generic costs, that is, costs which do not have a specific, identifiable beneficiary." Id. at 769. The court then went on to hold that, even if you wanted to call the annual charges a "tax," the COBRA provision satisfied the Supreme Court's test for a permissible delegation because it provided adequate standards for the implementing agency to apply. Id. at 772-776.

The Omnibus Budget Reconciliation Act of 1990 added a provision,codified at 42 U.S.C. § 2214, directing the NRC to collect fees and charges to approximate 100 percent of its budget authority. The Justice Department's Office of Legal Counsel has determined that this includes other federal agencies which hold NRC licenses. 15 Op. Off. Legal Counsel 91 (preliminary print, 1991).

Another COBRA provision, now codified at 49 U.S.C. § 60301, directs the Secretary of Transportation to collect annual fees from operators of various pipeline facilities. The fees are to be calculated to cover the costs of activities under the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979, not to exceed 105 percent of the total appropriations made for those activities in a given year. As with the NRC provision noted above, there was no way this provision could pass muster under the rigid interpretations of the IOAA, and, again as with the NRC provision, the operators were in court before the ink on the statute was dry. This time, the litigation produced a Supreme Court decision which once and for all laid to rest the "taxing issue" (bad pun) which had hovered over all user fee statutes since the 1974 IOAA decisions. The case is Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989). This time, the plaintiffs conceded that the statute satisfied the requirements of the nondelegation doctrine, but argued that the standards should be tighter when Congress is delegating authority under its taxing power. Not so, held the Court:

> "Even if the user fees are a form of taxation, we hold that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." Id. at 223.

As to the 1974 IOAA cases:

"National Cable Television and New England Power stand only for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties. . . . Of course, any such delegation must also meet the normal requirements of the nondelegation doctrine." Id. at 224.

Thus, what is important is not whether you call something a fee or a tax, but whether Congress has legislated its intention with sufficient clarity.

Another COBRA provision in this family is 42 U.S.C. § 7178, which directs the Federal Energy Regulatory Commission to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." 42 U.S.C. § 7178(a)(1). Like the NRC statute noted earlier, this provision does not replace fees charged under other laws but prescribes charges which, when added to those other fees, will reach the desired budgetary goal. In this case, the fees expressly preserved are those authorized under the Federal Power Act. 42 U.S.C. § 7178(a)(2). A case interpreting the Power Act fee provision is City of Vanceburg v. FERC, 571 F.2d 630 (D.C. Cir. 1977), cert. denied, 439 U.S. 818.

A final example is 21 U.S.C. § 886a, enacted as part of the Justice Department's 1993 appropriation act. It directs the Drug Enforcement Administration to set fees under its diversion control program "at a level that ensures the recovery of the full costs of operating the various aspects of that program." 21 U.S.C. § 886a(3). In American Medical Association v. Reno, 857 F. Supp. 80 (D.D.C. 1994), the court held the IOAA inapplicable, rejecting what has become almost a ritualistic challenge that the restrictive IOAA standards should continue to govern.

In sum, we have the IOAA and its progeny designed to recover the cost of providing goods and services, and we have the COBRA provisions and their progeny designed to recover part or all of an agency's operating budget. Perhaps the next step will be for Congress to tell an agency, in effect, "if you want to go in a particular direction, get the money from your customers." Precedent for this approach already exists. The Federal Bureau of Investigation had received authority in appropriation acts to establish and collect fees for certain fingerprint and name check activities. The authority is discretionary and applies to services provided to other federal agencies. 15 Op. Off. Legal Counsel 21 (preliminary print, 1991). The FBI's 1991 appropriation made the authority permanent and authorized the agency to—

> "establish such fees at a level to include an additional amount to establish a fund to remain available until expended to defray expenses for the automation of fingerprint identification services and associated costs." Pub. L. No. 101-515, 104 Stat. 2101, 2112 (1990), 28 U.S.C. § 534 note.

5. Disposition of Fees

The rule governing the accounting and disposition of user fees is the same rule that governs the accounting and disposition of receipts in general—they must, as required by 31 U.S.C. § 3302(b), be deposited in the general fund of the Treasury to the credit of the appropriate miscellaneous receipts account unless the agency has statutory authority to do something else.

a. Fees Under the IOAA

Normally, fees collected under the authority of the IOAA must be deposited as miscellaneous receipts. E.g., 49 Comp. Gen. 17 (1969). The original version of the IOAA specifically included the miscellaneous receipts requirement (65 Stat. 290). When the IOAA became 31 U.S.C. § 9701 in 1982, the recodifiers dropped the miscellaneous receipts language because there was no need for the IOAA to repeat what was already clearly the case by virtue of the general requirement of 31 U.S.C. § 3302(b). See Revision Note following 31 U.S.C. § 9701. As the Claims Court has pointed out, there is no other significance to the deletion. Bunge Corp. v. United States, 5 Cl. Ct. 511, 516 n.2 (1984), aff'd mem., 765 F.2d 162 (Fed. Cir. 1985).

Of course, Congress is always free to legislate exceptions. Thus, it is possible to have a fee authorized and governed by the IOAA but with specific authority for a different disposition in whole or in part. See B-215127, October 30, 1984. Several of the decisions cited later in our case study of the Customs Service provide specific examples.

b. Fees Under Other Authorities

Again, the rule is the same—the fees are deposited as miscellaneous receipts unless Congress has provided otherwise. As noted earlier, the IOAA itself reinforces this result by expressly preserving, in 31 U.S.C. § 9701(c)(1), any other statute which addresses the disposition of fees. This provision looks both forward and backward. For later enacted statutes, the result would at least arguably be the same under the specific versus general canon. For statutes predating the IOAA, subsection (c)(1) eliminates any possibility of an implied repeal or "later enactment of Congress" argument. See, e.g., 36 Comp. Gen. 75 (1956). Thus, there is no need to determine when a given fee statute was enacted. If it is silent as to disposition, the miscellaneous receipts statute governs. If it specifically addresses disposition, its own terms control.

It is not at all uncommon for fee statutes to address disposition. The precise approach varies depending on what Congress is trying to accomplish, or perhaps what the agency is able to persuade its oversight committees to permit, but it is nevertheless possible to identify broad categories.

(1) Miscellaneous receipts

Although silence would produce the same result, a number of statutes expressly require that the fees be deposited as miscellaneous receipts. One example is the statute requiring a percentage deduction from awards of the Iran-United States Claims Tribunal. The statute specifies that amounts deducted "shall be deposited into the Treasury of the United States to the credit of miscellaneous receipts." Pub. L. No. 99-93, § 502(b), 99 Stat. 405, 438, 50 U.S.C. § 1701 note. Another example is 44 U.S.C. §1307(b) (fees received by National Oceanic and Atmospheric Administration from sale and/or licensing of nautical or aeronautical products).

Congress sometimes uses the term "general fund" which, for deposit purposes, is synonymous with "miscellaneous receipts." (See Chapter 6, Availability of Appropriations: Amount.) Thus, application fees paid to the Federal Communications Commission are to be "deposited in the general fund of the Treasury." 47 U.S.C. § 158(e). The same language is used for permit fees paid to the Secretary of Commerce by owners or operators of foreign fishing vessels. 16 U.S.C. § 1824(b)(10)(B).

Miscellaneous receipts is a particularly appropriate disposition when the fees are intended to recoup the operating budget of some agency or activity rather than augment the agency's operating funds. For example, we noted earlier 42 U.S.C. § 7178, which directs the Federal Energy Regulatory Commission to assess fees to recover all of its costs. The statute goes on to provide that "[a]ll moneys received under this section shall be credited to the general fund of the Treasury." 42 U.S.C. § 7178(f).

(2) <u>Credit to agency's appropriation</u>

Another group of fee statutes authorizes the agency to retain the fees for credit to its own operating appropriations. This approach is used when Congress wants to let an agency augment its congressional appropriation and finance a greater program level than would be possible under the amount Congress is willing to appropriate directly. Perhaps the clearest form of augmentation approach is the fee statute for the Food and Drug Administration, 21 U.S.C. § 379h. Subsection (g)(1) provides:

> "Fees collected for a fiscal year . . . shall be credited to the appropriation account for salaries and expenses of the [FDA] and shall be available in accordance with appropriation Acts until expended without fiscal year limitation."

The augmentation feature is highlighted by 21 U.S.C. 379h(f)(1), under which fees in any fiscal year must be triggered by a Salaries and Expenses appropriation at least equal to a specified base year. Lest anyone think these user fees are pocket change, the FDA's 1996 appropriation act appropriated almost $85 million in fees under section 379h to the FDA's Salaries and Expenses account. Pub. L. No. 104-37, title VI, 109 Stat. 299, 326 (1995). Another example of an "augmentation fee" is the FBI fingerprint and name check fee provision, cited previously, which also authorizes credit of the fees to the FBI's Salaries and Expenses appropriation. Pub. L. No. 101-515, 104 Stat. 2101, 2112, 28 U.S.C. § 534 note.

Another situation in which Congress may authorize crediting to an appropriation account is where the fee amounts primarily to reimbursement of expenses borne by the receiving appropriation. Some examples are:

- The Department of Agriculture may sell various products and services of the National Agricultural Library, at prices set to at least recoup costs. Sale proceeds "shall be deposited in the Treasury of the United States to the credit of the applicable appropriation and shall remain available until expended." 7 U.S.C. § 3125a(f).
- Another Agriculture Department statute authorizes the furnishing of departmental paper or electronic publications at "reasonable" fees.

The fees may be used to pay related costs and "may be credited to appropriations or funds that incur such costs." 7 U.S.C. § 2242a(c)(2).

- The State Department is authorized to incur certain expenses incident to procuring information for private parties on a reimbursable basis. Reimbursements are to be "credited to the appropriation under which the expenditure was charged." 22 U.S.C. § 2661.
- Military departments may furnish stevedoring and terminal services and facilities to certain vessels at "fair and reasonable rates." Proceeds "shall be paid to the credit of the appropriation or fund out of which the services or facilities were supplied." 10 U.S.C. § 2633(c).

Each statute must be examined to determine the availability of the fees to the collecting agency in two important respects. First, statutes which authorize crediting of fees to operating appropriations may require further congressional action to make the fees available for obligation, like 21 U.S.C. § 379h, or may, like 7 U.S.C. § 3125a, in effect permanently appropriate the receipts similar to a revolving fund.

Second, the statute may direct which fiscal year receives the credit. For example, reimbursements to the Immigration and Naturalization Service for detention, transportation, hospitalization, and other expenses of detained aliens "shall be credited to the appropriation for the enforcement of this chapter for the fiscal year in which the expenses were incurred." 8 U.S.C. § 1356(a). Although not a user fee statute, the very next subsection illustrates the contrasting approach. Moneys spent by the INS to purchase evidence and subsequently recovered are "reimbursed to the current appropriation" of the INS. 8 U.S.C. § 1356(b). More directly on point is 10 U.S.C. § 2481(b), under which proceeds from the sale of certain utilities and related services by military departments "shall be credited to the appropriation currently available for the supply of that utility or service."

Collections credited to appropriation accounts are a form of offsetting collection (OMB Circular No. A-11, § 14.2(d)), and some statutes use this terminology. Federal Communications Commission regulatory fees "shall be deposited as an offsetting collection in, and credited to, the account providing appropriations to carry out the functions of the Commission." 47 U.S.C. § 159(e). Similarly, the National Oceanic and Atmospheric Administration's 1995 appropriation act authorized it to assess fees to be "credited to this appropriation as offsetting collections to be available until expended, to recover the costs of administering marine sanctuary and aeronautical charting programs," with the target of reducing the general fund appropriation by $6 million, at which point any additional fees are not available for obligation until the next fiscal year. Pub. L. No. 103317, title II, 108 Stat. 1724, 1741 (1994). The same appropriation provides that receipts from the sale of aeronautical charts resulting from an increase in price above a specified base level "shall be deposited in this account as an offsetting collection and shall be available for obligation." (The base price, as noted above, goes to miscellaneous receipts.) Use of the "offsetting collection" language is of significance primarily for budgetary purposes and by itself has no impact on the availability of the money to the agency.

(3) Special account or fund

In addition to crediting fees to an agency appropriation, Congress can "dedicate" the fees to a particular purpose by authorizing deposit to a revolving fund, a trust account, or a "special account," which simply means a receipt account earmarked by statute for a particular purpose.[77] The special account may be permanently appropriated, or it may require further congressional action to make the funds available for obligation. An example of the former is the treatment of Department of Agriculture grain inspection fees under 7 U.S.C. § 79. Subsection 79(j) provides:

> "Such fees, and the proceeds from the sale of samples obtained for purposes of official inspection which become the property of the United States, shall be deposited into a fund which shall be available without fiscal year limitation for the expenses of the Secretary incident to providing services under this chapter."

The statute may direct deposit into an already existing fund. The Agriculture Department also charges fees for grain weighing services; they are "deposited into the fund created in section 79(j) of this title." 7 U.S.C. § 79a(t)(1). Another example is 13 U.S.C. § 8(d)

[77] See Budget Glossary Exposure Draft, supra note 15, at 5.

which governs the disposition of fees for certain documents and services furnished by the Census Bureau:

"All moneys received in payment for work or services enumerated under this section shall be deposited in a separate account which may be used to pay directly the costs of such work or services, to repay appropriations which initially bore all or part of such costs, or to refund excess sums when necessary."

An example requiring further congressional action is section 304(b) of the Federal Land Policy and Management Act, 43 U.S.C. § 1734(b), which provides:

"The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended."

Similar to many of the statutes authorizing credit to appropriations, statutes establishing special accounts may prescribe that the deposits be treated as offsetting receipts.[78] An example is 21 U.S.C. § 886a, which establishes "in the general fund of the Treasury a separate account known as the Diversion Control Fee Account." Certain fees charged by the Drug Enforcement Administration are deposited in the account "as offsetting receipts," and are periodically refunded by Treasury to the DEA to reimburse expenses incurred in the DEA's diversion control program, the target being the recovery of the program's full operating costs. The Immigration and Naturalization Service has several similar accounts—8 U.S.C. §§ 1356(h) (Immigration User Fee Account), 1356(m) (Immigration Examinations Fee Account), and 1356(q) (Land Border Inspection Fee Account), all of which specify treatment of deposits as offsetting receipts.

Finally, there are instances where "offsetting receipts" terminology is used solely for accounting purposes and not tied in to any form of dedicated or earmarked account. An example is the following Coast Guard statute, 14 U.S.C. § 664(b):

[78]An offsetting receipt is a form of offsetting collection which is credited to a receipt account rather than an appropriation account. Budget Glossary Exposure Draft, supra note 15, at 27-29. Again, the terminology is significant primarily for budgetary purposes.

"Amounts collected by the Secretary for a service or thing of value provided by the Coast Guard shall be deposited in the general fund of the Treasury as proprietary receipts of the department in which the Coast Guard is operating and ascribed to Coast Guard activities."[79]

6. Customs Service: A Case Study

The Customs Service, because of the nature of its mission, has considerable exposure to the private sector in its day-to-day operations. This exposure in turn enhances the agency's potential for various forms of user financing. A survey of cases and statutes dealing with user financing in the Customs Service is instructive because it illustrates in practice virtually every concept and principle we have covered thus far in our discussion.

In the decades before the IOAA was enacted, Customs was in the same boat as most other agencies, and various proposals for user financing had to be rejected. E.g., 11 Comp. Gen. 153 (1931); 10 Comp. Gen. 209 (1930); 3 Comp. Gen. 128(1923); 2 Comp. Gen. 775 (1923). It made no difference that the private parties were perfectly willing to pay, and in many cases had in fact initiated the offer, in order to get services over and above what Customs was able or willing to provide. In addition, the proposals often involved paying the salaries of customs officials which, without congressional authorization, would have amounted to an improper augmentation of Customs' appropriations. 2 Comp. Gen. at 776. To make matters worse, a provision of the criminal code (now found at 18 U.S.C. § 209) makes it illegal for anyone to supplement or contribute to the salary of a government employee and for the employee to accept it.

Once the IOAA was in place, Customs began to explore its new options. A series of decisions approved proposals to assess user fees for a variety of services, including the following:

- Preclearance of air passengers at major airports in Canada over and above what the operation would cost if performed entirely in the United States. 48 Comp. Gen. 24 (1968). Preclearance, it could be demonstrated, conferred a financial benefit on the airlines and, some felt, attracted passengers. Id. at 25.

[79] A "proprietary receipt" is simply a type of offsetting receipt representing collections from outside the government. Budget Glossary Exposure Draft, supra note 15, at 29.

- Additional costs of extended hours at certain highway crossing points along the Canadian and Mexican borders. 48 Comp. Gen. 262 (1968). This case, as did 48 Comp. Gen. 24, pointed out that the charges could include employee compensation. In effect, the authority of the IOAA removed both the augmentation concern and the potential bar of 18 U.S.C. § 209.
- Reimbursement for the services of a customs officer upon the temporary designation of a community airport as an international airport. B-171027, December 7, 1970.
- Reimbursement (which could include free or reduced-rate transportation or accommodations) of the costs of providing employees to train private travel agents in Customs regulations and procedures. 62 Comp. Gen. 262 (1983).

In addition, each of these decisions noted that Customs could, as specifically authorized by 19 U.S.C. § 1524, credit the fees to the appropriations from which the costs in question had been paid. The Customs statute had been on the books long before the IOAA, and, as we have seen, 31 U.S.C. § 9701(c) expressly defers to any specific disposition authority. A similar provision is 19 U.S.C. § 1755(b), reflected in Customs regulations at 19 C.F.R. § 147.33, which requires that fair operators reimburse the Customs Service for "actual and necessary" expenses of services provided in connection with trade fairs, the reimbursement to be credited to the appropriation from which the expenses were paid.

In a 1980 decision, GAO was called upon to review its 1968 preclearance decision, 48 Comp. Gen. 24, in light of the intervening judicial decisions which had restrictively interpreted the IOAA. Some airlines had argued that preclearance was really for the benefit of the general public. However, Customs pointed out that preclearance was provided only when an airline specifically requested it. Accordingly, based on the body of jurisprudence from the Supreme Court and the courts of appeals, GAO agreed with Customs that the fees were within the scope of the IOAA. 59 Comp. Gen. 389 (1980). Among the costs Customs could recover were those specified in its regulations (19 C.F.R. § 24.18): "housing allowances, post of duty allowances, home leave and associated transportation costs, and equipment, supplies and administrative costs over and above that which Customs would normally incur." In addition, Customs could include that portion of the costs of its computerized data processing system attributable to the preclearance sites. 59 Comp. Gen. at 395.

Of course, there are limits on how far you can take the IOAA and another 1980 decision, 59 Comp. Gen. 294, illustrates one of them. The Miami International Airport is a busy place, and long delays incident to customs clearance were producing a lot of complaints. Local business and community leaders suggested that the airport or airlines might reimburse Customs to permit it to hire additional staff to expedite clearance during normal business hours. Congress had authorized Customs to charge for certain overtime services and for certain "special services" performed during normal duty hours. The Miami proposal involved neither situation, however. Accordingly, the decision concluded:

> "Since the Congress has appropriated monies to provide for the salary of Customs inspectors to perform clearance functions during regular business hours and has authorized the collection of fees only for certain special services, the collection of funds for clearance services performed during regular business hours on behalf of the general public would constitute an augmentation of [Customs appropriations]." Id. at 296.

While all of this IOAA activity was going on, the Customs Service had several other statutes which authorized it to do certain specific things on a reimbursable basis. Examples are 19 U.S.C. §§ 1447 (supervise the unloading of cargo from vessels at locations other than ports of entry); 1456 (compensation of customs officer stationed on a vessel or vehicle proceeding from one port of entry to another); 1457 (customs officer directed to remain on vessel or vehicle to protect revenue); 1458 (supervise unloading of bulk cargo under extension of time limit); and 1555(a) (supervise receipt and delivery of merchandise to and from bonded warehouses). Each of these statutes directs that the compensation of the customs officers performing the services "shall be reimbursed" by the appropriate owner, proprietor, or "party in interest."[80] These and other situations are set forth in Customs regulations, 19 C.F.R. § 24.17. At one time, the reimbursement obligation was held to include statutorily

[80]"Party in interest" for purposes of 19 U.S.C. § 1447 can include another federal agency. See 48 Comp. Gen. 622 (1969) (services performed on air force base billed to Department of the Air Force).

retroactive salary increases. 31 Comp. Gen. 417 (1952). However, that is no longer the case. 55 Comp. Gen. 226 (1975).

The relationship of these specific statutes to the IOAA was the subject of 55 Comp. Gen. 456 (1975). Under 31 U.S.C. § 9701(c), the IOAA yields to other statutes which prohibit the collection of a fee, or either fix the amount of a fee or prescribe the basis for determining it. The statutes in question do none of these things, nor was there any indication that any of them were intended to be exclusive. Accordingly, Customs could recover the kinds of costs authorized under the IOAA—specifically, administrative overhead—in addition to the reimbursements required by the other statutes. Customs regulations (19 C.F.R. § 24.21) now include administrative overhead.

A highly unusual approach is found in 19 U.S.C. § 58a. In addition to the statutes noted above, Customs had several other user fee statutes, some of which were old and prescribed fees which had long become economically obsolete (for example, 20 cents for various documents). Legislation in 1978 repealed several of these old laws and replaced them with 19 U.S.C. § 58a, a simple authorization for the Secretary of the Treasury to charge fees to recover the costs of services "similar to or the same as services furnished by customs officers under the sections repealed by subsection (a)." Problem is, "subsection (a)" refers to the 1978 legislation and is nothing more than the repealer provision. Therefore, in order to determine what services are covered by section 58a, it is necessary to consult the 1976 edition of the United States Code. See, for example, 19 U.S.C. § 58 (1976 ed.) for the 20-cent items noted above.

During the mid-1980s, the Customs Service like other parts of the federal government, received additional user fee authority. The process started innocuously enough with a provision of the Trade and Tariff Act of 1984,[81] now codified at 19 U.S.C. § 58b, which authorized user fees to cover the cost of providing customs services at a number of small airports, defined as those whose volume or value of business is not sufficient to otherwise justify the availability of customs services. Fees were to be deposited in a special account

[81]Pub. L. No. 98-573, § 236, 98 Stat. 2948, 2992 (1984).

dedicated to the particular airport which earned them, but required further appropriation action to make them available for obligation. Two years later, COBRA 1985 amended the funding provision to permanently appropriate the fees, but retained the dedication aspect and emphasized that the fees could not be used for any other purpose.[82] The law was expanded in 1989 to include seaports and other facilities.[83]

Then came 19 U.S.C. § 58c. Although its origin in COBRA 1985 was humble enough, it has evolved into a statute of nearly indescribable complexity.[84] Given its level of detail, it clearly displaces the IOAA to the extent of its coverage. The law prescribes a schedule of fees, a mixture of fixed fees and ad valorem levies, applicable to a variety of passenger and merchandise processing services. It also includes a variety of qualifications and limitations.

Disposition of the fees, which could be the subject of a board game, is addressed in 19 U.S.C. § 58c(f). Merchandise processing fees—those prescribed by subsections (a)(9) and (a)(10)—are deposited in the Customs User Fee Account, a separate account in the Treasury, where they are available, to the extent provided in appropriation acts, to pay the costs of the Customs Service's commercial operations. The rest of the fees—those prescribed by 19 U.S.C. § 58c(a) except for subsections (9) and (10)—are, in grossly oversimplified terms, permanently appropriated to be used to, in this order: (1) reimburse Customs appropriations for costs incurred for overtime compensation; (2) make a deficit reduction transfer to the general fund of the Treasury, potentially as much as $18 million per year, supposedly reflecting savings in overtime payments;
(3) reimburse Customs appropriations for the costs of premium pay, agency contributions to the Civil Service Retirement and Disability Fund, preclearance services for which reimbursement is not

[82]Pub. L. No. 99-272, § 13032, 100 Stat. 82, 310 (1986).

[83]Pub. L. No. 101-207, § 3(f), 103 Stat. 1833, 1835 (1989).

[84]A good piece, although ending in 1988 because it was written in 1988, is Frederick M. Kaiser, U.S. Customs Service User Fees: A Variety of Charges and Counter Charges, 8 Pub. Budgeting & Fin. 78 (1988). More recent information may be found in a GAO report, Customs Service: Information on User Fees, GAO/GGD-94-165FS (June 1994).

otherwise required,[85] and foreign language proficiency awards; (4) maintain a $30 million contingency fund; and (5) if there is anything left, hire personnel and procure equipment to enhance services to fee-payers, to be distributed in proportion to the fees collected under subsections (a)(1) through (a)(8).

The advent of statutes like 19 U.S.C. § 58c has an obvious impact on the kind of analysis needed to resolve problems. Questions of agency discretion under broad statutory language are necessarily replaced by an almost algebraic application of excruciatingly detailed provisions. An example is 71 Comp. Gen. 444 (1992), in which GAO concluded that the Customs Service is not authorized to charge express air freight carriers for clearance services at centralized hub facilities during normal duty hours. The law provides for charges at centralized hub facilities, but incorporates a definition from Customs regulations which was limited to services outside of regular operating hours. See 19 U.S.C. §§ 58c(b)(9) and (e)(6). Another decision advised that user fees reimbursed to appropriations under 19 U.S.C. § 58c(f)(3)(A)(i) could be used to defray inspectional overtime costs in the Commonwealth of Puerto Rico but not the U.S. Virgin Islands. B-253292, December 30, 1994.

7. User Fee as Grant Condition

In our chapter on grants, we present the established proposition that Congress may, within constitutional bounds, attach conditions to the receipt of federal money. Congress is not required to establish grant programs, and if it chooses to do so, may use the “carrot and stick” approach to foster some policy objective. An example is section 204(b) of the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. § 1284(b).

As amended in 1972, the Federal Water Pollution Control Act authorizes the Environmental Protection Agency to make grants for the construction of publicly-owned waste treatment facilities up to a specified percentage of construction costs. 33 U.S.C. §§ 1281(g), 1282. The law includes the following condition:

[85] This, in conjunction with portions of 19 U.S.C. § 58c(e), represents a change from the IOAA proposals GAO had previously reviewed, although the preclearance expenses are still user-funded.

"[T]he Administrator shall not approve any grant for any treatment works under section 1281(g)(1) of this title . . . unless he shall first have determined that the applicant has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction . . . will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant[.]"
33 U.S.C. § 1284(b)(1).

The requirement that grant applicants adopt user charge systems has two purposes: first, to assure adequate funding once the plant is constructed, and second, to encourage water conservation. City of New Brunswick v. Borough of Milltown, 519 F. Supp. 878, 883 (D.N.J. 1981), aff'd, 686 F.2d 120 (3d Cir. 1982).

A number of localities which employed ad valorem tax systems complained and argued that an ad valorem tax should be acceptable. An ad valorem tax is one which is based on the value of the property being taxed. The question reached the Comptroller General who concluded in 54 Comp. Gen. 1 (1974) that an ad valorem tax could not be used to satisfy the user charge requirement of 33 U.S.C. § 1284(b)(1). The decision quoted extensively from legislative history. As explained in several subsequent letters (e.g., B-183788, February 25,1976, and B-166506, October 31, 1974), the decision rested on several grounds:

- The statute, supported by more legislative history than one normally finds, clearly contemplated a user charge system, not a tax system.
- An ad valorem tax would violate the statutory requirement that each recipient pay its proportionate share because (a) tax-exempt users would not contribute, and (b) certain taxable nonusers—industrial facilities with their own waste treatment systems and residences with their own septic systems—would pay more than their proportionate share.
- An ad valorem tax system would not further the goal of promoting water conservation.

GAO emphasized that it was not going to get into the business of evaluating one user charge system against another, but noted that a system which included a minimum usage charge did not appear legally objectionable. B-183788, February 25, 1976; B-183788, January 14, 1976. The important thing is that whatever system is adopted must "achieve a greater degree of proportionality among users than is obtainable through an ad valorem tax system." B-183788, June 13, 1975.

The controversy continued and, as documented in B-166506, August 26, 1974, at least one major city turned down a grant rather than change its system. The concluding sentence of 54 Comp. Gen. 1 had advised EPA to seek a legislative solution if it felt ad valorem taxes would be appropriate in some circumstances. Id. at 5. This was done, and 33 U.S.C. § 1284(b)(1) was amended in 1977 to make an ad valorem tax acceptable if (1) it is a dedicated tax; (2) it was in use as of December 27, 1977, the date of the amendment; and (3) it "results in the distribution of operation and maintenance costs for treatment works to each user class, in proportion to the contribution to the total cost of operation and maintenance of such works by each user class." Thus, the amended version of the law would continue to use the federal financial "carrot" to influence the choice in all future cases, but would not force an applicant who already had a qualifying ad valorem system in place to change. EPA's regulations, 40 C.F.R. § 35.929-1(b), set forth the requirements for a "dedicated" tax.

GAO's 1974 decision recognized the difficulty of achieving true proportionality short of using meters, "which no one contends are required." 54 Comp. Gen. at 5. Some localities did go to a metering system, and this too produced its complaints. See, e.g., B-183788, June 13, 1975. The 1977 amendment to 33 U.S.C. § 1284 added subsection (b)(4), which specifies that a system of charges "may be based on something other than metering," as long as the applicant has a system to assure that the necessary funds for operation and maintenance will be available, and residential users are notified as to what portion of their total payment is allocated to waste treatment services.

The user charge condition has been upheld as a legitimate exercise of the congressional power to fix the terms on which it disburses federal money. Middlesex County Utilities Authority v. Borough of Sayreville, 690 F.2d 358 (3d Cir. 1982), cert. denied, 460 U.S. 1023; City of New Brunswick v. Borough of Milltown, 686 F.2d 120 (3d Cir. 1982), cert. denied, 459 U.S. 1201 (1983). In addition, both cases upheld EPA's right to withhold or suspend grant payments for noncompliance. See also Metropolitan Saint Louis Sewer District v. Ruckelshaus, 590 F. Supp. 385, 388 (E.D. Mo. 1984) (EPA's right to withhold funds conceded). EPA's remedies are spelled out in its regulations, 40 C.F.R. §§ 35.929 and 35.965.

E. Motor Vehicles

1. Acquisition

a. Need for Statutory Authority

Statutory controls over the acquisition and use of motor vehicles date back to 1914 with the enactment of what is now 31 U.S.C. § 1343(b). The 1914 law required specific authority to use appropriated funds "for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for any branch of the Government service."[86] The law was restated as part of the Administrative Expenses Act of 1946[87] and amended to delete the quadruped reference and to exempt vehicles for the use of the President, "secretaries to the President," or the heads of the departments listed in 5 U.S.C. § 101 (the so-called cabinet departments). Other exemptions are listed in 31 U.S.C. § 1343(e). The statute also requires specific authority to use appropriations, other than those of the armed forces, to buy, maintain or operate aircraft. 31 U.S.C. § 1343(d).

In what may be record time, the first decision under this law, 21 Comp. Dec. 14 (1914), was issued just seven days after enactment. In it, the Comptroller of the Treasury confirmed that the statute applies to the entire federal government regardless of geographical location, and to all appropriations, no-year as well as annual. It does not, however, apply to mixed-ownership government corporations. B-94685-O.M., May 8, 1950 (Federal Deposit Insurance Corporation).

The major issue of the early decades of the statute's life was the definition of "passenger vehicle," attributable in part perhaps to the fact that the "motor car" was still somewhat of a novelty. Short of

[86]Act of July 16, 1914, ch. 141, § 5, 38 Stat. 454, 508.

[87]Pub. L. No. 79-600, § 16(a), 60 Stat. 806, 810 (1946).

Rosebud, virtually every contrivance in or on which a human could ride was the subject of a decision. Of course, this was more than academic. If a given vehicle did qualify as a passenger vehicle, it was—and is—subject to the statutory requirement for specific authority. If it did not so qualify, then unless there was some other applicable restriction, its acquisition was simply a matter of applying the "necessary expense" doctrine. E.g., 18 Comp. Gen. 226 (1938).

As one might expect, the key distinction was between a passenger vehicle and a truck. The statute "has no effect whatever" on the purchase of trucks. 21 Comp. Dec. 38 (1914). It does not apply to a pickup truck (16 Comp. Gen. 320 (1936)) or a panel truck (29 Comp. Gen. 213 (1949)). An agency's appropriations are available to buy a truck without regard to 31 U.S.C. § 1343(b) if, as noted above, the expenditure is "reasonably necessary to carry out the object for which the appropriation is made." 18 Comp. Gen. at 227. The fact that the truck may be used to transport personnel is not controlling. 2 Comp. Gen. 573 (1923); B-150028-O.M., November 16, 1962. See also 3 Comp. Gen. 900 (1924).

From these and similar decisions, the following test developed:

> "[T]he question whether a vehicle is 'passenger-carrying' must be determined from the character of the vehicle as shown by its construction and design, and not from its intended use, and where it appears that the automobile is in fact a passenger-carrying vehicle, the prohibition of [31 U.S.C. §1343(b)] applies irrespective of the purpose of the Government department or agency involved to convert it to other usages . . . . That is to say, the provisions of the act may not be evaded upon the plea that a passenger-carrying automobile, once acquired, will be used otherwise than for the transportation of passengers." 16 Comp. Gen. 260, 261 (1936).

Similar statements appear in numerous decisions. E.g., 8 Comp. Gen. 636, 637 (1929) and 23 Comp. Dec. 19, 20 (1916).

Thus, a station wagon clearly is a passenger vehicle. 26 Comp. Gen. 542 (1947); 15 Comp. Gen. 451 (1935); 14 Comp. Gen. 367 (1934). So is an ordinary motorcycle. 22 Comp. Dec. 324 (1916). And a prison van. 26 Comp. Dec. 879 (1920). However, "jeeps" have been held not to be passenger vehicles for purposes of 31 U.S.C. § 1343(b). 23 Comp. Gen. 955 (1944).[88] Nor are motor boats, "vehicle" being defined in terms of land transportation. 22 Comp. Dec. 262 (1915); 26 Comp. Dec. 904 (1920). Initially, the Comptroller of the Treasury held the statute inapplicable to ambulances. 21 Comp. Dec. 830 (1915). However, the specific exemption for ambulances from the later-enacted price limitation provision of 31 U.S.C. § 1343(c), discussed below, showed that Congress "has classified ambulances as passenger vehicles and thus subject to the prohibition against purchase without specific authorization." 33 Comp. Gen. 539, 540 (1954). See also 41 Comp. Gen. 227, 229 (1961).

Stating the test in terms of construction and design rather than intended use inevitably led to a number of cases dealing with a variety of structural and other alterations. In the most simple situation, painting "truck" on the door of a limousine doesn't make it a truck. See 23 Comp. Dec. 19, 20 (1916). Slight changes, such as adding a tool box or similar attachment to a passenger vehicle, do not change the vehicle's character. 21 Comp. Dec. 116 (1914); B-117843-O.M., January 27, 1954. However, structural alterations which are of sufficient magnitude to preclude use of a vehicle for carrying passengers will remove it from the statute's coverage. 24 Comp. Gen. 123 (1944); B-115608, June 16, 1953; B-62865, January 30, 1947. The converse is equally true. 33 Comp. Gen. 539 (1954) (panel truck converted to ambulance use thereby became a passenger vehicle). Similarly, although an ordinary motorcycle is regarded as a passenger vehicle, a motorcycle constructed and equipped for freight-carrying purposes loses its character as a passenger vehicle. 27 Comp. Dec. 1016 (1921); 4 Comp. Gen. 141 (1924).

While the statement of the test in many of the decisions suggests that the intended use of the vehicle is irrelevant, this is not entirely accurate. In one very early case, for example, GAO advised

[88]The courts have held that a jeep is a passenger vehicle for transportation rate classification purposes. E.g., Union Pacific R. Co. v. United States, 91 F. Supp. 762 (Ct. Cl. 1950) (the leading case on the point); United States v. Louisville & Nashville RR., 217 F.2d 307 (6th Cir. 1954). Although GAO has followed these cases in the transportation rate context (e.g., B-145028, August 8, 1961), they have never been held to affect 23 Comp. Gen. 955.

something called the Federal Board for Vocational Education that it could, without specific authority, purchase unserviceable vehicles to be used for instructional purposes in shops and classrooms. 1 Comp. Gen. 58 (1921). Similarly, passenger automobiles to be used for research or testing purposes and not as a means of transportation have been viewed as exempt from 31 U.S.C. § 1343(b). 49 Comp. Gen. 202 (1969) (air pollution control testing); 1 Comp. Gen. 360 (1922) (fuel consumption testing). See also 4 Comp. Gen. 270 (1924) (automobile chassis as part of defense mobile searchlight unit). In such cases, an appropriate certification should appear on or accompany the voucher. 49 Comp. Gen. at 204; 1 Comp. Gen. at 361.

The original enactment of 31 U.S.C. § 1343(b) used only the word "purchase." It was soon held that "purchase" included "hire," at least hire by the month or year, and certainly an indefinite hire, otherwise the prohibition would be a sham. 4 Comp. Gen. 836 (1925); 21 Comp. Dec. 462 (1915). The statutory language was expanded to "purchase or hire" in the 1946 amendment, and "hire" became "lease" in the 1982 recodification of Title 31. This does not apply to the rental of taxicabs or other vehicles on a "per trip" basis incident to the normal performance of day-to-day business. 21 Comp. Dec. at 463; 33 Comp. Gen. 563 (1954); 2 Comp. Gen. 693 (1923). Nor does it apply to the rental of vehicles by employees on official travel. 24 Comp. Dec. 189 (1917). If "purchase" included "hire" under the early decisions for purposes of the prohibition, the authority to purchase logically should include the authority to hire. 4 Comp. Gen. 453 (1924); 22 Comp. Dec. 187 (1915). The issue has not been revisited since "hire" was specifically added to the statute, but there appears to be no compelling reason for a different result.

The statute specifies that the concept of purchase includes a transfer between agencies. 31 U.S.C. § 1343(a). Thus, the transfer of a vehicle declared excess under the Federal Property and Administrative Services Act, with or without reimbursement, is a "purchase" requiring specific authority under subsection (b). 44 Comp. Gen. 117 (1964). However, this is true only where the transfer has the effect of augmenting the number of vehicles the receiving agency is authorized to have. The statute does not apply to transfers without reimbursement for replacement or upgrading purposes where the receiving agency reports an equal number of vehicles as excess. 45 Comp. Gen. 184 (1965).

If the transfer of an excess vehicle to another agency is a "purchase" for purposes of 31 U.S.C. § 1343(b), so is a transfer to another agency's grantee. 55 Comp. Gen. 348 (1975). Custody and accountability for the transferred vehicle would pass to the grantor agency even though the grantee would have actual use during the life of the grant. Also, upon completion of the grant, the vehicle could well revert to the grantor. Id. at 351. This is distinguishable from a situation, such as that encountered in 43 Comp. Gen. 697 (1964), in which a grantee, incident to its performance and where not otherwise restricted, purchases a vehicle with grant funds. In a case where the government was authorized to purchase vehicles for use by a contractor, GAO cautioned that, upon completion of the contract, the agency could not retain the vehicles to augment its fleet in disregard of 31 U.S.C. § 1343(b). B-146876-O.M., June 8, 1965.

An acquisition not subject to the statute is illustrated in B-122552, February 7, 1957. The government seized an automobile which had been purchased with the proceeds of a forged check. The Secret Service found that it would be cheaper to retain the car (which the government was authorized to do under a settlement agreement) and use it than to convert it to cash. GAO found that the government had acquired the car "not by purchase, but by operation of law as a partial recovery of the sum it lost through the forgery." Under the circumstances, 31 U.S.C. § 1343(b) did not apply to the acquisition or to the transfer of the car's reasonable value from Secret Service appropriations to the account which had suffered the loss.

The authority required by 31 U.S.C. § 1343(b) must be specific. It cannot be implied from broad grants of discretionary authority. 13 Comp. Gen. 226 (1934). The authority to purchase necessary supplies and equipment is not enough. 26 Comp. Dec. 904, 905 (1920). The phrase "means of transportation" has also been found insufficient. 21 Comp. Dec. 671 (1915). The authority may be conferred in an appropriation act or elsewhere, and appears in a variety of forms. An agency may be authorized to use its operating appropriations for the purchase and/or hire of motor vehicles; a specific amount may be earmarked for this purpose from a lump-sum appropriation; the legislation may specify the number of vehicles authorized to be acquired. Following are a few random examples to illustrate the variety:

- The Navy's 1995 Other Procurement appropriation was available for "the purchase of not to exceed 262 passenger motor vehicles, of which 162 shall be for replacement only." Pub. L. No. 103-335, 108 Stat. 2599, 2609 (1994).
- A proviso in the 1995 appropriation for the Office of the Director, National Institutes of Health, stated that "funding shall be available for the purchase of not to exceed five passenger motor vehicles for replacement only." Pub. L. No.103-333, 108 Stat. 2539, 2553 (1994).
- A general provision in the Commerce Department's 1995 appropriation act provided that, "[d]uring the current fiscal year, appropriations made available to the Department of Commerce by this Act for salaries and expenses shall be available for the hire of passenger motor vehicles as authorized by 31 U.S.C. 1343 and 1344." Pub. L. No. 103-317, § 202, 108 Stat. 1724, 1748 (1994).
- The Federal Aviation Administration's 1997 Operations appropriation was made available for "lease or purchase of four passenger motor vehicles for replacement only." Pub. L. No. 104-205, 110 Stat. 2951, 2955 (1996).

For some agencies, authority exists in permanent legislation. An example is 50 U.S.C. § 403j(a)(t), under which appropriations made available to the Central Intelligence Agency may be used for "purchase, maintenance, operation, repair, and hire of passenger motor vehicles, and aircraft, and vessels of all kinds." An agency with no authority to purchase or hire motor vehicles can still obtain them from the General Services Administration's motor pool.

b. Price Limitations

Statutory price limitations on the purchase of passenger motor vehicles first appeared in the 1934 Treasury and Post Office Departments Appropriations Act, Pub. L. No. 72-428, § 3, 47 Stat. 1489, 1513 (1933). Out of apparent concern that the ceiling could be evaded by offering essentially a frame at a basic price with such frills as wheels and an engine priced separately as extras, the ceiling applied to vehicles "completely equipped for operation." This gave rise to another lengthy series of decisions holding that such things as heaters (28 Comp. Gen. 720 (1949)) and air conditioners (40 Comp. Gen. 205 (1960)) had to be charged against the ceiling. The phrase "completely equipped for operation" came to include all equipment or accessories permanently attached to the vehicle which contributed to "the comfort and convenience of the passengers and the efficient operation of the vehicle." 36 Comp. Gen. 725, 726 (1957). While the decisions doubtlessly reflected the intent of the legislation, they reached a level of trivia in which GAO was asked whether such items as a replacement gas cap and an extra length of heater hose were chargeable against the ceiling. See B-140843, October 19, 1959 (internal memorandum).

In 1970, Congress amended the law (Pub. L. No. 91-423, 84 Stat. 879), and it is now found at 31 U.S.C. § 1343(c):

> "(1) Except as specifically provided by law, an agency may use an appropriation to buy a passenger motor vehicle (except a bus or ambulance) only at a total cost (except costs required only for transportation) that—
>
> > "(A) includes the price of systems and equipment the Administrator of General Services decides is incorporated customarily in standard passenger motor vehicles completely equipped for ordinary operation;
> >
> > "(B) includes the value of a vehicle used in exchange;
> >
> > "(C) is not more than the maximum price established by the agency having authority under law to establish a maximum price; and
> >
> > "(D) is not more than the amount specified in a law.
>
> "(2) Additional systems and equipment may be bought for a passenger motor vehicle if the Administrator decides the purchase is appropriate. The price of additional systems or equipment is not included in deciding whether the cost of the vehicle is within the maximum price specified in a law."

The monetary ceiling is adjusted annually and set forth as a government-wide general provision in the Treasury, Postal Service Appropriation Act. For fiscal year 1997, the provision states:

> "Unless otherwise specifically provided, the maximum amount allowable during the current fiscal year in accordance with [31 U.S.C. § 1343(c)], for the purchase of any passenger motor vehicle (exclusive of buses, ambulances, law enforcement, and undercover surveillance vehicles), is hereby fixed at $8,100 except station wagons for which the maximum shall be $9,100: Provided, That these limits may be exceeded by not to exceed $3,700 for police-type vehicles, and by not to exceed $4,000 for special heavy-duty vehicles . . . ."[89]

The first feature to note about 31 U.S.C. § 1343 is that the exemptions for subsection (b) differ from those for subsection (c).

[89]Treasury, Postal Service and General Government Appropriations Act, 1997, § 604, Pub. L. No. 104-208, § 101(f), 110 Stat. 3009, 3009-353 (1996).

Subsection 1343(b) precludes the use of appropriated funds to acquire vehicles for the use of anyone other than certain specified officials. Subsection (c), however, sets price ceilings on all vehicle purchases. Thus, the acquisition of a vehicle for the use of a cabinet secretary does not require specific authority, but it is subject to the price limitation. 32 Comp. Gen. 345 (1953). Conversely, buses and ambulances are exempt from the price limitation but require specific authority. 33 Comp. Gen. 539 (1954). Apart from the exemptions specified in the statute, a passenger vehicle for one subsection is a passenger vehicle for the other. If, for example, a vehicle to be used solely for research or testing purposes is not considered a passenger vehicle for purposes of 31 U.S.C. § 1343(b), it is not subject to the price limitation of subsection (c). B-81562, December 1, 1948. The price limitation has been held inapplicable to purchases from a trust fund made up of testamentary gifts. B-78578, August 4, 1948.

Under 31 U.S.C. § 1343(c), GSA decides what is or is not included in a vehicle "completely equipped for ordinary operation," and the price ceiling applies to this package. Additional equipment, again within GSA's discretion, is not charged against the ceiling. GSA's regulations provide that standard passenger vehicles as defined in Federal Standard 122[90] will be regarded as "completely equipped for ordinary operation," with items other than those listed as standard to be considered additional equipment for purposes of 31 U.S.C. § 1343(c). 41 C.F.R. § 101-26.501(b). GSA has taken the position, and GAO agrees, that dealers should not be permitted to circumvent the statutory limitation "by transferring part of the basic vehicle cost to the portion of the bid price allocated to additional systems and equipment," and that contracting officers should examine bid prices to guard against this. B-182754, February 18, 1975. Similarly, GAO sustained GSA's rejection of a bid which attempted to include required options not specified in the solicitation. B-188439, June 30, 1977.

Subsection (c)(1)(B) specifies that any trade-in value is part of the total cost chargeable against the ceiling. This means that the

[90]GSA issues "Federal Vehicle Standards" for passenger motor vehicles and various classes of trucks, updated for each new model year. Federal Standard No. 122 is the standard for passenger vehicles.

trade-in value is part of the price and, when added to the balance paid in cash, may not exceed the limit. 17 Comp. Gen. 215 (1937); 17 Comp. Gen. 580 (1938). Determining trade-in value is not an exact science. The so-called "blue book" published by the National Automobile Dealers Association is a guide but is not conclusive and any reasonable method of valuation is acceptable. 28 Comp. Gen. 495, 497 (1949); B-74529, October 20, 1948. However, the valuation must not be a sham to avoid the statutory limitation. 17 Comp. Gen. 911, 913 (1938) ("ridiculously low" trade-in allowance an obvious circumvention); 28 Comp. Gen. at 497 (allowance approximating scrap value questionable where vehicle had not been wrecked and was not unserviceable). In legitimate circumstances, there is no legal objection to trading in more than one used vehicle toward the purchase of a new one. 17 Comp. Gen. at 582; 28 Comp. Gen. 495. However, if one of the old vehicles is excess, it should be disposed of in accordance with the Federal Property and Administrative Services Act. See 27 Comp. Gen. 30 (1947).

While trade-in value of an old vehicle actually traded in must be factored in, it is improper to consider the future trade-in value of the vehicle being purchased. This is because anticipated or prospective depreciation is regarded as too uncertain to be used as a bid evaluation factor. 33 Comp. Gen. 108 (1953).

Subsection (c) further provides that transportation costs are to be excluded for purposes of determining compliance with the price ceiling. Decisions applying this principle in a variety of factual contexts and contract terms include 21 Comp. Gen. 474 (1941); 20 Comp. Gen. 677 (1941); 14 Comp. Gen. 82 (1934); and B-127291, March 22, 1956.

Under a rental agreement whereby title to the vehicle passes to the government when total rental payments reach a stated value, or sooner if, upon termination, the government pays the difference between total payments and the stated value, the total amount paid, rental payments included, may not exceed the price ceiling. 29 Comp. Gen. 21 (1949). The decision distinguished 21 Comp. Gen. 548 (1941), in which, for purposes of exercising a recapture provision in a cost reimbursement contract, the rentals paid by the contractor prior to recapture were not required to count against the ceiling.

2. Use

a. The "Official Purpose" Limitation

Vehicles purchased or rented by the United States government are supposed to be used for government business; anything else is illegal. The first sentence of 31 U.S.C. § 1344(a)(1) makes the point:

"Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes."

The "official purpose" limitation originated as a government-wide general provision in appropriations acts in the 1930s and early 1940s. 3 Op. Off. Legal Counsel 329, 330 (1979). See A-19101, July 25, 1942, for an example. It became permanent as part of section 16 of the Administrative Expenses Act of 1946, and was reenacted in 1986 as part of the general revision of 31 U.S.C. § 1344.

The coverage of the statute is unusually broad. The phrase "appropriation or otherwise" covers all types of funding. Subsection (g)(1) defines "passenger carrier" as any "passenger motor vehicle, aircraft, boat, ship, or other similar means of transportation that is owned or leased by the United States Government." Subsection (g)(2) defines "Federal agency" to include, in addition to the "regular" departments and agencies, government corporations, mixed-ownership government corporations, the Executive Office of the President, independent regulatory agencies, the Smithsonian Institution, and nonappropriated fund instrumentalities. Subsection (h) even drags in the Postal Service. As did the Administrative Expenses Act of 1946, the law exempts the Senate, House of Representatives, and Architect of the Capitol.

With one significant exception, one thing the law does not do is define "official purposes." In fact, perhaps wisely, apart from the conventional wisdom that contrasts "official" with "personal," no one has attempted to do so. Lacking a definition, one is left with whatever one can glean from the cases.

By far, the overwhelming majority of activity under 31 U.S.C. § 1344 has involved home-to-work transportation, what one Senator once called "the ultimate status symbol for a Federal bureaucrat."[91] Power to Lenin may have come from the barrel of a gun, but to many in Washington it comes from being picked up at your front door in a chauffeured limousine, courtesy of the taxpayers. It is settled beyond any debate that ordinary home-to-work commuting is the personal responsibility—and personal expense—of the individual. E.g., 27 Comp. Gen. 1 (1947); 19 Comp. Gen. 836 (1940); B-233591, September 21, 1989. From this rule it is but a small and logical step to conclude that using a government vehicle for home-to-work transportation is not an "official purpose," unless of course Congress has authorized it.

The motor vehicle provision of the Administrative Expenses Act of 1946 (60 Stat. 810) included a home-to-work prohibition with a few exceptions. While the very existence of the statute perhaps deterred excessive abuse, some argued that home-to-work transportation could be provided on the basis of little more than an "interest of the government" determination. The argument derived support, according to its proponents, from language in GAO decisions such as 25 Comp. Gen. 844 (1946). Over time, GAO came to view the law's intent as unclear and advocated legislative clarification. E.g., B-178342, July 16, 1973; B-178342, May 8, 1973.

Home-to-work transportation became the "topic du jour" of the early 1980s and, in 62 Comp. Gen. 438 (1983), GAO tried to resolve the confusion. The thrust of 62 Comp. Gen. 438 was that, apart from those exceptions sanctioned in the statute plus a couple of fairly narrow nonstatutory exceptions, the use of government vehicles for home-to-work transportation is statutorily prohibited, period. Agencies have no discretion to exercise in the matter. The decision (id. at 446) quoted a Justice Department opinion, 3 Op. Off. Legal Counsel 329 (1979), which a few years earlier had given very similar advice. If anything, Justice was even more direct. To those who argued that chauffeured limousine service enabled them to extend their work day by working while being transported, the answer was simple: come in earlier, stay later, or live closer to the office. 3 Op. Off. Legal Counsel at 332. While the decision in 62 Comp. Gen. 438 lowered the boom on discretionary use of government vehicles for home-to-work transportation, it also recognized that GAO, itself,

[91] 132 Cong. Rec. 30249 (1986) (Sen. Proxmire).

had contributed to the confusion on this issue. Thus, GAO both applied its decision prospectively, and suspended its application entirely—pending the end of the-then present Congress in order to allow Congress a chance to legislatively resolve the matter. 62 Comp. Gen. at 440. Meanwhile, GAO reports continued to document existing practice.[92]

In 1986, Congress enacted Public Law No. 99-550, 100 Stat. 3067, which completely overhauled 31 U.S.C. § 1344. The objective was clear:

"Whatever the cause for the continued violation of 31 U.S.C. 1344, it is obvious that legislation is needed to end the confusion, by providing clear congressional guidance which will prevent future waste of government funds." H. R. Rep. No. 99-451, at 5 (1985), reprinted in 1986 U.S.C.C.A.N. 5171, 5175.

The revised 31 U.S.C. § 1344(a)(1) starts with the general "official purposes" requirement quoted above. It then adds:

"Notwithstanding any other provision of law, transporting any individual other than the individuals listed in subsections (b) and (c) of this section between such individual's residence and such individual's place of employment is not transportation for an official purpose."

The "notwithstanding any other provision of law" means that 31 U.S.C. § 1344 prevails over any other inconsistent legislation unless enacted in specific contravention of that section. H.R. Rep. No. 99-451 at 7, 1986 U.S.C.C.A.N. at 5177. The legislative history makes clear that residence means "the primary place where an individual resides while commuting to a place of employment," and is not to be confused with the concept of legal domicile where the two differ. Id. It also makes clear that the prohibition does not affect temporary duty situations. Id. Travel between a temporary duty site and a temporary residence such as a motel is not regarded as home-

[92] E.g., Use of Government Motor Vehicles for the Transportation of Government Officials and the Relatives of Government Officials, GAO/GGD-85-76 (September 16, 1985); Use of Government Vehicles for Home-to-Work Transportation, GA0/NSIAD-83-3 (September 28, 1983).

to-work transportation for purposes of 31 U.S.C. § 1344. 41 C.F.R. § 101-6.400(b). This has always been the case. See, e.g., B-159210-O.M., January 4, 1967.

The statute also specifies the permissible exemptions. They fall into two categories—position and situation. Subsection (b) lists the position exceptions. The list starts, of course, with the President and Vice-President. The President then is given 16 discretionary designations, 6 in the Executive Office of the President and 10 in other federal agencies. The remainder of the list includes: cabinet heads and a "single principal deputy" for each; Justices of the Supreme Court; principal diplomatic and consular officials abroad; several high-level military officials; Ambassador to the United Nations; CIA and FBI directors and Administrator of Drug Enforcement Administration; Chairman of the Board of Governors of the Federal Reserve; Comptroller General and Postmaster General.

What we call the situational exceptions are found in subsections (a)(2)(A), (a)(2)(B), and (b)(9). Subsection (a)(2)(A) preserves an exception from the 1946 law and provides that home-to-work transportation "required for the performance of field work," in accordance with regulations prescribed by the General Services Administration, is permissible when approved in writing by the agency head. "Field work" is—

> "official work performed by an employee whose job requires the employee's presence at various locations that are at a distance from the employee's place of employment . . . or at a remote location that is accessible only by Government-provided transportation." 41 C.F.R. § 101-6.401(g).

The simple act of calling something a "field office" does not by virtue of that fact make the work performed there "field work." Id. Subsection (a)(2)(B) authorizes home-to-work transportation which is "essential for the safe and efficient performance of intelligence, counterintelligence, protective services, or criminal law enforcement duties," again when approved in writing by the agency head. See, e.g., B-195073, November 21, 1979 (certain FBI agents authorized to take government vehicles home in order to maintain emergency response capability).[93] The"protective services" part of this exemption is reinforced by subsection (c) of the statute, which authorizes home-to-work transportation for anyone entitled to Secret Service protection under 18 U.S.C. § 3056(a).

Subsection (b)(9) gives a statutory basis to some nonstatutory exemptions recognized in the prior decisions. GAO had expressed the view that the law should allow an exception for emergencies. E.g., B-181212, August 15, 1974. Of course, this presumes a real emergency. B-152006-O.M., July 26, 1965, quoting B-152006-O.M., October 22, 1963. ("[I]t is difficult to believe that emergencies arise at the Savannah River plant with such frequency as to warrant an average of 442 trips per month in connection with overtime work.")

A "clear and present danger" of terrorist activities in foreign countries became another nonstatutory exception. 54 Comp. Gen. 855 (1975). Now, under 31 U.S.C. § 1344(b)(9), the head of any federal agency can provide home-to-work transportation to any officer or employee by making a written determination, in accordance with GSA regulations, "that highly unusual circumstances present a clear and present danger, that an emergency exists, or that other compelling operational considerations make such transportation essential to the conduct of official business." Transportation under this subsection is for a maximum of 15 calendar days, but may be extended for additional 90-day periods. 31 U.S.C. § 1344(d)(2). While there is obviously some discretion under these standards, the statute makes clear that "comfort and convenience" is not sufficient justification. 31 U.S.C. § 1344(e)(1).

A public transportation strike may trigger the emergency exception. The GSA regulations provide:

> "An emergency may occur where there is a major disruption of available means of transportation to or from a work site, an essential Government service must be provided, and there is no other way to transport those employees." 41 C.F.R. § 101-6.401(i).

[93]Since subsection (a)(2)(B) did not exist in 1979, the decision had to strain somewhat to try to apply the field work exception, which did exist. All pre-1986 decisions should be reexamined in light of the 1986 law and GSA regulations. Those we cite here illustrate points which appear unaffected by the subsequent changes.

Prior GAO decisions, which may be helpful in applying this regulation, had emphasized that the unavailability of public transportation alone does not shift to the government the employee's responsibility to get to work. In other words, a transit strike is not automatically an "emergency" justifying home-to-work transportation. 60 Comp. Gen. 420 (1981); B-200022, August 3, 1981. In two other cases, however, the circumstances were found to justify exceptions. In a 1975 case, the local Social Security Administration Office hired buses to transport employees to work from predetermined pick-up points during a San Francisco transit strike. Absent this or similar action, the processing of claims and payments at one of the nation's major Social Security centers would have come to an abrupt halt. GAO agreed that the action was within the agency's discretion as a "temporary emergency measure." 54 Comp. Gen. 1066 (1975). Some years earlier, during a New York City subway strike, an Internal Revenue Service supervisor "directed" one of his employees to use his own car to take five other employees to and from home during the strike. GAO agreed that the driver's "excess commuting costs" could be paid. A key factor here was that the (then) Civil Service Commission had authorized employees to stay home without a charge to leave. Thus, the supervisor's action enabled the work of the office to continue at minimum expense, as opposed to having to pay the employees anyway for doing no work. B-158931, May 26, 1966.

In view of the comprehensive nature and intent of the 1986 legislation, there are no longer any "nonstatutory" exceptions to 31 U.S.C. § 1344. Home-to-work transportation may be provided only as authorized under the statute and GSA regulations. There is, for example, no authority for the government to provide, or pay for, home-to-work transportation in connection with the performance of overtime work. 16 Comp. Gen. 64 (1936); B-190071, May 1, 1978. It makes no difference that the additional work is performed on non-regular work days (B-171969.42, January 9, 1976), or is "call-back" overtime (36 Comp. Gen. 171 (1956); B-189061, March 15, 1978).

Nor is there authority to provide home-to-work transportation for handicapped employees. B-198323-O.M., March 24, 1981. The situation in B-216602, January 4, 1985, could possibly be considered under the "compelling operational considerations" exception. The Solicitor of Labor had received a serious injury and during his recovery period was forbidden to drive an automobile or ride public transportation. Government transportation was the only way he could get to work, and the Secretary said his availability was "essential." GAO agreed that he could receive transportation "during the period in which he is medically incapable of otherwise commuting to and from his office," but that he should reimburse the government to the extent of his normal commuting costs. Alternatively, if GSA were to conclude that a situation like this is not covered by any of the statutory exceptions, it might be possible to take advantage of one of the President's discretionary designations under 31 U.S.C. § 1344(b)(1)(C) if any are available at the time.

The prohibition on home-to-work transportation applies to any portion of transportation between home and work. Thus, unless one of the exceptions can somehow be invoked, there is no authority for an agency to provide shuttle service for its employees to and from various intermediate areas. B-162326, September 14, 1967; B-183617-O.M., August 2, 1976. A more recent illustration is B-261729, April 1, 1996. An agency which had relocated one of its offices was concerned that many of its employees were not overly excited over commuting the extra distance. It proposed to equip a bus with phones and computers, call it a "mobile work site," and use it to transport employees from the old location to the new one. Noble motive, the decision concluded, but it's still commuting and would require statutory authority.

The law does not prohibit use of government transportation from an employee's home to an airport incident to official travel, subject to whatever guidance the Federal Travel Regulations may choose to include. 70 Comp. Gen. 196 (1991).

Agencies are required to "maintain logs or other records necessary to establish the official purpose" of home-to-work transportation they provide. 31 U.S.C. § 1344(f). The information to be recorded is set forth in 41 C.F.R. § 1016.403(a). Public access to these records would be governed by the disclosure requirements and exemptions of the Freedom of Information Act. B-233995, February 10, 1989. Of course the records must be made available for legitimate audit purposes. A 1991 GAO study found that the revised 31 U.S.C. § 1344 seemed to be working and that agencies were generally complying with it. Government Vehicles: Officials Now Rarely Receive

Unauthorized Home-to-Work Transportation, GAO/GGD-91-27 (March 1991).

Although the home-to-work prohibition captures the lion's share of attention under 31 U.S.C. § 1344, it is only one form of unauthorized use. Personal use of a government vehicle on weekends and holidays is another. E.g., B-216016, March 23, 1987. Still another controversial area is the use of government vehicles to transport family members. It does not violate the law for an agency to permit a family member to accompany an employee while the vehicle is being used for official business. 68 Comp. Gen. 186 (1989); 57 Comp. Gen. 226 (1978). The same principle applies to government aircraft. B-192053-O.M., August 3, 1978. See also B-155950, July 10, 1975. It is illegal, however, to use a government vehicle to shuttle about family members on personal errands. B-211856-O.M., July 8, 1983. It is equally unauthorized to permit a family member to use the vehicle for personal business. E.g., Clark v. United States, 162 Ct. Cl. 477, 483-84 (1963).

In B-275365, December 17, 1996, an official used a government car to drive himself and several other employees to the funeral of another employee's child because "he wanted to send a message that he cared for his people." GAO was unwilling to say that there are no circumstances in which this sort of thing might qualify as an "official purpose," but in this particular case use of the car violated the statute because, if for no other reason, the official made the decision himself and did not seek agency approval.

Use of a government vehicle, not so much for personal business, but in furtherance of an agency program was the subject of 63 Comp. Gen. 257 (1984). In that decision, the Veterans Administration had acquired a passenger bus to use in transporting students from a medical college to a VA hospital as part of a statutory training program. GAO agreed that the driver could keep the bus at home. The alternative would have been for the driver to make two round trips—one to pick up the bus and another to transport the students. Under the circumstances, any personal benefit to the driver was purely incidental to carrying out the program. The GSA regulations now recognize this type of situation. See 41 C.F.R. § 101-6.405(e). Providing transportation to representatives of foreign nations is also an "official purpose." B-216670, December 13, 1984.

In 71 Comp. Gen. 469 (1992), GAO held that use of a government vehicle to transport students incident to the agency's participation in a "partnership in education" program does not violate the statute. GAO, however, discouraged the practice because of the increased potential for government liability in the event of an accident. Id. at 472. This is also the case where an employee is transporting a family member (68 Comp. Gen. 186 (1989)), or for that matter in any case of expanded use (B-254296, November 23, 1993). Agencies should take precautions to limit potential tort liability in these situations. A device that has been used on occasion in the case of space-available transportation in government aircraft is the waiver of liability. Such waivers are generally valid although there is some state-to-state variation. See B-231930, November 23, 1988 (internal memorandum). In any event, there is no authority to use appropriated funds to purchase, or to reimburse an employee-driver for liability insurance. 45 Comp. Gen. 542 (1966).

Another provision of law, 31 U.S.C. § 1349(b), gives 31 U.S.C. § 1344 some teeth. It provides:

> "An officer or employee who willfully uses or authorizes the use of a passenger motor vehicle or aircraft owned or leased by the United States Government (except for an official purpose authorized by section 1344 of this title) or otherwise violates section 1344 shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office."

The penalty applies only to "willful" violations. For a violation found to be willful, the minimum penalty of a month's suspension without pay is mandatory. E.g., Clark v. United States, 162 Ct. Cl. 477, 486-87 (1963). As such, it cannot be reduced by an arbitrator. Devine v. Nutt, 718 F.2d 1048, 1055 (Fed. Cir. 1983), rev'd. on other grounds, sub nom. Cornelius v. Nutt, 472 U.S. 648 (1985).

GAO will not decide whether a violation is "willful." B-275365, December 17, 1996. The Merit Systems Protection Board, which sees many of these cases in its review of adverse actions, has developed a test. The Board will consider a violation as willful if the employee "had actual knowledge that the use of the vehicle would be characterized as nonofficial or that he acted in reckless disregard as to whether the use was for nonofficial purposes." Fischer v. Department of the Treasury, 69 M.S.P.R. 614, 617 (1996). The Court of Appeals for the Federal Circuit endorses this approach. Kimm v.

Department of the Treasury, 61 F.3d 888 (Fed. Cir. 1995); Felton v. Equal Employment Opportunity Commission, 820 F.2d 391 (Fed. Cir. 1987). In addition, the Board will not regard a violation as willful if it involves "minor personal use" while the vehicle is being used primarily on official business. Fischer, 69 M.S.P.R. at 617; Madrid v. Department of the Interior, 37 M.S.P.R. 418, 423 (1988). Acting with advice of counsel, however misguided or flat wrong that advice may be, would most likely preclude a finding that a violation was willful. 64 Comp. Gen. 782, 786 (1985).

Examples of situations in which the Board has sustained imposition of a penalty include the following:

- Using government vehicle to commute from duty station to law school classes. Aiu v. Department of Justice, 70 M.S.P.R. 509 (1996).
- Driving loan officer to lawyer's residence to sign papers on a personal loan. Madrid, 37 M.S.P.R. 418.
- Transporting agency employees and equipment to supervisor's residence to help build a fish pond. Barrett v. Department of the Interior, 65 M.S.P.R. 186 (1994).
- Transporting employee's son on personal business. Campbell v. Department of Health and Human Services, 40 M.S.P.R. 525 (1989). See also Davis v. Department of the Army, 56 M.S.P.R. 583 (1993). Under the particular circumstances involved in Kimm v. Department of the Treasury, cited above, however, driving a child to day care was found not to constitute a willful violation.
- Being arrested drunk and asleep while parked on the side of the road with the motor running. Tenorio v. Department of Health and Human Services, 30 M.S.P.R. 136 (1986). This one got the employee fired.

A car rented by an employee while on official travel is not "owned or leased by the United States Government" for purposes of 31 U.S.C. § 1349. Chufo v. Department of the Interior, 45 F.3d 419 (Fed. Cir. 1995). When an employee is renting a car while on travel or temporary duty, there is nothing wrong with using the car for personal business. The impropriety enters the picture when the employee tries to charge the government for the personal portion of the use. In contrast, a government-furnished vehicle may be used only for official purposes. Federal Travel Regulations, 41 C.F.R. § 301-2.6(a). As it should be, the concept of official purpose is somewhat broader in the travel/temporary duty context than at the regular duty station. Id.; B-254296, November 23, 1993 (limited recreational use permissible at remote location where no other transportation available).

It would appear that the Board's "minor personal use" exception now has a statutory basis. Section 503 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1755, as amended by Pub. L. No. 101-280, § 6(b), 104 Stat. 149, 160 (1990), 31 U.S.C. § 1344 note, provides, in part:

> "Notwithstanding any other provision of law, the head of each department, agency, or other entity of each branch of the Government may prescribe by rule appropriate conditions for the incidental use, for other than official business, of vehicles owned or leased by the Government . . . ."

While some would certainly like to view this as effectively negating the home-to-work prohibition, GAO regards it as

> "designed simply to provide reasonable agency latitude under prescribed rules for minor nonofficial vehicle use incidental to otherwise authorized official use. Section 503 does not provide the authority for any agency to ignore the provisions of the home-to-work transportation law . . . ." Government Vehicles: Officials Now Rarely Receive Unauthorized Home-to-Work Transportation, GAO/GGD-91-27, 8 (March 1991).

b. GSA Motor Pools

Under section 211 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 491, the General Services Administration has broad authority to establish, operate, and discontinue interagency vehicle motor pools.[94] Subsection (b) of the statute authorizes GSA, subject to regulations issued by the President and if determined advantageous in terms of economy, efficiency, or service, to—

> "(1) consolidate, take over, acquire, or arrange for the operation by any executive agency of, motor vehicles and other related equipment and supplies for the purpose of establishing motor vehicle pools and systems to serve the needs of executive agencies; and (2) provide for the establishment, maintenance, and operation (including servicing and storage) of motor vehicle pools or systems for transportation of property or passengers, and for furnishing such motor vehicle and related services to executive agencies . . . . [GSA] shall, so far as practicable, provide any of the services specified in this subsection to any Federal agency . . . ."

[94] GSA now calls them "interagency fleet management systems." They're still motor pools.

The President's regulations, mandated by 40 U.S.C. § 491(c), are contained in Executive Order No. 10579, November 30, 1954, 40 U.S.C. § 486 note, section 11 of which authorizes GSA to issue supplementary regulations. GSA's regulations are found at 41 C.F.R. Part 101-39. "Federal agency," as used in 40 U.S.C. § 491(b), includes the judicial branch. B-158712, March 7, 1977. Also, nothing in the statute or executive order prohibits GSA from permitting the use of motor pool vehicles by cost-reimbursement contractors. B-157729, February 10, 1966.

The statute quoted above, allows GSA, when forming a motor pool, "to take over" vehicles purchased by another agency with its own appropriations. See 41 C.F.R. § 101-39.104-1(a). GSA must reimburse the fair market value only if the vehicle was originally acquired through a revolving fund or trust fund and not previously reimbursed. 40 U.S.C. § 491(g); 41 C.F.R. § 101-39.104-2. This does not include a reimbursable but non-revolving fund appropriation. 38 Comp. Gen. 185 (1958).

GSA's activities under 40 U.S.C. § 491 are financed through GSA's revolving General Supply Fund (40 U.S.C. § 756) and must be reimbursed by the customer agencies. Under 40 U.S.C. § 491(d)(1), the Supply Fund is available for "all elements of cost . . . incident to the establishment, maintenance, and operation" of motor pools. Subsection (d)(2) provides that GSA should fix reimbursements so as to recover "all such elements of cost," including increments to cover estimated replacement costs. The law further provides that the purchase price of vehicles and equipment, plus the replacement increments, cannot be charged all at once but must be recovered through amortization. Id. It also directs GSA to use accrual accounting. Id.; B-139506, October 1, 1959.

The General Supply Fund is available for improvements to government-owned property incident to the establishment and operation of motor pools. This includes such things as fences, gasoline pumps and storage tanks, parking facilities, service station and storage facilities. B-134511, March 10, 1958. It is also available for the initial financing, subject to reimbursement as with other costs, of temporary service facilities and equipment on leased property. 43 Comp. Gen. 738 (1964).

A frequently recurring question has been GSA's authority to charge the using agency for damage to the vehicle. For many years, GSA's regulations provided that GSA would charge the using agency for damage caused by negligence or misuse attributable to the using agency, and GAO consistently upheld GSA's authority to include such a provision. The first decision considering a challenge to the regulation was 37 Comp. Gen. 306 (1957), in which the Comptroller General stated at page 307:

"There can be no question but that the costs of making repairs to vehicles damaged while being operated in a motor vehicle pool (or the amount of the loss where the vehicle is incapable of being repaired) are elements of cost incident to the operation of such motor vehicle pool."

The provision of the statute requiring amortization of the purchase price has no effect on GSA's ability to charge for damage. Id. at 307-08. The very next decision, 37 Comp. Gen. 308 (1957), reached the same conclusion where the damage was caused by an employee of the using agency other than the vehicle operator, and pointed out that 40 U.S.C. § 491 and the implementing regulations override the nonstatutory rule under which an agency is normally not liable for damage to the property of another agency. The validity of GSA's regulation was upheld again in 41 Comp. Gen. 199 (1961), and still again in 59 Comp. Gen. 515 (1980).

The regulations have changed since those decisions and now provide that GSA will charge the using agency for all damage to the vehicle unless caused by mechanical failure, normal wear and tear, or the negligence or willful act of an identifiable party other than an employee of the using agency. 41 C.F.R. § 101-39.406. There is no apparent reason why the principle of the earlier decisions should not apply equally to this version of the regulation. The using agency is responsible for investigating accidents and filing the required accident and investigation reports with GSA. 41 C.F.R. §§ 101-39.401, 101-39.403. GSA makes the initial determination based on this material. The using agency can dispute GSA's finding but GSA has the final word. 41 C.F.R. § 101-39.406(d).

GSA provides a range of services from short-term use to shuttle and driver services to indefinite assignment. 41 C.F.R. § 101-39.201. An agency which lacks the specific authority to purchase or hire passenger motor vehicles as required by 31 U.S.C. § 1343(b) can nevertheless use its appropriations to reimburse GSA for motor vehicle services provided under 40 U.S.C. § 491. B-158712, March 7, 1977. In other words, lack of authority to acquire the vehicles directly is not an impediment to obtaining them through the GSA interagency fleet system. Similarly, if GSA delegates leasing authority to a requesting agency because GSA cannot satisfy the agency's requirements, the agency can use its appropriations to lease vehicles pursuant to the delegation notwithstanding any lack of specific authority otherwise required by 31 U.S.C. § 1343(b). B-210657-O.M., July 15, 1983. A delegation from GSA can also be used to augment an agency's specific statutory authorization. B-158712-O.M., January 11, 1977.

c. Expenditure Control Requirements

In fiscal year 1985, the 20 federal agencies with the largest motor vehicle fleets controlled a total of more than 340,000 vehicles and spent $915 million on their acquisition, operation, and disposal.[95] Concerned with these numbers, Congress, as part of the Consolidated Omnibus Budget Reconciliation Act of 1985, enacted the provisions found at 40 U.S.C. §§ 901-913. The legislation applies to executive agencies (excluding the Tennessee Valley Authority) which operate at least 300 motor vehicles. Twenty agencies then met this qualification. They were identified in GAO/GGD-88-40, at 9 n.1. The legislation contained short-term cost-reduction goals (which GAO found in GGD-88-40 were generally met) and permanent requirements.

Each covered agency is to designate an office or officer to establish a central monitoring system and to provide oversight of the agency's motor vehicle operations. 40 U.S.C. § 901. The agency is also directed to develop a system to "identify, collect, and analyze" cost data with respect to its motor vehicle operations. 40 U.S.C. § 902.

The agency must include with each appropriation request a statement specifying total motor vehicle costs (acquisition, maintenance, leasing, operation, and disposal) for three fiscal years, and justifying why its requirements cannot be met more cheaply by some other means, such as increased use of GSA's motor pool system. 40 U.S.C. § 903(a). The President's budget submission is to

[95] Federal Motor Vehicles: Agencies' Progress in Meeting Expenditure Control Requirements, GAO/GGD-88-40, 8 (March 1988).

include a summary and analysis of these statements. 40 U.S.C. § 904(a).

GSA has a number of duties under this legislation. It is to develop requirements, in cooperation with GAO and the Office of Management and Budget, for agency data collection systems (40 U.S.C. § 902(b)); look for opportunities to consolidate vehicles, equipment, and related functions, with the goal of reducing the size and cost of the federal fleet (40 U.S.C. § 906(a)); reduce vehicle storage and disposal costs, and develop a program of vehicle reconditioning designed to improve the rate of return on vehicle sales (40 U.S.C. § 907).

3. Chauffeurs

Very little has been written about the use of appropriated funds for what may be the most sacred perk of all, chauffeurs. There is no government-wide statute or statutory regulation purporting to authorize, prohibit, or restrict the use of chauffeurs. Accordingly, most of the GAO reports which broach the subject—and they are few to begin with—are merely exercises in fact-finding. E.g., Use of Government Vehicles for Home-to-Work Transportation, GAO/NSIAD-84-27 (December 13, 1983) (presenting overtime data in tabular form).

While there are no government-wide provisions, there is the occasional restriction that appears in an appropriations act. For example, section 412 of the 1997 Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act includes the following general provision:

> "Except as otherwise provided in section 406, none of the funds provided in this Act to any department or agency shall be obligated or expended to provide a personal cook, chauffeur, or other personal servants to any officer or employee of such department or agency." Pub. L. No. 104-204, § 412, 110 Stat. 2874, 2922.

Section 406 is another general provision that reiterates the home-to-work prohibition and exemptions of 31 U.S.C. § 1344. Section 412 would not prohibit chauffeured home-to-work transportation for the Secretaries of HUD and VA, but the Veterans Administration was not covered before it became a cabinet department and a former Administrator reimbursed the government for the costs of what was then improper. See Office Refurbishing, Use of a Government Vehicle and Driver, and Out-of-Town Travel by the Former

Administrator of Veterans Affairs, GAO/HRD-83-10 (January 18, 1983). GAO suggested in that report that a definition of "chauffeur" for purposes of section 412 would be helpful. Id. at 20. Is it, for example, intended to cover someone designated to drive for several officials or who has non-driving duties as well?

The most controversial use of chauffeurs tends to be in the context of home-to-work transportation. GAO has summarized its position as follows:

> "While the law does not specifically include the employment of chauffeurs as part of the prohibition in [31 U.S.C. § 1344(a)], GAO has interpreted this section, in conjunction with other provisions of law, as authorizing such employment only when the officials being driven are exempted . . . from the prohibition." 62 Comp. Gen. 438, 441 (1983).

As support for this passage, the 1983 decision cited B-150989, April 17, 1963, which contains the following statement:

> "Chauffeurs for Cabinet officers are not expressly provided for by law, however, it is implicit in [31 U.S.C. §§ 1343, 1344] that the use of automobiles by Cabinet officers, purchased or leased with appropriated funds, is to be considered as a use for official purposes. Consequently, the general employment authority conferred upon heads of Departments by [5 U.S.C. § 3101] constitutes authority to employ chauffeurs when an appropriation is available for the payment of their compensation."

These decisions would seem to support the proposition that an official who is authorized to use a government vehicle for home-to-work transportation may also use a chauffeur unless restricted by some agency-specific legislation.

In a 1975 decision, B-162111, December 17, 1975, an official of the Selective Service System, without seeking agency approval, used an employee to chauffeur him to and from work in his (the official's) own car. The agency head, upon learning of the arrangement, disapproved, and the official resigned. As to what further action should be taken, GAO first noted that the home-to-work statutes were inapplicable because the official had used his own car. There might well have been a violation of 5 U.S.C. § 3103 which provides that an individual may be employed "only for services actually rendered in connection with and for the purposes of the appropriation from which he is paid," but the penalty for violating 5 U.S.C. § 3103 is removal and the violator was already gone.

Accordingly, and since congressional intent in the area was "quite uncertain," GAO's advice was to consider the case closed.

A final decision involves a situation other than home-to-work transportation. The question was whether the Equal Employment Opportunity Commission could use appropriated funds to hire a chauffeured limousine to transport a witness (who happened to be a Senator) from the airport to a hearing site and back to the airport. Since the home-to-work statutes were not involved, and since the Commission had authority to hire passenger vehicles (assuming it was needed for this type of hire), the question boiled down to one of purpose availability. The Commission had statutory authority to reimburse the expenses of a witness, and could have done so even without the specific authority. The agency chose to provide transportation rather than reimburse expense, and while GAO chided that it would have been cheaper to call a taxi, the choice could not be called illegal. B-194881, December 27, 1979.