

Availability of Appropriations: Amount

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Availability of Appropriations: Amount

A. Introduction

The two preceding chapters have discussed the purposes for which appropriated funds may be used and the time limits within which they may be obligated and expended. This chapter will discuss the third major element of the concept of the “legal availability” of appropriations—restrictions relating to amount. It is not enough to know what you can spend appropriated funds for and when you can spend them. You must also know how much you have available for a particular object.

In this respect, the legal restrictions on government expenditures are different from those governing your spending as a private individual. For example, as an individual, you can buy a house and finance it with a mortgage that may run for 25 or 30 years. Of course you don’t have enough money to cover your full legal obligation under the mortgage. You sign the papers on the hope and assumption that you will continue to have an income. If your income stops and you can’t make the payments, you lose the house. The government cannot operate this way. The main reason why is the Antideficiency Act, discussed in Section C.

Under the “separation of powers” doctrine established by the Constitution, Congress makes the laws and provides the money to implement them; the executive branch carries out the laws with the money Congress provides. Under this system, Congress must have the “final word” as to how much money can be spent by a given agency or on a given program. In exercising this power, Congress may give the executive branch considerable discretion within broad limits, but it is ultimately up to Congress to determine how much the executive branch can spend. In applying this theory to the day-to-day operations of the federal government, it should be readily apparent that restrictions on purpose, time, and amount are very closely related. Again, the Antideficiency Act is one of the primary “enforcement devices.” Its importance is underscored by the fact that it is the only one of the funding statutes to include both civil and criminal penalties for violation.

If the Antideficiency Act’s prohibition against overobligating or overspending an appropriation is to be at all meaningful, agencies must be restricted to the appropriations Congress provides. The rule prohibiting the unauthorized “augmentation” of appropriations, covered in Section E, is thus a crucial complement to the Antideficiency Act.

While Congress retains, as it must, ultimate control over how much an agency can spend, it does not attempt to control the disposition of every dollar. We began our general discussion of administrative discretion in Chapter 3 by quoting Justice Holmes' statement that "some play must be allowed to the joints if the machine is to work." This is fully applicable to the expenditure of appropriated funds. An agency's discretion under a lump-sum appropriation is discussed in Section F.

B. Types of Appropriation Language and the Concept of Earmarking

Congress has been making appropriations since the beginning of the Republic. Over the course of this time, certain forms of appropriation language have become standard. This section will point out the more commonly used language with respect to amount.

Congress may wish to specifically designate, or "earmark," part of a more general lump-sum appropriation for a particular object, as either a maximum, a minimum, or both.¹ For simplicity of illustration, let us assume that we have a lump-sum appropriation of \$1,000 for "smoking materials" and a particular object within that appropriation is "Cuban cigars."

If the appropriation specifies "not to exceed" \$100 for Cuban cigars or "not more than" \$100 for Cuban cigars, then \$100 is the maximum available for Cuban cigars. 64 Comp. Gen. 263 (1985).² A specifically earmarked maximum may not be augmented with funds from the general appropriation.

Statutory transfer authority will permit the augmentation of a "not to exceed" earmark in many, but not all, cases. In 12 Comp. Gen. 168 (1932), it was held that general transfer authority could be used to increase maximum earmarks for personal services, subject to the percentage limitations specified in the transfer statute. The decision pointed out that if the personal services earmark had been a separate

¹We use the term "earmarking" here to mean a specific statutory designation of a portion of a lump-sum appropriation or authorization. The term is also used to refer to the statutory designation of revenues for particular uses. For a brief but nevertheless useful discussion of earmarking in this latter sense, see GAO report entitled *Budget Issues: Earmarking in the Federal Government*, **GAO/AFMD-90-8FS (January 1990)**.

²A "not to exceed" earmark was held not to constitute a maximum in 19 Comp. Gen. 61 (1939), where the earmarking language was inconsistent with other language in the general appropriation.

line-item appropriation, the transfer authority would clearly apply. *Id.* at 170. Also, the transfer authority was remedial legislation designed to mitigate the impact of reduced appropriations. Somewhat similarly, in 36 Comp. Gen. 607 (1957), funds transferred to an operating appropriation from a civil defense appropriation could be used to exceed an administrative expense limitation in the former which had been calculated without including the increased administrative expenses the added civil defense functions would entail. However, in 33 Comp. Gen. 214 (1953), the Comptroller General held that general transfer authority could not be used to exceed a maximum earmark on an emergency assistance program where it was clear that Congress, aware of the emergency, intended that the program be funded only from the earmark. See also 18 Comp. Gen. 211 (1938).

Under a “not to exceed” earmark, the agency is not required to spend the entire amount on the object specified, *See, e.g., Brown v. Ruckelshaus*, 364 F. Supp. 258,266 (C.D. Cal. 1973) (“the phrase ‘not to exceed’ connotes limitation, not disbursement”). If, in our hypothetical, the entire \$100 is not used for Cuban cigars, unobligated balances may—within the time limits for obligation—be applied to other unrestricted objects of the appropriation. 31 Comp. Gen. 578,579 (1952); 15 Comp. Dec. 660 (1909); B-4568, June 27, 1939.

If later in the fiscal year a supplemental appropriation is made for “smoking materials,” the funds provided in the supplemental may not be used to increase the \$100 maximum for Cuban cigars unless the supplemental appropriation act so specifies. *See* Section D of this chapter.

Words like “not to exceed” are not the only way to establish a maximum limitation. If the appropriation includes a specific amount for a particular object (such as “For Cuban cigars, \$100”), then the appropriation is a maximum which may not be exceeded. 36 Comp. Gen. 526 (1957); 19 Comp. Gen. 892 (1940); 16 Comp. Gen. 282 (1936).

Another device Congress has used to designate earmarks as maximum limitations is the following general provision:

Whenever in this Act, an amount is specified within an appropriation for particular purposes or objects of expenditure, such amount, unless otherwise specified, shall be

considered as the maximum amount that maybe expended for said purpose or object rather than an amount set apart exclusively therefor.”³

By virtue of the “unless otherwise specified” clause, the provision does not apply to amounts within an appropriation which have their own specific earmarking “words of limitation” such as “exclusively.” 31 Comp. Gen. 578 (1952).

If a lump-sum appropriation includes several particular objects and provides further that the appropriation “is to be accounted for as one fund” or “shall constitute one fund,” then the individual amounts are not limitations, the only limitation being that the total amount of the lump-sum appropriation cannot be exceeded. However, individual items within that lump-sum appropriation that include the “not to exceed” language will still constitute maximum limitations. 22 Comp. Dec. 461 (1916); 3 Comp. Dec. 604 (1897); A-79741, August 7, 1936. The “one fund” language is still occasionally encountered, but has become uncommon.

If Congress wishes to specify a minimum for the particular object but not a maximum, the appropriation act may provide “Smoking materials, \$1,000, of which not less than \$100 shall be available for Cuban cigars.” B-137353, December 3, 1959. See also 64 Comp. Gen. 388 (1985); B-131935, March 17, 1986. If the phrase “not less than” is used, in contrast with the “not to exceed” language, portions of the \$100 not obligated for Cuban cigars may not be applied to the other objects of the appropriation. 64 Comp. Gen. at 394–95; B-128943, September 27, 1956.

Another phrase Congress often uses to earmark a portion of a lump-sum appropriation is “shall be available.” There are variations. For example, our hypothetical \$1,000 “smoking materials” appropriation may provide that, out of the \$1,000, \$100 “shall be available” or “shall be available only” or “shall be available exclusively” for Cuban cigars. Still another variation is “\$ 1,000, including \$100 for Cuban cigars.”

If the “shall be available” phrase is combined with the maximum or minimum language noted above (“not to exceed,” “not less than,”

³District of Columbia Appropriations Act, 1992, Pub. L. No. 102-111, § 103, 105 Stat. 559,567 (1991).

etc.), then the above rules apply and the phrase “shall be available” adds little. See, e.g., B-137353, December 3, 1959. However, if the earmarking phrase “shall be available” is used without the “not to exceed” or “not less than” modifiers, the rules are not quite as firm.

Cases interpreting the “shall be available” and “shall be available only” earmarks are somewhat less than consistent. The earlier decisions proclaimed “shall be available” to constitute a maximum but not a minimum (B-5526, September 14, 1939), although it could be a minimum if Congress clearly expressed that intent (B-128943, September 27, 1956). Later cases held the earmark to constitute both a maximum and a minimum which could neither be augmented nor diverted to other objects within the appropriation. B-137353, December 3, 1959; B-137353 -O.M., October 14, 1958. Another early decision held summarily that “shall be available only” results in a maximum which cannot be augmented. 18 Comp. Gen. 1013 (1939). More recent decisions, however, have expressed the view that the effect of “shall be available only” —whether it is a maximum or a minimum—depends on the underlying congressional intent. 53 Comp. Gen. 695 (1974); B-142190, March 23, 1960. Applying this test, the earmark in 53 Comp. Gen. 695 was found to be a maximum; similar language was found to be a minimum which could be exceeded in B-142190 and in B-70933, March 1, 1948.

Thus, if the phrase “shall be available” maybe said to contain an element of ambiguity, addition of the word “only” does not produce a plain meaning. The Claims Court, reviewing an authorization earmark for a Navy project known as RACER, commented:

“[I]t is not apparent from the language of the authorization (\$45 million ‘is available only for’) that Congress necessarily mandated the Navy to spend all \$45 million on the RACER system. Rather, Congress may have merely intended to preclude the Navy from spending that \$45 million on any other activities, i.e., the money would be forfeited if not spent on the RACER system.”

Solar Turbines, Inc. v. United States, 23 Cl. Ct. 142,158 (1991).

Use of the word “exclusively” is somewhat more precise. The earmark “shall be available exclusively” is both a maximum which cannot be augmented from the general appropriation, and a minimum which cannot be diverted to other objects within the appropriation. B-102971, August 24, 1951. Once again, however, clearly expressed congressional intent can produce a different result. B-113272-O. M.,

May 21, 1953; B-1 11392-O. M., October 17, 1952 (earmark held to be a minimum only in both cases).

Similarly, the term “including” has been held to establish both a maximum and a minimum. A-99732, January 13, 1939. As such, it cannot be augmented from a more general appropriation (19 Comp. Gen, 892 (1940)), nor can it be diverted to other uses within the appropriation (67 Comp. Gen. 401 (1988)).

To sum up, the most effective way to establish a maximum (but not minimum) earmark is by the words “not to exceed” or “not more than.” The words “not less than” most effectively establish a minimum (but not maximum). These are all phrases with well-settled plain meanings. The “shall be available” family of earmarking language presumptively “fences in” the earmarked sum (both **maximum** and minimum), but is more subject to variation based upon underlying congressional intent.

Our discussion thus far has centered on the use of earmarking language to prescribe the amount available for a particular object. Earmarking language may also be used to vary the period of availability for obligation. An illustrative case is B-23 1711, March 28, 1989 (appropriation provision earmarked portion of lump sum to remain available for an additional fiscal year, but was neither maximum nor minimum limitation on amount available for particular object).

Finally, earmarking language maybe found in authorization acts as well as appropriation acts. The same meanings apply. Several of the cases cited above involve authorization acts, e.g., 64 Comp. Gen. 388 (1985) and B-131935, March 17,1986.

C. The Antideficiency Act

1. Introduction and Overview

The so-called Antideficiency Act is one of the major laws in the statutory pattern by which Congress exercises its constitutional control of the public purse. It has been termed “the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds.”⁴

As with the series of funding statutes as a whole, the Antideficiency Act did not hatch fully grown but evolved over a period of time in response to various abuses. As we noted in Chapter 1, as late as the post-Civil War period, it was not uncommon for agencies to incur obligations in excess of or in advance of appropriations. Perhaps most egregious of all, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these “coercive deficiencies.”⁵ These were obligations to others who had fulfilled their part of the bargain with the United States and who now had at least a moral-and in some cases also a legal-right to be paid. Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget.

The congressional response to abuses of this nature was the Antideficiency Act. Its history is summarized in the following paragraphs:⁶

‘Control in the execution of the Government’s budgetary and financial programs is based on the provisions of section 3679 of the Revised Statutes, as amended. . . . commonly referred to as the Antideficiency Act. As the name. . . implies, one of the principal purposes of the legislation was to provide effective control over the use of appropriations so as to prevent the incurring of obligations at a rate which will lead to deficiency (or supplemental) appropriations and to fix responsibility on those

⁴Hopkins & Nutt, The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51,56 (1978).

⁵Id. at 57-58; Louis Fisher, Presidential Spending Power 232 (1975).

⁶Source Senate Committee on Government Operations Financial Management in the Federal Government, S. Dec. No. 11, 87th Cong., 1st Sess. 45-46 (1961). The statute is cited as “section 3679 of the Revised Statutes,” a designation that is now obsolete.

officials of Government who incur deficiencies or obligate appropriations without proper authorization or at an excessive rate.

“The **original** section 3679.. . was derived from legislation **enacted in 1870 [16 Stat. 251] and was** designed solely to prevent expenditures in excess of amounts appropriated. In 1905 [33 Stat. 1257] and 1906 [34 Stat. 48], section 3679 . . . was amended to provide specific prohibitions regarding the obligation of appropriations **and** required that certain types of appropriations be so apportioned over a fiscal year as to ‘prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made.’ Under the amended section, the authority to make, waive, or modify apportionments was vested in the head of the department or agency concerned. By Executive Order 6166 of June 10, 1933, this authority was transferred to the Director of the [Office of Management and Budget]. . . .

“During and following World War II, with the expansion of Government functions and the increase in size and complexities of budgetary and operational problems, situations arose highlighting the need for more effective control and conservation of funds. In order to effectively cope with these conditions it was necessary to seek Legislation clarifying certain technical aspects of section **3679** of the Revised Statutes, and strengthening the apportionment procedures, particularly as regards to agency control systems. Section 1211 of the General Appropriation Act, 1951 [64 Stat. 765], amended section 3679. . . to provide a basis for more effective control and economical use of appropriations. Following a recommendation of the **second** Hoover Commission that agency allotment systems should be simplified, Congress passed legislation in 1956 [70 Stat. 783] further amending section 3679 to provide that each agency work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative subdivision for each appropriation or fund affecting such unit. In 1957 [71 Stat. 440] section 3679 was further amended, adding a prohibition against the requesting of apportionments or reapportionments which indicate the necessity for a deficiency or supplemental estimate except on the determination of the agency head that such action is within the exceptions expressly set out in the law. The revised Antideficiency Act serves as the primary foundation for the Government’s administrative control of funds systems.”

In its current form, the law prohibits

1. Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law;
2. Involving the government in any contractor other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law;

3. Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property; and

4. Making obligations or expenditures in excess of art apportionment or reapportionment, or in excess of the amount permitted by agency regulations.⁷

Subsequent sections of this chapter will explore these concepts in detail. However, the fiscal principles inherent in the Antideficiency Act are really quite simple. The idea is to “pay as you go.” Government officials are warned not to make payments-or to commit the United States to make payments at some future time-for goods or services unless there is enough money in the “bank” to cover the cost in full. The “bank,” of course, is the available appropriation.

The combined effect of the Antideficiency Act, in conjunction with the other funding statutes discussed throughout this publication, was summarized in a 1962 decision. The summary has been quoted in numerous later Antideficiency Act cases and bears repeating here:

“These **statutes** evidence a plain intent on the part of the Congress to prohibit executive officers unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contractor other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made.” 42 Comp. Gen. 272,275 (1962).

⁷Id. at 48; B-131361, May 9, 1957. Further discussion from varying perspectives will be found in the following sources: Efron, Rollee H., Statutory Restrictions on Funding of Government Contracts, 10 Public Contract Law Journal 254 (Dec. 1978); Feaster, Herbert H., and Christian Volz, The Antideficiency Act: Constitutional Control Gone Astray, 11 Public Contract Law Journal 155 (No. 1, Nov. 1979); Frazier, John R., Col., Use of Annual Funds with Conditional, Option, or Indefinite Delivery Contracts, 8 A.F. JAG L. Rev. 50 (No. 2, Mar.-Apr. 1966); Hopkins, Gary L., Major, and Lt. Col. Robert M. Nutt, The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978); Spriggs, William J., The Anti-Deficiency Act Comes to Life in U.S. Government Contracting, 10 National Contract Management Journal 33 (Winter 1976-77).

To the extent it is possible to summarize appropriations law in a single paragraph, this is it. Viewed in the aggregate, the Antideficiency Act and related funding statutes “[restrict] in every possible way the expenditures and expenses and liabilities of the government, so far as executive offices are concerned, to the specific appropriations for each fiscal year.” Wilder’s Case, 16 Ct. Cl. 528,543 (1880).

**2. Obligation/Expenditure
in Excess or Advance of
Appropriations**

The key provision of the Antideficiency Act is 31 U.S.C. § 1341 (a)(1):⁸

“(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not–

“(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

“(B) involve either government in a contract or obligation for the payment of **money** before an appropriation is made unless authorized by law.”

Not only is section 1341(a)(1) the key provision of the Act, it was originally the only provision, the others being added to ensure enforcement of the basic prohibitions of section 1341.

The law is not limited to the executive branch, but applies to any “officer or employee of the United States Government” and thus extends to all branches. Examples of legislative branch applications are B-107279, January 9, 1952 (Office of Legislative Counsel, House of Representatives); B-78217, July 21, 1948 (appropriations to Senate for expenses of Office of Vice President); 27 Op. Att’y Gen. 584 (1909) (Government Printing Office). Within the judicial branch, it applies to the Administrative Office of the United States Courts. E.g., 50 Comp. Gen. 589 (1971). However, whether a federal judge is an officer or employee for purposes of 31 U.S.C. § 1341(a)(1) appears to remain an open question, at least in some contexts. See Arrester v. United States District Court, 792 F.2d 1423, 1427 n.7 (9th Cir. 1986).

Some government corporations are also classified as agencies of the United States Government, and their officials are therefore “officers

⁸Prior **to the 1982 recodification of title 31 of the United States Code**, the Antideficiency Act consisted of 9 lettered subsections of what was then 31 U.S.C. § 665. The recodification scattered the law among several new sections. To better show the relationship of the material, our organization in this chapter retains the sequence of the former subsections.

and employees of the United States.” To the extent they operate with funds which are regarded as appropriated funds, they too are subject to 31 U.S.C. § 1341(a)(1). E.g., B-223857, February 27, 1987 (Commodity Credit Corporation); B-135075-O.M., February 14, 1975 (Inter-American Foundation). It follows that section 1341(a)(1) does not apply to a government corporation which is not an agency of the United States Government. E.g., B-175155, July 26, 1976 (Amtrak). These principles are, of course, subject to variation if and to the extent provided in the relevant organic legislation.

There are two distinct prohibitions in section 1341(a)(1). Unless otherwise authorized bylaw, no officer or employee of the United States may make (or authorize the making of) an expenditure, or create or involve (or authorize the creation or involvement of) the United States in any contractor obligation to make future expenditures, in the absence of sufficient funds in the account to cover the payment or the obligation at the time it is made or incurred. Put another way, the two sets of prohibitions are concerned with

- Making expenditures or incurring obligations in excess of available appropriations; and
- Making expenditures or incurring obligations in advance of appropriations.

The distinction between obligating in excess of an appropriation and obligating in advance of an appropriation is clear in the majority of cases, but can occasionally become blurred. For example, an agency which tries to meet a current shortfall by “borrowing” from (i.e., obligating against) the unenacted appropriation for the next fiscal year is clearly obligating in advance of an appropriation. E.g., B-236667, January 26, 1990. However, it is also obligating in excess of the currently available appropriation. Since both are equally illegal, determining precisely which subsection of 31 U.S.C. § 1341(a) has been violated is of secondary importance. In any event, the point to be stressed here is that the law is violated not only if there are insufficient funds in an account when a payment becomes due. The very act of obligating the United States to make a payment when the necessary funds are not already in the account is also a violation of 31 U.S.C. § 1341(a).

Note that the statute refers to overspending the amount available in an “appropriation or fund.” OMB Circular No. A-34 specifies:

“As **used in this Circular**, the phrase ‘appropriation or fund accounts’ refers to general fund expenditure accounts, special fund expenditure accounts, public enterprise revolving funds, intragovernmental revolving funds, management funds, trust fund expenditure accounts, and trust revolving fund accounts. . . .”⁹

Thus, for example, the Antideficiency Act applies to Indian trust funds managed by the Bureau of Indian Affairs. However, the investment of these funds in certificates of deposit with federally insured banks under authority of 25 U.S.C. § 162a does not, in GAO’s opinion, constitute an obligation or expenditure for purposes of 31 U.S.C. § 1341. Accordingly, overinvested trust funds do not violate the Antideficiency Act unless the overinvested funds, or any attributable interest income, are obligated or expended by the Bureau. B-207047-O. M., June 17, 1983. GAO also views the Act as applicable to presidential and vice-presidential “unvouchered expenditure” accounts. B-239854, June 21, 1990 (internal memorandum),

a. Exhaustion of an
Appropriation

When we talk about an appropriation being “exhausted,” we are really alluding to any of several different but related situations:

- Depletion of appropriation account (i.e., fully obligated and/or expended).
- Similar depletion of a maximum amount specifically earmarked in a more general lump-sum appropriation.
- Depletion of an amount subject to a monetary ceiling imposed by some other statute (usually, but not always, the relevant program legislation).

(1) Making further payments

In simple terms, once an appropriation is exhausted, the making of any further payments, apart from using unexpended balances to liquidate valid obligations recorded against that appropriation, violates 31 U.S.C. § 1341. When the appropriation is fully expended, no further payments may be made in any case. If an agency finds itself in this position, unless it has transfer authority or other clear statutory basis for making further payments, it has little choice but to seek deficiency or supplemental appropriations from Congress, and to adjust or curtail operations as may be necessary. E.g., 61 Comp. Gen.

⁹**OMB Circular No. A-34, Instructions on Budget Execution**, Part II, § 21.1 (August 1985).

661 (1982); 38 Comp. Gen. 501 (1959). If the appropriation account has expired but has not yet been closed, the agency has the alternative of asking Congress for authority to use current appropriations to liquidate the obligations, an option which may enable more prompt liquidation. B-123964, November 27, 1956.

In many ways, the prohibitions in the Adequacy of Appropriations Act, 41 U.S.C. § 11, parallel those of 31 U.S.C. § 1341(a). For example, a contract in excess of the available appropriation violates both statutes. E.g., 9 Comp. Dec. 423 (1903). However, a contract in compliance with 41 U.S.C. § 11 can still result in a violation of the Antideficiency Act. Presumably, if a contract is entered into and there are sufficient funds available when the contract is signed, there is no violation of 41 U.S.C. § 11. The Antideficiency Act, however, anticipates a further development. Suppose there are sufficient funds available when a particular contract is signed, but during the period before payment becomes due, the agency makes a number of payments to other contractors or incurs a number of other obligations, all charged to the same appropriation account, and finds it has nothing left to pay the contract in question. The Antideficiency Act is violated when the contract payment becomes due even though there was no violation when the contract was signed.

To restate the point, the fact that the incurring of an obligation passes Antideficiency Act muster is no guarantee against future violations with respect to that obligation. Assessment of Antideficiency Act violations is not frozen at the point when the obligation is incurred. Certainly the Act is violated if there are insufficient unobligated balances to support the obligation at the time it is incurred. However, even if the initial obligation was well within available funds, the Act can still be violated if insufficient funds remain to liquidate the obligation when actual payment is due or if upward adjustments cause the obligation to exceed available funds. E.g., 55 Comp. Gen. 812, 826 (1976).

What one authority termed the “granddaddy of all violations” occurred when the Navy overobligated and overspent nearly \$110 million from its “Military Personnel, Navy” appropriation during the years 1969-1972, initially discovered in an internal audit, GAO summarized the violation in a letter report, B-177631, June 7, 1973. While there may have been some concealment, GAO concluded that the violation was not the result of some evil scheme; rather, the “basic cause of the violation was the separation of the authority to create obligations from the responsibility to control them.” The authority to create obligations had been decentralized while control was centralized in the Bureau of Naval Personnel,

Granddaddy was soon to lose his place of honor on the totem pole. Around November of 1975, the Department of the Army discovered that, for a variety of reasons, it had overobligated four procurement appropriations in the aggregate amount of more than \$160 million and consequently had to halt payments to some 900 contractors. The Army asked and received the Comptroller General’s advice on a number of potential courses of action it was considering. The resulting decision was 55 Comp. Gen. 768 (1976). The Army acknowledged that there were adequate funds available when all the contracts were signed and therefore the contractors generally had valid, enforceable obligations. However, the Army also recognized its duty to mitigate the Antideficiency Act violation.¹¹ It was clear that without a deficiency appropriation, all the contractors could not be paid. One option—to use current appropriations to pay the deficiencies—had to be rejected because there is no authority to apply current funds to pay off debts incurred in a previous year.¹² An option GAO sanctioned was to reduce the amount of the deficiencies by terminating some of the contracts for convenience, although the termination costs would still have to come from a deficiency appropriation unless there was enough left in the appropriation accounts to cover them.

¹⁰Fisher, *Presidential Spending Power* 236 (1975).

¹¹“We believe it is obvious that, once an Antideficiency Act violation has been discovered, the agency concerned must take all reasonable steps to mitigate the effects of the violation insofar as it remains executory.” 55 Comp. Gen. at 772.

¹²This statement applies to appropriation accounts which have expired but have not yet been closed. 71 Comp. Gen. (B-245856.7, August 11, 1992). Once an account has been closed, typically 5 fiscal years after expiration, obligations chargeable to that account must, within certain limits, be charged to current appropriations. 31 U.S.C. § 1553(b).

(2) Status of contracts

If the Antideficiency Act prohibits any further payments when the appropriation is exhausted, where does this leave the contractor? Is the contractor expected to know how and at what rate the agency is spending its money? There is a small body of judicial case law which discusses the effect of the exhaustion of appropriations on government obligations. The fate of the contractor seems to depend on the type of appropriation involved and the presence or absence of notice, actual or constructive, to the contractor on the limitations of the appropriation.

Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts. For example, in Ferris v. United States, 27 Ct. Cl. 542 (1892), the plaintiff had a contract with the government to dredge a channel in the Delaware River. The Corps of Engineers made him stop work halfway through the job because it had run out of money. In discussing the contractor's rights in a breach of contract suit, the court said:

"A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation= merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." Id. at 546.

The rationale for this rule is that "a contractor cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund." Ross Construction Corp. v. United States, 392 F.2d 984,987 (Ct. Cl. 1968). Other illustrative cases are Dougherty ex rel. Slavens v. United States, 18 Ct. Cl. 496 (1883), and

Joplin v. United States, 89 Ct. Cl. 345 (1939). The Antideficiency Act may “apply to the official, but [does] not affect the rights in this court of the citizen honestly contracting with the Government.” Dougherty, 18 Ct. Cl. at 503. Thus, it is settled that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted.

However, under a specific line-item appropriation, the answer is different. The contractor in this situation is deemed to have notice of the limits on the spending power of the government official with whom he contracts. A contract under these circumstances is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery beyond that limit. E.g., Sutton v. United States, 256 U.S. 575 (1921); Hooe v. United States, 218 U.S. 322 (1910); Shipman v. United States, 18 Ct. Cl. 138 (1883); Dougherty, 18 Ct. Cl. at 503.

The distinction between the Ferris and Sutton lines of cases follows logically from the old maxim that ignorance of the law is no excuse. If Congress appropriates a specific dollar amount for a particular contract, that amount is specified in the appropriation act and the contractor is deemed to know it. It is certainly not difficult to locate. If, on the other hand, a contract is but one activity under a larger appropriation, it is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time. A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well.

In two cases in the 1960s, the Court of Claims permitted recovery on contractor claims in excess of a specific monetary ceiling. See Anthony P. Miller, Inc. v. United States, 348 F.2d-475 (Ct. Cl. 1965) (claim by Capehart Housing Act contractor), and Ross Construction Corp. v. United States, 392 F.2d 984 (Ct. Cl. 1968) (claim by contractor for “off-site” construction ancillary to Capehart Act housing). The court distinguished between matters not the fault or responsibility of the contractor (for example, defective plans or specifications or changed conditions under the “changed conditions” clause), in which case above-ceiling claims are allowable, and excess costs resulting from what it termed “simple extras,” in which case they are not. Without attempting to detail the fairly complex Capehart legislation here, we note merely that Ross is more closely analogous

to the Ferris situation (392 F.2d at 986), while Anthony P. Miller is more closely analogous to the Sutton situation (392 F.2d at 987). The extent to which the approach reflected in these cases will be applied to the more traditional form of exhaustion of appropriations remains to be developed, although the Ross court intimated that it saw no real distinction for these purposes between a specific appropriation and a specific monetary ceiling imposed by other legislation (id.).

b. Contracts or Other
Obligations in Excess or
Advance of Appropriations

It is easy enough to say that the Antideficiency Act prohibits you from obligating a million dollars when you have only half a million left in the account, or that it prohibits you from entering into a contract in September purporting to obligate funds for the next fiscal year that have not yet been appropriated. Many of the situations that actually arise from day to day, however, are not quite that simple. A useful starting point is the relationship of the Antideficiency Act to the recording of obligations under 31 U.S.C. §1501.

(1) Recording obligations

Proper recording practices are essential to sound fund control. However, it should be apparent that, if the Antideficiency Act is to mean anything, the actual recording of obligations cannot by itself provide a sufficient basis on which to assess potential violations. Reliance solely on the recording of obligations can produce error in two directions. It can suggest violations which in fact do not exist, and it can overlook violations which do exist.

If it appears that the total amount of recorded obligations exceeds the available appropriation, there may be several reasons for this other than an Antideficiency Act violation. Excessively high estimates may have been recorded, through either error or an excess of caution, which subsequent liquidation reveals can be reduced. Items may have been incorrectly posted or improperly recorded as obligations. Or, accounts receivable that should be credited to the appropriation may not have been properly identified and taken into consideration.

For these reasons, an amount of recorded obligations in excess of the available appropriation is prima facie evidence of a violation of the Antideficiency Act, but is not conclusive. B-134474-O.M., December 18, 1957. Similarly, GAO has cautioned that an Antideficiency Act violation should not be determined solely on the basis of year-end

reports prior to reconciliation and adjustment. B-1 14841 .2-O. M., January 23, 1986.

If an examination of recorded obligations can be misleading in the sense of indicating violations which in fact do not exist, the converse is also true. Violations may exist which recorded obligations alone will not disclose. Again, there are several reasons. One important principle is stated in the following passage:

“[T]he recording of obligations under 31 U.S.C. § [1501] is not the sole consideration in determining violations of 31 U.S.C. § [1341] We believe that the words ‘any contract or other obligation’ as used in [the predecessor of 31 U.S.C. § 1341] encompass not merely recorded obligations but other actions which give rise to Government liability and will ultimately require the expenditure of appropriated funds.”

55 Comp. Gen. 812,824 (1976). See also 42 Comp, Gen. 272,277 (1962) (Act forbids not only the incurring of obligations beyond the period of availability but also “any other obligation or liability which may arise thereunder and ultimately require the expenditure of funds”); B-163058, March 17, 1975; B-133170, January 29, 1975. An example of action of this type might be conduct by an agency which, under a clear line of administrative or judicial precedent, would result in government liability to a contractor through claims proceedings. 55 Comp. Gen. at 824; B-163058, March 17, 1975.

Also, in many situations, the amount of the government’s liability is not definitely freed at the time the obligation is incurred. An example is a contract with price escalation provisions. In other situations, such as certain contingent liability cases, the government is not required to record any obligation unless and until the contingency materializes. Thus, while examining the actual recording of obligations is a necessary first step, it is also essential to look at what happens as the contract is performed.

Finally, the possibility exists that there are valid obligations which the agency has failed or neglected to record. The incurring of an obligation in excess or advance of appropriations violates the Act, and this is not affected by the agency’s failure to record the obligation. E.g., 65 Comp. Gen. 4,9 (1985); 62 Comp. Gen. 692,700 (1983); 55 Comp. Gen. 812,824 (1976).

In sum, for purposes of assessing violations of the Antideficiency Act, you must start by looking at the actual recording of obligations, but you cannot end there.

(2) Obligation in excess of appropriation

Incurring an obligation in excess of the available appropriation violates 31 U.S.C. § 1341 (a)(1).¹³ As the Comptroller of the Treasury advised an agency head many years ago, “your authority in the matter was strictly limited by the amount of the appropriation. . . ; otherwise there would be no limit to your power to incur expenses for the service of a particular fiscal year. . . .” 9 Comp. Dec. 423, 425 (1903). If you want higher authority, the Supreme Court has stated that, absent statutory authorization, “it is clear that the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation.” Bradley v. United States, 98 U.S. 104, 114 (1878).

To take a fairly simple illustration, the statute was violated by an agency’s acceptance of an offer to install automatic telephone equipment for \$40,000 when the unobligated balance in the relevant appropriation was only \$20,000.³⁵ Comp. Gen. 356 (1955).

In a 1969 case, the Air Force wanted to purchase computer equipment but did not have sufficient funds available. It attempted an arrangement whereby it made an initial down payment, with the balance of the purchase price to be paid in installments over a period of years, the contract to continue unless the government took affirmative action to terminate. This was nothing more than a sale on credit, and since the contract constituted an obligation in excess of available funds, it violated the Antideficiency Act. 48 Comp. Gen. 494 (1969).

¹³Determining the amount of available budgetary resources against which obligations maybe incurred is covered later in this chapter under the heading ‘Amount of Available Appropriation or Fund.’

(3) Variable quantity contracts

A leading case discussing the Antideficiency Act ramifications of “variable quantity” contracts (requirements contracts, indefinite quantity contracts, and similar arrangements)¹⁴ is 42 Comp. Gen. 272 (1962). That decision considered a three-year contract the Air Force had awarded to a firm to provide any service or maintenance work necessary for government aircraft landing on Wake Island. GAO questioned the legality of entering into the contract for more than one year, since the Air Force had only a one-year appropriation available. The Air Force argued that it was a “requirements” contract. No obligation would arise unless or until some maintenance work was ordered. The only obligation was a negative one—not to buy service from anyone else but the contractor should the services be needed. GAO disagreed. The services covered were “automatic incidents of the use of the air field.” There was no place for a true administrative determination that the services were or were not needed. There was no true “contingency” as the services would almost certainly be needed if the base were to remain operational. Accordingly, the contract was not a true requirements contract but amounted to a firm obligation for the needs of future years, and was therefore an unauthorized multi-year contract. As such, it violated the Antideficiency Act. GAO recognized that the rules in this area could create difficult problems, especially in remote spots like Wake Island, but felt that the only solution was to ask Congress for multi-year procurement authority. ¹⁵

The Wake Island decision noted that the contract contained no provision permitting the Air Force to reduce or eliminate requirements short of a termination for convenience. *Id.* at 277. If the contract had included such a provision—and in the unlikely event that, given the nature of the contract, such a provision could have been meaningful—a somewhat different analysis might have resulted. Compare, for example, the situation in 55 Comp. Gen. 812 (1976). The exercise of a contract option required the Navy to furnish various items of government-furnished property (GFP), but another contract clause authorized the Navy to unilaterally delete items of GFP. If the entire quantity of GFP had to be treated as a firm obligation at the

¹⁴We cover the obligational treatment of contracts of this type in Chapter 7, Section B.1.e, which should be read in conjunction with this section.

¹⁵The authority was subsequently sought and granted, and is found at 10 U.S.C. § 2306(g).

~~time~~ the option was exercised, the obligation would have exceeded available appropriations, resulting in an Antideficiency Act violation. However, since the Navy was not absolutely obligated to furnish all the GFP items at the time the option was exercised, it was inappropriate to use the full value of all GFP items under the contract to assess a violation of 31 U.S.C. §1341 at that time. The Navy could avert a violation if it were able to delete enough GFP to stay within the available appropriation; if it found that it could not do so, the violation would then exist.¹⁶ See also B-134474-O. M., December 18, 1957,

In 47 Comp. Gen. 155 (1967), GAO considered an Air Force contract for mobile generator sets which specified minimum and maximum quantities to be purchased over a 12-month period. Since the contract committed the Air Force to purchase only the minimum quantity, it was necessary to obligate only sufficient funds to cover that minimum. Subsequent orders for additional quantities up to the maximum were not legally objectionable as long as the Air Force had sufficient funds to cover the cost when it placed those orders. See also 19 Comp. Gen. 980 (1940). The fact that the Air Force did not, at the time it entered into the contract, have sufficient funds available to cover the maximum quantity was, for Antideficiency Act purposes, irrelevant. The decision distinguished the Wake Island case on the basis that nothing in the mobile generator contract purported to commit the Air Force to obtain any requirements over and above the specified minimum from the contractor.

In a more recent case, GAO found no Antideficiency Act problems with a General Services Administration ‘Multiple Award Schedule’ contract under which no minimum purchases were guaranteed and no binding obligation would arise unless and until a using agency made an administrative determination that it had a requirement for a scheduled item. 63 Comp. Gen. 129 (1983).

¹⁶The rationale worked in that case because the Navy could stay within the appropriation by deleting a relatively small percentage of GFP. If the numbers had been different, such that the amount of GFP to be deleted were so large as to effectively preclude contractor performance, the analysis might well have been different. In a 1964 report, for example, GAO found the Antideficiency Act violated where the Air Force, to keep within a “minor military construction” ceiling, deleted needed plumbing, heating, and lighting from a building alteration contract, resulting in an incomplete facility, and subsequently charged the deleted items to Operation and Maintenance appropriations. Continuing Inadequate Control Over Program and Financing of Construction, B-133316, July 23, 1964, at 12-15.

Regardless of whether we are dealing with a requirements contract, indefinite quantity contract, or some variation, two points apply as far as the Antideficiency Act is concerned:

- Whether or not there is a violation at the time the contracts entered into depends on exactly what the government is obligated to do under the contract.
- Even if there is no violation at the time the contract is entered into, a violation may occur later if the government subsequently incurs an obligation under the contract in excess of available funds, for example, by electing to order a maximum quantity without sufficient funds to cover the quantity ordered.

A conceptually related situation is a contract which gives the government the option of two performances at different prices. The government can enter into such a contract without violating the Antideficiency Act as long as it has sufficient appropriations available at the time the contract is entered into to pay the lesser amount. For example, the Defense Production Act of 1950 authorizes the President to contract for synthetic fuels, but the contract must give the President the option to refuse delivery and instead pay the contractor the amount by which the contract price exceeds the prevalent market price at the time the delivery is made. Such a contract would not violate the Antideficiency Act at the time it is entered into as long as sufficient appropriations are available to pay any anticipated difference between the contract price and the estimated market price at the time of performance. 60 Comp. Gen. 86 (1980). Of course, the government could not choose to accept delivery unless there were sufficient appropriations available at that time to cover the full cost of the fuel under the contract.

(4) Multi-year or “continuing” contracts

A multi-year contract is a contract covering the needs or requirements of more than one fiscal year. Our discussion here presupposes a general familiarity with relevant portions of Chapter 5, primarily the nature of a fixed-term appropriation and the bona fide needs rule as it relates to multi-year contracts.

We start with some very basic propositions:

- A fixed-term appropriation (fiscal year or multiple-year) maybe obligated only during its period of availability.
- A freed-term appropriation maybe validly obligated only for the bona fide needs of that freed term.
- The Antideficiency Act prohibits the making of contracts which exceed currently available appropriations or which purport to obligate appropriations not yet made.

As we have seen in Chapter 5, performance may extend into a subsequent fiscal year in certain situations. Also, as long as a contract is properly obligated against funds for the year in which it was made, actual payment can extend into subsequent years. Apart from these situations, and unless the agency either has specific multi-year contracting authority (e.g., 62 Comp. Gen. 569 (1983)) or is operating under a no-year appropriation (e.g., 43 Comp. Gen. 657 (1964)), the Antideficiency Act, together with the bona fide needs rule, prohibits contracts purporting to bind the government beyond the obligational duration of the appropriation.¹⁷ This is because the current appropriation is not available for future needs, and appropriations for those future needs have not yet been made. Citations to support this proposition are numerous.¹⁸ The rule applies to any attempt to obligate the government beyond the end of the fiscal year, even where the contract covers a period of only a few months. 24 Comp. Gen. 195 (1944).

The guiding principle still followed today stems from a 1925 decision of the United States Supreme Court. An agency had entered into a long-term lease for office space with one-year money, but its contract specifically provided that payment for periods after the first year was subject to the availability of future appropriations. In Leiter v. United States, 271 U.S. 204 (1925), the Supreme Court specifically rejected that theory. The Court held that the lease was binding on the government only for one fiscal year, and it ceased to exist at the end of the fiscal year in which the obligation was incurred. It takes

¹⁷Every violation of the bona fide needs rule does not necessarily violate the Antideficiency Act as well. Determinations must be made on a case-by-case basis. B-235086.2, January 22, 1992 (non-decision letter).

¹⁸E.g., 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 61 Comp. Gen. 184,187 (1981); 48 Comp. Gen. 471,475 (1969); 42 Comp. Gen. 272 (1962); 37 Comp. Gen. 60 (1957); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 27 Op. Att'y Gen. 584 (1909).

affirmative action to bring the obligation back to life. The Court stated its position as follows:

“It is not alleged or claimed that these leases were made under any specific authority of law. And since at the time they were made there was no appropriation available for the payment of rent after the first fiscal year, it is clear that in so far as their terms extended beyond that year they were in violation of the express provisions of the [Antideficiency Act]; and, being to that extent executed without authority of law, they created no binding obligation against the United States after the first year. [Citations omitted.] A lease to the Government for a term of years, when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year. [Citations omitted.] **And** it is plain that, to make it **binding** for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year.” *Id.* at 206–07.

GAO has relied heavily on Leiter in subsequent decisions. For example, GAO refused to approve an automatic, annual renewal of a contract for repair and storage of automotive equipment, even though the contract provided that the government had a right to terminate. The reservation of a right to terminate does not save the contract from the prohibition against binding the government in advance of appropriations. 28 Comp. Gen. 553 (1949).

The Post Office wanted to enter into a contract for services and storage of government-owned highway vehicles for periods up to four years because it could obtain a more favorable flat rate per mile of operations instead of an item by item charge required if the contract was for one year only. GAO held that any contract for continuous maintenance and storage of the vehicles would be prohibited by 31 U.S.C. § 1341 because it would obligate the government beyond the extent of the existing appropriation. However, there would be no legal objection to including a provision which gave the government an affirmative option to renew the contract from year to year, not to exceed four years. 29 Comp. Gen. 451 (1950).¹⁹

Where a contract gives the government a renewal option, it may not be exercised until appropriations for the subsequent fiscal year

¹⁹Some additional cases are 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 42 Comp. Gen. 272,276 (1962); 37 Comp. Gen. 155,160 (1957); 37 Comp. Gen. 60,62 (1957); 36 Comp. Gen. 683 (1957); 9 Comp. Gen. 6 (1929); B-1 16427, September 27, 1955. See also B-97718, October 9, 1950 (similar point but Leiter not cited).

actually become available. 61 Comp. Gen. 184, 187 (1981). Under a one-year contract with renewal options, the fact that funds become available in subsequent years does not place the government under an obligation to exercise the renewal option. Government Systems Advisors, Inc. v. United States, 13 Cl. Ct. 470 (1987), aff'd, 847 F.2d 811 (Fed. Cir. 1988).²⁰

Note that, in Leiter, the inclusion of a contract provision conditioning the government's obligation on the subsequent availability of funds was to no avail. In this connection, see also 67 Comp. Gen. 190, 194 (1988); 42 Comp. Gen. 272,276 (1962); 36 Comp. Gen. 683 (1957). If a "subject to availability" clause were sufficient to permit multi-year contracting, the effect would be automatic continuation from year to year unless the government terminated. If funds were not available and the government nevertheless permitted or acquiesced in the continuation of performance, the contractor would obviously be performing in the expectation of being paid.²¹ Apart from questions of legal liability, the failure by Congress to appropriate the money would be a serious breach of faith. Congress would, as a practical, if not a legal matter, have little real choice. This is another example of a **type** of "coercive deficiency" the Antideficiency Act was intended to prohibit. Thus, it is not enough for the government to retain the option to terminate at any time if sufficient funds are not available. Under Leiter and its progeny, the contract "dies" at the end of the fiscal year, and may be revived only by affirmative action by the government. This "new" contract is then chargeable to appropriations for the subsequent year.

This is not to say that "subject to availability" clauses are not important. They are, and are in fact required by the Federal Acquisition Regulation in several situations: (1) contract actions initiated prior to the availability of funds;²² (2) certain requirements

²⁰The Claims Court based its conclusion in part on Leiter and the Antideficiency Act; the Federal Circuit relied on the language of the contract.

²¹The Federal Acquisition Regulation states that encouraging a contractor to continue performance in the absence of funds violates the Antideficiency Act. 48 C.F.R. § 32.704(c).

²²Availability of Funds, 48 C.F.R. § 52.232-18.

and indefinite-quantity contracts;²³ (3) fully funded cost-reimbursement contracts;²⁴ (4) facilities acquisition and use;²⁵ and (5) incrementally funded cost-reimbursement contracts.²⁶ FAR, 48 C.F.R, Subpart 32.7. While the prescribed contract clauses vary in complexity, they all have one thing in common—each requires the contracting officer to specifically notify the contractor of the availability of funds and to confirm the notification in writing. The objective of these clauses is compliance with the Antideficiency Act and other funding statutes. See *ITT Federal Laboratories*, ASBCA No. 12987, 69-2 BCA 117,849 (1969). What is not sufficient is a simple “subject to availability” clause which would permit automatic continuation subject to the government’s right to terminate.

It maybe useful at this point to reiterate the basic principle that compliance with the Antideficiency Act is determined on the basis of when an obligation occurs, not when actual payment is scheduled to be made. In the renewal option situation, for example, as long as sufficient funds are available to cover the first year’s obligations, there is no violation at the time the contract is made, and this is not affected by the fact that payment may not be made until the following year or later. Of course, a violation would occur when payment becomes due if the appropriation has become exhausted by that time.

Termination charges under renewal option contracts may also present Antideficiency Act complications. As a general proposition, the government has the right to terminate a contract “for the convenience of the government” if that action is determined to be in the government’s best interests. The Federal Acquisition Regulation

²³Availability of funds for the Next Fiscal Year, 48 C.F.R. § 52.232-19.

²⁴Limitation of Cost, 48 C.F.R. § 52.232-20.

²⁵Limitation of cost (Facilities), 48 C.F.R. § 52.232-21.

²⁶Limitation of Funds, 48 C.F.R. § 52.232-22.

prescribes the required contract clauses. 48 C.F.R. Subpart 49.5 (1991).²⁷ Under a termination for convenience, the contractor is entitled to be compensated, including a reasonable profit, for the performed portion of the contract, but may not recover anticipatory profits on the terminated portion. E.g., 48 C.F.R. §§49.201,49.202. Total recovery may not exceed the contract price. Id. § 49.207. In a renewal option situation, the government may also simply decline to exercise the option.

In the typical fiscal-year contract, termination does not pose a problem because the basic contract obligation will be sufficient to cover potential termination costs. Under a renewal option contract, however, the situation may differ. A contractor who must incur substantial capital costs at the outset has a legitimate concern over recovering these costs if the government does not renew. A device used to address this problem is a clause requiring the government to pay termination charges or “separate charges” upon early termination. As discussed in Chapter 5, separate charges have been found to violate the *bona fide* needs rule to the extent they do not reasonably relate to the value of current fiscal year requirements. E.g., 36 Comp. Gen. 683 (1957), *aff'd*, 37 Comp. Gen. 155 (1957). As such, whether we regard them as obligations against funds not yet appropriated or obligations against current funds for the needs of future years, they also violate the Antideficiency Act.

The leading case in this area is 56 Comp. Gen. 142 (1976), *aff'd*, 56 Comp. Gen. 505 (1977). The Burroughs Corporation protested the award of a contract to the Honeywell Corporation to provide automatic data processing (ADP) equipment to the Mine Enforcement and Safety Administration. If all renewal options were exercised, the contract would run for 60 months after equipment installation. The contract included a “separate charges” provision under which, if the government failed to exercise any renewal option or otherwise terminated prior to the end of the 60-month systems life, the government would pay a percentage of all future years’ rentals based on Honeywell’s “list prices” at the time of discontinuance or termination. This provision violated the Antideficiency Act for two reasons. First, it would amount to an obligation of fiscal-year funds for the requirements of future years. And second, it would commit the

²⁷Where a Termination for Convenience clause is required by regulation, it will be read into the contract whether expressly included or not. *G.L. Christian and Associates v. United States*, 312 F.2d 418 and 320 F.2d 345 (Ct. CL 1963), *cert. denied*, 375 U.S. 954.

government to indeterminate liability because the contractor could raise its list or catalog prices at any time, The government had no way of knowing the amount of its commitment. Similar cases involving separate charges are 56 Comp. Gen. 167 (1976), B-216718.2, November 14, 1984, and B-190659, October 23, 1978.

The Burroughs decision also offers guidance on when separate charges may be acceptable. One instance is where it is the only way the government can obtain its needs. Cited in this regard was 8 Comp. Gen. 654 (1929), a case invoking the installation of equipment and the procurement of a water supply from a town. There, however, the town was the only source of a water supply, a situation clearly inapplicable to a competitive industry like ADP. 56 Comp. Gen. at 157. In addition, separate charges are permissible if they, together with payments already made, reasonably represent the value of requirements actually performed, Thus, where the contractor has discounted its price based on the government's stated intent to exercise all renewal options, separate charges may be based on the "reasonable value (e.g., ADP schedule price) of the actually performed work at termination based upon the shortened term." Id. at 158. However, termination charges may not be inconsistent with the Termination for Convenience clause remedy; for example, they may not exceed the value of the contractor include costs not cognizable under a "T for C." Id. at 157.

Where termination charges are otherwise proper, the Antideficiency Act also requires that the agency have sufficient funds available to pay them if and when the contingency materializes. E.g., 62 Comp. Gen. 143 (1983). See also 8 Comp. Gen. 654,657 (1929) (same point but Antideficiency Act not cited). This requirement is sometimes specified in multi-year contracting legislation. An example is 40 **U.S.C.** § 757(c)(1), the Information Technology Fund. Congress may also, of course, provide exceptions. E.g., B-174839, March 20, 1984.

c. Indemnification

(1) Prohibition against unlimited liability

Under an indemnification agreement, one party promises, in effect, to cover another party's losses. It is no surprise that the government is often asked to enter into indemnification agreements. The rule is that, absent express statutory authority, the government may not enter into an agreement to indemnify where the amount of the government's liability is indefinite, indeterminate, or potentially unlimited. Such an

agreement would violate both the Antideficiency Act, 31 U.S.C. § 1341, and the Adequacy of Appropriations Act, 41 U.S.C. § 11, since it can never be said that sufficient funds have been appropriated to cover the contingency. In plain English, you cannot purport to bind the government to unlimited liability. The rule is not some arcane GAO concoction. The Court of Claims stated in California-Pacific Utilities Co. v. United States, 194 Ct. Cl. 703,715 (1971):

“The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the Antideficiency Act] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated. [Citations omitted,]”

For example, in an early case, the Interior Department, as licensee, entered into an agreement with the Southern Pacific Company under which the Department was to lay telephone and telegraph wires on property owned by the licensor in New Mexico. The agreement included a provision that the Department was to indemnify the Company against any liability resulting from the operation. Upon reviewing the indemnity provision, the Comptroller General found that it purported to impose indeterminate contingent liability on the government. By including the indemnity provision, the contracting officer had exceeded his authority, and the provision was held void. 16 Comp. Gen. 803 (1937).

Similarly, an indefinite and unlimited indemnification provision in a lease entered into by the General Services Administration without statutory authority was held to impose no legal liability on the government. 35 Comp. Gen. 85 (1955).

More recently, in 59 Comp. Gen. 369 (1980), the National Oceanic and Atmospheric Administration desired to undertake a series of hurricane seeding experiments off the coast of Australia in cooperation with its Australian counterpart. The State Department, as negotiator, sought GAO’s opinion on an Australian proposal under which the United States would agree to indemnify Australia against all damages arising from the activities. State recognized that an unlimited agreement would violate the Antideficiency Act and asked whether the proposal would be acceptable if it specified that the government’s liability would be subject to the appropriation of funds by Congress for that purpose. GAO conceded that an agreement expressly providing that the United States would not be obligated unless

Congress chooses to appropriate the funds would not violate the letter of the law. However, it would violate the spirit of the law because, even though it would impose no legal obligation, it would impose a moral obligation on the United States to make good on its promise. This is still another example of the so-called “coercive deficiency.” There was a way out, however, GAO concluded that the government’s policy of self-insurance did not apply here. NOAA could therefore purchase private insurance, with the premiums hopefully to be shared by the government of Australia. NOAA’s share of the insurance premium would simply be a necessary expense of the project.

Another decision applying the general rule held that the Federal Emergency Management Agency could not agree to provide indeterminate indemnification to agents and brokers under the National Flood Insurance Act, B-201394, April 23, 1981. If FEMA considered indemnification necessary to the success of its program, it could either insert a provision limiting the government’s liability to available appropriations or seek broader authority from Congress.

In B-201072, May 3, 1982, the Department of Health and Human Services questioned the use of a contract clause entitled “Insurance–Liability to Third Persons,” found in the Federal Procurement Regulations (predecessor to the Federal Acquisition Regulation). The clause purported to permit federal agencies to agree to reimburse contractors, without limit, for liabilities to third persons for death, personal injury, or property damage, arising out of performance of the contract and not compensated by insurance, whether or not caused by the contractor’s negligence. Since the clause purported to commit the government to an indefinite liability which could exceed available appropriations, the Comptroller General found it in violation of the Antideficiency Act and the Adequacy of Appropriations Act. This decision was affirmed upon reconsideration in 62 Comp. Gen. 361 (1983), one of GAO’s more comprehensive discussions of the indemnification problem.

For other cases applying or discussing the general rule, see 20 Comp. Gen. 95, 100 (1940); 7 Comp. Gen. 507 (1928); 15 Comp. Dec. 405 (1909); B-1 17057, December 27, 1957; A-95749, October 14, 1938; 2 Op. Off. Legal Counsel 219, 223–24 (1978). A brief letter report making the same point is Agreements Describing Liability in Undercover Operations Should Limit the Government’s Liability, GGD-83-53 (March 15, 1983).

Some court cases are Frank v. United States, 797 F.2d 724,727 (9th Cir. 1986); Lopez v. Johns Manville, 649 F. Supp. 149 (W.D. Wash. 1986), aff'd on other grounds, 858 F.2d 712 (Fed. Cir. 1988); In re All Asbestos Cases, 603 F. Supp. 599 (D. Hawaii 1984); Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17,29 (1992); Hercules Inc. v. United States, 25 Cl. Ct. 616 (1992); Johns-Manville Corp. v. United States, 12 Cl. Ct. 1 (1987). (Several of these are asbestos cases in which the courts rejected claims of an implied agreement to indemnify.) In Johns-Manville Corp. v. United States, the court stated:

“Contractual agreements that create contingent liabilities for the Government serve to create obligations of funds just as much as do agreements creating definite or certain liabilities. The contingent nature of the liability created by an indemnity agreement does not so lessen its effect on appropriations as to make it immune to the limitations of [the Antideficiency Act].” 12 CL Ct. at 25.

The Federal Labor Relations Authority has also applied the anti-indemnity rule. National Federation of Federal Employees and U.S. Department of the Interior, 35 F. L.R.A. 1034 (No. 113, 1990) (proposal to indemnify union against judgments and litigation expenses resulting from drug testing program held contrary to law and therefore nonnegotiable); American Federation of State, County and Municipal Employees and U.S. Department of Justice, 42 F. L.R.A. 412, 515–17 (No. 33, 1991) (same).

In some of the earlier cases—for example, 7 Comp. Gen. 507 (1928) and 16 Comp. Gen. 803 (1937)—GAO noted as further support for the prohibition the then-existing principle that the United States was not liable for the tortious conduct of its employees. Of course, since the enactment of the Federal Tort Claims Act in 1946, this is no longer true. Thus, the reader should disregard any discussion of the government’s lack of tort liability appearing in the earlier cases. The thrust of those cases, namely, the prohibition against open-ended liability, remains valid.

A limited exception to the rule was recognized in 59 Comp. Gen. 705 (1980). In that case, the Comptroller General held that the General Services Administration could agree to certain indemnity provisions in procuring public utility services for government agencies under the Federal Property and Administrative Services Act.

The extent of the exception carved out by 59 Comp. Gen. 705 was discussed in a later decision, B-197583, January 19, 1981. There, GAO

once again applied the general rule and held that the Architect of the Capitol could not agree to indemnify the Potomac Electric Power Company for loss or damages resulting from PEPCO'S performance of tests on equipment installed in government buildings or from certain other equipment owned by PEPCO which could be installed in government buildings to monitor electricity use for conservation purposes. GAO pointed to two distinguishing factors that justified—and limited—the exception in 59 Comp. Gen. 705. First, in 59 Comp. Gen. 705, there was no other source from which the government could obtain the needed utility services. Here, the testing and monitoring could be performed by government employees. The second factor is summarized in the following excerpt from B-197583:

“An even more important distinction, though, is that unlike the situation in the GSA case [59 Comp. Gen. 705], the Architect has not previously been accepting the testing services or using the impulse device from PEPCO and has therefore not previously agreed to the liability represented by the proposed indemnity agreements. In the GSA case, GSA merely sought to enter a contract accepting the same service and attendant liability, previously secured under a non-negotiable tariff, at a rate more advantageous to the Government. Here, however, the Government has other means available to provide the testing and monitoring desired.”

Thus, the case did not fall within the “narrow exception created by the GSA decision,” and the proposed indemnity agreement was improper. Citing 59 Comp. Gen. 369 (the hurricane seeding case previously discussed), however, GAO suggested that the Architect consider the possibility of obtaining private insurance.

The prohibition against incurring indefinite contingent liabilities is not limited to indemnification agreements. It applies as well to other types of contingent liabilities such as contract termination charges. The cases are included in our preceding discussion of multi-year contracting.

(2) When indemnification may be authorized

Indemnification agreements maybe proper if they are limited to available appropriations and are otherwise authorized. Before ever getting to the question of amount, for an indemnity agreement to be permissible in the first place, it must be authorized either expressly or under a necessary expense theory. For example, in 1958, the National Gallery of Art asked if it could enter into an agreement to indemnify a corporation which was providing air conditioning equipment maintenance training to members of the Gallery's engineering staff.

Under the proposal, the Gallery would indemnify the corporation for losses resulting from death or injury to Gallery employees caused by the negligence of the corporation or its employees. In reviewing the proposal, GAO did not find it necessary to address the definite vs. indefinite issue. There was simply no authority for the Gallery to use appropriated funds to pay claims of this type, nor could they be considered authorized training expenses under the Government Employees Training Act. B-137976, December 4, 1958. See also 63 Comp. Gen. 145, 150 (1984); 59 Comp. Gen. 369 (1980); B-201394, April 23, 1981.

Once you cross the purpose hurdle—that is, once you determine that the indemnification proposal you are considering is a legitimate object on which to spend your appropriations—you are ready to grapple with the unlimited liability issue.

One way to deal with this issue is, of course, to specifically limit the amount of the liability assumed to available appropriations. Such a limitation of an indemnity agreement may come about in either of two ways: it may follow necessarily from the nature of the agreement itself, coupled with an appropriate obligation or administrative reservation of funds, or it may be expressly written into the agreement. The latter alternative is the only acceptable one where the government's liability would otherwise be potentially unlimited.

For example, where the government rented buses to transport Selective Service registrants for physical examination or induction, there was no objection to the inclusion of an indemnity provision which was a standard provision in the applicable motor carrier charter coach tariff. 48 Comp. Gen. 361 (1968). Potential liability was not indefinite since it was necessarily limited to the value of the motor carrier's equipment.

Similarly, under a contract for the lease of aircraft, the Federal Aviation Administration could agree to indemnify the owner for loss or damage to the aircraft in order to eliminate the need to reimburse the owner for the cost of "hull insurance" and thereby secure a lower rental rate. The liability could properly be viewed as a necessary expense incident to hiring the aircraft, FAA had no-year appropriations available to pay for any such liability, and, as in the Selective Service case, the agreement was not indefinite because maximum liability was measurable by the fair market value of the

aircraft. 42 Comp. Gen. 708 (1963), See also 22 Comp. Gen. 892 (1943) (Maritime Commission could amend contract to agree to indemnify contractor against liability to third parties, in lieu of reimbursing contractor for cost of liability insurance premiums, to the extent of available appropriations and provided liability was limited to coverage of existing insurance policies).²⁸

In B-114860, December 19, 1979, the Farmers Home Administration asked whether it could purchase surety bonds or enter into an indemnity agreement in order to obtain the release of deeds of trust for borrowers in Colorado where the original promissory notes had been lost while in FmHA's custody. Colorado law required one or the other where the canceled original note could not be delivered to the Colorado public trustee. GAO concluded that the indemnity agreement was permissible as long as it was limited to an amount not to exceed the original principal amount of the trust deed. The decision further advised that FmHA should administratively reserve sufficient funds to cover its potential liability. This aspect of the decision was reconsidered in B-198161, November 25, 1980, Reviewing the particular circumstances involved, GAO was unable to foresee situations in which the government might be required to indemnify the public trustee, and accordingly advised FmHA that the administrative reservation of funds would not be necessary.

In 63 Comp. Gen. 145 (1984), certain indemnification provisions in a ship-chartering agreement were found not to impose indefinite or potentially unlimited contingent liability because liability could be avoided by certain separate actions solely under the government's control.

In cases like the Selective Service bus case (48 Comp. Gen. 361) and the FAA aircraft case (42 Comp. Gen. 708), even though the government's potential liability is limited and determinable, this fact alone does not guarantee that the agency will have sufficient funds available should the contingency ripen into an obligation. This concern is met in one of two ways. The first is the obligation or administrative reservation of sufficient funds to cover the potential liability. In particular cases, reservation maybe determined

²⁸22 Comp. Gen. 892 is discussed in 62 Comp. Gen. 361,362-63 (1983), and *Johns-Marville Corp. v. United States*, 12 Cl. Ct. 1,23 (1987). The Claims Court noted the "significant deficiency" of 22 Comp. Gen. 892 in that it nowhere mentions the Antideficiency Act.

unnecessary, as in B-198161, above. Also, naturally, a specific directive from Congress will render reservation of funds unnecessary. See B-159141, August 18, 1967. The second way is for the agreement to expressly limit the government's liability to appropriations available at the time of the loss with no implication that Congress will appropriate funds to makeup any deficiency.

This second device—the express limitation of the government's liability to available appropriations—is sufficient to cure an otherwise fatally defective (i.e., unlimited) indemnity proposal. GAO has considered this type of provision in several contexts.

For example, the government may in limited circumstances assume the risk of loss to contractor-owned property. While the maximum potential liability would be determinable, it could be very large and the “administrative reservation” of funds is not feasible. Thus, without some form of limitation, such an agreement could result in obligations in excess of available appropriations. The rules concerning the government's assumption of risk on property owned by contractors and used in the performance of their contracts are set forth in 54 Comp. Gen. 824 (1975), modifying B-168106, July 3, 1974. The rules are summarized below:²⁹

- If administratively determined to be in the best interest of the government, the government may assume the risk for contractor-owned property which is used solely in the performance of government contracts.
- The government may not assume the risk for contractor-owned property which is used solely for nongovernment work. If the property is used for both government and nongovernment work and the nongovernment portion is separable, the government may not assume the risk relating to the nongovernment work.
- Where the amount of a contractor's commercial work is so insignificant when compared to the amount of the contractor's government work that the government is effectively bearing the entire risk of loss by in essence paying the full insurance premiums, the government may assume the risk if administratively determined to be in the best interest of the government.

²⁹54 Comp. Gen. 824 overruled a portion of 42 Comp. Gen. 708, discussed in the text, to the extent it held that there was no need to either obligate or reserve funds. Thus, in a situation like 42 Comp. Gen. 708, the agency would presumably have to either obligate or administratively reserve funds or include a provision like the one described in 54 Comp. Gen. 824.

- Any agreement for the assumption of risk by the government under the above rules must clearly provide that, in the event the government has to pay for losses, payments may not exceed appropriations available at the time of the losses, and that nothing in the contract may be considered as implying that Congress will at a later date appropriate funds sufficient to meet deficiencies.

A somewhat different situation was discussed in 60 Comp. Gen. 584 (1981), involving an “installment purchase plan” for automatic data processing equipment. Under the plan, the General Services Administration would make monthly payments until the entire purchase price was paid, at which time GSA would acquire unencumbered ownership of the equipment. GSA’s obligation was conditioned on its exercising an option at the end of each fiscal year to continue payments for the next year. The contract contained a risk of loss provision under which GSA would be required to pay the full price for any equipment lost or damaged during the term. GAO concluded that the equipment should be treated as contractor-owned property for purposes of the risk of loss provision, and that the provision would be improper unless one of the following conditions were met:

1. The contract must include the provisions specified in 54 Comp. Gen. 824 limiting GSA’s liability to appropriations available at the time of the loss and expressly precluding any inference that Congress would appropriate sufficient funds to meet any deficiency; or
2. If the contract does not include these provisions, then GSA must obligate sufficient funds to cover its possible liability under the risk of loss provision.

If neither of these conditions are met, the assumption of risk clause could potentially violate the Antideficiency Act by creating an obligation in excess of available appropriations if the contingency occurs.

In a 1982 case, the Defense Department and the state of New York entered into a contract for New York to provide certain support functions for the 1980 Winter Olympic Games at Lake Placid, New York. The contract provided for federal reimbursement of any disability benefits which New York might be required to pay in case of death or injury of persons participating in the operation. The contract

specified that the government's liability could not exceed appropriations for assistance to the Games available at the time of a disabling event, and that the contract did not imply that Congress would appropriate funds sufficient to meet any deficiencies. Since these provisions satisfied the test of 54 Comp. Gen. 824, the indemnity agreement was not legally objectionable. B-2025 18, January 8, 1982. Under this type of arrangement, the time to record an obligation would be when the agency is notified that a disabling event has occurred. The initial recording of course would have to be based on an estimate.

Also, the decision in the National Flood Insurance Act case mentioned above (B-201394, April 23, 1981) noted that the defect could have been cured by inserting a clause along the lines of 54 Comp. Gen. 824. The same point was made in B-201072, May 3, 1982, also discussed earlier. See also National Railroad Passenger Corp. v. United States, 3 Cl. Ct. 516,521 (1983) (indemnification agreement between Federal Railroad Administration and Amtrak did not violate Antideficiency Act where liability was limited to amount of appropriation).

When we first stated the anti-indemnity rule at the outset of this discussion, we noted that the rule applies in the absence of express statutory authority to the contrary. Naturally, an indemnification agreement, however open-ended it maybe, will be "legal" if it is authorized by some express provision of law.

One statutory exception to the indemnification rules exists for certain defense-related contracts by virtue of 50 U.S.C. §1431, often referred to by its Public Law designation, Public Law 85-804. The statute evolved from a temporary wartime measure, section 201 of the First War Powers Act, 1941, 55 Stat. 838,839. The implementing details on indemnification are found in Executive Order No. 10789, as amended.³⁰

Another statutory exception is 42 U.S.C. § 2210, the Price-Anderson Act, which authorizes indemnification agreements with Nuclear

³⁰A decision approving an indemnity agreement under authority Of the First WarPowers Act is B-33801, April 19, 1943. A later related decision is B-33801, October 27, 1943. Both of these decisions involved the famed "Manhattan Project," although that fact is well-concealed. The decisions had been classified but were declassified in 1986.

Regulatory Commission licensees and Department of Energy contractors to pay claims resulting from nuclear accidents.

Some of the more recent cases have expressed the view that indemnity agreements, even with limiting language, should not be entered into without congressional approval in view of their potentially disruptive fiscal consequences to the agency.³¹ 63 Comp. Gen. 145,147 (1984); 62 Comp. Gen. 361,368 (1983); B-242146, August 16, 1991. Precisely what form this approval should take in cases where the contractual language is sufficient to minimally satisfy the Antideficiency Act is not entirely clear.

In 1986, the Chairman of the Subcommittee on Nuclear Regulation, Senate Committee on Environment and Public Works, in connection with proposed Price-Anderson amendments the committee was considering, asked GAO to identify possible funding options for a statutory indemnification provision. GAO's response, B-197742, August 1, 1986, lists several options and notes the benefits and drawbacks of each from the perspective of congressional flexibility. The options range from creating a statutory entitlement with a permanent indefinite appropriation for payment (indemnity guaranteed but no congressional flexibility), to making payment fully dependent on the appropriations process (full congressional flexibility but no guarantee of payment). In between are various other devices such as contract authority, use of contract provisions such as those in 54 Comp. Gen. 824, and various forms of limited funding authority.

The discussion in B-197742 highlights the essence of the indemnification funding problem:

“An indemnity statute should generally include two features—the indemnification provisions and a funding mechanism. Indemnification provisions can range from a legally binding guarantee to a mere authorization. Funding mechanisms can similarly vary in terms of the degree of congressional control and flexibility retained. It is impossible to maximize both the assurance of payment and congressional flexibility. Either objective is enhanced only at the expense of the other. . . .

....

³¹To illustrate the potential fiscal consequences, an authorized indemnity agreement entered into in 1950 produced liability of over \$64 million plus interest more than four decades later. See *E.I. Du Pont De Nemours & Co. v. United States*, 24 Cl. Ct. 635 (1991).

“If payment is to be assured, Congress must yield control over funding, either in whole or up to specified ceilings. . . . Conversely, if Congress is to **retain funding** control, payment cannot be assured in any legally binding form and the indemnification becomes less than an entitlement.”

GAO’s bottom line: Whatever funding approach Congress may deem desirable in a particular situation should be spelled out in the legislation. Funding should never occur by default.

(3) Summary

Absent specific statutory authority, the government may generally not enter into an indemnification agreement which would impose an indefinite or potentially unlimited liability on the government. Since the obligation or administrative reservation of funds is not a feasible option in the indefinite liability situation, the only cure is for the agreement to expressly limit the government’s liability to available appropriations with no implication that Congress will appropriate the money to meet any deficiencies. If the government’s potential liability is limited and determinable, an agreement to indemnify will be acceptable if it is otherwise authorized and if appropriate safeguards are taken to protect against violation of the Antideficiency Act. These safeguards may be either the obligation or administrative reservation of sufficient funds to cover the potential liability, or the inclusion in the agreement of a clause expressly limiting the government’s liability to available appropriations.

While the preceding discussion reflects the relevant case law as of the date of this publication, GAO is aware that the guidance provided does not solve all problems. For example, limiting an indemnification agreement to appropriations available at the time of the loss, as in B-202518 (the New York Winter Olympics case), may remove the “unlimited liability” objection, but it remains entirely possible that liabilities incurred under such an agreement could exhaust the agency’s appropriation and produce further Antideficiency Act complications. Also, from the standpoint of the contractor or other “beneficiary,” indemnification under these circumstances can prove largely illusory, as it will obviously make a big difference whether the incident giving rise to the claim occurs at the beginning or the end of a fiscal year.

The indemnification area is concealeedly a troublesome one. While there are devices that may be employed to structure indemnification

agreements in such a way as to make them legally acceptable, they are no substitute for clear legislative authority. If an agency thinks that indemnification agreements in a particular context are sufficiently in the government's interests, the preferable approach is for the agency to go to Congress and seek specific statutory authority.

d. Specific Appropriation
Limitations/Purpose Violations

In Chapter 4 we covered in some detail 31 U.S.C. § 1301(a), which prohibits the use of appropriations for purposes other than those for which they were appropriated. As seen in that chapter, violations of purpose availability can arise in a wide variety of contexts—charging an obligation or expenditure to the wrong appropriation, making an obligation or expenditure for an unauthorized purpose, violating a statutory prohibition or restriction, etc. The question we explore in this section is the relationship of purpose availability to the Antideficiency Act. In other words, when and to what extent does a purpose violation also violate the Antideficiency Act?

Why does it matter whether you have violated one statute or two statutes? To our knowledge, nobody is keeping score. The reason here is that, if the second statute is the Antideficiency Act, there are reporting requirements and potential penalties to consider.

A useful starting point is the following excerpt from 63 Comp. Gen. 422,424 (1984):

“Not every violation of 31 U.S.C. § 1301(a) also constitutes a violation of the Antideficiency Act. . . . Even though an expenditure may have been charged to an improper source, the Antideficiency Act’s prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both 31 U.S.C. § 1301(a) and § 1341(a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible.”

First, suppose an agency charges an obligation or expenditure to the wrong appropriation account. This can involve either charging the wrong appropriation for the same time period, or charging the wrong fiscal year. The answer is found in the above passage from 63 Comp. Gen. 422. If the appropriation that should have been charged in the first place has sufficient available funds to enable the adjustment of

accounts, there is no Antideficiency Act violation. A violation exists if the proper account does not have enough money to permit the adjustment, and this includes cases where sufficient funds existed at the time of the error but have since been obligated or expended. See also 70 Comp. Gen. 592 (1991); B-222048, February 10, 1987; B-95136, August 8, 1979.

Other cases illustrating or applying this principle are 57 Comp. Gen. 459 (1978) (grant funds charged to wrong fiscal year); B-224702, August 5, 1987 (contract modifications charged to expired accounts rather than current appropriations); B-208697, September 28, 1983 (items charged to General Services Administration Working Capital Fund which should have been charged to other operating appropriations). Actually, the concept of “curing” a violation by making an appropriate adjustment of accounts is not new. See, e.g., 16 Comp. Dec. 750 (1910); 4 Comp. Dec. 314,317 (1897). The Armed Services Board of Contract Appeals has also followed this principle. New England Tank Industries of New Hampshire, Inc., ASBCA No. 26474, 88-1 BCA ¶ 20,395 (1987).³²

The next situation to consider is an obligation or expenditure in excess of a statutory ceiling. This maybe an earmarked maximum in a more general appropriation or a monetary ceiling imposed by some other legislation. An obligation or expenditure in excess of the ceiling violates 31 U.S.C. § 1341(a). See, for example, the following:

- Monetary ceilings on minor military construction (10 U.S.C. § 2805): 63 Comp. Gen. 422 (1984); Continuing Inadequate Control Over Programing [sic] and Financing of Construction, B-133316, July 23, 1964; Review of Programing [sic] and Financing of Selected Facilities Constructed at Army, Navy, and Air Force Installations, B-133316, January 24, 1961. (The latter two items are audit reports.)³³

³²Although the Board's decision was vacated and remanded on other grounds by the Court of Appeals for the Federal Circuit, New England Tank Industries of New Hampshire v. United States, 861 F.2d 685 (Fed. Cir. 1988), the court noted its agreement with the Board's Antideficiency Act conclusions. *Id.* at 692 n.15.

³³Another report in this series, making similar findings under a different statutory ceiling is illegal Use of Operation and Maintenance Funds for Rehabilitation and Construction of Family Housing and Construction of a Related Facility B-133102, August 30, 1963.

- Monetary ceiling on lease payments for family housing units in foreign countries (10 U.S.C. § 2828(e)): report entitled Leased Military Housing Costs in Europe Can Be Reduced by Improving Acquisition Practices and Using Purchase Contracts, GAO/NSIAD-85-113 (July 24, 1985), at 7-8; 66 Comp. Gen. 176 (1986); B-227527/B-227325, October 21, 1987 (non-decision) letter.
- Ceiling in supplemental appropriation: B-204270, October 13, 1981 (dollar limit on Standard Level User Charge payable by agency to General Services Administration).³⁴
- Ceiling in authorizing legislation: 64 Comp. Gen. 282 (1985) (dollar limit on two Small Business Administration direct loan programs).

In a statutory ceiling case, the account adjustment concept described above may or may not come into play. If the ceiling represents a limit on the amount available for a particular object, then there generally will be no other funds available for that object and hence no “correct” funding source from which to reimburse the account charged. If, however, the ceiling represents only a limit on the amount available from a particular appropriation and not an absolute limit on expenditures for the object, as in the minor military construction cases, for example, then it may be possible to cure violations by an appropriate adjustment. 63 Comp. Gen. at 424.

The final situation—and from this point on, the law gets a bit murky—is an obligation or expenditure for an object which is prohibited or simply unauthorized. In 60 Comp. Gen. 440 (1981), a proviso in the Customs Service’s 1980 appropriation expressly prohibited the use of the appropriation for administrative expenses to pay any employee overtime pay in an amount in excess of \$20,000. By allowing employees to earn overtime pay in excess of that amount, the Customs Service violated 31 U.S.C. §1341. The Comptroller General explained the violation as follows:

“When an appropriation act specifies that an agency’s appropriation is not available for a designated purpose, and the agency has no other funds for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of

³⁴This case also illustrates that the Antideficiency Act applies to interagency transactions the same as any other obligations or expenditures.

appropriations made for that purpose. In either case the Antideficiency Act is violated.” Id. at 441.

In B-201260, September 11, 1984, the Comptroller General advised that expenditures in contravention of the Boland Amendment would violate the Antideficiency Act (although none were found in that case). The Boland Amendment, an appropriation rider, provided that “[n]one of the funds provided in this Act may be used” for certain activities in Central America. In B-229732, December 22, 1988, GAO found the Antideficiency Act violated when the Department of Housing and Urban Development used its funds for commercial trade promotion activities in the Soviet Union, an activity beyond its statutory authority. Similarly, a nonreimbursable interagency detail of an employee, contrary to a specific statutory prohibition, produced a violation in B-247348, June 22, 1992 (letter to Public Printer). All three cases also involved purpose violations and are consistent with 60 Comp. Gen. 440, the rationale being that expenditures would be in excess of available appropriations, which were zero.³⁵

However, one court has reached a result which may interpret the Antideficiency Act somewhat differently. In Southern Packaging and Storage Co. v. United States, 588 F. Supp. 532 (D.S.C. 1984), the court found that the Defense Department had purchased certain combat meal products (“MRE”) in violation of a “Buy American” appropriation rider, which provided that “[n]o part of any appropriation contained in this Act. . . shall be available” to procure items not grown or produced in the United States. The court rejected the contention that the violation also contravened the Antideficiency Act, stating:

“There is no evidence in this case to show that [the Defense Personnel Supply Center] authorized expenditures beyond the amount appropriated by Congress for the procurement of the MRE rations and the component foods thereof.” Id. at 550.

Given the sparse discussion in the decision and the fact that Congress does not make specific appropriations for MRE rations, it is difficult to discern precisely how the Southern Packaging court would apply the Antideficiency Act. While it is possible to reconcile Southern

³⁵There are also a few older cases finding violations of both statutes, but they are of little help in attempting to formulate a reasoned approach. Examples are 39 Comp. Gen. 388 (1959), which does not discuss the relationship, and 22 Comp. Gen. 772 (1943), which includes a rationale, now obsolete, based on the then-existing lack of authority to include interest stipulations in contracts.

Packaging with the GAO cases, it is **also** possible to find an element of inconsistency. In the opinion of the editors, this area requires further careful thought. On the one hand, every expenditure for an unauthorized purpose should not also violate the **Antideficiency Act**. It does not seem to have been the intent of Congress that every unauthorized entertainment expenditure or every payment for an unauthorized long-distance telephone call be reported to Congress and the President as an **Antideficiency Act** violation, a result that could be reached by a broad application of the language of 60 **Comp. Gen.** 440. Yet on the other hand, where Congress has expressly prohibited the use of appropriated funds for some particular expenditure, it seems clear that the “available appropriation” for that item is zero. Further refinement in this area appears necessary.

e. Amount of Available
Appropriation or Fund

Questions occasionally arise over precisely what assets an agency may count for purposes of determining the amount of available resources against which it may incur obligations.

The starting point, of course, is the unobligated balance of the relevant appropriation. In Section F of this chapter, we discuss the rule that subdivisions of a lump-sum appropriation appearing in legislative history are not legally binding on the agency. They are binding only if carried into the appropriation act itself, or are made binding by some other statute. Thus, the entire unobligated balance of an unrestricted lump-sum appropriation is theoretically available for **Antideficiency Act** purposes. 55 **Comp. Gen.** 812 (1976).³⁶

Where an agency is authorized to retain certain receipts or collections for credit to an appropriation or fund under that agency’s control, those receipts are treated the same as direct appropriations for purposes of obligation and the **Antideficiency Act**, subject to any applicable statutory restrictions. **E.g.**, 71 **Comp. Gen.** 224 (1992) (National Technical Information Service may use subscription **payments** to defray its operating expenses but, under governing legislation, may use customer advances only for costs directly related to firm orders).

³⁶We say “theoretically available” because matching an obligation against the entire unobligated balance will in many cases do little more than postpone the violation until later in the fiscal year.

In addition, certain other assets maybe “counted,” that is, obligated against. For example, OMB Circular No. **A-34** includes certain accounts receivable (also referred to as a form of “offsetting collection”) as a “budgetary resource.”³⁷ See also **B-134474** -O. M., December 18, 1957. **This** does not mean anticipated receipts from transactions that have not yet occurred or orders that have not yet been placed. Obligations cannot be charged against anticipated proceeds from an anticipated sale of **property**. **35 Comp. Gen.** 356 (1955) (sale of old telephone equipment to be replaced with new equipment); **B-209758 -O.M.**, September 29, 1983 (sale of assets seized from embezzler). Thus, the Customs Service violated the **Antideficiency Act** by obligating against anticipated receipts from future sales of seized property unless it had **sufficient** funds available from other sources to cover the obligation. **B-237135**, December 21, 1989. Similarly, the Comptroller General found that the Air Force violated the **Antideficiency Act** by **overobligating** its Industrial Fund based on estimated or anticipated customer orders. See report entitled The Air Force Has Incurred Numerous Overobligations in its Industrial Fund, **AFMD-81-53** (August 14, 1981); **62 Comp. Gen.** 143, 147 (1983). Even where receivables are properly included as budgetary resources, an agency may not incur obligations against receipts expected to be received after the end of the current fiscal year without specific statutory authority. **51 Comp. Gen.** 598,605 (1972).

GAO considered another **aspect** of the question in **60 Comp. Gen.** 520 (1981). The General Services Administration buys furniture and other equipment for other agencies through the General Supply Fund, a revolving fund established by statute. Agencies pay GSA either in advance or by reimbursement. For reasons of economy, GSA normally makes consolidated and bulk purchases of commonly used items. Concern over the application of the **Antideficiency Act** arose when, for several reasons, the Fund began experiencing cash flow problems. GSA wanted to obligate against the value of inventory in the Fund. In other words, GSA **wanted to** consider the amount of the available appropriation as the cash assets, including advances, in the Fund, plus inventory.

³⁷**Budgetary resources** include (a) orders from other government accounts that represent **valid** obligations of the ordering account, and (b) orders from the **public**, including state and local governments, but only to the extent accompanied by an advance. OMB Circular No. A-34, **§31.4**

The Comptroller General held that inventory in the General Supply Fund did not constitute a “budgetary resource” against which obligations could be incurred. The items in the inventory had already been purchased with appropriated funds and could not be counted again as a new budgetary resource. This was in accord with OMB Circular No. A-34, which does not include inventory as a “budgetary resource” for budget execution purposes. Thus, a violation of the **Antideficiency Act** would occur at the moment GSA incurs obligations in excess of available “budgetary resources.”

Supplemental appropriations, requested but not yet enacted, may not be counted as a budgetary resource. B-230117-0. M., February 8, 1989. See also OMB Circular No. A-34, §31.4.

f. Intent/Factors Beyond
Agency Control

A violation of the **Antideficiency Act** does not depend on intent or lack of good faith on the part of contracting or other officials who obligate or pay in advance or in excess of appropriations. Although these factors may influence the applicable penalty, they do not affect the basic determination of whether a violation has occurred. 64 **Comp. Gen.** 282, 289 (1985). The Comptroller General once expressed the principle in the following passage which, although stated in a slightly different context, is equally applicable here:

Where a payment is prohibited by law, the utmost good faith on the part of the officer, either in ignorance of the facts or in disregard of the facts, in purporting to authorize the incurring of an obligation the payment of which is so prohibited, cannot take the case out of the statute, otherwise the purported good faith of an officer could be used to nullify the law.” A-86742, June 17, 1937.

To illustrate, a contracting officer at the United States Mission to the North Atlantic Treaty Organization accepted an offer for installation of automatic telephone equipment at twice the amount of the unobligated balance remaining in the applicable account. The Department of State explained that the contracting officer had misinterpreted General Accounting Office regulations and implementing State Department procedures. But for this misinterpretation, additional funds could have been placed in the account. State therefore felt that the transaction should not be considered in violation of the Act. GAO did not agree and held that the **overobligation** must be immediately reported as required by 31 U.S.C. §1517(b). The official’s state of mind was not relevant in deciding whether a violation had occurred. 35 **Comp. Gen.** 356 (1955).

An **overobligation** may result from external factors beyond the agency's control. Whether this will produce an **Antideficiency Act** violation depends on the particular circumstances.

In 58 **Comp. Gen.** 46 (1978), the Army asked whether it **could** make payments to a contractor under a contract requiring payment in local (foreign) currency where the original dollar obligation was well within applicable funding limitations but, due to subsequent exchange rate fluctuations, payment would exceed those limitations. The Army argued that a payment under these circumstances should not be considered a violation of the Act because currency fluctuations are totally beyond the control of the contracting **officer** or any other agency official. GAO disagreed. The fact that the contracting **officer** was a victim of circumstances does not make a payment in excess of available appropriations any less illegal. (It is, of course, as with state of mind, relevant in assessing penalties for the violation.) See also 38 **Comp. Gen.** 501 (1959) (severe adverse weather conditions or prolonged employee strikes generally not sufficient to justify **overobligation** by former Post Office Department, but facts in particular case could **justify** deficiency apportionment).

In apparent contrast, the Comptroller General stated in 62 **Comp. Gen.** 692, 700 (1983) that an **overobligation** resulting from a judicial award of attorney's fees under 28 U.S.C. § 2412(d), the Equal Access to Justice Act, would not violate the **Antideficiency Act**. See also 63 **Comp. Gen.** 308,312 (1984) (judgments or board of contract appeals awards under Contract Disputes Act, same answer); **B-227527/B-227325**, October 21, 1987 (non-decision letter) (amounts awarded by court judgment need not be counted in determining whether statutory ceiling on lease payments has been exceeded and **Antideficiency Act** thereby violated); **A-37316**, July 11, 1931 (land condemnation under Declaration of Taking Act which results in deficiency judgment would not violate **Antideficiency Act**).³⁸

The distinction appears to be based on the extent to which the agency can act to avoid the **overobligation** even though it is imposed by some external force beyond its control. Thus, the currency fluctuation decision stated:

³⁸In apparent contradiction to **A-37316** is 54 **Comp. Gen.** 799 (1975).

“[W]hen a contracting officer finds that the dollars required to continue or make final payment on a contract will exceed a statutory limitation he may terminate the contract, provided the termination costs will not exceed the statutory limitations. Alternatively, the contracting officer may issue a stop work order and the agency may ask Congress for a deficiency appropriation citing the currency fluctuation as the reason for its request.”

58 **Comp. Gen.** at 48. Similarly, the Postmaster General could curtail operations if necessary. 38 **Comp. Gen.** at 504. See also 66 **Comp. Gen.** 176 (1986) (**Antideficiency Act** would not preclude Air Force from entering into lease for overseas family housing without provision limiting annual payments to statutory ceiling, even though certain costs could conceivably escalate above ceiling, where good faith cost estimates were well below ceiling and lease included termination for convenience clause). Where the agency could have acted to avert the **overobligation** but did not, the violation will not be excused. In contrast, in the case of a payment ordered by a court, comparable options (apart from seeking a deficiency appropriation) are not available. (Curtailling activities after the **overobligation** has occurred to avoid compounding the violation is a separate question.)

g. Exceptions

An exception to the **Antideficiency Act** is built right into 31 U.S.C. §1341(a). The statute prohibits contracts or other obligations in advance or excess of available appropriations, “unless authorized by law.” This is nothing more than the recognition that Congress can authorize exceptions to the statutes it enacts.

(1) Contract authority

At the outset, it is necessary to distinguish between “contract authority” and the “authority to enter into contracts.” A contract is simply a legal device employed by two or more parties to create binding and **legally** enforceable obligations in furtherance of some objective. The federal government uses contracts every day to procure a wide variety of goods and services. An agency does not need **specific** statutory authority to enter into contracts. It **has** long been established that a government agency has the inherent authority to enter into binding contracts in the execution of **its** duties. *Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886); *United States v. Maurice*, 26 F. Cas. 1211, 1216-17 (C.C.D. Va. 1823) (No. 15,747). It should be apparent that these contracts, “authorized by law” though

they may be, cannot be **sufficient** to constitute exceptions to the **Antideficiency Act**, else the Act would be meaningless.

For purposes of the **Antideficiency Act** exception, a “contract authorized bylaw” requires not only authority to enter into a contract, but authority to do so without regard to the availability of appropriations. While the former may be inherent, the latter must be conferred by statute. The most common example of this is “contract authority” as that term is defined and described in Chapter 2—**statutory** authority which **specifically** authorizes an agency to enter into a contract in excess of, or prior to enactment of, the applicable appropriation.

In some cases, the “exception” language **will** be unmistakably explicit. An example is the Price-Anderson Act, which provides authority to “make contracts in advance of appropriations and incur obligations without regard to” the **Antideficiency Act**. 42 U.S.C. § 2210(j). Other examples of clear authority, although perhaps not as explicit as the Price-Anderson Act, maybe found in 27 **Comp. Gen.** 452 (1948) (long-term operating-differential subsidy agreements under the Merchant Marine Act); **B-211190**, April 5, 1983 (contracts with states under the Federal Boat Safety Act); **B-164497(3)**, June 6, 1979 (certain provisions of the Federal-Aid Highway Act of 1973); **B-168313**, November 21, 1969 (interest subsidy agreements with educational institutions under the Housing Act of 1950).

In an earlier case involving contract authority, GAO insisted that the Corps of Engineers had to include a “**no** liability unless funds are later made available” clause for any work done in excess of available funds. 2 **Comp. Gen.** 477 (1923). The Corps had trouble with this clause because a Court of Claims decision, C.H. Leaven and Co. v. United States, 530 F.2d 878 (Ct. Cl. 1976), allowed the contractor an equitable **adjustment** for suspension of work due to a delay in enacting an appropriation to pay him, notwithstanding the “availability of funds” clause. In 56 **Comp. Gen.** 437 (1977), GAO overruled 2 **Comp. Gen.** 477, deciding that section 10 of the River and Harbor Act of 1922, by expressly authorizing the Corps to enter into large multi-year civil works projects without seeking a full appropriation in the first year, constituted the necessary exception to the **Antideficiency Act** and a “funds available” clause was not necessary. This applies as well to contracts financed from the Corps’

Civil Works Revolving Fund. **B-242974.6**, November 26, 1991 (interred memorandum).

The rationale of 56 **Comp. Gen.** 437 has also been applied to long-term fuel storage facilities contracts authorized by 10 **U.S.C.** § 2388. New England Tank Industries of New Hampshire, Inc., ASBCA No. 26474,88-1 BCA 1120,395 (1987), vacated on other grounds, New England Tank Industries of New Hampshire v. United States, 861 **F.2d** 685 (Fed. **Cir.** 1988).

In 28 **Comp. Gen.** 163 (1948), the Commissioner of Reclamation was authorized in an appropriation act to enter into certain contracts in advance of appropriations but subject to a monetary ceiling. Since the contract authority was explicit, with no language making it contingent on appropriations being made at some later date, the statute authorized the Commissioner to enter into a **firm** and binding contract.

Contract authority may be “transferred” from one agency to another in certain circumstances. The Bureau of Mines was authorized to enter into a contract (in advance of the appropriation) to construct and equip an anthracite research laboratory. The Bureau asked the General Services Administration to enter into the contract on its behalf pursuant to section 103 of the Federal Property and Administrative Services Act of 1949, which provided that “**funds** appropriated to . . . other **Federal** agencies for the foregoing purposes [execution of contracts and supervision of construction] shall be available for transfer to and expenditure by the [General Services Administration].” GAO held that the transfer language merely authorized the transfer of funds appropriated to the various agencies to GSA. It did not, however, preclude GSA from entering into contracts before the funds were appropriated, in this instance, because GSA was acting for the Bureau of Mines which clearly did have the necessary authority, 29 **Comp. Gen.** 504 (1950).³⁰

A somewhat different kind of contract authority is found in 41 **U.S.C.** § 11, the so-called Adequacy of Appropriations Act. An exception to the requirement to have adequate appropriations-or any appropriation at all-is made for procurements by the military

³⁰The provisions of the 1949 legislation discussed in 29 **Comp. Gen.** 504 have been superseded by the Public Buildings Act of 1959. The case is included here merely to illustrate the concept.

departments for “clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.” By administrative interpretation, the Defense Department has limited this authority to emergency circumstances where immediate action is necessary. Department of Defense Directive No. 7220.8.

It should again be emphasized that to constitute an exception to 31 U.S.C. § 1341(a), the “contract authority” must be specific authority to incur the obligation in excess or advance of appropriations, not merely the general authority any agency **has** to enter into contracts to **carry out its functions**.

Congress may grant **authority** to contract beyond the fiscal year in terms which amount to considerably less than the type of “contract authority” described above. An example is 43 U.S.C. § 388, which authorizes the Secretary of the Interior to enter into certain contracts relating to reclamation projects “which may cover such periods of time **as** the **Secretary** may consider necessary but in which the liability of the United States shall be contingent upon appropriations being made **therefor**.” While this provision has been referred to as an exception to the **Antideficiency Act (B-72020, January 9, 1948)**, it authorizes only “contingent contracts” under which there is no legal obligation to pay unless and until appropriations are provided. 28 **Comp. Gen.** 163 (1948). A similar example, discussed in **B-239435, August 24, 1990**, is 38 U.S.C. § 230(c) (**Supp. II 1990**), which authorizes the Department of Veterans Affairs to enter into certain leases for periods of up to 35 years but further provides that the government’s obligation to make payments is “subject to the availability of appropriations for that purpose.”

(2) Other obligations “authorized by law”

The “authorized by law” exception in 31 U.S.C. § 1341(a) applies to non-contractual obligations as well as to contracts. The basic approach is the same. The authority must be more than just authority to undertake the particular activity. In the broader sense, everything government officials do should be authorized bylaw, otherwise they shouldn’t be doing it. To constitute an **Antideficiency Act** exception, the authority must be authority to incur the obligation in excess or advance of appropriations.

For example, statutory authority to acquire land and to pay for it from a **specified** fund is not an exception to the **Antideficiency** Act. It merely authorizes acquisitions to the extent of funds available in the specified source at the time of purchase. 27 **Comp. Dec.** 662 (1921). **Similarly**, the authority to conduct hearings does not, without more, confer authority to do so without regard to available appropriations. 16 **Comp. Dec.** 750 (1910). Provisions in the District of Columbia Code requiring Saint Elizabeth's Hospital to treat **all** patients who meet admission eligibility requirements were held not to authorize the Hospital to operate beyond the level of its appropriations. If mandatory expenditures would cause a deficiency, the Hospital would have to reduce **nonmandatory** expenditures. 61 **Comp. Gen.** 661 (1982).

Several cases have considered the effect of various statutory salary or compensation increases. If a statutory increase is mandatory and does not give anyone discretion to determine the amount, or if it gives some administrative body discretion to determine the amount, payment of which then becomes mandatory, the obligation is deemed "authorized by law" for **Antideficiency** Act purposes. 39 **Comp. Gen.** 422 (1959) (salary increases for Wage Board employees); 22 **Comp. Gen.** 570 (1942); 21 **Comp. Gen.** 335 (1941); **B-168796**, February 2, 1970 (mandatory statutory increase in retired pay for Tax Court judges); **B-107279**, January 9, 1952 (mandatory increases for certain legislative personnel). GAO **has** not treated the granting of increases retroactively to correct past administrative errors as creating the same type of exception. See 24 **Comp. Gen.** 676 (1945). Increases which are discretionary do not permit the incurring of obligations in excess or advance of appropriations. 31 **Comp. Gen.** 238 (1951) (discretionary pension increases); 28 **Comp. Gen.** 300 (1948).⁴⁰

Some other examples of obligations "authorized by law" for **Antideficiency** Act purposes are:

- **Mandatory pilot** program in Vermont under Farms for the Future Act of 1990 (loan guarantees and interest assistance). **B-244093**, July 19, 1991.

⁴⁰28 **Comp. Gen.** 300 concerned increases to Wage Board employees under legislation which is now obsolete (see 39 **Comp. Gen.** 422, cited in the text). However, it is still useful for the basic proposition, stated on page 302, that **nonmandatory** increases are not obligations "authorized by law" as that term is used in 31 U.S.C. § 1341(a).

- Mandatory entitlement programs administered by Department of Veterans Affairs. **B-226801**, March 2, 1988.
- Mandatory transfer from one appropriation account to **another** where “donor” account contained insufficient unobligated funds. 38 **Comp. Gen.** 93 (1958).
- Statute authorizing Interstate Commerce Commission to order a substitute rail carrier to service shippers abandoned by their primary carrier in emergency situations, and to reimburse certain costs of the substitute carrier, **B-196132**, October **11**, 1979.
- Provision in Criminal Justice Act of 1964 imposing **mandatory** deadline on commencement of certain programs which would necessarily involve creation of financial obligations. **B-156932**, August 17, 1965.

What are perhaps the outer limits of the “authorized by law” exception are illustrated in **B-159141**, August 18, 1967. The Federal Aviation Administration had entered into long-term, **incrementally** funded contracts for the development of a civil supersonic aircraft (SST). To ensure compliance with the **Antideficiency Act**, the FM each year budgeted for, and obligated, **sufficient funds** to cover **potential** termination liability. The appropriations committees became concerned that unnecessarily large amounts were being tied up this way, especially in light of the highly remote possibility that the SST contracts would be terminated. In considering the FAA’s 1968 appropriation, the House Appropriations Committee reduced the FAA’s request by the amount of the termination reserve, and in its report directed the FAA not to obligate for potential **termination costs**. The Comptroller General advised that if the Senate Appropriations Committee did the same thing—a **specific** reduction tied to the amount requested for the reserve, coupled with clear direction in the legislative history—then an **overobligation** resulting from a termination would be regarded **as** “authorized by law” and not in violation of the **Antideficiency Act**.

3. Voluntary Services Prohibition

a. Introduction

The next portion of the **Antideficiency Act** is 31 U.S.C. § 1342:

“An officer or employee of the United States Government or of the District of Columbia government **may** not accept **voluntary** services for either government or

employ personal services exceeding that authorized bylaw except for emergencies involving the **safety** of human life or the protection of property, . . .“

This provision **first** appeared, in almost identical form, in a deficiency appropriation act enacted in 1884 (23 Stat. 17). Although the original prohibition read “hereafter, no department or officer of the United States shall accept. . . .“ it **was** included in an appropriation for the **(then) Indian Office** of the Interior Department, and the Court of Claims held that it was applicable only **to** the Indian **Office**. Glavey v. United States, 35 Ct. Cl. 242,256 (1900), reversed on other grounds, 182 U.S. 595 (1901). The Comptroller of the Treasury continued to apply it across the board. See, **e.g.**, 9 **Comp. Dec.** 181 (1902). In any event, the applicability of the 1884 statute soon became moot because Congress reenacted it as part of the **Antideficiency Act** in 1905 (33 Stat. 1257) and again in 1906 (34 Stat. 48).

Prior to the 1982 recodification of Title 31, section 1342 was subsection (b) of the **Antideficiency Act**, while the basic prohibitions of section 1341, previously discussed, constituted subsection (a). The proximity of the two provisions in the Code reflects their relationship, as section 1342 supplements and is **a** logical extension of section 1341. If an agency cannot directly obligate in excess or advance of **its** appropriations, it should not be able to accomplish the same thing indirectly by accepting ostensibly “voluntary” services and then presenting Congress with the bill, in the hope that Congress will recognize a “moral obligation” to pay for the benefits conferred-another example of the so-called “coercive deficiency.” In this connection, the chairman of the House committee responsible for what became the 1906 reenactment of the voluntary services prohibition stated:

“It is a hard matter to deal with. We give to Departments what we think is ample, but they come back with a deficiency. Under the law they **can** [not] make these deficiencies, and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them. . . .”⁴¹

In addition, as we have noted previously, the **Antideficiency Act** was intended to keep an agency’s level of operations within the amounts Congress appropriates for that purpose. The unrestricted ability to use voluntary services would permit circumvention of that objective. Thus, without section **1342**, section 1341 could not be **fully** effective.

⁴¹39 **Cong. Rec.** 3687 (1906), quoted in 30 **OP. Att’y Gen.** 51,53-54 (1913).

Note that 31 U.S.C. § 1342 contains two distinct although closely related prohibitions: It bans, **first**, the acceptance of any type of voluntary services for the United States, and second, the employment of personal services “exceeding that authorized by **law**.”

b. Appointment Without
Compensation and Waiver of
salary

(1) The **rules**—general discussion

One of the evils which the “personal services” prohibition was designed to correct was a practice which was controversial in 1884 but is much less so today. Lower-grade government employees were being asked to “volunteer” their services for overtime periods in excess of the periods allowed by law, thus enabling the agency to economize at the employees’ expense but nevertheless generating claims by the **employees**.⁴² Although this practice appears to have receded, the applicability of 31 U.S.C. § 1342 remains relevant in a number of contexts involving **services** by government employees or services which would otherwise have to be performed by government employees.

One of the earliest questions to arise under 31 U.S.C. § 1342—and the issue that seems to have generated the greatest number of cases—was whether a government **officer** or employee, or an individual about to be appointed to a government position, could voluntarily work for nothing or for a reduced salary. Initially, the Comptroller of the Treasury ducked the question on the grounds that it did not involve a payment from the Treasury, and suggested that the question was appropriate to take to the Attorney **General**. 19 **Comp. Dec.** 160, 163 (1912).

The very next year, the Attorney General tackled the question when asked whether a retired Army officer could be employed as superintendent of an Indian school without additional compensation. In what has become the leading case construing 31 U.S.C. § 1342, the Attorney General replied that the appointment would not violate the voluntary services prohibition. 30 **Op. Att’y Gen.** 51 (1913). In reaching this conclusion, the Attorney General drew a distinction which the Comptroller of the Treasury thereafter adopted, and which GAO and the Justice Department continue to follow to this day—the distinction between “voluntary services” and “gratuitous services.”

⁴²15 **Cong. Rec.** 3410–11 (1884), quoted in 30 **Op. Att’y Gen.** 51,54–55 (1913).

The key passages from the Attorney General's opinion **are** set forth below:

"[I]t seems plain that the words 'voluntary service' were not intended **to** be synonymous with 'gratuitous service' and were not intended to cover services rendered in an **official** capacity under regular appointment to an office otherwise permitted bylaw to be **nonsalaried**. in their ordinary and normal meaning **these words** refer to service intruded by a private person se a 'volunteer' and not **rendered pursuant to any prior** contractor obligation. . . . It would be stretching the language a good deal to extend it so far as to prohibit **official** services without compensation in those instances in which **Congress** has not required even a minimum salary for the office.

The context corroborates the view that the **ordinary** meaning of 'voluntary **services**' was intended. The very next words 'or employ personal service in excess of that authorized by law' deal with **contractual** services, thus making a balance between 'acceptance' of 'voluntary service' (i.e., the cases where there is no prior contract) and 'employment' of 'personal service' (i.e., the cases where there is such prior contract, though unauthorized bylaw).

....

"Thus it **is** evident that the evil at which Congress was aiming was not appointment or employment for authorized **services** without compensation, but the acceptance of unauthorized services not intended or agreed **to** be gratuitous and therefore likely to **afford a basis** for a future claim upon Congress. . . ." **Id.** at 52-53, 55.

The Comptroller of the Treasury agreed with this interpretation:

"[The statute] was intended to guard against **claims** for compensation. A service offered clearly and distinctly as gratuitous with a proper record made of that fact does not violate this statute **against** acceptance of voluntary service. An appointment to serve without compensation which is accepted and properly recorded is not a violation of [31 U.S.C. § 1342], and is valid **if otherwise** lawful." 27 **Comp.** Dec. 131, 132-33 (1920).

Two **main** rules emerge from 30 Op. **Att'y Gen.** 51 and its progeny. First, if compensation for a position is freed by law, art appointee may not agree to serve without compensation or to waive that compensation in whole or in part (these are two different ways of saying the same thing). **Id.** at 56. This portion of the opinion did not

break any new ground. The courts had already held, based on public policy, that compensation **fixed** by law could not be **waived**.⁴³ Second, and this is really just a corollary **to** the rule just stated, if the level of compensation is discretionary, or if the relevant statute prescribes only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or **partial**, is **permissible**. Id.; 27 **Comp. Dec.** at 133.

Both GAO and the Justice Department have had frequent occasion to address these issues, and there are numerous decisions illustrating and applying the **rules**.⁴⁴

In a 1988 opinion, the Justice Department's Office of **Legal** Counsel considered whether the Iran-Contra Independent Counsel could appoint Professor **Laurence** Tribe as Special Counsel under an agreement to serve without compensation. Applying the rules set forth in 30 **Op. Att'y Gen.** 51, the **OLC** concluded that the appointment would not contravene the **Antideficiency** Act since the statute governing the appointment set a maximum salary but no minimum. Independent Counsel's Authority to Accept Voluntary Services – Appointment of Laurence H. Tribe, *Op. Off. Legal Counsel*, May 19, 1988.

Similarly, the Comptroller General held in 58 **Comp. Gen.** 383 (1979) that members of the United **States** Metric Board could waive their salaries since the relevant statute merely prescribed a maximum rate of pay. In addition, since the Board had statutory authority to accept gifts, a member who chose **to** do so could accept compensation and then return it to the Board as a gift. Both cases make the point that compensation is not "freed by law" for purposes of the "no waiver" rule where the statute merely sets a maximum limit for the salary.

⁴³Glavey v. United States, 182 U.S. 595 (1901); Miller v. United States, 103 F. 413 (C.C.S.D.N.Y. 1900). See also 9 **Comp. Dec.** 101 (1902). Later cases following Glavey are MacMath v. United States, 248 U.S. 151 (1918), and United States v. Andrews, 240 U.S. 90 (1916). The policy rationale is that to permit agencies to disregard compensation prescribed by statute could work to the disadvantage of those who cannot, or are **not willing to**, accept the position for less than the prescribed **salary**. See Miller, 103 F. at 415-16.

⁴⁴Some cases in addition to those cited in the text are 32 **Comp. Gen.** 236 (1952); 23 **Comp. Gen.** 109, 112 (1943); 14 **Comp. Gen.** 193 (1934); 34 **Op. Att'y Gen.** 490 (1925); 30 **Op. Att'y Gen.** 129 (1913); 3 *Op. Off. Legal Counsel* 78 (1979).

A good illustration of the kind of situation 31 U.S.C. § 1342 is designed to prevent is 54 **Comp. Gen.** 393 (1974). Members of the Commission on **Marihuana** and Drug Abuse had, apparently at the chairman's urging, agreed to waive their statutory entitlement to \$100 per day while involved on **Commission** business. The year after the **Commission** ceased to exist, one of the former members changed his mind and **filed** a claim for a portion of the compensation he would have received but for the waiver. Since the \$100 per day had been a statutory entitlement, the purported waiver was invalid and the former commissioner was entitled to be paid. Similar claims by **any** or all of the other former members would also have to be allowed. If insufficient funds remained in the **Commission's** now-expired appropriation, a deficiency appropriation would be necessary.

A few earlier cases deal with fact situations similar to that considered in 30 **Op. Att'y Gen.** 51 –the acceptance by someone already on the federal payroll of additional duties without additional compensation. In 23 **Comp. Gen.** 272 (1943), for example, GAO concluded that a retired Army officer could serve, without additional compensation, as a courier for the State Department. The voluntary services prohibition, said the decision, does not preclude “the assignment of persons holding **office** under the Government to the **performance** of additional duties or the duties of another position without additional compensation.” *Id.* at 274. Another World War II decision held that American Red **Cross** Volunteer Nurses' Aides who also happened to be full-time federal employees could perform volunteer nursing services at Veterans Administration hospitals. 23 **Comp. Gen.** 900 (1944).

One thing the various cases discussed above have in common is that they involve the appointment of an individual to an official government position, permanent or temporary. Services rendered prior to appointment are considered purely voluntary and, by virtue of 31 U.S.C. § 1342, cannot be compensated. *Lee v. United States*, 45 Ct. Cl. 57,62 (1910); **B-181934**, October 7, 1974.⁴⁵ It also follows that post-retirement services, apart from appointment as a reemployed **annuitant**, are not compensable. 65 **Comp. Gen.** 21 (1985). In that case, an alleged agreement to the contrary by the individual's supervisor was held unauthorized and therefore invalid.

⁴⁵**B-181934** was overruled by 55 **Comp. Gen.** 109 (1975) because additional information showed that the individual was a “de facto employee” performing under color of appointment and with a claim of right to the position. A “voluntary” employee has no such “color of appointment” or *indicia* of lawful employment.

It has also been held that experts and consultants employed under authority of 5 U.S.C. § 3109 may serve without compensation without violating the **Antideficiency** Act as long as it is clearly understood and agreed that no compensation is to be expected. 27 **Comp. Gen.** 194 (1947); 6 **Op. Off. Legal Counsel** 160 (1982). Cf. **B-185952**, August 18, 1976 (uncompensated participation **in pre-bid** conference, on-site inspection, **and** bid opening by contractor engineer who had prepared **specifications** regarded as “technical violation” of 31 U.S.C. § 1342).

Several of the decisions note the requirement for a written record of the agreement to serve without compensation. Proper documentation is important for **evidentiary** purposes should a claim subsequently be attempted. **E.g.**, 27 **Comp. Gen.** 194, 195 (1947); 26 **Comp. Gen.** 956, 958 (1947); 27 **Comp. Dec.** 131,132-33 (1920); 2 **Op. Off. Legal Counsel** 322,323 (1977).

The rule that compensation freed by statute may not be waived does not apply if the waiver or appointment without compensation is itself authorized by statute. The Comptroller General stated the principle as follows in 27 **Comp. Gen.** 194,195 (1947):

“[E]ven where the compensation for a particular position is freed by or pursuant to law, the occupant of the position may waive his ordinary right to the compensation fixed for the position and thereafter forever be estopped from claiming and receiving the salary previously waived, if there be some applicable provision of law authorizing the acceptance of services without compensation.” (Emphasis in original.)

In **B-139261**, June 26, 1959, GAO reiterated the above principle, and gave several examples of statutes **sufficient** for this purpose. Another example may be found in 2 **Op. Off. Legal Counsel** 322 (1977).

At this point a 1978 case, 57 **Comp. Gen.** 423, must be noted although its effect is not entirely clear. The decision held that a statute authorizing the Agency for International Development to accept gifts of “services of any kind” did not meet the test of 27 **Comp. Gen.** 194, and therefore did not permit waiver of salary by employees whose compensation is **fixed** by statute. While 57 **Comp. Gen.** 423 did not purport to overrule or **modify** any prior cases, it seems to say that statutory authority to accept gifts of personal service is no longer adequate to permit waiver of compensation freed by statute. However, in **B-139261**, June 26, 1959, not cited in 57 **Comp. Gen.** 423, one of the examples given of statutes that would authorize waiver of compensation fixed by law was a gift statute very similar to the AID

statute involved in 57 **Comp. Gen.** 423. If 57 **Comp. Gen.** 423 is in fact a modification of the prior case law, then an agency would need explicit authority to employ persons without compensation. For an example of such authority, see 32 **Comp. Gen.** 236 (1952).

The rules for waiver of salary or appointment without compensation may be summarized as follows:

- If compensation is not **fixed** by statute, i.e., if it is **fixed administratively** or if the statute merely prescribes a maximum but no minimum, it maybe waived as long as the waiver **qualifies** as “gratuitous.” There should be an advance written agreement waiving all claims.
- If compensation is freed by statute, it may not be waived, the voluntary vs. gratuitous distinction notwithstanding, without **specific statutory authority**. Unfortunately, the decisions are not consistent as to what form this authority must take, and the extent to which authority to accept donations of services (as opposed to explicit authority **to** employ persons without compensation) will suffice is not entirely clear.
- If the employing agency has statutory authority to accept **gifts**, the employee can accept the compensation and return it to the agency as a gift. Even if the agency has no such authority, the employee can still accept the compensation and donate it to the United States Treasury.

(2) Student interns

In 26 **Comp. Gen.** 956 (1947), the (then) Civil **Service** Commission asked whether an agency could accept the uncompensated **services** of college students as part of a college’s internship program. The students “would be assigned to productive work, i.e., to the regular work of the agency in a position which would ordinarily fall in the competitive civil service.” The answer was no. Since the students would be used in positions the compensation for which was freed by law, **and** since compensation freed by law cannot be waived, the proposal **would** require legislative authority.

Thirty years later, the Justice Department’s **Office** of Legal Counsel considered another internship program and provided similar advice. Without statutory authority, uncompensated student **services** that furthered the agency’s mission, i.e., “productive work,” could not be accepted. 2 Op. Off. Legal Counsel 185 (1978).

In view of the long-standing rule, supported as we have seen by decisions of the Supreme Court, prohibiting the waiver of compensation for positions required bylaw **to** be salaried, GAO and Justice had **little** choice but to respond as they did. Clearly, however, this was not a very useful answer. It meant that uncompensated student interns could **be** used only for essentially “make-work” tasks, a result of benefit **to** neither the students nor the agencies.

The solution, apparent from both cases, was legislative authority, which Congress provided later in 1978 by the enactment of 5 U.S.C. § 3111. The statute authorizes agencies, subject to regulations of the Office of Personnel Management, to accept the uncompensated services of high **school** and college students, “[notwithstanding section 1342 **of** Title 31,” if the **services** are part of an agency program designed to provide educational experience for the student and will not be used to displace any employee.

In a **1981** decision, GAO held that 5 U.S.C. § 3111 does not authorize the payment of travel or subsistence expenses for the students. **60 Comp. Gen.** 456 (1981).

A paper entitled A Part-Time Clerkship Program in Federal Courts for Law Students by the Honorable Jack B. Weinstein and **William B. Bonvillian**, written in 1975 and printed at 68 **F.R.D.** 265. considered the use of **law** students as part-time law clerks, without pay, to mostly supplement the work **of** the regular law clerks **in** furtherance of the **official** duties of the **courts**. Based on the statute’s legislative history and 30 Op. **Att’y Gen.** 51, previously discussed, Judge Weinstein concluded that the program did not violate the **Antideficiency** Act. Although this aspect of the issue is not explicitly discussed in the paper, it appears that the compensation of regular law clerks is **fixed** administratively. See 28 U.S.C. § **604(a)(5)**. In any event, the Administrative Office of the United States **Courts** was given authority in 1978 to “accept and utilize voluntary and uncompensated (gratuitous) services.” 28 U.S.C. § **604(a)** (17).

(3) Program beneficiaries

Programs are enacted from time to time to provide job training assistance to various classes of individuals. The training is intended to enable participants to enter the labor market at a higher level of skill and thereby avoid the need for public assistance. Also, in more recent

years, the concept of “**workfare**” (work as a requirement for the receipt of public assistance) has begun to evolve. Questions have arisen under programs of this nature as to the authority of federal agencies to serve as employers.

A 1944 case, 24 **Comp. Gen.** 314, considered a vocational rehabilitation program for disabled war veterans. GAO concluded that 31 U.S.C. § 1342 did not preclude federal agencies from providing on-the-job training, without payment of salary, to program participants. The decision is further discussed in 26 **Comp. Gen.** 956, 959 (1947).

In 51 **Comp. Gen.** 152 (1971), GAO concluded that 31 U.S.C. § 1342 precluded federal agencies from accepting work by persons hired by local government-s for **public** service employment under the Emergency Employment Act of 1971. Four years **later**, GAO modified the 1971 decision, holding that a federal agency could provide work without payment of compensation to (i.e., accept the free services **of**) trainees sponsored and paid by nonfederal organizations from federal grant funds under the Comprehensive Employment and Training Act of 1973.⁵⁴ **Comp. Gen.** 560 (1975). The decision stated:

“[Considering that the services in question will arise out of a program initiated by the Federal Government, it would be anomalous to conclude that such **services** are proscribed as being voluntary within the meaning of 31 U.S.C. § [1342]. That is to say, it is our opinion that the utilization of enrollees or trainees by a Federal agency under the circumstances here involved need not be considered the acceptance of ‘**voluntary** services’ within the meaning of that phrase as used in 31 U.S.C. § [1342].” **Id.** at 561.

Several issues under a **workfare** program (Community Work Experience Program) are discussed in **B-211079.2**, January 2, 1987. The relevant program legislation expressly authorizes program participants to perform work for federal agencies “notwithstanding section 1342 of title 31 .” 42 U.S.C. § **609(a)(4)(A)**. The decision seems to say that the statutory authority was **necessary** not because of the **Antideficiency** Act but to avoid an impermissible augmentation of appropriations. It is in any event consistent in result with 24 **Comp. Gen.** 314 and 54 **Comp. Gen.** 560. The relationship between voluntary service and the augmentation concept is **explored** later in this chapter in our discussion of augmentation of appropriations.

(4) Applicability to legislative and judicial branches

The applicability of 31 U.S.C. § 1342 to the legislative and judicial branches of the federal government does not appear to have been seriously questioned.

The salary of a Member of Congress is **fixed** by statute and therefore cannot be waived without specific **statutory** authority. **B-159835**, April 22, 1975; **B-123424**, March 7, 1975; **B-123424**, April 15, 1955; **A-8427**, March 19, 1925; **B-206396.2**, November 15, 1988 (non-decision letter). However, as each of these cases points out, nothing prevents a Senator or Representative from accepting the salary and then, as several have done, donate part or all of it back to the United States Treasury.

In 1977, GAO was asked by a congressional committee chairman whether section 1342 applies to Members of Congress who use volunteers to perform official office functions. GAO responded **first** that section 1342 seems clearly to apply to the legislative branch. GAO then **summarized** the rules for appointment without compensation and advised that, to the extent that a particular employee's **salary** could be freed administratively by the Member in any amount he or she chooses to set, that employee's salary can be **fixed** at zero. (This once again was essentially an application of the rules set down decades earlier in 30 Op. Att'y Gen. 51 and 27 Comp. Dec. 131.) **B-69907**, February 11, 1977.

The salary of a federal judge is also "**fixed** by law—even more so because of the constitutional prohibition against diminishing the compensation of a federal judge while in office. A case applying the standard "no waiver" rules to a federal judge is **B-157469**, July 24, 1974.

c. Other Voluntary **Services**

Before entering the mainstream of the modern case law, two very early decisions should be noted. In 12 **Comp. Dec.** 244 (1905), the Comptroller of the Treasury held that an offer by a meat-packing firm to pay the salaries of Department of **Agriculture** employees to conduct

a **pre-export** pork inspection could not be accepted because of the voluntary services **prohibition**.⁴⁶ Similar cases have since come up, but they have been decided under the augmentation theory without reference to 31 U.S.C. s 1342. See 59 **Comp. Gen.** 294 (1980) and 2 **Comp. Gen.** 775 (1923), discussed later in Section E of this chapter. To restate, apart from the 1905 decision, which has not been **followed** since, the voluntary services prohibition has not been applied to donations of money.

In another 1905 decision, a vendor asked permission to install an appliance on Navy property for trial purposes at no expense to the government. Presumably, if the Navy liked the appliance, it would then buy it. The Comptroller pointed out an easily overlooked phrase in the voluntary service prohibition—the **services** that are prohibited are voluntary services “for the United States.” Here, **temporary** installation by the vendor for trial purposes amounted to service for his own benefit and on his own behalf, “as an incident to or necessary concomitant of a proper exhibition of his appliance for sale.” Therefore, the Navy could grant **permission** without violating the **Antideficiency** Act as long as the vendor agreed **to** remove the appliance at his own expense if the Navy chose not to buy it. 11 **Comp. Dec.** 622 (1905). This case, although it has not been cited since, would appear to be still valid.

For the most part, the cases have been resolved by applying the “voluntary vs. gratuitous” distinction **first** enunciated by the Attorney General in 30 **Op. Att’y Gen.** 51, discussed above. The underlying philosophy is perhaps best conveyed in the following statement by the Justice Department’s Office of **Legal** Counsel:

“Although the interpretation of § [1342] has not been entirely consistent over the years, the weight of authority **does** support the view that the section was intended to eliminate subsequent claims against the United **States** for compensation of the ‘volunteer,’ rather than **to** deprive the government of the benefit of **truly** gratuitous **services**.” 6 **Op. Off. Legal Counsel** 160, 162 (1982).

In an early formulation that has often been quoted since, the Comptroller General noted that:

⁴⁶It would also contravene 18 U.S.C. § 209, which prohibits **payment of salaries** of **government** employees from **nongovernment** sources. This statute did not exist at the time of the 1905 decision.

“The **voluntary** service referred to in [31 U.S.C. § 1342] is not **necessarily** synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States **therefor**. Services **furnished** pursuant to a **formal contract are not** voluntary within the **meaning** of said section.” 7 **Comp. Gen. 810, 811** (1928).

In 7 **Comp. Gen. 810**, a contractor had agreed to prepare stenographic transcripts of Federal Trade **Commission** public proceedings and to furnish copies to the **FTC** without cost, **in** exchange for the exclusive right to report the proceedings and to sell transcripts to the public. **The** decision noted that consideration under a contract does not have to be monetary consideration, and **held** that the contract in question **was** supported by sufficient legal consideration. While the case is thus arguably not a true “voluntary services” case, it has often been cited since, not so much for the actual holding but for the above-quoted statement of the rule.

For example, in **B-13378**, November 20, 1940, the Comptroller General held that the Secretary of Commerce could accept gratuitous services from a private agency, created by various social science associations, which had offered to assist in the preparation of official monographs analyzing census data. The **services** were to be rendered under a cooperative agreement which **specified** that they would be free of cost to the government. The Commerce Department agreed to furnish space and equipment, but the monographs would not otherwise have been prepared.

Applying the same approach, **GAO** found no violation of 31 **U.S.C. § 1342** for the Commerce Department to accept services by the Business Advisory Council, agreed in advance to be gratuitous. **B-125406**, November 4, 1955. Likewise, the Commission on Federal Paperwork could accept free services from the private sector as long as they were agreed in advance to be gratuitous. **B-182087-O. M.**, November 26, 1975.

In a 1982 decision, the American Association of Retired Persons wanted to volunteer services to assist in crime prevention activities (distribute literature, give lectures, etc.) on Army installations. **GAO** found no **Antideficiency** Act problem as long as the services were agreed in advance, and so documented, as gratuitous. **B-204326**, July 26, 1982.

In **B-177836**, April 24, 1973, the Army had entered into a contract with a landowner under which it acquired the right to remove trees and other shrubs from portions of the landowner's **property** incident to an easement. A subsequent purchaser of the property complained that some tree stumps had not been removed, and the Army proceeded to contract to have the work done. The landowner then submitted a claim for certain costs he had incurred incident to some preliminary work he had done prior to the Army's contract. Since the landowner's actions had been purely voluntary and had been taken without the knowledge or consent of the government, 31 U.S.C. § 1342 prohibited payment.

In 7 **Comp. Gen.** 167 (1927), a customs official had stored, in his own private boathouse, a boat which had been seized for smuggling whiskey. The customs **official** later **filed** a claim for storage charges. Noting that "the United States did not expressly or **impliedly** request the use of the premises and therefore did not by implication promise to pay **therefor**," GAO concluded that the storage had been purely a voluntary service, payment for which would violate 31 U.S.C. § 1342.

As if to prove the proverb that there is nothing new under the sun (**Ecclesiastes 1:9**), GAO considered another storage case over 50 years later, **B-194294**, July 12, 1979. There, an Agriculture Department employee had **an** accident while driving a government-owned vehicle assigned to him for his work. A Department official ordered the damaged vehicle towed to the employee's driveway, to be held there until it could be sold. Since the government did have a role in the employee's assumption of responsibility for the wreck, GAO found no violation of 31 U.S.C. § 1342 and allowed the employee's claim for reasonable storage charges on a quantum **meruit** basis.

Section 1342 covers any type of service which has the effect of creating a legal or moral obligation to pay the person rendering the service. Naturally, this includes government contractors. The prohibition includes arrangements in which government contracting **officers** solicit permit-tacitly or otherwise-a contractor to continue performance on a "temporarily unfunded" basis while the agency, which has exhausted its appropriations and can't pay the contractor immediately, seeks additional appropriations. This was one of the options considered in 55 **Comp. Gen.** 768 (1976), discussed previously in connection with 31 U.S.C. § 1341(a). The Army proposed a contract modification which would explicitly recognize the

government's obligation to pay for any work performed under the contract, possibly including reasonable interest, subject to subsequent availability of funds. The government would use **its** best efforts to obtain a deficiency appropriation, **Certificates** to this effect would be issued to the contractor, including a statement that any additional work performed would be done at the contractor's own risk. In return, the contractor would be asked to defer any action for breach of contract.

GAO found this proposal "of dubious validity at best." Although the **certificate** given to the contractor would say that continued **performance** was at the contractor's own risk, it was clear that both parties expected the contract to continue. The government expected to accept the benefits of the contractor's performance and the contractor expected to be paid—eventually—for it. This is certainly not an example of a clear written understanding that work for the government is to be performed gratuitously. Also, the proposal to pay interest was improper as it would compound the **Antideficiency Act** violation. Although 55 **Comp. Gen.** 768 does not **specifically** discuss 31 U.S.C. §1342, the relationship should be apparent.

d. Exceptions

Two kinds of exceptions to 31 U.S.C. § 1342 have already been discussed—where acceptance of services without compensation is specifically authorized bylaw, and where the government and the volunteer have a written agreement that the services are to be rendered gratuitously with no expectation of future payment.

There is a third exception, written into the statute itself: "emergencies involving the safety of human life or the protection of **property**." As can be seen from the cases discussed, with very few exceptions, **GAO** has not been called upon to construe the scope of the safety of human life or protection of property exceptions in recent decades. However, the Attorney General in 1981 considered the exceptions in the context of funding gaps, and articulated a somewhat broader standard than that applied in the early **GAO** decisions. The opinion, published at 5 Op. Off. Legal Counsel 1 (1981), and a 1990 amendment to 31 U.S.C. § 1342 designed to retrench somewhat from that broader view, are discussed in more detail later under the Funding Gaps heading.

(1) Safety of human life

The services provided to protect human life must have been rendered in a true emergency situation. What constitutes an emergency is discussed in several decisions.

In 12 **Comp. Dec.** 155 (1905), a municipal health **officer** disinfected **several** government buildings to prevent the further spread of diphtheria. Several cases of diphtheria had already occurred at the government compound, including four deaths. The Comptroller of the **Treasury** found that the services had been rendered in an emergency involving the loss of human life, and held accordingly that the doctor could be reimbursed for the cost of materials used and the fair value of his services.

In another case, the **S.S. Rexmore**, a British vessel, deviated from **its** course to London to answer a **call** for help from an Army transport ship carrying over 1,000 troops. The ship had sprung a leak and appeared to be in danger of sinking. The Comptroller General **allowed** a claim for the vessel's actual operating costs plus lost profits attributable to the services performed. The **Rexmore** had rendered a tangible service to save the lives of the people aboard the Army transport, as well **as** the transport vessel itself. 2 **Comp. Gen.** 799 (1923).

On the other hand, GAO denied payment to a man who **was** boating in the Florida Keys and saw a Navy seaplane make a forced landing. He offered to tow the aircraft over two miles to the nearest island, and did so. His claim for expenses **was** denied. The aircraft had landed intact and the pilot was in no immediate danger. Rendering service to overcome mere inconvenience or even a potential future emergency is not enough to overcome the statutory prohibition. 10 **Comp. Gen.** 248 (1930).

(2) Protection of property

The main thing to remember here is that the property must be either government-owned property or property for which the government has some responsibility. The standard was established by the Comptroller of the Treasury in 9 **Comp. Dec.** 182, 185 (1902) as follows:

“I think **it is** clear that the statute does not **contemplate** property in which the Government has no **immediate** interest or concern; but I do not think it was intended to apply exclusively to property owned by the Government. The **term** ‘property’ is used in the statute without any **qualifying** words, but it **is** used in connection with the rendition of services for the Government. The implication is, therefore, **clear** that the property in contemplation is property in which the Government has an immediate interest or in connection with which it has some duty **to** perform.”

In the cited decision, an individual had gathered up **mail** scattered in a train wreck **and** delivered it to a nearby town. The government did not “own” the mail but had a responsibility to deliver it. Therefore, the services came within the statutory exception and the individual **could** be paid for the value of his services.

Applying the approach of 9 **Comp. Dec.** 182, the Comptroller General held in **B-152554**, February 24, 1975, that section 1342 did not permit the Agency for International Development to make expenditures in excess of available funds for disaster relief in foreign countries.

A case clearly within the exception is 3 **Comp. Gen.** 979 (1924), allowing reimbursement **to** a municipality which had rendered **firefighting** assistance to prevent the destruction of federal property where the federal property was not within the territory for which the municipal **fire** department was responsible.

An exception was also recognized in 53 **Comp. Gen.** 71 (1973), where **a** government employee **brought** in food for other government employees in circumstances which would **justify** a determination that the expenditure was incidental to the protection of government property in an extreme emergency.

e. **Voluntary** Creditors

A related line of decisions are the so-called “voluntary creditor” cases. A voluntary creditor is an individual, government or **nongovernment**, who pays what he or she perceives **to** be a government obligation from personal funds. The rule is that the voluntary creditor cannot be reimbursed, although there are **significant** exceptions. For the most part, the decisions have not related the voluntary creditor prohibition to the **Antideficiency** Act, with the exception of one very early **case** (17 **Comp. Dec.** 353 (1910)) and two more recent ones (53 **Comp. Gen.** 71 (1973) and 42 **Comp. Gen.** 149 (1962)). The voluntary creditor cases are discussed in detail in Chapter 12.

4. Apportionment of Appropriations

a. Statutory Requirement for Apportionment

As a general proposition, an agency does not have the full amount of its appropriations available to it at the beginning of the **fiscal** year. This is because of what, prior to the 1982 **recodification** of Title 31, was subsection (c) of the **Antideficiency Act** and is now 31 U.S.C. §1512. Subsection (a) of section 1512 establishes the basic requirement:

“(a) Except as provided in this subchapter, an appropriation available for obligation for a **definite** period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an **indefinite** period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.”

Although apportionment was **first** required legislatively in 1905 (33 Stat. 1257), the current form of the statute derives from a revision enacted in 1950 as section 1211 of the General Appropriation Act, 1951. The 1950 revision was part of an overall effort by Congress to **amplify** and enforce the basic restrictions against incurring deficiencies in 31 U.S.C. §1341.

Section **1512(a)** requires that all appropriations be administratively apportioned so as to ensure their obligation and expenditure at a controlled rate which will prevent deficiencies from arising before the end of a **fiscal** year. Although section 1512 does not tell you who is to make the apportionment, section 1513, discussed later, specifies the President as the apportioning official for most executive branch agencies. The function was delegated to the Director of the Bureau of the Budget in 1933,⁴⁷ and now reposes in the successor to that **office**, the Director, Office of Management and Budget (**OMB**).

The term “apportionment” may be defined **as—**

“A distribution made by the Office of Management and Budget of amounts available for obligation. . . in an appropriation or fund account. Apportionments divide amounts available for obligation by specific time periods (**usually** quarters), activities,

⁴⁷Executive Order No. 6166, § 16 (June 10, 1933).

projects, objects, or a combination thereof. The amounts so apportioned limit the amount of obligations that maybe **incurred**.⁴⁸

Apportionment is required not only to prevent the need for deficiency or supplemental appropriations, but also to insure that there is no drastic curtailment of the activity for which the appropriation is made. 36 **Comp. Gen.** 699 (1957). See also 38 **Comp. Gen.** 501 (1959). In other words, the apportionment requirement is designed to prevent an agency from spending its entire appropriation before the end of the **fiscal** year and then putting the Congress in a position in which it must either grant an additional appropriation or allow the entire activity to come to a halt.

In 36 **Comp. Gen.** 699 (1957), the Director of **OMB** reapportioned Post Office funds in such a way that the fourth quarter funds were substantially less than those for the third quarter. The Comptroller General stated:

‘A drastic curtailment toward the close of a **fiscal** year of operations carried on under a final year appropriation is aprima facie indication of a failure to so apportion an appropriation ‘as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period.’ In our view, this is the very situation the amendment of the law in 1950 was intended to remedy.” 36 **Comp. Gen.** at 703.

Therefore, the very fact that a deficiency or supplemental appropriation is necessary or that services in the last quarter must be drastically cut suggests that the apportioning authority has violated 31 U.S.C. § 1512(a).

A more recent **case** involved the Department of Agriculture’s Food Stamp Program. The program was subject to certain spending ceilings which, it seemed certain, the Department was going to exceed if it continued its present rate of expenditures. The Department feared that, if it was bound by a formula in a different section of its authorizing act to pay the mandated amount to each eligible recipient, it would have to stop the whole program when the funds were exhausted. Based on both the **Antideficiency** Act and the program legislation, GAO concluded that there had to be an immediate pro rata reduction for all participants. Discontinuance of the program when

⁴⁸GAO, A Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 34 (1981). See also OMB Circular No. A-34, ¶ 21.1; B-167034, September 1, 1976.

the funds ran out would violate the purpose of the apportionment requirement. **A-51604**, March 28, 1979.

This is not to say that every sub-activity or project must be carried out for the full fiscal year, on a reduced basis, if necessary. Section **1512(a)** applies to amounts made available in an appropriation or fund. Where, for example, the Veterans Administration nursing home program was funded from moneys made available in a general, lump-sum VA medical care appropriation, the agency was free to **discontinue** the nursing home program and reprogram the balance of its funds to other programs **also** funded under that heading. **B-167656**, June 18, 1971. (It would be different if the nursing home program had received a line-item appropriation.)

The requirement to apportion applies not only to “one year” appropriations and other appropriations limited to a **fixed** period of time, but also to “no-year” money and even to contract authority (authority to contract in advance of appropriations). 31 U.S.C. §§ **1511(a), 1512(a)**. In the case of indefinite appropriations and contract authority, the requirement states only that the apportionment is to be made in such a way as “to achieve the most effective and economical use” of the budget authority. **Id.** § **1512(a)**.

Prior to the 1982 recodification of Title 31, the apportionment requirement applied explicitly to government corporations which are instrumentalities of the United **States**.⁴⁹ While the applicability of the requirement has not changed, the recodification dropped the explicit language, viewing it as covered by the broad definition of “executive agency” in 31 U.S.C. §102.50 The authority of some government corporations to determine the necessity of their expenditures **and** the manner in which they shall be incurred is not sufficient to exempt a corporation from the apportionment requirement. 43 **Comp. Gen.** 759 (1964).

b. Establishing Reserves

Section **1512(c)** of 31 U.S.C. provides as follows:

“(c)(1) In apportioning or reapportioning an appropriation, a reserve may be established **only**—

⁴⁹31 U.S.C. § 665(d)(2) (1976 ed.).

⁵⁰See codification note following 31 U.S.C. 51511.

that a reasonable reserve for contingencies was properly within the agency's discretion.

c. Method of Apportionment

The remaining portions of 31 U.S.C. § 1512 are subsections (b) and (d), set forth below:

“(b)(1) An appropriation subject to apportionment is apportioned by—

“(A) months, calendar quarters, operating seasons, or other time periods;

“(B) activities, functions, projects, or objects; or

“(C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.”

“(d) An apportionment or reapportionment shall be reviewed at least 4 times a year by the official designated in section 1513 of this title to make apportionments.”

These two provisions are largely technical, implementing the basic apportionment requirement of 31 U.S.C. § 1512(a).

Section 1512(b) makes it clear that apportionments need not be made strictly on a monthly, quarterly, or other **fixed** time basis, nor must they be for equal amounts in each time period. The apportioning officer is free to take into account the “activities, functions, projects, or objects” of the program being funded and the usual pattern of spending for such programs in deciding how to apportion the funds. Absent some statutory provision to the contrary, **OMB's** determination is controlling. Thus, for example, in Maryland Department of Human Resources v. Department of Health and Human Services, 854 F.2d 40 (4th Cir. 1988), the court **upheld OMB's** quarterly apportionment of social services block grant funds, rejecting the state's contention that it should receive its entire annual allotment at the beginning of the fiscal year.

Section 1512(d) requires a minimum of four reviews each year to enable the apportioning officer to make reapportionments or other **adjustments** as necessary.

d. Control of Apportionments

The former subsection (d) of the **Antideficiency Act**, now 31 U.S.C. § 1513, deals with the mechanisms for making the apportionments or

economic, fiscal, or policy considerations which are extraneous to the individual appropriation or are in derogation of the appropriation's purpose. **B-125187**, September 11, 1973; **B-130515**, July 10, 1973. See also State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), which held that the right to reserve funds in order to "effect savings" or due to "subsequent events," etc., must be considered in the context of the applicable appropriation statute. *Id.* at 1118. If the apportioning authority goes beyond the authority delegated, section 1512(c) is violated.

The Impoundment Control Act of 1974 amended section 1512(c) by eliminating the "other developments" clause and by prohibiting the establishment of appropriation reserves except as provided under the **Antideficiency** Act for contingencies or savings, or as provided in other specific statutory authority. The intent was to preclude reliance on section 1512(c) as authority for "policy impoundments." City of New Haven v. United States, 809 F.2d 900,906 (D.C. Cir. 1987); 54 **Comp. Gen.** 453 (1974); **B-148898**, August 28, 1974.

Examples of permissible reserves were discussed in 51 **Comp. Gen.** 598 (1972) and 51 **Comp. Gen.** 251 (1971). The first case concerned the provisions of a long-term charter of several tankers for the Navy. The contract contained options to renew the charter for periods of 15 years. In the event that the Navy declined to renew the charter short of a full 15-year period, the vessels were to be sold by a Board of Trustees, acting for the owners and bondholders. Any shortfall in the proceeds over the termination value was to be unconditionally guaranteed by the Navy. **GAO held** that it would not violate the **Antideficiency** Act to cover this contingent liability by setting up a reserve. 51 **Comp. Gen.** 598 (1972). In 51 **Comp. Gen.** 251 (1971), **GAO** said that it was permissible to provide in regulations for a clause to be inserted in future contracts for payment of interest on delayed payments of a contractor's claim. Reserving **sufficient** funds from the appropriation used to support the contract to cover these potential interest costs would protect against **potential Antideficiency** Act violations.

In 1981, the Community Services Administration established a reserve as a cushion against **Antideficiency** Act violations while the agency was terminating its operations. Grantees argued that the reserve improperly reduced amounts available for discretionary grants. In Rogers v. United States, 14 CL Ct. 39, 46-47 (1987), the court held

“[T]he apportionment power may not lawfully be used as a form of executive control or influence over agency functions. Rather, it may only be exercised by **OMB** in the manner and for the purposes prescribed in **31 U.S.C. § [1512]—i.e., to prevent obligation or expenditure in a manner which would give rise to a need for deficiency or supplemental appropriations, to achieve the most effective and economical use of appropriations and to establish reserves either to provide for contingencies or to effect savings which are in furtherance of or at least consistent with, the purposes of an appropriation.**

“As thus limited, the apportionment process serves a necessary purpose—the promotion of economy and efficiency in the use of **appropriations**. . . .

....

“[S]ince a useful purpose is served by **OMB’s** proper exercise of the apportionment power, we do not believe that the potential for abuse of the power **is sufficient** to justify removing it from **OMB**.”

Thus, the appropriations of independent regulatory agencies like SEC are subject to apportionment by **OMB**, but **OMB** may not lawfully use its apportionment power to compromise the independence of those agencies. To use the example given in **B-163628**, if **OMB** tried to use apportionment to prevent the SEC from hiring personnel authorized by Congress, that would be an abuse of its apportionment powers. But this possibility does not justify denying **OMB’s** basic apportionment authority altogether.

The Impoundment Control Act may permit **OMB**, in effect, to delay the apportionment deadlines prescribed in **31 U.S.C. § 1513(b)**. For example, when the President sends a rescission message to Congress, the budget **authority** proposed to be rescinded may be withheld for up to 45 days pending congressional action on a rescission bill. **2 U.S.C. §§ 682(3), 683(b)**. In **B-115398.33**, August 12, 1976, GAO responded to a congressional request to review a situation in which an apportionment had been withheld for more than 30 days after enactment of the appropriation act. The President had planned to submit a rescission message for some of the funds but was late in drafting and transmitting his message. If the full amount contained in the rescission message could be withheld for the entire **45-day** period, and Congress ultimately disallowed the full rescission, release of the funds for obligation would occur only a few days before the budget authority expired. The Comptroller General suggested that, where Congress has completed action on a rescission bill rescinding **only** a part of the amount proposed, **OMB** should immediately apportion the

reapportionments of appropriations which are required by section 1512.

Section **1513(a)** applies to appropriations of the legislative and **judicial** branches of the federal government, as well as appropriations of the International Trade Commission and the District of Columbia **government**.⁵¹ The authority to apportion is given to the “**official** having administrative control” of the appropriation. Apportionment must be made no later than 30 days before the start of the **fiscal** year for which the appropriation is made, or within 30 days after the enactment of the appropriation, whichever is later. The apportionment must be in writing.

Section **1513(b)** deals with apportionments for the executive branch. The President is designated as the apportioning authority. As we have seen, the function has been delegated to the Director, **OMB**. Time limits are established, first for submission of information by the various agency heads to **OMB** to enable it to make reasonable apportionments. Although primary responsibility for a violation of section 1512 lies with the Director of **OMB**, the head of the agency concerned may also be found responsible if he or she fails to send the Director accurate information on which to base an apportionment. **Secondly**, the Director of **OMB** has up to 20 days before the start of the **fiscal** year or 30 days after enactment of the appropriation act, whichever is later, to make the actual apportionment and notify the agency of the action taken. Again, the apportionments must be in writing.

In **B-163628**, January 4, 1974, GAO responded to a question from the chairman of a congressional committee about the power of **OMB** to apportion the funds of independent **regulatory** agencies, such as **the** Securities and Exchange Commission. The Comptroller General agreed with the chairman that independent agencies should generally be free from executive control or interference. The response then stated:

⁵¹A permanent provision of law included in the 1988 District of Columbia appropriation act states that appropriations for the D.C. government “shall not be subject to apportionment except to the extent specifically provided by statute.” Pub. L. No. 100-202, §135, 101 Stat. 1329, 1329-102 (1987). Thus, the applicability of 31 U.S.C. §1513(a) to the D.C. government will be extremely limited.

“[T]he apportionment power may not lawfully be used as a form of executive control or influence over agency functions. Rather, it may only be exercised by OMB in the manner and for the purposes prescribed in 31 U.S.C. §[1512]—i.e., to prevent obligation or expenditure in a manner which would give rise to a need for deficiency or supplemental appropriations, to achieve the most effective and economical use of appropriations and to establish reserves either to provide for contingencies or to effect savings which are in furtherance of or at least consistent with, the purposes of an appropriation.

“As thus limited, the apportionment process serves a necessary purpose—the promotion of economy and efficiency in the use of appropriations. ...

....

“[S]ince a useful purpose is served by OMB’s proper exercise of the apportionment power, we do not believe that the potential for abuse of the power is sufficient to justify removing it from OMB.”

Thus, the appropriations of independent regulatory agencies like SEC are subject to apportionment by OMB, but OMB may not lawfully use its apportionment power to compromise the independence of those agencies. To use the example given in B-163628, if OMB tried to use apportionment to prevent the SEC from hiring personnel authorized by Congress, that would be an abuse of its apportionment powers. But this possibility does not justify denying OMB’s basic apportionment authority altogether.

The Impoundment Control Act may permit OMB, in effect, to delay the apportionment deadlines prescribed in 31 U.S.C. § 1513(b). For example, when the President sends a rescission message to Congress, the budget authority proposed to be rescinded may be withheld for up to 45 days pending congressional action on a rescission bill. 2 U.S.C. §§ 682(3), 683(b). In B-1 15398.33, August 12, 1976, GAO responded to a congressional request to review a situation in which an apportionment had been withheld for more than 30 days after enactment of the appropriation act. The President had planned to submit a rescission message for some of the funds but was late in drafting and transmitting his message. If the full amount contained in the rescission message could be withheld for the entire 45-day period, and Congress ultimately disallowed the full rescission, release of the funds for obligation would occur only a few days before the budget authority expired. The Comptroller General suggested that, where **Congress has completed action on a rescission bill rescinding only a part of the amount proposed, OMB should immediately apportion the**

amounts not included in the rescission bill without awaiting the expiration of the **45-day** period. See also **B-115398.33**, March 5, 1976.

e. Apportionments Requiring
Deficiency Estimate

In our discussion of the basic requirement for apportionment, we quoted 31 U.S.C. § 1512(a) to the effect that appropriations must be apportioned “to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation.” Thus, GAO has held that the **Antideficiency** Act requires that freed-term appropriations be obligated and expended in such away as to avoid situations in which Congress must either make a deficiency or supplemental appropriation or face exhaustion of the appropriation and the consequent drastic curtailment of the activity the appropriation was intended to fund. 64 **Comp. Gen.** 728, 735 (1985); 36 **Comp. Gen.** 699,703 (1957). ‘

The requirement that appropriations be apportioned so as to avoid the need for deficiency or supplemental appropriations is fleshed out in 31 U.S.C. § 1515 (formerly subsection (e) of the **Antideficiency** Act):

“(a) An appropriation required to be apportioned under section 1512 of this title may be apportioned on a basis that indicates the need for a deficiency or supplemental appropriation to the extent necessary to permit payment of such pay increases as may be granted pursuant to law to civilian officers and employees (including prevailing rate employees whose pay is freed and **adjusted** under subchapter IV of chapter 53 of title 5) and to retired **and** active **military** personnel.

“(b)(1) Except as provided in subsection (a) of this section, an official may make, and the head of an executive agency may request, an apportionment under section 1512 of this title that would indicate a necessity for a deficiency or supplemental appropriation only when the **official** or agency head decides that the action is required because of—

“(A) a law enacted after submission to Congress of the estimates for an appropriation that requires an expenditure beyond **administrative** control; or

“(B) an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals when an appropriation that would allow the United States Government to pay, or contribute to, amounts required to be paid to individuals in **specific** amounts **fixed** by law or under formulas prescribed by law, is **insufficient**.

“(2) If an **official** making an apportionment decides that an apportionment **would** indicate a necessity for a deficiency or supplemental appropriation, the official shall

submit immediately a detailed report of the facts to Congress. The report **shall be** referred to in submitting a proposed deficiency or supplemental appropriation.”

Section 1515 provides certain exceptions to the requirement of section 1512(a) that apportionments be made in such manner as to assure that the funds will **last** throughout the **fiscal** year and there will be no necessity for a deficiency appropriation. Under subsection 1515(a), deficiency apportionments are **permissible** if necessary to pay salary increases granted pursuant to law to federal civilian and military personnel. Under subsection 1515(b), apportionments can be made in an unbalanced manner (e.g., an entire appropriation could be obligated by the end of the second quarter) if the apportioning officer determines that (1) a law enacted subsequent to the transmission of budget estimates for the appropriation requires expenditures beyond administrative control, or (2) there is an emergency involving safety of human life, protection of property, or immediate welfare of individuals in cases where an appropriation for mandatory payments to those individuals is insufficient.

Prior to 1957, what is now subsection 1515(b) prohibited only the **making** of **an** apportionment indicating the need for a deficiency or supplemental appropriation, so the only person who could violate this subsection was the Director of **OMB**. An amendment in 1957 made it equally a violation for an agency to request such an apportionment. See 38 **Comp. Gen.** 501 (1959).

The exception for expenditures “beyond **administrative** control” required by a statute enacted after submission of the budget estimate may be illustrated by **statutory** increases in compensation, although many of the cases would now be covered by subsection (a). We noted several of the cases in our consideration of when an obligation or expenditure is “authorized by law” for purposes of 31 **U.S.C.** 51341. Those cases established the rule that a mandatory increase is regarded as “authorized by law” so as **to** permit **overobligation**, whereas a discretionary increase is not. The same rule applies in determining when an expenditure is “beyond administrative control” for purposes of 31 **U.S.C.** § 1515(b). Thus, statutory pay increases for Wage Board employees granted pursuant to a wage survey meet the test. 39 **Comp.**

Gen. 422 (1959); 38 **Comp. Gen.** 538,542 (1959). See also 45 **Comp. Gen.** 584,587 (1966) (severance pay in **fiscal year 1966**).⁵²

Discretionary increases, just as they are not “authorized by law” for purposes of 31 U.S.C. §1341, are not “beyond administrative control” for purposes of section 1515(b). 44 **Comp. Gen.** 89 (1964) (salary increases to Central Intelligence Agency employees); 31 **Comp. Gen.** 238 (1951) (pension increases to retired District of Columbia police and **firefighters**).

The Wage Board exception was separately codified in 1957 and now appears at 31 U.S.C. § 1515(a), quoted above, Subsection 1515(a) reached its present form in 1987 when Congress expanded it to include pay increases granted pursuant to law to non-Wage Board civilian officers and employees and to retired and active military **personnel**.⁵³

The exceptions in subsection 1515(b)(1)(B) do not appear to have been discussed in any GAO decisions as of the date of this publication, although a 1989 internal memorandum suggested that the exception would apply to Forest Service appropriations for fighting forest **fires**. **B-230117-O.M.**, February 8, 1989. The exceptions for safety of human life and protection of property appear to be patterned after the identical exceptions under 31 U.S.C. §1342, so the case law under that section **should** be equally relevant for construing the scope of the exceptions under section 1515(b).

It is important to note that the exceptions in 31 U.S.C. §1515(b) are exceptions **only** to the prohibition against making or requesting apportionments requiring deficiency estimates; they are not exceptions to the basic prohibitions in 31 U.S.C. § 1341 against obligating or spending in excess or advance of appropriations. The point was discussed at some length in **B-167034**, September 1, 1976. Legislation had been proposed in the Senate to repeal 41 U.S.C. § 11, which prohibits the making of a contract, not otherwise authorized by law, **unless** there is an appropriation “adequate to its fulfillment,” except in the case of contracts made by a military department for “clothing, subsistence, forage, fuel, quarters, transportation, or

⁵²The law mandating payment of severance pay was enacted after the start of FY 1966, which is why the expenditures in that case would qualify under 31 U.S.C. §1515(b).

⁵³Pub. L. No. 100-202, § 105, 101 Stat. 1329, 1329-433 (1987) (1988 continuing resolution).

medical and hospital **supplies.**” It had been suggested that 41 U.S.C. § 11 was unnecessary in light of 31 U.S.C. § 1515(b). The question was whether, if 41 U.S.C. § 11 were repealed, the military departments would have essentially the same authority under section 1515(b).

The Defense Department expressed the view that section 1515(b) would not be an adequate substitute for the 41 U.S.C. § 11 exception which allows the incurring of obligations for limited purposes even though the applicable appropriation is **insufficient** to cover the expenses at the time the commitment is made. Defense commented as follows:

“The authority to apportion funds on a deficiency basis in [31 U.S.C. § 1515(b)] does not, as alleged, provide authority to incur a deficiency. It **merely authorizes obligating** funds at a deficiency rate under certain **circumstances**, e.g., a \$2,000,000 appropriation can be obligated in its entirety at the end of the third quarter, but it does not provide authority to obligate one dollar more than \$2,000,000.” Letter from the Deputy Secretary of Defense to the Chairman, House **Armed Services Committee**, April 2, 1976 (quoted in **B-167034**, September 1, 1976).

The Comptroller General agreed with the Deputy Secretary, stating:

“[Section 1515(b)] in no way authorizes an agency of the Government **actually to** incur obligations in excess of the total amount of money appropriated for a period. It only provides an exception to the general apportionment rule set out in [31 U.S.C. § 1512(a)] that an appropriation be allocated so as to insure that it is not exhausted prematurely. [Section 1515(b)] says nothing about increasing the total amount of the appropriation itself or authorizing the incurring of obligations in excess of the **total** amount appropriated. On the contrary, **as noted above, apportionment** only involves the subdivision of appropriations already enacted by **Congress**. It **necessarily** follows that the sum of the **parts**, as apportioned, could not exceed the **total** amount of the appropriations being apportioned.

“Any deficiency that an agency incurs where obligations exceed total amounts appropriated, including a deficiency that arises in a situation where it was determined that one of the exceptions set forth in [section 1515(b)] was applicable, would constitute a violation of 31 U.S.C. § [1341(a)]” **B-167034**, September 1, 1976.

f. Exemptions From
Apportionment Requirement

A number of exemptions from the apportionment requirement, formerly found in subsection (f) of the **Antideficiency Act**, are now gathered in 31 U.S.C. § 1516:

“An official designated in section 1513 of this title to make apportionment may exempt from **apportionment**—

“(1) a trust fund or working fund if an expenditure from the fund has no **significant** effect on the financial operations of the United **States Government**;

“(2) a **working** capital fund or a **revolving** fund established for intragovernmental operations;

“(3) receipts from industrial and power **operations** available under law; and

“(4) appropriations made **specifically** for-

“(A) interest on, or retirement of, the public debt;

“(B) payment of claims, judgments, refunds, and drawbacks;

“(C) items the President decides are of a **confidential** nature;

“(D) payment under a law requiring payment of the **total** amount of the appropriation to a designated payee; and

“(E) grants to the States **under** the **Social Security Act** (42 **U.S.C. 301 et seq.**)”

Section 1516 is largely self-explanatory and the various enumerated exceptions appear to be readily **understood**. Note that the statute does not make the exemptions **mandatory**. It merely authorizes them, within the discretion of the apportioning authority (**OMB**). **OMB’s** implementing instructions, **OMB Circular No. A-34**, §41.1, have not adopted all of the exemptions permitted under the statute. In several cases—for example, trust funds and intragovernmental revolving **funds—the** funds are subject to apportionment unless **OMB** grants an exemption for a particular account. *Id.*

In addition, 10 **U.S.C. § 2201(a)** authorizes the President to exempt appropriations for military functions of the Defense Department from apportionment upon determining “such action to be necessary in the interest of national defense.”

Another exemption, this one **mandatory**, is contained in 31 **U.S.C. § 1511(b)(3)**, for “the Senate, the House of Representatives, a committee of Congress, a member, officer, employee, or office of either House of Congress, or the Office of the Architect of the Capitol or an officer or employee of that **Office.**” Apart from this specific exemption, the remainder of the legislative branch, and the judicial branch, are subject to apportionment. **31 U.S.C. § 1513(a)**.

g. **Administrative** Division of Apportionments

Thus far, we have reviewed the provisions of the **Antideficiency** Act directed at the appropriation **level** and the apportionment **level**. The law also addresses agency subdivisions.

The **first** provision to note is 31 U.S.C. §1513(d):

"An appropriation apportioned under this subchapter may be divided and subdivided **administratively** within the limits of the apportionment."

Thus, administrative subdivisions are expressly authorized. The precise pattern of subdivisions will vary based on the nature and scope of activities funded under the apportionment and, to some extent, agency preference. The levels of subdivision below the apportionment level are, in descending order, allotment, **suballotment**, and allocation. OMB Circular No. **A-34**, §21.1. Additional subdivisions may exist with varying designations such as allowance, operating budget, etc. *Id.* § 32.2(7). **As** we will see later in our discussion of 31 U.S.C. §1517(a), there are definite **Antideficiency** Act implications flowing from how an agency structures its **fund** control system.

The next relevant statute is 31 U.S.C. §1514:⁵⁴

"(a) The **official** having administrative control of an appropriation **available** to the legislative branch, the **judicial** branch, the United States international Trade **Commission**, or the District of Columbia government, and, subject to the **approval** of the President, the head of each executive agency (except the **Commission**) **shall** prescribe by regulation a system of administrative control not inconsistent with accounting procedures prescribed under law. The system **shall** be designed to—

"(1) restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of the appropriation; and

"(2) enable the **official** or the head of the executive agency to **fix** responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.

"(b) To have a **simplified** system for **administratively** dividing appropriations, the head of each executive agency (except the **Commission**) **shall** work toward the objective of financing each operating unit, at the highest **practical** level, from not more than one **administrative** division for each appropriation affecting the **unit**."

⁵⁴Prior to the 1982 recodification of Title 31, sections 1513(d) and 1514 had been combined as subsection (g) of the Antideficiency Act.

Section 1514 is designed to ensure that the agencies in each **branch** of the government keep their obligations and expenditures within the bounds of each apportionment or reapportionment. The **official** in each agency who has administrative control of the apportioned funds is required to set up, by regulation, a system of administrative controls to implement this objective. The system must be consistent with any accounting procedures prescribed by or pursuant to law, and must be designed to (1) prevent obligations and expenditures in excess of apportionments or reapportionments, **and** (2) **fix** responsibility for any obligation or expenditure in excess of an apportionment or reapportionment. Agency fund control regulations in the executive branch must be approved by **OMB**. See **OMB** Circular No. **A-34**, 8§31.3 and 31.5.

Subsection (b) of 31 U.S.C. § 1514 was added in 1956 (70 Stat. 783) and was intended to simplify agency allotment systems. Prior to 1956, it was not uncommon for agencies to divide and subdivide their apportionments into numerous “pockets” of obligational authority **called** “allowances.” Obligating or spending more than the amount of each allowance was a violation of the **Antideficiency** Act as it then existed. The Second Hoover Commission (Commission on Organization of the Executive Branch of the Government) had recommended simplification in 1955. The Senate and House Committees on Government Operations agreed. Both committees reported as **follows**:

“The making of numerous allotments which are further divided and **suballotted** to lower levels leads to much confusion and inflexibility in the financial control of appropriations or funds as well as numerous minor violations of [the **Antideficiency** Act].”

S. Rep. No. 2265, **84th Cong., 2d Sess.** 9 (1956), reprinted in 1956 U.S. Code **Cong. & Admin. News** 3794, 3802; **H.R. Rep. No. 2734, 84th Cong., 2d Sess.** 7 (1956). The result was what is now 31 U.S.C. § 1514(b).⁵⁵

As noted, one of the objectives of 31 U.S.C. § 1514 is to enable the agency head to **fix** responsibility for obligations or expenditures in excess of apportionments. The statute encourages agencies to **fix** responsibility at the highest practical level, but does not otherwise

⁵⁵The historical summary in this **paragraph** is taken largely from 37 *Comp. Gen.* 220 (1957).

prescribe precisely how this **is to** be done. Apart from subsection (b), the substance of section 1514 derives from a 1950 amendment to the **Antideficiency Act** (64 Stat. 765). In testimony on that legislation, the Director of the (then) Bureau of the Budget stated:

“At the present time, theoretically, I presume the agency head is about the only one that you could really hold responsible for exceeding [an] apportionment. The revised section provides for going down the line to the person who creates the obligation **against** the fund **and fixes** the responsibility on the bureau head or the division head, if he is the one who creates the **obligation.**”⁵⁶

Thus, depending on the agency regulations and the level at which administrative responsibility is freed, the violating individual could be the person in charge of a major agency bureau or operating unit, or it could be a contracting officer or finance officer.

Identifying the person responsible for a violation will be easy in probably the majority of cases. However, where there are many individuals involved in a complex transaction, and particularly where the actions producing the violation occurred over a long period of time, the pinpointing of responsibility can be much more **difficult**. Hopkins and **Nutt**, in their study of the **Antideficiency Act**, present the following as a sensible approach:

“Generally, [the individual to be held responsible] will be the highest ranking **official** in the decision-making process who **had** knowledge, either actual or **constructive**, of (1) precisely what actions were taken and (2) the impropriety or at least **questionableness** of such actions. There **will** be officials who had knowledge of either factor. But the person in the best and perhaps only position to **prevent** the **ultimate** error-and thus the one who must be held accountable-is the highest one who **is aware of both.**”⁵⁷

Thus, Hopkins and **Nutt** conclude, where multiple individuals are involved in a violation, the individual to be held responsible “**must not** be too remote from the cause of the **violation** and must be in a position to have prevented the violation from **occurring.**”⁵⁸

⁵⁶Hearings Before Senate Comm. on Appropriations on H.R. 7786, 81st Cong., 2d Sess. 10 (1950), quoted in Hopkins & Nutt, *The Anti-Deficiency Act* (Revised Statutes 3679) and *Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51,128 (1978).

⁵⁷Memorandum for the Assistant Secretary Of the Army (Financial Management), 1976, quoted in Hopkins & Nutt, *supra* note 56, at 130.

⁵⁸*Id.*

h. Expenditures in Excess of Apportionment

The former subsection (h) of the **Antideficiency Act**, now 31 U.S.C. §1517(a), provides:

“(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding-

“(1) an apportionment; or

“(2) the amount permitted by regulations prescribed under section 1514(a) of this title.”

Section 1517(a) must be read in conjunction with sections 1341, 1512, and 1514, previously discussed.

Subsection (a)(1) is self-explanatory-it prohibits obligations or expenditures in excess of an apportionment. Thus, an **agency** must observe the limits of its apportionments just as it must observe the limits of **its** appropriations.

There is, however, one difference. It has been held that, under some circumstances, an agency may have a legal duty to seek an additional apportionment from **OMB. Berends v. Butz**, 357 F. Supp. 143, 155-56 (D. Minn. 1973); **Blackhawk Heating & Plumbing Co. v. United States**, 622 F.2d 539,552 n.9 (Ct. Cl. 1980). In **Berends v. Butz**, the Secretary of Agriculture had terminated an emergency **farm** loan program, allegedly due to a shortage of funds. The court found the termination improper and directed reinstatement of the program. Since the shortage of funds related to the amount apportioned and not the amount available under the appropriation, the court found that the Secretary had a duty to request an additional apportionment in order to continue implementing the program. The case does not address the nature and extent of any duty **OMB might** have in response to such a request.

Subsection (a)(2) makes it a violation to obligate or expend in excess of an administrative subdivision of an apportionment to the extent provided in the agency’s fund control regulations. The import of 31 U.S.C. § 1514 becomes much clearer when it is read in conjunction with 31 U.S.C. §1517(a)(2). The statute does not prescribe the level of **fiscal** responsibility for violations below the apportionment level. It merely recommends that the agency set the level at the highest practical point and suggests no more than one subdivision below the

apportionment level. The agency thus, under the statute, has a measure of discretion. If it chooses to elevate **overobligations** or **overexpenditures** of lower-tier subdivisions to the level of **Antideficiency** Act violations, it is free **to** do so in its fund control regulations.

At this point, it is important to return to **OMB** Circular No. **A-34**. Since agency fund control regulations must be approved by **OMB**, **OMB** has a role in determining what levels of **administrative** subdivision should constitute **Antideficiency** Act violations. Under **A-34**, **overobligation** or **overexpenditure** of an allotment or **suballotment** are **always** violations. **Overobligation** or **overexpenditure** of other administrative subdivisions are violations only if and **to** the extent specified in the agency's fund control regulations. **OMB** Circular **No. A-34, §§ 21.1 and 32.2**.

In 37 **Comp. Gen.** 220 (1957), GAO considered proposed fund control regulations of the Public Housing Administration. The regulations provided for allotments as the **first** subdivision below the apportionment level. They then authorized the further subdivision of allotments into "allowances," but retained **responsibility** at the allotment level. The "allowances" were intended as a means of meeting operational needs rather than an apportionment control device. GAO advised that this proposed structure conformed **to** the purposes of 31 U.S.C. §1514, particularly in light of the 1956 addition of section **1514(b)**, and that expenditures in excess of an "allowance" would not constitute **Antideficiency** Act violations.

For further illustration, see 35 **Comp. Gen.** 356 (1955) (**overobligation** of allotment stemming from misinterpretation of regulations); **B-95136**, August 8, 1979 (**overobligation** of regional allotments would constitute reportable violation **unless** sufficient unobligated balance existed at central account level to **adjust** the allotments); **B-179849**, December 31, 1974 (**overobligation** of allotment held a violation of section **1517(a)** where agency regulations specified that allotment process was the "principal means whereby responsibility is **fixed** for the conduct of program activities within the funds available"); **B-1** 14841 .2-0. M., January 23, 1986 (no violation in exceeding **allotment** subdivisions termed "work plans").

5. Penalties and Reporting Requirements

a. Administrative and Penal Sanctions

Violations of the **Antideficiency Act** are subject to sanctions of two types, administrative and penal. The **Antideficiency Act** is the only one of the Title 31 funding statutes to prescribe penalties of both types, a fact which says something about congressional perception of the Act's importance.

An officer or **employee** who violates 31 U.S.C. § 1341(a) (obligate/expense in excess or advance of appropriation), § 1342 (voluntary services prohibition), or § 1517(a) (obligate/expense in excess of an apportionment or administrative subdivision as specified by regulation) “shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.” 31 U.S.C. §§ 1349(a), 1518. For a case in which an **official** was reduced in grade and reassigned to other duties, see Duggar v. Thomas, 550 F. Supp. 498 (D.D.C. 1982) (upholding the agency's action against a charge of discrimination).

In addition, an officer or employee who “knowingly and willfully” violates any of the three provisions cited above “shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.” 31 U.S.C. §§ 1350, 1519. As far as the editors are aware, it appears that no officer or employee has ever been prosecuted, much less convicted, for a violation of the **Antideficiency Act** as of this writing. The knowing and willful failure to record an **overobligation** in order to conceal an **Antideficiency Act** violation is also a criminal offense. See 71 **Comp. Gem** — (B-245856.7, August 11, 1992).

Earlier in this chapter, we pointed out that factors such as the absence of bad faith or the lack of intent to commit a violation are irrelevant for purposes of determining whether a violation has occurred. However, intent is relevant in evaluating the assessment of penalties. Note that the **criminal** penalties are linked to a determination that the law was “knowingly and willfully” violated, but the administrative sanction provisions do not contain similar language. Thus, intent or state of mind may (and probably should) be taken into consideration when evaluating potential administrative sanctions (whether to assess them and, if so, what type), but must be taken into consideration in determining applicability of the criminal sanctions. Understandably,

the provisions for fines and/or jail are intended to be reserved for particularly flagrant violations.

Finally, it should be emphasized that the administrative and penal sanctions apply only to violations of the three provisions cited—31 U.S.C. §§ 1341(a), 1342, and 1517(a). They do not, for example, apply to violations of 31 U.S.C. § 1512.36 **Comp. Gen.** 699 (1957).

i. Reporting Requirements

Once it is determined that there has been a violation of 31 U.S.C. § 1341(a), 1342, or 1517(a), the agency head “shall report immediately to the President and Congress all relevant facts and a statement of actions taken.” 31 U.S.C. § 1351, 1517(b). The report to the President is to be forwarded through the Director of OMB. Further instructions on preparing the reports maybe found in OMB Circular No. A-34, §§ 32.2-32.4. The reports are to be signed by the agency head. *Id.* § 32.7.

As noted, the report is to include all pertinent facts and a statement of all actions taken (any administrative discipline imposed, referral to the Justice Department where appropriate, new safeguards imposed, etc.), presumably including a request for additional appropriations where necessary. It is also understood that the agency will do everything it can lawfully do to mitigate the financial effects of the violation. *E.g.*, 55 **Comp. Gen.** 768, 772 (1976); B-114841.2-O. M., January 23, 1986. In view of the explicit provisions of 31 U.S.C. § 1351, it has been held that there is no private right of action for declaratory, mandatory, or injunctive relief under the Antideficiency Act. *Thurston v. United States*, 696 F. Supp. 680 (D.D.C. 1988).

Factors such as mistake, inadvertence, lack of intent, or the minor nature of a violation do not affect the duty to report. Of course, if the agency feels there are extenuating circumstances, it is entirely appropriate to include them in the report. 35 **Comp. Gen.** 356 (1955).

What if GAO uncovers a violation in the course of its audit activities but the agency thinks GAO is wrong? The agency should still make the required reports, and should include an explanation of the disagreement. OMB Circular No. A-34, § 32.5. See also GAO report entitled *Anti-Deficiency Act: Agriculture’s Food and Nutrition Service Violates the Anti-Deficiency Act*, GAO/AFMD-87-20 (March 1987).

6. Funding Gaps

The term “funding gap” refers to a period of time between the expiration or exhaustion of an appropriation and the enactment of a new one. A funding gap is one of the most difficult **fiscal** problems a federal agency may have to face. As our discussion here will demonstrate, the case law reflects an attempt **to** forge a workable solution to a bad situation.

Funding gaps occur most commonly at the end of a fiscal year when new appropriations, or a continuing resolution, have not yet been enacted. In this context, a gap may affect only a few agencies (if, for example, only one appropriation act remains **unenacted** as of October 1), or the entire federal government. A funding gap may also occur if a particular appropriation becomes exhausted before the end of the **fiscal** year, in which event it may affect only a single agency or a single program, depending on the scope of the appropriation.

Funding gaps occur for a variety of reasons. For one thing, the complexity of the budget and appropriations process makes it difficult at best for Congress to get everything done on time. Add to this the enormity of some programs and the need to address budget deficits and the scope of the problem becomes more apparent. Also, to some extent, funding gaps are perhaps an inevitable reflection of the political process.

As GAO has pointed out, funding gaps, actual or threatened, are both disruptive and **costly**.⁵⁹ They also produce extremely difficult legal problems under the **Antideficiency** Act. The basic question, easy to state but not quite as easy to try to answer, is what is an agency permitted or required to do when faced with a funding gap? Can it continue with “business as usual,” or must it lock up and go home, or is there some acceptable middle ground?

In 1980, a congressional subcommittee asked whether agency heads could legally permit employees to come to work when the applicable appropriation for salaries had expired and Congress had not yet enacted either a regular appropriation or a continuing resolution for the next fiscal year. The Comptroller General replied that 31 U.S.C. §§ 1341(a) and 1342 were both violated if employees reported for work under those circumstances. The salaries of federal employees

⁵⁹GAO, Funding Gaps Jeopardize Federal Government Operations, PAD-81-31 (March 3, 1981); Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76 (June 1991).

are generally **fixed** by law. Thus, permitting the employees to come to work would result in an obligation to pay salary for the time worked, **an** obligation in advance of appropriations in violation of section **1341(a)**. With respect to section 1342, no one was suggesting that the employees were offering to work gratuitously, even **assuming** they could lawfully do so, which for the most part they cannot. The fact that employees were willing **to** take the risk that the necessary appropriation would eventually be enacted did not avoid the violation. Clearly, the employees still expected to be paid eventually. **B-197841**, March 3, 1980. “During a period of expired appropriations,” the Comptroller General stated, “the only way the head of an agency can avoid violating the **Antideficiency** Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted.” *Id.* at 3.

However, GAO, like **all** other agencies, had been groping for a better solution. Whatever might be the cause of a particular funding gap, it seemed clear that it was not the intent of Congress that the federal government simply shut down. At the beginning of **FY 1980**, GAO prepared an internal memorandum to address its own operations. The memorandum said, in effect, that employees could continue to come to work, but that operations would have to be severely restricted. No new obligations could be incurred for contracts or small purchases of any kind, and of course the employees could not **actually** be paid until appropriations were enacted. The memorandum was printed in the Congressional Record, and at least one Senator viewed the approach as “**commonsense guidelines**.”⁶⁰ The memorandum was noted in **B-197841**, discussed above, but it was conceded that those guidelines, however sensible they might appear, would nevertheless “legally produce widespread violations of the **Antideficiency** Act.” *Id.* at 4.

Less than two months after **B-197841** was issued, the Attorney General issued a formal opinion to the President. The Attorney General essentially agreed with GAO’s analysis that permitting employees to work during a funding gap would violate the **Antideficiency** Act, but concluded further that the approach outlined in the GAO internal memorandum went beyond what the Act permitted. 43 Op. Att’y Gen. ____ (No. 24), 4A Op. Off. Legal Counsel 16 (1980). The opinion stated:

⁶⁰125 Cong. Rec. 26974 (October 1, 1979).

“[T]here is nothing in the language of the **Antideficiency** Act in its long history from which any exception to its terms during a period of lapsed **appropriations** may be inferred. . . .

....

“[F]irst of all. . . on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.

“Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the **Antideficiency** Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. . . . [Authority may be inferred from the **Antideficiency** Act itself for federal **officers** to incur those minimal obligations **necessary** to closing their agencies.” 4A Op. Off. Legal Counsel at 19,20.

This opinion seemed to say that agencies had little choice but to lock up and go home. A second formal opinion, 43 Op. **Att’y Gen.** __, 5 Op. Off. Legal Counsel 1 (1981), went into much more detail on possible exceptions and should be read in conjunction with the 1980 opinion.

As set forth in the 1981 Attorney General opinion, the exceptions fall into two broad categories. The first category is obligations “authorized by law.” Within this **category**, there are four types of exceptions:

- (1) Activities under funds which do not expire at the end of the fiscal year, i.e., multiple-year and no-year **appropriations**.⁶¹
- (2) Activities authorized by statutes which expressly permit obligations in advance of appropriations.
- (3) Activities “authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.” To take the example given in the opinion, there will be cases where benefit payments under an

⁶¹This would also include certain **revolving fund** operations, but not those whose use requires affirmative authorization in annual appropriation acts. B-241730.2, **February 14**, 1991 (Government **Printing** Office revolving fund).

entitlement program are funded from other than one-year appropriations, e.g., a trust fund, but the salaries of personnel who administer the program are funded by one-year money. As long as money for the benefit payments remains available, administration of the program is, by necessary implication, “authorized by law,” unless the entitlement legislation or its legislative history provides otherwise or Congress takes **affirmative** measures to suspend or terminate the program.

(4) Obligations “necessarily incident to presidential initiatives undertaken within his constitutional powers.” Example: the power to grant pardons and **reprieves**.⁶²

The second broad category reflects the exceptions authorized under 31 U.S.C. § 1342—**emergencies** involving the safety of human life or the protection of **property**. The Attorney General suggested the following rules for interpreting the scope of this exception:

“First, there must be some reasonable and **articulable connection** between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property **would** be compromised, in some degree, by delay in the performance of the function in question.”

5 Op. Off. Legal Counsel at 8. The Attorney General then cited the identical exception language in the deficiency apportionment prohibition of 31 U.S.C. § 1515, and noted that **OMB** followed a similar approach **in** granting deficiency apportionments over the years. Given the wide variations in agency activities, it would not be feasible to attempt an advance listing **of** functions or activities that might qualify under this exception. Accordingly, the Attorney General made the following recommendation:

“To erect the most solid foundation for the Executive Branch’s practice in this regard, I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the **Office** of Management and Budget some written description, that **could** be transmitted to Congress, of what the head of the agency, assisted by its general counsel, considers to be the agency’s emergency functions.”

⁶²The same rationale would apply to the legislative branch. B-241911, October 23, 1990 (non-decision letter).

5 Op. Off, Legal Counsel at 11. Lest this approach be taken too far, Congress added the following sentence to 31 U.S.C. § 1342:

“As used in this section, the term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.”

Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §13213(b), 104 Stat. 1388, 1388-621 (1990). The conference report on the 1990 legislation explains the intent:

“The conference report also makes conforming changes to title 31 of the United States Code to make clear that. . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and **affirm** that the constitutional power of the purse resides with Congress.”

H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990).

The Ninth Circuit Court of Appeals added to the list of exceptions, holding the suspension of the civil jury **trial** system for lack of funds unconstitutional. Arrester v. United States District Court, 792 F.2d 1423 (9th Cir. 1986). Faced With the potential exhaustion of appropriations for juror fees, the Administrative **Office** of the United States Courts, at the direction of the Judicial Conference of the United States, had sent a memorandum to all district court judges advising that civil jury trials would have to **be** suspended until more money was available. Basing its holding on the Constitution and expressly declining to rule on the **Antideficiency** Act, the court held that a suspension for more than a “most minimal” time violated the seventh amendment. *Id.* at 1430. See also Hobson v. Brennan, 637 F. **Supp.** 173 (D.D.C. 1986).

Since the appropriation was not yet actually exhausted, and since there **was** still ample time for Congress to provide additional funds, the court noted that **its** decision did not amount to ordering Congress to appropriate money. The court noted, but did not address, the far more difficult question of what would happen if the appropriation became exhausted and Congress refused to appropriate additional funds. *Id.* at 1430–31 and 1431 **n.14**.

This, then, is the basic framework. There are a number of exceptions to the **Antideficiency Act** which would permit certain activities to continue during a funding gap. For activities not covered by any of the exceptions, however, the agency must proceed with prompt and orderly termination or violate the Act and risk invocation of the criminal sanctions. A very brief restatement may be found in 6 Op. Off. Legal Counsel 555 (1982).

Within this framework, GAO and the Justice Department have addressed a number of specific problems agencies have encountered in coming to grips with funding gaps. For example, towards the end of FY 1982, the President vetoed a supplemental appropriations bill. As a result, the Defense Department did not have sufficient funds to meet the military payroll. The total payroll obligation consisted of (1) the take-home pay of the individuals, and (2) various items the employing agency was required to withhold and transfer to someone else, such as federal income tax and Social Security contributions. The Treasury Department published a change to its regulations permitting a temporary deferral of the due date for payment of the withheld items, and the Defense Department, relying on the "safety of human life or protection of property" exception, used the funds it had available to pay military personnel their full take-home pay. The Attorney General upheld the legality of this action. 43 Op. Att'y Gen. ____, 6 Op. Off. Legal Counsel 27 (1982). The Comptroller General agreed, but questioned the blanket assumption that all military personnel fit within the exception. B-208985, October 5, 1982; B-208951, October 5, 1982. The extent to which this device might be available to civilian agencies would depend on (1) Treasury's willingness to grant a similar deferral, and (2) the extent to which the agency could legitimately invoke the emergency exception.

Additional cases dealing with funding gap problems are:

- Salaries of commissioners of Copyright Royalty Tribunal attach by virtue of their status as officers without regard to availability of funds. Salary obligation is therefore viewed as "authorized by law" for purposes of **Antideficiency Act**, and commissioners could be retroactively compensated for periods worked without pay during a funding gap. 61 Comp. Gen. 586 (1982).
- Richmond district office of Internal Revenue Service shut down for half a day in October 1986 due to a funding gap. Subsequent legislation authorized retroactive compensation of employees

- affected. GAO concluded that the **legislation** applied to intermittent as well as regular full-time employees, and held that the intermittent employees could be compensated in the form of administrative leave for time lost during the half-day furlough. **B-233656**, June 19, 1989.
- Witness who had been ordered to appear in federal court was stranded without money to return home when court did not convene due to funding gap. Cash disbursement to permit witness to return home or secure overnight lodging was held permissible since hardship circumstances indicated reasonable likelihood that safety of witness would be jeopardized. 5 Op. Off. **Legal** Counsel 429 (1981).

There are also a few cases addressing actions an agency has taken to forestall the effects of a funding gap. In 62 **Comp. Gen.** 1 (1982), the Merit Systems Protection Board, faced with a substantial cut in its appropriation, placed most of its employees on half-time, half-pay status in an attempt to stretch its appropriation through the end of the **fiscal** year. A subsequent supplemental appropriation provided the **necessary** operating funds. GAO advised that it was within the Board's discretion, assuming the availability of **sufficient** funds, to grant retroactive administrative leave to the employees who had been affected by the partial shutdown.

GAO reviewed another furlough plan in 64 **Comp. Gen.** 728 (1985). The Interstate Commerce Commission had determined that if it continued its normal rate of operations, it would exhaust its appropriation six weeks before the end of the fiscal year. To prevent this from happening, it furloughed **its** employees for one day per week. GAO found that the ICC's actions were in compliance with the **Antideficiency** Act. While the ICC was thus able to continue essential services, the price was financial hardship for its employees, plus "serious backlogs, missed deadlines and reduced efficiency." **Id.** at 732.

GAO has issued several reports on funding gaps. The **first** was **Funding Gaps Jeopardize Federal Government Operations, PAD-81-31** (March 3, 1981). In that report, GAO noted the costly and disruptive effects of funding gaps, and recommended the enactment of permanent legislation to permit federal agencies to incur obligations, but not disburse funds, during a funding gap. In the second report, **Continuing Resolutions and an Assessment of Automatic Funding Approaches, GAO/AFMD-86-16** (January 1986), GAO compared several possible options but this time made no specific recommendation. **OMB**

had pointed out, and GAO agreed, that automatic funding legislation could have the undesirable effects of (1) reducing pressure on Congress to make timely funding decisions, and (2) permitting major portions of the government to operate for extended periods without action by either House of Congress or the President. The ideal solution, both agencies agreed, is the timely enactment of the regular appropriation bills.

GAO continues to support the concept of an automatic continuing resolution in a form that does not reduce the incentive to complete action on the regular appropriation bills. Managing the Cost of Government: Proposals for Reforming Federal Budgeting Practices, GAO/AFMD-90-1 (October 1989) at 28-29. A 1991 report analyzed the impact of a funding gap which occurred over the 1990 Columbus Day weekend and again renewed the recommendation for permanent legislation to, at a minimum, allow agencies to incur obligations to compensate employees during temporary funding gaps but not pay them until enactment of the appropriation. Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76 (June 1991). The report stated:

“In our opinion, shutting down the government during temporary funding gaps is an inappropriate way to encourage compromise on the budget. Beyond being counterproductive from a financial standpoint, a shutdown disrupts government services. In addition, forcing agency managers to choose who will and will not be furloughed during these temporary funding lapses severely tests agency management’s ability to treat its employees fairly.” Id. at 9.

D. Supplemental and Deficiency Appropriations

A supplemental appropriation may be defined as “an act appropriating funds in addition to those in an annual appropriation act.”⁶³ The purpose of a supplemental appropriation is to fund projects and activities not included in the budget request for the current annual appropriation and which cannot be postponed until the next regular appropriation. Factors generating the need for supplemental appropriations include the following:

- Enactment of legislation adding new or increased functions
- Unanticipated surge in workload
- Inflation higher than that projected for the fiscal year
- Emergency situations involving unforeseen expenditures

⁶³GAO, A Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 79.

- Pay increases not previously budgeted
- Items not included in regular appropriation for lack of timely authorization
- Poor program planning

There is a technical distinction between supplemental appropriations and deficiency **appropriations**.⁶⁴ However, Congress stopped enacting separate “deficiency appropriation **acts**” in the **1960s** and now, supplemental appropriations and deficiency appropriations are combined in “supplemental appropriation acts.” The rules governing the availability of supplemental and deficiency appropriations are essentially the same. Thus, the term “supplemental appropriation” for purposes of the following discussion should be construed as including both types.

A supplemental appropriation “supplements the original appropriation, partakes of its nature, and is subject to the same limitations as to the expenses for which it can be used as attach by law to the original appropriation” unless otherwise provided. 4 **Comp. Dec.** 61 (1897). See also 27 **Comp. Gen.** 96 (1947); 25 **Comp. Gen.** 601 (1946); 20 **Comp. Gen.** 769 (1941). This means that a supplemental appropriation is subject to the purpose and time limitations, plus any other applicable restrictions, of the appropriation being supplemented.

Thus, **an** appropriation made to supplement the regular annual appropriation of a given fiscal year is available beyond the expiration of that fiscal year only to liquidate obligations incurred within the fiscal year. The unobligated balance of a supplemental appropriation will expire at the end of the fiscal year in the same manner as the regular annual appropriation. See 27 **Comp. Gen.** 96 (1947); 4 **Comp. Dec.** 61 (1897); 3 **Comp. Dec.** 72 (1896). Of course, a supplemental appropriation, just like any other appropriation, can be made available until expended (no-year). **E.g.**, 36 **Comp. Gen.** 526 (1957); **B-72020**, January 9, 1948.

⁶⁴A deficiency appropriation is an appropriation made to pay obligations legally created but ‘or which sufficient funds are not available in the appropriation originally made for that purpose. 27 **Comp. Gen.** 96 (1947); 25 **Comp. Gen.** 601,604 (1946); 4 **Comp. Dec.** 61,62 (1897). The need for deficiency appropriations often results from violations of the **Antideficiency Act**, and they can be made in the same fiscal year as the **overobligated** appropriation or in a later year. **Since they serve** essentially the same purpose as supplemental appropriations, the distinction had become recognized by the late 1950s as a “**distinction without a difference**.” See 103 **Cong. Rec.** 6420 (1957).

Unless otherwise provided, a restriction contained in an annual appropriation act **will** apply to funds provided in a supplemental appropriation act even though the restriction is not repeated in the supplemental. For example, a restriction in a foreign assistance appropriation act prohibiting the use of funds for assistance to certain countries would apply equally to funds provided in a supplemental appropriation for the same fiscal year. **B-158575**, February 24, 1966. Similarly, a provision in an annual appropriation act that “**no** part of **any** appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses” of certain **officials** who were not **qualified** engineers would apply as well to funds appropriated in supplemental appropriation acts for the same fiscal year. **B-86056**, May 11, 1949. The rule applies to supplemental authorizations as well as supplemental appropriations. **B-106323**, November 27, 1951. If a supplemental appropriation act includes a new appropriation which is separate and distinct from the appropriations being supplemented, restrictions contained in the original appropriation act will not apply to the new appropriation unless **specifically** provided. **Id.** The fiscal year limitations of the original appropriation, however, would still apply.

The rule that supplemental appropriations are subject to restrictions contained in the regular appropriation act being supplemented applies equally to specific dollar limitations. Thus, if a regular annual appropriation act **specifies** a maximum limitation for a particular object, either by using the words “not to exceed” or otherwise, a more general supplemental appropriation for the same **fiscal** year does not authorize an increase in that limitation. 19 **Comp. Gen.** 324 (1939); 4 **Comp. Gen.** 642 (1925); **B-71583**, February 20, 1948; **B-66030**, May 9, 1947. Naturally, this principle will not apply if the supplemental appropriation specifically provides for the object in question. 19 **Comp. Gen.** 832 (1940).

Restrictions appearing in a supplemental appropriation act may not reach back and apply to balances remaining in the original annual appropriation, depending on the precise statutory language used. Thus, without more, a restriction in a supplemental applicable by its terms to “this appropriation” would apply only to the supplemental funds. **B-31546**, January 12, 1943. See also 31 **Comp. Gen.** 543 (1952).

At onetime, supplemental appropriation acts specified that the funds were for the same objects and subject to the same limitations as the appropriations being supplemented. The (then) Bureau of the Budget wanted to delete this language pursuant **to** its mandate **to eliminate** unnecessary words in **appropriations**.⁶⁵ The Comptroller General agreed that the appropriation language was unnecessary, pointing out that these conditions would apply even without being explicitly stated in the supplemental appropriation acts themselves. **B-13900**, December 17, 1940.

In addition to supplementing prior appropriations, a supplemented appropriation act may make entirely new appropriations which are separate and distinct from those made by **an** earlier appropriation act. Where a supplemental appropriation act contains new legislation, whether permanent or temporary, the new legislation will take effect on the date the supplemental is enacted absent a clear intent to make it retroactive. 20 **Comp. Gen.** 769 (1941). In the cited decision, an appropriation **included** in a supplemental appropriation act enacted late in **fiscal** year 1941 which for the **first** time permitted payment of transportation expenses of certain military dependents was held effective on the date of enactment of the supplemental act and not on the first day of **FY** 1941.

A supplemental appropriation may also provide for a new object within a lump-sum appropriation. If the original appropriation was not available for that object, then the supplemental amounts to a new appropriation. For example, a **FY** 1957 supplemental appropriation for the Maritime Administration provided \$18 million for a nuclear-powered merchant ship under the heading “ship construction.” Funds for the nuclear-powered ship had been sought under the regular “ship construction” lump-sum appropriation for **FY** 1957, but had been denied. Under the circumstances, the Comptroller **General** found that the supplemental appropriation amounted **to** a specifically earmarked maximum for the vessel, and that the agency **could** not exceed the \$18 million by using funds from the regular appropriation. 36 **Comp. Gen.** 526 (1957).

⁶⁵Prior to the 1982 recodification of Title 31, the mandate was found in 31 U.S.C. § 623. The recodifiers thought those words themselves were unnecessary, and the concept is now included in the general mandate in 31 U.S.C. § 1104(a) to “use uniform terms” in requesting appropriations.

E. Augmentation of Appropriations

1. The Augmentation Concept

As a general proposition, an agency may not augment its appropriations from outside sources without specific **statutory** authority. The prohibition against augmentation is a corollary of the separation of powers doctrine. When Congress makes an appropriation, it is also establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the **level** that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without **specific** congressional sanction would amount **to** a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is **to** prevent a government agency from undercutting the congressional power of the purse by circuitously **exceeding** the amount Congress has appropriated for that activity.

There is no statute which, in those precise terms, prohibits the augmentation of appropriated funds. The concept does nevertheless have an adequate statutory basis, although it must be derived from several separate enactments. **Specifically:**

- 31 U.S.C. § 3302(b), the “miscellaneous receipts” statute.
- 31 U.S.C. § 1301(a), restricting the use of appropriated funds to their intended purposes. Early decisions often based the augmentation prohibition on the combined effect of 31 U.S.C. §§ 3302(b) and 1301(a). See, *e.g.*, 17 *Comp. Dec.* 712 (1911); 9 *Comp. Dec.* 174 (1902).
- 18 U.S.C. § 209, which prohibits the payment of, contribution to, or supplementation of the salary of a government officer or **employee** as compensation for his or her **official** duties from any source other than **the government** of the United States.

The augmentation concept manifests itself in a wide variety of contexts. One application is the prohibition against transfers between appropriations without **specific** statutory authority. An unauthorized transfer is an improper augmentation of the receiving appropriation. *E.g.*, 23 *Comp. Gen.* 694 (1944); **B-206668**, March 15, 1982. In **B-206668**, for example, a department received a General Administration appropriation plus separate appropriations for the

administration of **its** component bureaus. The unauthorized transfer of **funds** from the bureau appropriations to the General Administration appropriation was held to be an improper augmentation of the latter appropriation. As with the transfer prohibition itself, however, the augmentation rule has no application at the agency allotment level within the same appropriation account. 70 **Comp. Gen.** 601 (1991).

It should also be apparent that the augmentation rule is related to the concept of purpose availability. For example, a very early case pointed out that charging a general appropriation when a **specific** appropriation is exhausted not only violates 31 **U.S.C. § 1301(a)** by using the general appropriation for an unauthorized purpose, but also improperly augments the **specific** appropriation. [1] Bowler, First **Comp. Dec.** 257,258 (1894). However, it is most closely related to the subject of this chapter-availability as to amount-because it has the effect of restricting executive spending to the amounts appropriated by Congress. In this respect, it is a logical, perhaps indispensable, complement to the **Antideficiency** Act.

For the most part, although the cases are not entirely consistent, GAO has distinguished between receipts of money and receipts of services, dealing with the former under the augmentation rule and the latter under the voluntary services prohibition (31 **U.S.C. § 1342**). For example, in **B-13378**, November 20, 1940, a private organization was willing to donate either funds or services. Since the agency lacked statutory authority to accept gifts, acceptance of a cash donation would improperly augment its appropriations. Acceptance of services was distinguished, however, and addressed under 31 **U.S.C. § 1342**. GAO drew the same distinction in **B-125406**, November 4, 1955. More recently, acceptance by the Federal Communications Commission of free space at industry trade shows was found not to constitute an augmentation of the Commission's appropriation because there had been no donation of funds. 63 **Comp. Gen.** 459 (1984).

In apparent conflict with these cases, however, is **B-21 1079.2**, January 2, 1987, which stated that, without statutory authority, an agency would improperly augment its appropriations by accepting the uncompensated services of "workfare" participants to do work which would normally be done by the agency with **its** own personnel and funds. Logic would seem to support the formulation in **B-21 1079.2**. Certainly, if I wash your car without charge or if I give you money to

have it washed, the result is the same—the car gets washed and your own money is free to be used for something else. Be that as it may, the **majority** of the cases support limiting the augmentation rule to the receipt of money. In the final analysis, the distinction probably makes little practical difference. **In** view of 31 U.S.C. §1342, limiting the augmentation rule **to** the receipt of funds does not mean that the rule can be negated by the unrestricted acceptance of **services**.

In a 1991 case, 70 **Comp. Gen.** 597, GAO concluded that the Interstate Commerce Commission **would** not improperly augment its appropriations by permitting private carriers **to install** computer equipment at the ICC headquarters, to facilitate access to electronically **filed** rate tariffs. Installation was viewed as a reasonable exercise of the ICC’s statutory authority to prescribe the form and manner of tariff **filing** by those over whom the agency has regulatory authority. Somewhat similar in concept to the **workfare** case, however, the decision suggests that use of the equipment for other purposes, such as word processing by ICC staff, would be an improper augmentation, **and** advised the ICC to establish controls to prevent this.

2. Disposition of Moneys Received: Repayments and Miscellaneous Receipts

a. General Principles

(1) The “miscellaneous receipts” statute

A very important statute in the overall scheme of government **fiscal** operations is 31 U.S.C. § 3302(b), known as the “miscellaneous receipts” statute. Originally enacted in 1849 (9 Stat. 398), 31 U.S.C. § 3302(b) provides:

“Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source **shall** deposit the money in the Treasury as soon as **practicable** without deduction for any charge or claim.”

Penalties for violating 31 U.S.C. § 3302(b) are found in 31 U.S.C. § 3302(d), and include the possibility of removal from office. In addition, if funds which should have been deposited in the Treasury but were not are lost or stolen, there is the risk of personal liability. **E.g.**, 20 Op. **Att’y Gen.** 24 (1891) (liability would attach where funds,

which disbursing agent had placed in bank which was not an authorized depository, were lost due to bank failure).

“It is **difficult** to see,” said an early decision, “how a legislative prohibition could be more clearly expressed.” 10 **Comp. Gen.** 382, 384 (1931). Simply stated, any money an agency receives from a source outside of the agency must be deposited into the Treasury. This means deposited into the general fund (“miscellaneous receipts”) of the Treasury, not into the agency’s own appropriations, even though the agency’s appropriations may be technically still “in the Treasury” until the agency actually spends **them**.⁶⁶ The Comptroller of the Treasury explained the distinction in the following terms:

“It [31 U.S.C. § 3302(b)] could hardly be made more comprehensive as to the moneys that are meant and these moneys are required to be paid ‘into the Treasury.’ This does not mean that the moneys are to be added to a fund that has been appropriated from the Treasury and may be in the Treasury or outside. [Emphasis in original.] It seems to me that it can only mean that they shall go into the general fund of the Treasury which is subject to any disposition which Congress might choose to make of it. This has been the holding of the accounting officers for many years. [Citations omitted.] If Congress intended that these moneys should be returned to the appropriation from which a similar amount had once been expended it could have been readily so stated, and it was not.”

22 **Comp. Dec.** 379,381 (1916). See also 5 **Comp. Gen.** 289 (1925).

The term “miscellaneous receipts” does not refer to any single account in the Treasury. Rather, it refers to a number of receipt accounts under the heading “General Fund.” These are **all** listed in the Treasury Department’s “Federal Account Symbols and Titles” publication.

⁶⁶As a general proposition, an agency’s appropriations do remain “in the Treasury” until needed for a valid purpose. Unless Congress expressly so provides, an agency may not have its appropriations paid over directly to it to be held pending disbursement. 21 **Comp. Gen.** 489 (1941).

In addition to 31 U.S.C. § 3302(b), several other statutes require that moneys received in various **specific** contexts be deposited as miscellaneous **receipts**.⁶⁷ Examples are:

- 7 U.S.C. §§ 2241, 2242, 2246, 2247 (proceeds from sale of various products by Secretary of Agriculture)
- 10 U.S.C. § 2667 (moneys received by the military departments from authorized leases)
- 16 U.S.C. § 499 (revenue from the national **forests**, such as timber sales, subject to the deductions specified in 16 U.S.C. §§ 500 and 501)
- 19 U.S.C. § 527 (customs fees, penalties, and forfeitures)
- 40 U.S.C. § 485(a) (proceeds from sale of surplus public property, except as provided in other subsections of section 485)⁶⁸

Although it is preferable, it is not necessary that the statute use the words “**miscellaneous receipts**” A statute requiring the deposit of funds “into the Treasury of the United States” will be construed as meaning the general fund of the Treasury. 27 **Comp. Dec.** 1003 (1921).

To understand the significance of 31 U.S.C. § 3302(b) and related statutes, it is **necessary** to recall the provision in Article I, section 9 of the Constitution directing that “No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.” Once money is deposited into a “miscellaneous receipts” account, it takes an appropriation to get it back out. **E.g.**, 3 **Comp. Gen.** 296 (1923); 2 **Comp. Gen.** 599,600 (1923); 13 **Comp. Dec.** 700,703 (1907). Thus, the effect of 31 U.S.C. § 3302(b) is to ensure that the executive branch remains dependent upon the congressional appropriation process. Viewed from this perspective, 31 U.S.C. § 3302(b) emerges as another

⁶⁷Several specific references to miscellaneous receipts in the pre-1982 version of Title 31 were deleted in the recodification because they were regarded as covered by the general prescription of the new section 3302. An example is the so-called User Charge Statute. The pre-recodification version, 31 U.S.C. § 483a, required fees to be deposited as miscellaneous receipts. The current version, 31 U.S.C. § 9701, omits the requirement because, as the Revision Note points out, it is covered by § 3302. Other examples are 31 U.S.C. §§ 485 and 487 (1976 ed.).

⁶⁸Section 485 stems from the Federal Property and Administrative Services Act of 1949. Prior to this law, proceeds from the sale of public property were required to be deposited as miscellaneous receipts under the more general authority of what is now 31 U.S.C. § 3302(b). See *Mammoth Oil Co. v. United States*, 275 U.S. 13,34 (1927); *Pan American Petroleum and Transport Co. v. United States*, 273 U.S. 456,502 (1927). (These are the notorious “Teapot Dome” cases.) Property sales not governed by 40 U.S.C. § 485, such as the situation in 28 **Comp. Gen.** 38 (1948), for example, would remain subject to 31 U.S.C. 53302.

element in the statutory pattern by which Congress retains control of the public purse under the separation of powers doctrine. See 51 **Comp. Gen.** 506,507 (1972); 11 **Comp. Gen.** 281,283 (1932); 10 **Comp. Gen.** 382,383 (1931) (the intent is that ‘all the public moneys shall go into the Treasury; appropriations then follow”).

Accordingly, for an agency to retain and credit to its own appropriation moneys which it should have deposited into the general fund of the Treasury is an improper augmentation of the agency’s appropriation. This applies even though the appropriation is a no-year appropriation. 46 **Comp. Gen.** 31 (1966). (No-year status relates to duration, not amount.)

Receipts in the form of “monetary credits” are treated for deposit and augmentation purposes the same as cash. 28 **Comp. Gen.** 38 (1948) (use by government of monetary credits received as payment for sale of excess electric power held unauthorized unless agency transfers corresponding amount from its appropriated funds to miscellaneous receipts). This will not apply, however, where it is clear that the appropriation or other legislation involved contemplates a different treatment. **B-125127**, February 14, 1956 (transfer to miscellaneous receipts not required where settlement of accounts was to be made on “net balance” basis). See also 62 **Comp. Gen.** 70, 74–75 (1982) (credit procedure which would differ from treatment of cash receipts recognized in legislative history).

(2) Exceptions

Exceptions to the “miscellaneous receipts” requirement fall into two broad categories, statutory and nonstatutory:

1. An agency may retain moneys it receives if it has statutory authority to do so. In other words, 31 U.S.C. § 3302(b) will not apply if there is specific statutory authority for the agency to retain the funds.
2. Receipts that qualify as “repayments” to an appropriation maybe retained to the credit of that appropriation and are not required to be deposited into the General Fund. 6 **Comp. Gen.** 337 (1926); 5 **Comp. Gen.** 734,736 (1926); **B-138942** -O. M., August 26, 1976.

These exceptions are embodied in Treasury Department-GAO Joint Regulation No. 1, § 2, reprinted at 30 **Comp. Gen.** 595 (1950), which

defines authorized repayments in terms of two general classes, reimbursements and refunds, as follows:

“a. Reimbursements to appropriations which represent amounts collected from outside sources for commodities or services furnished, or **to** be furnished, and which bylaw may be credited directly to **appropriations**.

“b. Refunds to appropriations which represent amounts collected from outside sources for payments made in error, overpayments, or **adjustments** for **previous** amounts **disbursed**, including returns of authorized advances.”

As used in the above definitions, the term “reimbursement” generally refers to situations in which retention by the agency is authorized by statute. The term “refund” embraces a category of mostly nonstatutory exceptions in which the receipt is directly related to, and is a direct reduction of, a previously recorded expenditure. Thus, the recovery of an erroneous payment or overpayment which **was** erroneous at the time it was made qualifies as a refund to the appropriation originally charged. **E.g., B-139348**, May 12, 1959 (utility overcharge refund); **B-138942-O.M.**, August 26, 1976 (collections resulting from disallowances by GAO under the “Fly America Act”). Also, the return of an authorized advance, such as a travel advance, is a “refund.”

At this point, an important distinction must be made. Moneys collected to reimburse the government for expenditures previously made are not automatically the same as “**adjustments** for previous amounts disbursed.” Reimbursements must generally, absent statutory authority to the contrary, be deposited as miscellaneous receipts. The mere fact that the reimbursement is related to the prior expenditure—although this is an indispensable element of an authorized “**refund**”—**is** not in itself sufficient to remove the transaction from the scope of 31 U.S.C. § 3302(b). See, for example, 16 **Comp. Gen.** 195 (1936); 24 **Comp. Dec.** 694 (1918); 22 **Comp. Dec.** 253 (1915); **B-45198**, October 27, 1944. The controlling principles were stated as follows in two early decisions:

“The question as to whether moneys **collected** to reimburse the Government for expenditures previously made should be used to reimburse the appropriations from which the expenditures were made or should **be** covered into the **general** fund of the Treasury has often been before the accounting officers of the Treasury and this office, and it has been uniformly held that in the absence of an express provision in the statute to the contrary, such funds should be covered in as **miscellaneous** receipts.” 5 **Comp. Gen.** 289,290 (1925),

“On the other hand, if the collection involves a refund or repayment of **moneys** paid from an appropriation in excess of what **was** actually due such refund **has** been held to be properly **for** credit to the appropriation originally charged. . . .” **5 Comp. Gen.** 734,736 (1926).

The key language in the above passage is “in excess of what was actually due.” Apart from the more obvious situations—refunds of overpayments, erroneous payments, unused portions of authorized advances—the type of situation contemplated by the “**adjustments** for previous amounts disbursed” portion of the **definition** is illustrated by **23 Comp. Gen.** 652 (1944). The Agriculture Department was authorized to enter into cooperative agreements with states for soil conservation projects. Some states were prohibited by state law from making advances and were limited to making reimbursements after the work was performed. In these cases, Agriculture initially put up the state’s share and was later reimbursed. The Comptroller General held that Agriculture could credit the reimbursements to the appropriation charged for the project. The distinction between this **type** of situation and the simpler “related to a previous expenditure” situation in which the money must go to miscellaneous receipts lies in the nature of the agency’s obligation. Here, Agriculture was not required to contribute the state’s share; it could simply have foregone the projects in those states which could not advance the funds. This is different from a situation in which the agency is required to make a given expenditure in any event, subject to later reimbursement. In **23 Comp. Gen.** 652, the agency made payments larger than it was required to make, knowing that the “excess” of what it paid over what it had to pay would (or at least was required to) be returned. See also **64 Comp. Gen.** 431 (1985); **61 Comp. Gen.** 537 (1982); **B-69813**, December 8, 1947; **B-220911.2-O. M.**, April 13, 1988.

For other examples of refunds as that term is used in the Joint Regulation, see **69 Comp. Gen.** 260 (1990) (recoveries under False Claims Act to the extent of reimbursing erroneous payments); **65 Comp. Gen.** 600 (1986) (rebates from Travel Management Center contractors); **62 Comp. Gen.** 70 (1982) (partial repayment of contribution to International Natural Rubber Organization occasioned by addition of new members); **B-139348**, May 12, 1959 (refund of overcharge by public utility); **B-209650-O. M.**, July 20, 1983 (same).

A repayment is credited to the appropriation initially charged with the related expenditure, whether current or expired. If the appropriation is still current, then the funds remain available for further obligation

within the time and purpose limits of the appropriation. However, if the appropriation has expired for obligational purposes (but has not yet been closed), the repayment must be credited to the expired account, not to current funds. See 23 **Comp. Gen.** 648 (1944); 6 **Comp. Gen.** 337 (1926); **B-138942-O**, M., August 26, 1976. If the repayment relates to an expired appropriation, crediting the repayment to current funds is an improper augmentation of the current appropriation unless authorized by statute. **B-114088**, April 29, 1953. These same principles apply to a refund in the form of a credit, such as a credit for utility overcharges. **B-139348**, May 12, 1959; **B-209650-O**, M., July 20, 1983.⁶⁹ Once an appropriation account has been closed in accordance with 31 U.S.C. §§ 1552(a) or 1555, repayments must be deposited as miscellaneous receipts regardless of how they would have been treated prior to closing. 31 U.S.C. § 1552(b), as amended by Pub. L. No. 101-510, § 1405 (1990).

Where funds are authorized to be credited to an appropriation, restrictions on the basic appropriation apply to the credits as well as to the amount originally appropriated. **A-95083**, June 18, 1938.

The fact that some particular reimbursement is authorized or even required by law is not, standing alone, sufficient to overcome 31 U.S.C. § 3302(b). *E.g.*, 67 **Comp. Gen.** 443 (1988); 22 **Comp. Dec.** 60 (1915); 1 **Comp. Dec.** 568 (1895). The accounting for that reimbursement—whether it maybe retained by the agency and, if so, how it is to be credited—will depend on the terms of the statute. Some statutes, for example, permit reimbursements to be credited to current appropriations regardless of which appropriation “earned” the reimbursement. As a general proposition, however, this practice, GAO has pointed out, diminishes congressional control. For further discussion of these concepts in the context of statutes applicable to the Defense Department, see GAO report entitled Reimbursements to Appropriations: Legislative Suggestions for Improved Congressional Control, **FGMSD-75-52** (November 1, 1976).

As might be expected, there have been a great many decisions involving the “miscellaneous receipts” requirement. It is virtually impossible to draw further generalizations from the decisions other

⁶⁹It should not be automatically assumed that every form of “credit” accruing to the government under a contract will qualify as a “refund” to the appropriation. See, *e.g.*, **A-51604**, May 31, 1977.

than **to** restate the basic rule: Art agency must deposit into the General Fund of the Treasury any funds it receives from sources outside of the agency unless the receipt constitutes **an** authorized repayment or **unless** the agency **has** statutory authority to retain the funds for credit to its own appropriations.

(3) Timing of deposits

As to the timing of the deposit in the Treasury, 31 U.S.C. § 3302(b) says merely “as soon as practicable.” There is another statute, however, now found at 31 U.S.C. § 3302(c), which provides in relevant part:

“(1) A person having custody or possession of public money, including a disbursing **official** having public money not for current expenditure, shall deposit **the money** without delay in the Treasury or with a depository designated by the **Secretary** of the Treasury under law. Except as provided in paragraph (2), money required to be **deposited** pursuant to this subsection shall be deposited not later than the third day after the custodian receives the money. . . .

“(2) The Secretary of the Treasury may by regulation prescribe that a person having custody or possession of money required **by** this subsection to be deposited shall deposit such **money** during a period of time that is greater or lesser than the period of time **specified** by the second sentence of paragraph (1).”

This statute, formerly designated as Revised Statutes § 3621, originated in 1857 (11 Stat. 249). It was amended in 1896 (29 Stat. 179) to specify a deadline of 30 days. The time limit was reduced to three days by section 2652(b)(1) of the Deficit Reduction Act of 1984 (98 Stat. 494, 1152).

Treasury Department regulations provide:

“An agency will achieve same day deposit of monies. Where same day deposit is not cost-effective or is impracticable, next day deposit of monies must be achieved.”

31 C.F.R. § 206.5(a)(1) (1991). However, receipts of less than \$1,000 may be accumulated and deposited when the total reaches \$1,000. *Id.* **§ 206.5(b)(1)**. Further procedural guidance is contained in I Treasury Financial Manual Chapter 5-4000.

As a general proposition, section 3302(c) and the Treasury regulations place an outer limit on what is “practicable” under section 3302(b). 11 **Comp. Gen.** 281, 283–84 (1932); 10 **Comp. Gen.** 382,

385 (1931). The deadline applies to all receipts, including those **to** be credited to an appropriation account (which, of course, is “in the Treasury”), not just those for deposit as miscellaneous receipts. **E.g.**, 10 **Comp. Gen.** 382 (1931).

(4) Money not received “for the Government”

As originally enacted, 31 U.S.C. § 3302(b) required deposit in the Treasury of moneys received “for the use of the United States” (9 Stat. 398). The 1982 recodification of Title 31 changed this language to moneys received “for the Government.” The meaning, of course, is the same. Although the Comptroller General has not attempted to define this phrase in any detail, its scope, consistent with the statutory purpose, is broad. There is no distinction between money received for the use of the United States and money received for the use of a particular agency; such a distinction would largely nullify the statute.

As will be seen from the following case summaries, situations in which the “for the use of the United States” clause was the primary basis for the decision do not fall into any particular pattern.

In **B-205901**, May 19, 1982, a railroad had furnished 15,000 gallons of fuel to the Federal Bureau of Investigation for use in an undercover investigation of thefts of diesel **fuel** from the railroad. The railroad and FBI agreed that the fuel or the proceeds from **its** sale would be returned upon completion of the investigation. In view of 31 U.S.C. § 3302(b), the FBI then asked whether money generated from the sale of the fuel had to be deposited in the Treasury as miscellaneous receipts.

In one sense, it could be argued that the money was received “for the use of the United States,” in that the FBI planned to use it as evidence. However, the Comptroller General pointed out, this is not the kind of receipt contemplated by 31 U.S.C. § 3302(b). Citing 33 Op. **Att’y Gen.** 316,321 (1922), the decision concluded that “[f]unds are received for the use of the United States only if they are **to** be used to bear the expenses of the Government or to pay the obligations of the United States.” Therefore, there was no legal barrier to returning the funds to the railroad.

In another case, GAO held that misconduct fines levied on Job Corps participants by the Labor Department need not be treated as money

received for the use of the United States for purposes of 31 U.S.C. §3302(b). The governing legislation specifically authorized “reductions of allowances” as a disciplinary measure. Labor felt that, in some cases, immediate collection of a cash **fine** from the individual’s pocket would be more effective. Finding a legislative intent to confer broad discretion in matters of enrollee discipline, GAO agreed that the cash fines could be regarded as a form of disciplinary allowance reduction, and accordingly credited to Job Corps appropriations. **B-130515**, August 18, 1970. GAO followed the same approach in a similar question several years later in **65 Comp. Gen.** 666,671 (1986).

In **64 Comp. Gen.** 217 (1985), a food service concession contract required the contractor to reserve a percentage of income to be used for the replacement of government-owned equipment. The reserve was found not to constitute money “for the Government” within the meaning of 31 U.S.C. §3302(b). GAO distinguished an earlier decision, **35 Comp. Gen.** 113 (1955), because the reserve here was merely a bookkeeping entry whereas the proposal in the 1955 case would have required the actual transfer of funds to a bank account. **64 Comp. Gen.** at 219.

Two cases deal with fees paid to contractors. In **B-166506**, October 20, 1975, the Environmental Protection Agency had a number of contracts with private firms for the processing, storage, and retrieval of various kinds of recorded environmental information. Much of this information was of value to private parties and available under the Freedom of Information Act. Fees collected by an agency under **FOIA** must be deposited as miscellaneous receipts. Here, however, EPA proposed advising requesting parties to deal directly with the contractors, who would charge and retain fees for providing the data, although the requesters would retain the right to deal with EPA. GAO approved the proposal, concluding that fees charged by the contractors in these circumstances were not money received for the use of the United States. The decision cautioned, however, that the fees charged and retained by the contractors could not exceed the fees which EPA could charge if it provided the services directly. Thus, the fees could include the direct costs of document search and duplication, but not costs associated with developing the information. In **61 Comp. Gen.** 285 (1982), GAO provided similar advice to the Federal Election Commission in connection with requests from the public for microfilm copies of **its** reports.

Finally, several of the trust fund cases noted **later** in this chapter **have** employed the “not received for the use of the United States” rationale. **E.g.**, 60 **Comp. Gen.** 15,26-27 (1980); **B-241744**, May 31, 1991; 13-166059, July 10, 1969; **B-43894**, September 11, 1944; **B-24117-O. M.**, April 21, 1942.

b. Contract Matters

(1) Excess **reprocurement** costs

We use the term “excess **reprocurement** costs” hereto include two factually different but conceptually related situations:

1. **Original** contractor defaults. Agency still needs the work done and contracts with someone else to complete the work, almost invariably at a cost higher than the original contract price. Original contractor is liable to the government for these “excess **reprocurement** costs.”

2. Agency incurs **additional expense** to correct defective work by original contractor. Contractor is liable for the amount of this additional expense.

Disposition of amounts recovered in these situations has generated numerous cases. As a general proposition, the answer depends on the timing **of** the recovery in relation **to** the agency’s **reprocurement** or corrective action and the status of the applicable appropriation. The objective is to avoid the depletion of currently available appropriations to get what the government was supposed to get under the original obligation. The rules were most recently summarized, and the case law reviewed, in 65 **Comp. Gen.** 838 (1986).

The rules are as **follows**:

1. **If**, at the time of the recovery from the original contractor, the agency has not yet incurred the additional expense, the agency may **retain** the amount recovered to the extent necessary to fund the **reprocurement** or corrective measures. The collection is credited to the appropriation obligated for the original contract, without regard to the status of that appropriation.

2. **If**, at the time of recovery from the original contractor, the agency has already incurred the additional **reprocurement** or corrective expense, the agency may retain the **recovery** for credit to the applicable appropriation, to the extent necessary to reimburse itself,

if that appropriation is still available for obligation, If the appropriation is no longer available for obligation, the recovery should go to miscellaneous receipts.

These rules apply **equally** to default **and** defective work situations. To restate them from the perspective of the type of appropriation involved, if the appropriation used to fund the original contract is a no-year appropriation, the recovery may be credited to that appropriation regardless of whether the agency has or has not yet actually incurred the additional costs. If the appropriation is an annual or multiple-year appropriation and the agency has not yet incurred the additional costs as of the time of recovery, the agency may credit the collection to the appropriation regardless of whether it is still current or expired. In the case of an annual or multiple-year appropriation where the agency has already incurred the **reprocurement** or corrective costs as **of** the time of recovery, the agency may retain the recovery if the appropriation is still available for obligation, but not if it has expired. (Where the excess costs have already been incurred and the appropriation has expired at the time of recovery, depletion of currently available funds is clearly not a concern.)

Prior to 1983, there were essentially two separate lines of cases, one dealing with defective work and the other dealing with default. The defective work cases, if one examines the facts and types of appropriations involved, had always applied the principles stated above, although not necessarily in those terms. Some illustrative cases are summarized below:

- **8 Comp. Gen. 103 (1928)**. Supplies delivered by a contractor were found upon inspection to be unsatisfactory for use, that is, not in accordance with the terms of the contract. It was held that a refund by the contractor could be credited to the appropriation originally charged, on the theory that the payment was improperly made from the appropriation in the first instance. The appropriation involved was an annual appropriation, and the corrective costs had not been paid as of the time of the recovery.
- **34 Comp. Gen. 577 (1955)**. An amount recovered from a contractor's surety because the work failed to meet specifications after the contractor received final payment was regarded as in the nature of a reduction in contract price representing the value of unfinished work, and therefore amounted to the recovery of an unauthorized overpayment. As such, it could be deposited in the appropriation

- charged** with the contract and expended for completion of the work. The appropriation involved was a no-year appropriation.
- 44 **Comp. Gen.** 623 (1965). Recovery for defective work could be credited to **an** expired annual appropriation. Since the corrective work had not yet been undertaken, the funds would remain available for that corrective work under the “replacement contract” theory.
 - 65 **Comp. Gen.** 838 (1986), Recovery for faulty design could be used for necessary corrective work. The appropriation involved was a multiple-year appropriation still available for obligation at the time of the recovery.

In the default situation, the earliest decisions held that the agency could retain excess **reprocurement** costs recovered from the **defaulting** contractor. Consistent with the defective work cases, the early default cases involved situations in which the recovered funds would still be available for obligation, either because the appropriation used for the contract was still available or under the replacement contract theory. 21 **Comp. Dec.** 107 (1914) (expired annual appropriation, **reprocurement** not yet effected); 16 **Comp. Dec.** 384 (1909) (no-year appropriation). However, the decisions inexplicably changed course, starting apparently with 23 **Comp. Dec.** 352 (1916), and for several decades thereafter consistently held, without attempting much further analysis, that excess **reprocurement** costs recovered from defaulting contractors had to be deposited as miscellaneous **receipts**.⁷⁰

The two lines of cases met in a 1983 decision, 62 **Comp. Gen.** 678. That decision recognized that there was no real reason to distinguish between default and defective work for purposes of accounting for recoveries. The rules should be the same in both situations. Accordingly, 62 **Comp. Gen.** 678 modified the prior default cases and held, in effect, that the rules previously applied in the defective work cases should be applied in the future to all excess **reprocurement** cost cases “without reference to the event that gave rise to the need for the replacement contract—that is, whether occasioned by a default or by defective workmanship.” *Id.* at 681. The decision went on to hold that the Bureau of Prisons **could** retain damages recovered from a

⁷⁰**E.g.**, 46 **Comp. Gen.** 554 (1966); 40 **Comp. Gen.** 590 (1961); 27 **Comp. Gen.** 117 (1947); 14 **Comp. Gen.** 729 (1935); 14 **Comp. Gen.** 106 (1934); 10 **Comp. Gen.** 510 (1931); 8 **Comp. Gen.** 284 (1928); 26 **Comp. Dec.** 877 (1920); **A-26073**, March 20, 1929, **aff’d** upon reconsideration, **A-26073**, August 8, 1929; **A-24614**, June 20, 1929. The rule was applied regardless of whether the funds were **actually** collected or merely withheld from contract payments due. 52 **Comp. Gen.** 45 (1972).

contractor charged with defective work, for credit to the appropriation which had been used to replace the defective work. Although not noted in the decision, the appropriation **to** be credited was a no-year appropriation. 65 **Comp. Gen.** 838,841 **n.3** (1986).

The decision added another new element: The rules would apply even where the recovery, by virtue of factors such as inflation or underbidding, exceeds the amount paid to the original contractor. Of course, the reason behind permitting retention of the funds is to enable the agency to get what it originally bargained for, not for the agency to make a “profit” on the transaction. Thus, any amounts recovered over and above what is actually necessary to fund the **reprocurement** or corrective work (or to reimburse the appropriation charged with that work, if it is still currently available) must be deposited in the Treasury as miscellaneous receipts, 62 **Comp. Gen.** at 683.

It follows logically from what has been said that the proceeds of a forfeited performance bond should be available to the contracting agency if and to the extent necessary to fund a replacement contract to complete the work of the original contract, and this was the holding in 64 **Comp. Gen.** 625 (1985). It had been held in an earlier case that, under a contract for the exchange of government property for private property, when the government delivers its property but the contractor defaults, moneys received from a surety under a performance bond, presumably representing the value of the government property delivered, could be regarded as in recoupment of the “advance payment” and used for a replacement purchase. 27 **Comp. Gen.** 117 (1947).⁷¹

In 65 **Comp. Gen.** 838 (1986), GAO reviewed the evolution of the case law on excess **reprocurement** costs, restated the rules, and pointed out that in no case had GAO approved agency retention of recovered funds where the **reprocurement** or corrective costs “had already been paid from an appropriation which, at the time of the **recovery**, was no **longer** available for obligation.” **Id.** at 841 **n.5**.

Before leaving the subject, it may be **helpful** to once again summarize the **rules** in a slightly different manner. From the perspective of

⁷¹27 **Comp. Gen.** 117 went on to state that any moneys recovered from the contractor over and above the amount of the performance bond had to go to **miscellaneous** receipts. It was this portion of the decision that was **modified** by 62 **Comp. Gen.** 678.

appropriation status and the timing of agency action, the fact patterns may be categorized as follows:

1. No-year appropriation; recovery made before agency incurs additional costs.
2. No-year appropriation; additional costs incurred prior to **recovery**.
3. Annual or multiple-year appropriation; recovery made before agency **incurs** additional costs; appropriation still current at time of recovery.
4. Annual or multiple-year appropriation; additional costs incurred prior to recovery; appropriation still current at time of recovery.
5. Annual or multiple-year appropriation; recovery made before agency incurs additional costs; appropriation expired at time of **recovery**.
6. Annual or multiple-year appropriation; additional costs incurred prior to recovery; appropriation expired at time of recovery.

In the first five situations, the agency may retain amounts recovered to the extent necessary to fund the **reprocurement** or corrective work, or to reimburse itself for costs already incurred. In the sixth situation, the **recovery** goes to the Treasury as miscellaneous **receipts**.⁷²

(2) Other contract situations

The traditional rule for liquidated damages is that they may be retained in the appropriation originally charged. 44 **Comp. Gen.** 623 (1965); 23 **Comp. Gen.** 365 (1943); 9 **Comp. Gen.** 398 (1930); 18 **Comp. Dec.** 430 (1911). See also **B-237421**, September 11, 1991. The rationale for retaining liquidated damages in the appropriation account rather than depositing them in the Treasury as miscellaneous receipts is that they effect an authorized reduction in the price of the individual contract concerned, and also that this would make them available for return to the contractor should the liability subsequently

⁷²It is entirely possible that some of the default cases modified by 62 **Comp. Gen.** 678 involved this precise situation, in which event the result in those cases would still be correct. However, since this cannot be known with certainty from the text of the decisions alone, it is best to disregard them.

be relieved. However, where this rationale does not apply—for example, in a case where the contractor did nothing and therefore earned nothing and the Comptroller General had denied the remission of liquidated damages under 41 U.S.C. § 256a—the liquidated damages should be deposited in the Treasury as miscellaneous receipts. 46 **Comp. Gen.** 554 (1966).

In some liquidated damage situations, the agency will not have incurred any additional **reprocurement** or corrective costs. This might happen in a case where an agency received liquidated damages for delay in performance but the contractor’s performance, though late, was otherwise satisfactory. In other cases, however, the agency will incur additional **costs**. In the situation described in 46 **Comp. Gen.** 554, for example, the agency would presumably need to **reprocure**, in which event it could retain the liquidated damages in accordance with the rules for excess **reprocurement** costs just discussed. 64 **Comp. Gen.** 625 (1985) (modifying 46 **Comp. Gen.** 554 to that extent). Consistent with these rules, liquidated damages credited to an expired appropriation may not be used for work which is not part of a legitimate replacement contract. **B-242274**, August 27, 1991.

Compensation paid by an insurance company for damage to government property caused by a contractor may not be used to augment the agency’s appropriation used for the contract, absent specific statutory authority, and the moneys, whether paid to the government or to the contractor, are for deposit into the Treasury as miscellaneous receipts. 67 **Comp. Gen.** 129 (1987); 48 **Comp. Gen.** 209 (1968). The retention of insurance proceeds was also involved in **B-93322**, April 19, 1950, an apparent exception based on the particular circumstances involved. In that case, the General Services Administration had entered into a contract for renovation of the Executive Mansion. The contract required the contractor to carry adequate fire and hazard insurance. The renovation project had been undertaken under a specific appropriation which was enough for the initial, cost but would not have been sufficient for repairs in the event of a fire or other hazard. Since the renovation was a “particular job of temporary nature,” and since a contrary result would defeat the purpose of the appropriation, the Comptroller General held that insurance proceeds received in the event a covered risk occurred could be retained and used for the cost of repairs.

Somewhat similarly, it was held in 39 **Comp. Gen.** 647 (1960) that to require amounts refunded to the United States for contract violations under the Great Plains Conservation Program to be deposited as miscellaneous receipts would deplete the appropriation to that extent and would thereby defeat the statutory purpose. However, the exception was permitted only for the refund of “unearned payments,” that is, violations which amounted to a failure of consideration such that the payments did not result in any benefit to the program, Refunds of “earned payments,” that is, where the payments had resulted in some benefit to the program, would have to go to miscellaneous receipts since their retention would constitute an improper augmentation. In recognizing the limited exception, the Comptroller General noted that the terms of 31 U.S.C. § 3302(b) “are general in nature and should receive a reasonable construction with respect to any particular form of income or receipt,” *Id.* at 649. The decision also noted that the “contracts” involved were—not procurement contracts but were more in the nature of grants. *Id.*

Refunds received by the government under a price redetermination clause may be credited to the appropriation from which the contract was funded. 33 **Comp. Gen.** 176 (1953). However, if the refund is entirely voluntary on the part of the contractor, the money goes to miscellaneous receipts. 24 **Comp. Gen.** 847, 851 (1945).

Refunds received by the government under a warranty clause maybe considered as an adjustment in the contract price and therefore credited to the appropriation originally charged under the contract. 34 **Comp. Gen.** 145 (1954), The same result applies where the warranty refund is in the form of a replacement purchase credit. 27 **Comp. Gen.** 384 (1948). (These cases are conceptually related to the “defective work” cases discussed earlier, and the result follows logically from the result in those cases.)

A different type of credit was discussed in 53 **Comp. Gen.** 872 (1974). It was proposed to require prospective timber sale purchasers to make certain property surveys, the cost of which would be credited against the sale price. The surveys had previously been financed from Forest Service appropriations. GAO viewed the proposal as an unauthorized augmentation of those appropriations. Similarly, the Department of Agriculture could not apply savings in the form of credits accrued under a contract for the handling of food stamp sales receipts to offset the cost of a separate data collection contract, even

though both contracts were necessary to the same program objective. **A-51604**, May 31, 1977.

The rule that money received by the government under a contract is governed by 31 U.S.C. § 3302(b) unless one of the established exceptions applies is underscored by the case of Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992). The Air Force had awarded a contract to a commercial air carrier to provide passenger and cargo service to a remote base in the Aleutian Islands. The carrier's revenue would be derived almost entirely from fares either purchased directly or reimbursed by the United States (military personnel, their dependents, and government contractor employees). The contract granted the carrier landing rights and ground support at the base, and the contractor agreed to return a specified portion of its receipts as a "concession fee," to be deposited in the base morale, welfare, and recreation fund. "[I]nnovation consistent with the law should be encouraged," said the court, "but this transaction so plainly violates the express terms of 31 U.S.C. § 3302(b) . . . that it should be nipped in the bud." Id. at 421. Since there was no authority to divert the funds from the Treasury to the welfare fund, and since the diversion would actually increase the cost to the government, the court found the contract award to be arbitrary and capricious, and declared the contract "null, void and of no force and effect." Id. at 423.

A similar GAO decision is 35 **Comp. Gen.** 113 (1955), holding that a provision in a food services contract under which a portion of gross receipts would be set aside in a reserve fund for the repair and replacement of government-owned equipment was contrary to 31 U.S.C. § 3302(b).

If a contract requires the government to pay a deposit on containers and provides for a refund by the contractor of the deposit upon return of the empty containers by the government, the refund may be credited to the appropriation from which the deposit was paid. **B-8121**, January 30, 1940. However, if the contract establishes a time limit for the government to return the empty containers and provides further that thereafter title to the containers shall be deemed to pass to the government, a refund received from the contractor after expiration of the time limit is treated as a sale of surplus property and must be deposited as miscellaneous receipts. 23 **Comp. Gen.** 462 (1943).

c. Damage to Government
Property and Other Tort
Liability

As a general proposition, amounts recovered by the government for loss or damage to government property cannot be credited to the appropriation available to repair or replace the property, but must be deposited in the Treasury as miscellaneous receipts. 64 **Comp. Gen.** 431 (1985) (damage to government motor vehicle); 26 **Comp. Gen.** 618 (1947) (recovery from insurance company for **damage** to government vehicle); 3 **Comp. Gen.** 808 (1924) (loss of Coast Guard vessel resulting from collision).⁷³ While the recovery may well be “related” to a prior expenditure for repair of the property, it is not an “**adjustment**” of a previous disbursement for purposes of Treasury-GAO Joint Regulation No. 1.64 **Comp. Gen.** 431,433 (1985).

There are statutory exceptions. One involves property purchased and maintained by the General Services Administration from the General Supply Fund, a revolving fund established by 40 U.S.C. § 756. By virtue of 40 U.S.C. § 756(c), recoveries for loss or damage to General Supply Fund property are credited to the General **Supply** Fund. This includes recoveries from other federal agencies for **damage** to GSA motor pool vehicles. 59 **Comp. Gen.** 515 (1980).

Another is 16 U.S.C. § 579c, which authorizes the Forest Service to retain the proceeds of bond forfeitures resulting from failure to complete performance under a permit or timber sale contract, and money received from a judgment, compromise, or settlement of a government claim for present or potential **damage** to lands or improvements under the administration of the Forest Service. If the receipt exceeds the amount necessary to complete the required work or make the needed repairs, the excess must be transferred to miscellaneous receipts. This provision is discussed in 67 **Comp. Gen.** 276 (1988), holding that the proceeds of a bond forfeiture could be used to reimburse a general Forest Service appropriation which had **been charged with** the cost of repairs.

In addition, where an agency has statutory authority to retain income derived from the use or sale of certain property, and the governing legislation shows an intent for the particular program or activity to be **self-sustaining**, the agency may retain recoveries for loss or **damage** to that property. 24 **Comp. Gen.** 847 (1945); 22 **Comp. Gen.** 1133

⁷³Further cases for this proposition are 35 **Comp. Gen.** 393 (1956); 28 **Comp. Gen.** 476 (1949); 15 **Comp. Gen.** 683 (1936); 5 **Comp. Gen.** 928 (1926); 20 **Comp. Dec.** 349 (1913); 14 **Comp. Dec.** 87 (1907); 9 **Comp. Dec.** 174 (1902).

(1943). While the two cited decisions involve recoveries from insurers, the principle applies equally to recoveries directly from the party responsible for the loss or damage. 27 **Comp. Gen.** 352 (1947).

There is also a nonstatutory exception. Where a private party responsible for loss or damage to government property agrees to replace it in kind or to have it repaired to the satisfaction of the proper government officials and to make payment directly to the party making the repairs, the arrangement is permissible and the agency is not required to transfer an amount equal to the cost of the repair or replacement to miscellaneous receipts.⁷⁴ The principle was first recognized in 14 **Comp. Dec.** 310 (1907), and has been followed, either explicitly or implicitly, ever since. **E.g.**, 67 **Comp. Gen.** 510 (1988); **B-87636**, August 4, 1949; **B-128209-O.M.**, July 12, 1956. The exception applies even though the money would have to go to miscellaneous receipts if the responsible party paid it directly to the government. 67 **Comp. Gen.** at 511; **B-87636**, August 4, 1949. For an apparent “exception to the exception” based on the specific legislation involved, see 28 **Comp. Gen.** 476 (1949).

If one regards 14 **Comp. Dec.** 310 from the standpoint of pure logic, it appears difficult to support. It is, in fact, one of the extremely few instances in which the decisions have sanctioned doing indirectly something that cannot be done directly. Be that as it may, the exception has been followed since 1907 and appears to be firmly entrenched. Thus, for example, in **B-128209-O.M.**, July 12, 1956, GAO addressed the relationship between 14 **Comp. Dec.** 310 and 28 **Comp. Gen.** 476, stating that “14 **Comp. Dec.** 310 has been followed for almost 50 years and we have never expressed disagreement with the conclusion reached therein.” The exception does not disturb the rule itself; it is “nothing more than an exception that maybe advantageous if the timing of repair and payment can be made to coincide.” 64 **Comp. Gen.** 431,433 (1985).

The rule that recoveries for loss or damage to government property must be deposited as miscellaneous receipts applies equally to recoveries from common carriers for government property lost or

⁷⁴A 1943 case suggested a different result, i.e., the agency might have to transfer the value of the repairs to miscellaneous receipts, if the agency had a specific appropriation for repair or replacement of the property in question. 22 **Comp. Gen.** 1133, 1137 (1943). GAO indicated in 67 **Comp. Gen.** 510 (1988) that this would not be the case, although 67 **Comp. Gen.** 510 did not deal with a specific repair appropriation, which would appear to be a rare case in any event.

damaged in transit. 46 **Comp. Gen.** 31 (1966). See also 28 **Comp. Gen.** 666 (1949); 2 **Comp. Gen.** 599 (1923); 22 **Comp. Dec.** 703 (1916); 22 **Comp. Dec.** 379 (1916). There is a narrow exception in cases where the freight bill on the shipment of the property lost or damaged exceeds the amounts paid for repairs and both are payable from the same appropriation, in which event the bill is reduced and the amount deducted to cover the cost of repairs is allowed to remain to the credit of the appropriation. 21 **Comp. Dec.** 632 (1915), as amplified in 8 **Comp. Gen.** 615 (1929) and 28 **Comp. Gen.** 666 (1949). The rule and exception are discussed in 46 **Comp. Gen.** 31 and in **B-4494**, September 19, 1939. Also, as with receipts in general, the miscellaneous receipts requirement does not apply if the appropriation or fund involved is made reimbursable by statute. 46 **Comp. Gen.** at 33.

The requirement to deposit as miscellaneous receipts recoveries from carriers for property lost or damaged in transit does not apply to operating funds of the National Credit Union Administration since, even though the funds are treated as appropriated funds for most other purposes, they are technically not direct appropriations but fees and assessments collected from member credit unions. 50 **Comp. Gen.** 545 (1971).

While the preceding cases have all involved loss or damage to property, the United States may also recover amounts resulting from tortious injury to persons, for example, under the so-called Federal Medical Care Recovery Act, 42 U.S.C. § 2651. See, e.g., 57 **Comp. Gen.** 781 (1978). Such recoveries must be deposited in the Treasury as miscellaneous receipts. 52 **Comp. Gen.** 125 (1972).

A case involving the **Military Personnel and Civilian Employees Claims Act of 1964**, 31 U.S.C. § 3721, provides a good illustration of an adjustment to a prior disbursement, i.e., an authorized refund which the agency may retain for credit to the disbursing appropriation. The statute authorizes agencies to pay claims by their employees for personal property lost or damaged incident to service. In cases where there may be third-party liability (e.g., an insurer or carrier), the agency has a choice. It may pay the entire amount of the employee's claim and be subrogated to the employee's claim against the third party, or it may require the "employee to pursue the third-party claim first. If the agency chooses the former option, it may retain any third-party recoveries for credit to the appropriation used to pay the

claim. 61 **Comp. Gen.** 537 (1982). Art agency adopting the former policy, the decision **stated—**

“will be making payments in some cases that are, strictly speaking, higher than are required. In such cases, it is entirely legitimate to treat a third-party **recovery** as a reduction in the amount previously disbursed rather than as an augmentation of the agency’s appropriation.” *Id.* at 540.

A comparison of 61 **Comp. Gen.** 537 with the Federal Medical Care Recovery Act case, 52 **Comp. Gen.** 125, illustrates the distinction previously discussed with respect to applying the definition of “refund”— 61 **Comp. Gen.** 537 is an example of an **adjustment** to an amount previously disbursed; 52 **Comp. Gen.** 125 illustrates a collection which must go to miscellaneous receipts even though it is “related” to a prior expenditure. See 61 **Comp. Gen.** at 539–40; 64 **Comp. Gen.** 431, 432–33 (1985). In this respect, the situation in 61 **Comp. Gen.** 537 is very similar to the situation in 23 **Comp. Gen.** 652 (1944), described in our earlier discussion.

d. Fees **and Commissions**

Fees and commissions paid either to the government itself or to a government employee for activities relating to official duties must be deposited in the Treasury as miscellaneous receipts absent statutory authority to the contrary.

In the case of fees paid directly to the government, the result is a simple application of 31 U.S.C. § 3302(b). Thus, the following items, it has been held, must be deposited as miscellaneous receipts:

- Commissions from the use of pay telephones in government buildings. 59 **Comp. Gen.** 213 (1980); 44 **Comp. Gen.** 449 (1965); 23 **Comp. Gen.** 873 (1944); 14 **Comp. Gen.** 203 (1934); 5 **Comp. Gen.** 354 (1925); **B-4906**, October 11, 1951.
- Fees and related reimbursable incidental expenses paid to the Department of Agriculture in connection with the investigation of and issuance of certifications of quality on certain farm products. 2 **Comp. Gen.** 677 (1923).
- Fees collected under the Freedom of Information Act. **4B Op. Off. Legal Counsel** 684,687 (1980).

Of course, art agency may retain fees and use them to offset operating costs if and to the extent expressly authorized by statute. Examples are 28 U.S.C. § 1921(c) (fees collected by the United States Marshals

Service for service of civil process and judicial execution seizures and sales, to the extent provided in advance in appropriation acts); 28 U.S.C. § 1931 (specified portions of filing fees paid to the clerk of court, to the extent provided in annual appropriation acts). The relevant legislation will determine precisely what may be retained. E.g., 34 Comp. Gen. 58 (1954).

Training fees illustrate both the general rule and statutory exceptions. Under the Government Employees Training Act, an agency may extend its training programs to employees of other federal agencies on a reimbursable or nonreimbursable basis. 5 U.S.C. § 4104. The agency may, unless it receives appropriations for interagency training, retain the fees. B-241269, February 28, 1991 (non-decision letter). Similarly, an agency may admit state and local government employees to its training programs, and may charge a fee or waive it in whole or in part. Fees received are credited to the appropriation to which the training costs were charged. 42 U.S.C. 54742. The agency may also admit other private persons to its training programs on a space-available and fee basis, but unless it has statutory authority to the contrary, must deposit the fees as miscellaneous receipts. 42 Comp. Gen. 673 (1963); B-241269, February 28, 1991; B-190244, November 28, 1977.

Parking fees assessed by federal agencies under the authority of 40 U.S.C. § 490(k) are to be credited to the appropriation or fund originally charged for providing the service. However, any amounts collected in excess of the actual cost of providing the service must be deposited as miscellaneous receipts. 55 Comp. Gen. 897 (1976). Parking fees may be authorized by statutes other than 40 U.S.C. § 490(k), in which event the terms of the particular statute must be examined. For example, parking fees at Department of Veterans Affairs medical facilities are addressed in 38 U.S.C. § 5009. Originally, the fees had to go to miscellaneous receipts under 31 U.S.C. § 3302(b). 45 Comp. Gen. 27 (1965). However, 38 U.S.C. § 5009 was later amended and the fees now go into a revolving fund,

Income derived from the installation and operation of vending machines on government-owned or controlled property is generally for deposit as miscellaneous receipts, 32 Comp. Gen. 124 (1952); A-44022, August 14, 1944. However, there are two major exceptions. First, if the contractual arrangement with the vendor is made by an employee association with administrative approval, the employee

group may retain the income. 32 **Comp. Gen.** 282 (1952); **B-1 12840**, February 2, 1953. Second, under the Randolph-Sheppard Act, 20 **U.S.C. § 107d-3**, vending machine income in certain cases must go to blind licensee-operators or state agencies for **the** blind. See **B-238937**, March 22, 1991 and **B-199132**, September 10, 1980 (non-decision letters).

For purposes of determining the disposition of amounts collected, there is a distinction between donations, which are voluntary, and fees and assessments, which are not. Statutory authority to accept gifts and donations does not include fees and assessments exacted involuntarily. 25 **Comp. Gen.** 637,639 (1946); **B-195492**, March 18, 1980; **B-225834** .2-0. M., April 11, 1988. This is more of a presumption than a rule, however, and specific circumstances may warrant different treatment. E.g., **B-232482**, June 4, 1990 (not improper for Commerce Department to treat certain registration fees as “contributions” within scope of 22 **U.S.C. § 2455(f)**; interpretation **ratified first** by appropriation, later by specific legislation).

Fees paid to individual employees require a two-step analysis. The first step is the principle that the earnings of a government employee in excess of the regular compensation gained in the course of or in connection with his or her services belong to the government and not to the individual employee. The second step is then the application of 31 **U.S.C. § 3302(b)**. Using this analysis, GAO has held that fees were required to be deposited as miscellaneous receipts in the following instances:

- An honorarium paid to an Army officer for delivering a lecture at a university in his capacity as an officer of the United States. 37 **Comp. Gen.** 29 (1957).
- Fees collected from private individuals by government employees for their services as notaries public. 16 **Comp. Gen.** 306 (1936).
- Witness fees and any allowances for travel and subsistence, over and above actual expenses, paid to federal employees for testifying in **certain** state court proceedings. 36 **Comp. Gen.** 591 (1957); 23 **Comp. Gen.** 628 (1944); 15 **Comp. Gen.** 196 (1935); **B-160343**, November 23, 1966.

Applying the same analysis, a proposal under which a nonprofit corporation funded entirely by private industry would **pay** monthly “bonuses” to Army **enlistees** to encourage enlistment and satisfactory

service, even if otherwise proper, could not be implemented without specific statutory authority because the payments could not be retained by the **enlistees** but would have to be deposited in the Treasury under 31 U.S.C. § 3302(b). **B-200013**, April 15, 1981.

e. Economy Act

The Economy Act, 31 U.S.C. § 1535 and 1536, authorizes the **inter- and intra-departmental** furnishing of materials or performance of work or services on a **reimbursable** basis. It is a statutory exception to 31 U.S.C. § 3302(b), authorizing a performing agency to credit reimbursements to the appropriation or fund charged in executing its performance. However, **this** is not mandatory. The performing agency may, at **its** discretion, deposit reimbursements for both direct and indirect costs in the Treasury as miscellaneous receipts. **57 Comp. Gen.** 674,685 (1978), **modifying 56 Comp. Gen.** 275 (1977).

There is one area in which the agency has no discretion. Reimbursements may not be credited to an appropriation against which no charges have been made in executing the order. This would constitute an improper augmentation. Such reimbursements must therefore be deposited into the General Fund as miscellaneous receipts. An example would be depreciation in some cases. **57 Comp. Gen.** at 685-86.

f. Setoff

Collections by **setoff** may be factually distinguishable from direct collections, but the effect on the appropriation is the same. If crediting an agency appropriation with a direct collection in a particular instance would result in an improper augmentation, then retaining an amount collected by **setoff** would equally constitute an improper augmentation. Thus, **setoffs** must be treated the same as direct collections. If an agency could retain a direct collection in a given situation, it can retain the **setoff**. However, if a direct collection would have to go to miscellaneous receipts, the **setoff** also has to go to miscellaneous receipts. In this latter situation, the agency must take **the** amount of the **setoff** from **its** own appropriation and transfer it to the General Fund of the Treasury. **E.g.**, **2 Comp. Gen.** 599 (1923); **20 Comp. Dec.** 349 (1913).

A hypothetical situation will illustrate. Suppose a contractor negligently damages a piece of government equipment and becomes liable to the government in the amount of \$500. Suppose further that an employee of the contracting agency, in a separate transaction,

negligently damages property of the contractor. The contractor files a claim under the Federal Tort Claims Act and the agency settles the claim for \$600. Neither party disputes the validity or amount of either claim. The agency sets the contract debt off against the tort claim and makes a net payment to the contractor of \$100. However, if the agency stops here, it has augmented **its** appropriation to the tune of \$500. If the tort claim had never occurred and the agency collected the \$500 from the contractor, the \$500 would have to go to miscellaneous receipts (see “Contract Matters,” above). Conversely, if the contract claim did not exist, the agency would end up paying \$600 on the tort **claim**. Now, combining both claims, if both were paid without **setoff**, the net result would be that the agency is out \$600. The **setoff** cannot operate to put the agency’s appropriation in a better position than it would have been in had the agency and contractor simply exchanged checks. Thus, in addition to paying the contractor \$100, the agency must deposit \$500 from its own appropriation into the Treasury as miscellaneous receipts.

A different type of “**setoff**” occurs under the Back Pay Act, 5 U.S.C. § 5596. When an agency pays an employee back pay under the Back Pay Act, it must deduct amounts the employee earned through other employment during the time period in question. The agency simply pays the net amount. There is no requirement to transfer the amount of the deduction for outside earnings to miscellaneous receipts 31 **Comp. Gen.** 318(1952). The deduction for outside earnings is not really a collection; it is merely part of the statutory formula for determining the amount of the payment.

g. Revolving Funds

A **major** exception to the requirements of 31 U.S.C. § 3302(b) is the revolving fund. Under the revolving fund concept, receipts are credited directly to the fund and are available, without further appropriation by Congress (unless the Legislation specifies otherwise), for expenditures to carry out the purposes of the fund. An agency must have **statutory** authority to establish a revolving fund. The enabling statute will specify the receipts that may be credited to the fund and the purposes for which they may be expended. An example is the General Services Administration’s “General Supply Fund,” noted above under “Damage to Government Property.” Receipts that are properly for deposit to a revolving fund are, obviously, exempt from the miscellaneous receipts requirement of § 3302(b). **E.g.**, 33 Op. **Att’y Gen.** 316 (1922).

However, the existence of a revolving fund does not automatically signal that 31 U.S.C. § 3302(b) will never apply. In other words, it should not be assumed that a revolving fund is incapable of being improperly augmented. Thus, where the statute establishing the fund does not authorize the crediting of receipts of a given type back into the fund, those receipts must be deposited in the Treasury as miscellaneous receipts. See 69 **Comp. Gen.** 260 (1990); 40 **Comp. Gen.** 356 (1960); 23 **Comp. Gen.** 986 (1944); 20 **Comp. Gen.** 280 (1940).

Augmentation of a revolving fund may occur in other ways, depending on the nature of the fund and the terms of the governing legislation. Examples are:

- Statute authorizes Bureau of Land Management to **retain** funds collected as a result of coal trespasses on federal lands, to use those funds to repair damage to the specific lands involved in the trespass, and, within the Bureau's discretion, to refund any excess. An excess of collections over repair costs which the Bureau determines is inappropriate to refund should not be retained in the revolving fund to be used for other purposes, but must be deposited in the Treasury as miscellaneous receipts. **B-204874**, July 28, 1982.
- Corps of Engineers has a revolving fund used to provide supervision and administration of certain construction work for other agencies on a reimbursable basis, it charges a flat rate calculated to recover actual costs over the long run. Recovery from a contractor for faulty design may be reimbursed to the fund to the extent of the amount actually charged, but any excess must go to the **Treasury**. 65 **Comp. Gen.** 838 (1986). However, an "excess" representing costs which were not calculated into the flat rate may be reimbursed to the fund, **B-237421**, September 11, 1991.

Legislation which merely authorizes, or even requires, that certain expenditures be reimbursed is not sufficient to create a revolving fund. Reimbursements must be deposited as miscellaneous receipts unless the statute specifically authorizes retention by the agency. 67 **Comp. Gen.** 443 (1988); 22 **Comp. Dec.** 60 (1915); 1 **Comp. Dec.** 568 (1895).

h. Trust Funds

Moneys properly received by a federal agency in a trust capacity are not subject to 31 U.S.C. § 3302(b) and thus do not have to be deposited in the **Treasury** as miscellaneous receipts. 60 **Comp. Gen.**

15,26 (1980); 27 **Comp. Gen.** 641 (1948). In the latter case, the government of Persia had made a payment to the United States government to reimburse expenses incurred in sending an American vessel to Persia to return to the United States the body of an American official killed by a mob in **Tehran**. The State Department suggested that the money **be** used as a trust fund for the education **of** Persian students. However, the Comptroller General found that the funds had not been received under conditions which would constitute a “proper and legal trust” and therefore were properly deposited as miscellaneous receipts, the clear implication being that 31 **U.S.C. § 3302(b)** would not **apply** to money received in a valid trust capacity.

Other authorities supporting this general proposition are Emery v. United States, 186 **F.2d** 900,902 (**9th Cir.** 1951) (money paid to United States under court order as refund of overcharges by persons who had violated rent control legislation was held in trust for tenants and could be disbursed to them without need for appropriation); Varney v. Warehime, 147 **F.2d** 238,245 (**6th Cir.** 1945) (assessments levied against milk handlers to defray certain wartime expenses were trust funds and did not have to be covered into the Treasury); United States v. Sinnott, 26 **F.** 84 (D. Ore. 1886) (proceeds from sale of lumber made at Indian sawmill were to be applied for benefit of Indians and were not subject to 31 **U.S.C. § 3302(b)**); 62 **Comp. Gen.** 245, 251–52 (1983) (proceeds from sale of certain excess stockpile materials where federal agency was acting on behalf of foreign government); **B-223146**, October 7, 1986 (moneys received by Pension Benefit Guaranty Corporation when acting in its trustee capacity); **B-43894**, September 11, 1944; **B-23647**, February 16, 1942 (taxes and **fin**es collected in foreign territories occupied by American armed forces); **B-24117-O. M.**, April 21, 1942 (penalty **on** defaulted bond received by United States as trustee for Indians).

In addition, receipts generated by activities financed with trust funds are generally credited to the trust fund and not deposited **as** miscellaneous receipts **B-166059**, July 10, 1969 (**recovery** for damage to property purchased with trust funds); **B-4906**, October 11, 1951 (receipts accruing from activities financed from Federal Old-Age and **Survivors** Insurance Trust Fund). See also 50 **Comp. Gen.** 545, 547 (1971) (summarizing the holding in **B-4906**). In 51 **Comp. Gen.** 506 (1972), GAO advised the Smithsonian Institution that receipts generated by various activities at the National Zoo need not be deposited as miscellaneous receipts. The Smithsonian is financed **in**

part by trust funds and in part by appropriated funds, although the activities in question were supported mostly by appropriated funds,

The Justice Department's Office of Legal Counsel has cautioned against carrying this theory too far in the case of nonstatutory trusts created by executive action. For example, the United States and the Commonwealth of Virginia sued a transportation company for causing an oil spill in the Chesapeake Bay. A settlement was proposed under which the defendant would donate money to a private waterfowl preservation organization. The OLC found that the proposal would contravene 31 U.S.C. § 3302(b), stating:

"In our view, the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of § 3302(b), if a federal agency could have accepted possession and retains discretion to direct the use of the money. The doctrine of constructive receipt will ignore the form of a transaction in order to get to its substance. . . . Since we believe that money available to the United States and directed to another recipient is constructively 'received' for purposes of § 3302(b), we conclude that the proposed settlement is barred by that statute."

4B Op. Off. Legal Counsel 684,688 (1980). There was a solution in that case, however. Since the United States had not suffered any monetary loss, it was not required to seek damages. The proposed contribution by the defendant could be attributed to the co-plaintiff, Virginia, which of course is not subject to 31 U.S.C. § 3302(b). *Id.* 75

GAO reached a similar conclusion in **B-210210**, September 14, 1983, holding that the Commodity Futures Trading Commission lacked authority to enter into a settlement agreement under which a party charged with violation of the Commodity Exchange Act would donate funds to an educational institution with no relationship to the violation. A more recent case concluded that, without statutory authority, permitting a party who owes a penalty to contribute to a research project in lieu of paying the penalty amounts to a circumvention of 31 U.S.C. § 3302(b) and improperly augments the agency's research appropriations. 70 **Comp. Gen.** 17 (1990). A case saying essentially the same thing in the context of Clean Air Act violations is **B-247155**, July 7, 1992.

⁷⁵The opinion noted that the proposed settlement would be authorized under subsequent amendments to the governing legislation.

GAO considered **similar** issues in several cases involving consent orders between the **Department** of Energy and **oil** companies charged with violation of federal oil price and **allocation** regulations. The Department has **limited authority** to use recovered overcharge funds for **restitutionary** purposes, and in fact has a duty to attempt restitution. However, **to** the extent this cannot reasonably be accomplished or funds remain **after** restitution efforts have been exhausted, the funds may not be used for energy-related programs with no **restitutionary** nexus but must be deposited in the Treasury pursuant to 31 U.S.C. § 3302(b). 62 **Comp. Gen.** 379 (1983); 60 **Comp. Gen.** 15 (1980). It is equally unauthorized to give the funds to charity or to use them to augment appropriations for administering the overcharge refund program. **B-200170**, April 1, 1981.

In a 1991 case, an agency had discovered a \$10,000 bank account belonging to an employee morale club which had become defunct. No documentation of the club's creation or dissolution could be located. Thus, if the club had ever provided for the disposition of its funds, it could no longer be established. Clearly, the money was not received for the use of the government for purposes **of 31 U.S.C. § 3302(b)**. It was **equally** clear that the money could not be credited to the agency's appropriations. GAO advised that the money could be turned over to a successor employee **morale** organization to be used for its intended **purposes. If** no successor organization stepped forward, the funds would have to be deposited in a Treasury trust account in accordance with 31 U.S.C. § 1322. **B-241744**, May 31, 1991.

i. Miscellaneous Cases: Money **In** addition to the categories discussed above, there have been numerous other decisions involving the disposition of receipts in various contexts. Some cases in which the Comptroller **General** held that receipts of a particular type must be deposited in the Treasury as **miscellaneous** receipts under 31 U.S.C. § 3302(b) or related statutes **are** set forth below.

- Costs awarded to the United States **by a court** under 28 U.S.C. § 2412. 47 **Comp. Gen.** 70 (1967).
- Moneys collected as a fine **or penalty.** 70 **Comp. Gen.** 17 (1990) (civil penalties assessed against Nuclear Regulatory Commission licensees); 69 **Comp. Gen.** 260 (1990) (penalties—as opposed to the recovery of actual losses—under the False Claims Act); 47 **Comp. Gen.** 674 (1968) (dishonored checks); 23 **Comp. Dec.** 352 (1916);

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- B-235577.2-O. M.**, November 9, 1989 (civil penalties under Food Stamp Act). See also 39 **Comp. Gen.** 647,649-50 (1960).
- Interest earned on grant advances by grantees other than states. **E.g.**, 69 **Comp. Gen.** 660 (1990).
 - Reimbursements received for child care services provided by federal agencies for their employees under authority of 40 U.S.C. § 490b. 67 **Comp. Gen.** 443, 448-49 (1988).
 - Receipts generated by undercover operations by law enforcement agencies. 67 **Comp. Gen.** 353 (1988); 4B Op. Off. Legal Counsel 684, 686 (1980). In GAO's opinion, however, short-term operations (a card game or dice game, for example) maybe treated as single transactions. 67 **Comp. Gen.** 353, clarifying **B-201751**, February 17, 1981. Thus, 31 U.S.C. § 3302(b) need not be read as requiring an undercover agent participating in a card game to leave the table to make a miscellaneous receipts deposit after every winning hand. If, however, the agent ends up with winnings at the end of the game, the money cannot be used to offset expenses of the operation.⁷⁶ Related cases are 5 **Comp. Gen.** 289 (1925) and 3 **Comp. Gen.** 911 (1924) (moneys used to purchase evidence for use in criminal prosecutions and recovered when no longer needed for that purpose must be deposited as miscellaneous receipts).
 - Proceeds from silver and gold sold as excess property by the Interior Department as successor to the American Revolutionary Bicentennial Administration. (The silver and gold had been obtained by melting down unsold commemorative medals which had been struck by the Treasury Department for sale by the ARBA.) **B-200962**, May 26, 1981.
 - Income derived from oil and gas leases on "acquired lands" (as distinguished from "public domain lands") of the United States used for military purposes. **B-203504**, July 22, 1981.

j. Miscellaneous Cases: Money Retained by Agency

Most cases in which an agency may credit receipts to its own appropriation or fund involve the areas previously discussed: authorized repayments, Economy Act transactions, revolving funds,

⁷⁶Starting in FY 1979, the Federal Bureau of Investigation, and later the Drug Enforcement Administration as well, received authority annually, first in authorization acts and later in appropriation acts, to use proceeds from undercover operations to offset reasonable and necessary expenses of the operations. **E.g.**, Pub. L. No. 102-140, § 102(b), 105 Stat. 782, 791-93 (1991) (FY 1992 Justice Department appropriation act). As soon as the proceeds or the balance thereof are no longer necessary for the conduct of the operation, they are to be deposited as miscellaneous receipts. **Id.** § 102(b)(2). The Internal Revenue Service, the subject of 67 **Comp. Gen.** 353, received similar authority late in 1988 (Pub. L. No. 100-690, § 7601(c), 102 Stat. 4181, 4504), but it appears to have expired as of December 31, 1991 (Pub. L. No. 101-647, § 3301(a), 104 Stat. 4789, 4917).

or the other specific situations noted. There is another group of cases, not susceptible of further generalization, in which an agency simply has **specific** statutory authority to retain certain receipts. Examples are:

- Forest Service may retain moneys paid by permittees on national forest lands representing their pro rata share under cooperative agreements for the operation and maintenance of waste disposal systems under the **Granger-Thye Act**. 55 **Comp. Gen.** 1142 (1976).
- Customs Service may, under 19 U.S.C. §1524, retain charges collected from airlines for **preclearance** of passengers and baggage at airports in Canada, for credit to the appropriation originally charged with providing the service. 48 **Comp. Gen.** 24 (1968).
- Overseas Private Investment Corporation may retain interest on loans of excess foreign currencies made under the Foreign Assistance Act of 1961, as amended. 52 **Comp. Gen.** 54 (1972).
- Payroll deductions **for government-furnished** quarters under 5 U.S.C. § 5911 are retained in the appropriation(s) or fund(s) from which the employee's salary is paid. 59 **Comp. Gen.** 235 (1980), as modified by 60 **Comp. Gen.** 659 (1981). However, if the employee pays directly rather than by payroll deduction, the direct payments must go to miscellaneous receipts unless the agency has specific statutory authority to retain them. 59 **Comp. Gen.** at 236.⁷⁷
- Under the Mineral Lands Leasing Act of 1920, receipts from the sale or lease of public lands are distributed in the manner specified in the statute. This was held to include the proceeds of bid deposits forfeited by successful mineral lease bidders who fail to execute the **lease**. 65 **Comp. Gen.** 570 (1986).
- By virtue of provisions in the Job Training Partnership Act and annual appropriation acts, certain receipts generated by Job Corps Centers may be retained for credit to the Labor Department appropriation from which the Centers are funded. 65 **Comp. Gen.** 666 (1986).
- Legislation establishing the Commission on the Bicentennial of the United States Constitution authorized the Commission to retain revenues derived from its licensing activities but did not address sales revenues. Sales revenues, therefore, had to be deposited as miscellaneous receipts. **B-228777**, August 26, 1988.

⁷⁷For agencies funded under the annual Interior Department and Related Agencies appropriation acts, the rentals, whether collected by payroll deduction or otherwise, go into a "special fund" maintained by each agency to be used for maintenance and **operation** of the quarters. 5 U.S.C. § 5911 note.

In the occasional case, the authority maybe less than specific. In **B-1 14860**, March 20, 1975, for example, based on the broad authority of the National Housing Act, GAO advised that the Department of Housing and Urban Development **could** require security deposits from tenants in **HUD-owned** multifamily projects. consistent with practice **in** the private sector, the deposit **would** be considered the property of the tenant and held in an escrow account, to be either returned to the tenant upon completion of the lease or forfeited to the government in cases of breach.

A final case we will note is 24 **Comp. Gen.** 514 (1945), an exception stemming from the particular funding arrangement involved rather than a specific statute. The case dealt with certain government corporations which did not receive **regular** appropriations but instead received annual authorizations for expenditures from their **capital** funds for administrative expenses. An appropriation act had imposed a limit on certain communication expenditures and provided that savings resulting from the limit “shall not be diverted to other use but **shall** be covered into the **Treasury** as miscellaneous receipts.” The **Comptroller General** construed this as meaning returned to the source from which made available. In the case of the corporations in question, this meant that the savings **could** be returned to their **capital** funds.

k. Money Erroneously
Deposited **as** Miscellaneous
Receipts

The various accounts that comprise the heading “miscellaneous receipts” are just that—they are receipt accounts, not expenditure or appropriation accounts. As noted **earlier**, by virtue of the Constitution, once money is deposited into miscellaneous receipts, it takes an appropriation to get it back out. What, therefore, can be done if an agency deposits some money into miscellaneous receipts by mistake?

This question really involves **two** separate situations. In the **first** situation, an agency receives funds which it is authorized, under the principles discussed above, to credit to its own appropriation or fund, but erroneously deposits them as miscellaneous receipts. The decisions have always recognized that the agency can make **an** appropriate **adjustment** to correct the error. In an **early** case, the Interior Department sold some property and deposited the proceeds as miscellaneous receipts when in fact it was statutorily authorized to credit the proceeds to its reclamation fund. The Interior Department then requested a transfer of the funds back to the reclamation fund, and the Secretary of the Treasury asked the Comptroller of the

Treasury if it was authorized. Of course it was, replied the Comptroller:

“This is not taking money out of the Treasury in violation of paragraph 7, section 9, Article I of the Constitution. . . .

“The proceeds of the sale. . . have been appropriated by law. Taking it from the Treasury and placing it to the credit in the Treasury of the appropriation to which it belongs violates neither the Constitution nor any other law, but simply corrects an error by which it was placed to the unappropriated surplus instead of to the appropriation to which it belongs.” 12 **Comp. Dec.** 733, 735 (1906).

This concept has consistently been followed. See 45 **Comp. Gen.** 724 (1966); 3 **Comp. Gen.** 762 (1924); 2 **Comp. Gen.** 599 (1923).⁷⁸

In the second situation, a private party pays money to a federal agency, the agency deposits it as miscellaneous receipts, and it is subsequently determined that the party is entitled to a refund. Here, in contrast to the first situation, an appropriation is necessary to get the money out. E.g., 3 **Comp. Gen.** 296 (1923).

There is a permanent indefinite appropriation for refunding collections “erroneously received and covered” which are not properly chargeable to any other appropriation. 31 U.S.C. § 1322(b)(2). The availability of this appropriation depends on exactly where the receipts were deposited. If the amount subject to refund was credited to some specific appropriation account, the refund is chargeable to the same account. If, however, the receipt was deposited in the general fund as miscellaneous receipts, then the appropriation made by 31 U.S.C. § 1322(b)(2) is available for the refund, provided that the amount in question was “erroneously received and covered.” 61 **Comp. Gen.** 224 (1982); 55 **Comp. Gen.** 625 (1976); 17 **Comp. Gen.** 859 (1938).

Examples of cases in which use of the “Moneys Erroneously Received and Covered” appropriation was found authorized are 71 **Comp. Gen.** — (B-239769.2, July 24, 1992) (refund to investment company of late **filing** fee upon issuance of order by Securities and Exchange Commission exempting company from **filing** deadline for **fiscal** year in

⁷⁸The reverse adjustment is made when funds which should have been deposited as **miscellaneous** receipts are erroneously credited to an appropriation. The **remedy** is a transfer from the appropriation to the appropriate miscellaneous **receipts** account. **E.g., B-48722, April 16, 1945.**

question); 63 **Comp. Gen.** 189 (1984) (Department of Energy deposited overcharge recoveries from oil companies into general fund instead of first attempting to use them to make **restitutionary** refunds); **B-217595**, April 2, 1986 (interest collections subsequently determined to have been erroneous).

One case, 53 **Comp. Gen.** 580 (1974), combined elements of both situations. The Army Corps of Engineers had been authorized to issue discharge permits under the Refuse Act Permit Program. The program was statutorily transferred in 1972 to the Environmental Protection Agency. Under the User Charge Statute, 31 U.S.C. §9701, both the Corps and EPA had charged applicants a fee. In some cases, the fees had been deposited as miscellaneous receipts before the applications were processed. The legislation that transferred the program to EPA also provided that EPA could authorize states to issue the permits. However, there was no provision that authorized EPA to transfer to the states any fees **already** paid. Thus, some applicants found that they had paid a fee to the Corps or EPA, received nothing for it, and were now being charged a second fee by the state for the same application. EPA felt that the original fees should be **refunded**. So did the applicants.

GAO noted that the User Charge Statute contemplates that the federal agency **will** furnish something in exchange for the fee. Since this had not been done, the fees could be viewed as having been erroneously deposited in the general fund. However, the fees had not been erroneously received—the Corps and EPA had been entirely correct in charging the fees in the first place—so the appropriation **made by 31 U.S.C. § 1322(b)(2)** could not be used. There was a way out, but the refunds would require a two-step process. The Corps **and** EPA should have deposited the fees in a trust **account**⁷⁹ and kept them there until the applications were processed, at which time depositing as **miscellaneous** receipts would have been proper. Thus, EPA could first transfer the funds from the general fund to its suspense account as **the** correction of an error, and then make the refunds directly from the suspense account.

In cases where the “Moneys Erroneously Received and Covered” appropriation is otherwise **available**, it is available without regard to

⁷⁹See also **B-3596/A-51615**, November 30, 1939. Use of a deposit fund suspense account is equally acceptable. **B-158381**, June 21, 1968.

whether the original payment was made under protest. 55 **Comp. Gen.** 243 (1975). Payments under 31 U.S.C. §1322(b)(2) are made by the Treasury Department without the need for settlement action by GAO, except in doubtful cases. **B-142380**, March 24, 1960 (circular letter). The procedure is for the finance office of the agency making the refund to submit a Standard Form 1166 to the Treasury Department, citing account 20X1807 in the “appropriations summary” block. See **B-217595**, April 2, 1986; **B-210638**, July 5, 1984 (non-decision letter).

The appropriation made by 31 U.S.C. §1322(b)(2) is available only to refund amounts actually received and deposited. If a given refund bears interest, for example, a refund claim approved by a contracting officer under the Contract Disputes Act, the interest portion must be charged to the contracting agency’s operating appropriations for the fiscal year in which the award is made. **B-217595**, April 2, 1986.

If an agency collects money from someone to whom it owes a refund from a prior transaction, it should not simply deposit the net amount. The correct procedure is to deposit the new receipt into the general fund (assuming that’s the proper receptacle), and then make the refund using the “Moneys Erroneously Received and Covered” appropriation. **B-19882**, October 28, 1941; **A-96279**, September 15, 1938. However, GAO has approved offsetting a refund against future amounts due from the same party in cases where there is a continuing relationship, but suggested that the party be given the choice. **B-217595**, April 2, 1986, at 4.

Clearly, if the receipt cannot be regarded as erroneous, 31 U.S.C. §1322(b)(2) is not available. 53 **Comp. Gen.** 580 (1974); **B-1461** 11, July 6, 1961. Also, the “Moneys Erroneously Received and Covered” appropriation is available only where the amount to be refunded was deposited into the general fund. E.g., 11 **Comp. Dec.** 300 (1904). If a refund is due of moneys deposited somewhere other than the general fund, some other basis must be sought.

3. Gifts and Donations to the Government

a. Donations to the Government

It has long been recognized that the United States (as opposed to a particular agency) may receive and accept gifts. No particular

statutory authority is necessary. As the Supreme Court has said, “[u]ninterrupted usage from the foundation of the Government has sanctioned it.” United States v. Burnison, 339 U.S. 87, 90 (1950). The gifts may be of real property or personal property, and they may be testamentary (made by will) or inter vivos (made by persons who are not dead yet). Since monetary gifts to the United States go to the general fund of the Treasury, there is no augmentation problem.

However, as the Supreme Court held in the Burnison case, a state may prohibit testamentary gifts by its domiciliaries to the United States. Also, a state may impose an inheritance tax on property bequeathed to the United States. United States v. Perkins, 163 U.S. 625 (1896). The tax is not regarded as a constitutionally impermissible tax on federal property “since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax. . . .” Id. at 630.

While gifts to the United States do not require statutory authority, gifts to an individual federal agency stand on a different footing. The rule is that a government agency may not accept for its own use (i.e., for retention by the agency or credit to its own appropriations) gifts of money or other property in the absence of specific statutory authority. 16 Comp. Gen. 911 (1937). As the Comptroller General said in that decision, “[w]hen the Congress has considered desirable the receipt of donations. . . it has generally made specific provision therefor . . .” Id. at 912. See also B-13378, November 20, 1940; A-44015, March 17, 1937.

Thus, acceptance of a gift by an agency lacking statutory authority to do so is an improper augmentation. If an agency does not have statutory authority to accept donations, it must turn the money in to the Treasury as miscellaneous receipts. E.g., B-139992, August 31, 1959 (proceeds of life insurance policy designating federal agency as beneficiary).

For purposes of this discussion, the term “gifts” maybe defined as “gratuitous conveyances or transfers of ownership in property without any consideration.” 25 Comp. Gen. 637,639 (1946); B-217909, September 22, 1986. A receipt that does not meet this definition does not become a gift merely because the agency characterizes it as one. For example, a fee paid for the privilege of

filming a motion picture in a national park is not a gift and must be deposited as miscellaneous receipts rather than in the agency's trust fund. 25 **Comp. Gen.** 637 (1946). See also **B-61938**, April 16, 1948. Similarly, a reduction of accrued liability in fulfillment of a contractual obligation is not a donation for purposes of a statute authorizing appropriations to match "donations." **B-183442**, October 21, 1975.

A number of departments and agencies have statutory authority to accept gifts. A partial listing is contained in **B-149711**, August 20, 1963. The statutory authorizations contain varying degrees of specificity as to precisely what may be accepted (money, property, services, etc.). For example, the State Department's gift statute, 22 U.S.C. §2697, authorizes the acceptance of gifts of money or property, real or personal, and, in the Secretary's discretion, conditional gifts. A case discussing this statute is 67 **Comp. Gen.** 90 (1987) (United States Information Agency may accept donations of radio programs prepared by private syndicators for broadcast over Voice of America facilities). Another is 70 **Comp. Gen.** 413 (1991) (United States Information Agency may accept donations of foreign debt). Authority to accept voluntary services does not include donations of cash. **A-86115**, July 15, 1937; **A-51627**, March 15, 1937.

The authority of the Defense Department to accept gifts is found in several statutes. First, the Defense Department may accept contributions of money or real or personal property "for use by the Department of Defense" from any person, foreign government, or international organization. The money and proceeds from the sale of property are credited to the Defense Cooperation Account in the Treasury. The money is not automatically available to Defense, but is available for obligation or expenditure only in the manner and to the extent provided in appropriation acts. 10 U.S.C. § 2608 (**Supp. III 1991**). Second, the Department may accept services, supplies, real property, or the use of real property under a mutual defense or similar agreement or as reciprocal courtesies, from a foreign government for the support of any element of United States armed forces in that country. 10 U.S.C. § 2350g (**Supp. III 1991**). These authorities formed the basis for the United States to accept contributions from foreign governments and others to defray the costs of the 1991 military operations in the Persian Gulf. See GAO report, Operations Desert Shield/Storm: Foreign Government and Individual Contributions to the Department of Defense, **GAO/NSIAD-92-144 (May 1992)**. Other

limited-purpose authorities available to the military are found in 10 U.S.C. §§ 2601–2607.

We may also note a statute tailor-made for the philanthropist desiring to make a donation for the express purpose of reducing the national debt. (Some people think they already do this in April of each year.) The Secretary of the Treasury may accept **gifts** of money, obligations of the United States, or other intangible personal **property** made for the express purpose of reducing the public debt. Gifts of other real or personal property for the same purpose may be made to the Administrator of the General Services Administration. 31 U.S.C. §3113.

Assuming the existence of the requisite **statutory** authority, it is quite easy to make a gift to the government. There are no particular forms required. A simple letter to the appropriate agency head transmitting the funds for the stated purpose will **suffice**. See **B-157469**, July 24, 1974 (non-decision letter).

A 1980 GAO study found that, during fiscal year 1979, 41 government agencies received a total of \$21.6 million classified as **gift** revenue. See report entitled Review of Federal Agencies' Gift Funds, **FGMSD-80-77** (September 24, 1980). The report pointed out that the use of **gift** funds dilutes congressional oversight because the funds do not go through the appropriation process. The report recommended that agencies be required to more fully disclose gift fund operations in their budget submissions.

The issue raised in most gift cases is the purpose for which gift funds may be used. This ultimately depends on the scope of the agency's statutory authority and the terms of the gift. Gift funds are accounted for as trust funds. They must be deposited in the Treasury as trust funds under 31 U.S.C. §1321(b), to be disbursed in accordance with the terms of the trust. In 16 **Comp. Gen.** 650,655 (1937), the Comptroller General stated:

“Where the Congress authorizes Federal officers to accept private gifts or **bequests** for a specific purpose, often subject to certain prescribed conditions as to administration, authority must of necessity be reposed in the custodians of the trust fund to make expenditures for administration in such a manner as to carry out the purposes of the trust and to comply with the prescribed conditions thereof without reference to **general** regulatory and prohibitory statutes applicable to public funds.”

While this passage correctly states the trust theory, agencies have sometimes misconstrued it to mean that they have free and unrestricted use of donated funds. This is not **the** case. On the one hand, donated funds are not subject to all of the restrictions applicable to direct appropriations. Yet on the other hand, they are still “public funds” in a very real sense. They can be used only in furtherance of authorized agency purposes and incident to the terms of the trust. See **B-195492**, March 18, 1980.

An interesting illustration of this point occurred in **B-16406**, May 17, 1941. A citizen had bequeathed money in her will to a hospital. When the will was made, the hospital belonged to the state of Louisiana. By the time the will was probated, however, it had been acquired by the United States. Louisiana was concerned that the bequest might, if deposited in the United States Treasury, be diverted from the decedent’s intent. There was no need for concern, the Comptroller General advised. The money would have to be deposited as trust funds and would be available for expenditure only for the purposes specified in the trust, i.e., for the hospital.

Since gift funds are accounted for as trust funds, they are presumably subject to the Antideficiency Act. See OMB Circular No. **A-34, § 21.1** (1985), which includes trust fund expenditure accounts in the definition of “appropriation or fund.”

In evaluating the propriety of a proposed use of gift funds, it is first necessary to examine the precise terms of the statute authorizing the agency to accept the gift. Limitations imposed by that statute must be followed. Thus, under a statute which authorized the Forest Service to accept donations “for the purpose of establishing or operating any forest research facility,” the Forest Service could not turn over unconditional gift funds to a private foundation under a cooperative agreement, with the foundation to invest the funds and use the proceeds for purposes other than establishing or operating forest research facilities. **55 Comp. Gen.** 1059 (1976). See also **40 Op. Att’y Gen.** 66 (1941) (Library of Congress could not, without statutory authority, share income from donated property with Smithsonian Institution); **B-198730**, December 10, 1986 (funds donated to Library of Congress to further purposes of Library’s Center for the Book could not be used for unrelated Library programs).

Under a statute authorizing the Federal Board for Vocational Education to accept donations to be used “in connection with the appropriations hereby made or hereafter to be made, to defray the expenses of providing and maintaining courses of vocational rehabilitation,” the funds could be used only to supplement the Board’s regular appropriations and could not be used for any expense not legally payable from the regular appropriation. The statute here conferred no discretion. 27 **Comp.** Dec. 1068 (1921).

If an agency is authorized to accept conditional **gifts** (**gifts** made on the condition that the funds be used for a specific authorized purpose), the funds may be used to augment a “not to exceed” earmark applicable to that purpose. **B-52501**, November 9, 1945. (Although the statute involved in **B-52501**, the predecessor of 10 U.S.C. § 2608 noted above, no longer exists, the point of the decision is still valid.)

Once it is determined that the proposed use will not contravene the terms of the agency’s authorizing statute, the agency will have some discretion under the trust theory. The area in which this discretion has most often manifested itself in the decisions is entertainment. Although appropriated funds are generally not available for entertainment, several decisions have established the proposition that donated funds may be used for entertainment. This does not mean any entertainment agency **officials** may desire. Donated funds maybe used for entertainment only if the entertainment will further a valid function of the agency, if the function could not be accomplished as effectively from the government’s standpoint without the expenditure, and if the expenditure does not violate any restrictions imposed by the donor on the use of the funds. 46 **Comp. Gen.** 379 (1966); **B-170938**, October 30, 1972; **B-142538**, February 8, 1961. See also **B-195492**, March 18, 1980; **B-152331**, November 19, 1975. (**B-152331** involved a trust fund which included both gift and non-gift funds.) It follows that donated funds may not be used for entertainment which does not **bear** a legitimate relationship to official agency purposes. 61 **Comp. Gen.** 260 (1982), affirmed upon reconsideration, **B-206173**, August 3, 1982 (donated funds improperly used for breakfast for Cabinet wives and Secretary’s Christmas party); **B-198730**, April 13, 1981 (non-decision letter).

The trust fund concept was also applied in 36 **Comp. Gen.** 771 (1957). The Alexander Hamilton Bicentennial Commission had been

given statutory authority to accept gifts and wanted to use the donations to award Alexander Hamilton Commemorative Scholarships. The **Commission** was to have a brief existence and would not have sufficient time to **administer** the scholarship awards. The Comptroller General held that the Commission could, prior to the date of its expiration, transfer the funds to a responsible private **organization** for the purpose of enabling proper administration of the scholarship awards. The distinction between this case and 55 **Comp. Gen.** 1059, mentioned above, is that in 36 **Comp. Gen.** 771, the objective of transferring the funds to a private organization was to better carry out an authorized purpose. In 55 **Comp. Gen.** 1059, the objective was to enable the funds to be used for unauthorized purposes.

Another case illustrating permissible administrative discretion under the trust theory is **B-131278**, September 9, 1957. A number of persons had made donations to St. Elizabeth's Hospital to enable it to buy an organ for its chapel. The donors (organ donors?) had made the **gifts** on the condition that the Hospital purchase a high-quality (expensive) organ. When the Hospital issued its invitation for bids on the organ, the specifications were sufficiently restrictive so as to preclude offers on lower quality organs. The decision found this to be entirely within the Hospital's discretion in using the gift funds in accordance with their terms.

As noted above, however, the agency's discretion in **administering** its gift funds is not unlimited. Thus, for example, an agency may not use gift funds for purely personal items such as greeting cards. 47 **Comp. Gen.** 314 (1967); **B-195492**, March 18, 1980.

The particular statutory scheme will determine the extent to which donated funds are subject to other laws governing the expenditure of public funds. In two cases, for example, where it was clear that a designated activity was to be carried out **solely** or primarily with donated funds, GAO found that the recipient agency could invest the gift funds in non-Treasury interest-bearing accounts, and was not required to comply with the Federal Property and Administrative Services Act of 1949 or the Federal Acquisition Regulation. 68 **Comp. Gen.** 237 (1989) (Christopher Columbus **Quincentenary** Jubilee Commission); **B-211149**, December 12, 1985 (Holocaust Memorial council).

Gifts which involve continuing expense present special problems. Although there are no recent cases, indications are that the agency needs specific statutory authority-not merely general authority to accept gifts-since the agency's appropriations would not otherwise be available to make the continuing expenses. For example, an individual made a testamentary gift to a United States naval hospital. The will provided that the money was to be invested in the form of a memorial fund, with the income to be used for **specified** purposes. The Comptroller General found this objectionable in that "the United States would become, in effect, a trustee for charitable uses, would never gain a legal title to the money, but would have the burden and obligation of administering in perpetuity a trust fund. . . ." Also, absent **specific** authorization by Congress, appropriations would not be available for the expenses of administering the trust. Therefore, absent congressional authorization to accept the donation "as made," it could not be accepted either by the naval hospital, 11 **Comp. Gen.** 355 (1932), or by the Treasury Department, **A-40707**, December 15, 1936. See also *Story v. Snyder*, 184 **F.2d** 454,456 (**D.C. Cir.** 1950), cert. denied, 340 U.S. 866 ("[g]ifts to the United States which involve any duty, burden, or condition, or are made dependent upon some future performance by the United States, are not accepted by the Government unless by the express authority of Congress"); 10 **Comp. Gen.** 395 (1931); 22 **Comp. Dec.** 465 (1916)⁸⁰; 30 **Op. Att'y Gen.** 527 (1916). A few of the cases (e.g., 10 **Comp. Gen.** 395 and 30 **Op. Att'y Gen.** 527) have tied the result in with the **Antideficiency Act** prohibition against incurring obligations in advance of appropriations.

A question which appears to have received little attention is whether an agency with **statutory** authority to accept gifts may use either appropriated funds or donated funds to solicit the gifts. GAO found that the Holocaust Memorial Council may use either appropriated or donated funds to hire a fund-raiser, but the cases have little precedent value since the legislation involved included specific authority to solicit as well as accept donations. See **B-211149**, December 12, 1985; **B-211149**, June 22, 1983.

An interesting, and hopefully unique, situation presented itself in **B-230727**, August 1, 1988. Congress had enacted legislation to establish a Commission on Improving the Effectiveness of the United

⁸⁰Some wag once said, jokingly we think, that if you looked hard enough You could probably find a case dealing with the use of appropriated funds to buy dog food. 22 **Comp. Dec.** 465 is it.

Nations, to be funded solely from private contributions. The effective date of the legislation was March 1, 1989. Unfortunately, the legislation failed to provide a mechanism for anyone (Treasury Department or General Services Administration, for example) to accept and account for donations prior to the effective date, and the Commission itself could not do so since it had no **legal** existence. Thus, unless the statute were amended to authorize some other agency to act on the Commission's behalf, potential donors could not make contributions prior to the effective date since there was no one authorized to accept them.

Occasionally, someone makes a gift to the United States and later wants the money back. Where the elements of an unconditional gift have been satisfied (intent to make a gift, delivery, and acceptance), claims for refund have been denied, **A-94582**, June 6, 1938; **B-151432-O. M.**, June 3, 1963.

Finally, if an agency is authorized to accept gifts, it may also accept a loan of equipment by a private party without charge to be used in connection with particular government work. The agency's appropriations for the work will be available for repairs to the equipment, but only to the extent necessary for the continued use of the equipment on the government work, and not after the government's use has terminated. 20 **Comp. Gen.** 617 (1941). In one case, GAO approved the loan of private property to a federal agency by one of its employees, without charge and apparently without statutory authority, where the agency administratively determined that the equipment was necessary to the discharge of agency functions and the loan was in the interest of the United States. 22 **Comp. Gen.** 153 (1942). The decision stressed, however, that the practice should not be encouraged. The decision seems to have been based in part on wartime needs and its precedent value would therefore seem minimal. See, e.g., **B-168717**, February 12, 1970.

b. Donations to Individual Employees

(1) Contributions to salary or expenses

As a general proposition, unless authorized by statute, private contributions to the salary or expenses of a federal employee are improper. First, they may in some circumstances violate 18 U.S.C. § 209, which prohibits the supplementation of a government employee's salary from private sources. "The evils of such, were it permitted, are obvious." Exchange National Bank v. Abramson, 295

F. **Supp.** 87,90 (D. **Minn.** 1969). For **purposes of 18 U.S.C. § 209**, the proverb that it is better to give than to receive doesn't work. Both the giving and the receiving are criminal offenses under the statute. The employee would presumably violate the law by receiving more than he or she is entitled to receive under applicable statutes and regulations. 33 Op. **Att'y Gen.** 273 (1922).

Second, they are improper as unauthorized augmentations. To the extent the private contribution replaces the employee's government salary, it is a direct augmentation of the employing agency's appropriations. To the extent the contribution supplements the government salary, it is an augmentation in an indirect sense, the theory being that when Congress appropriates money for an activity, all expenses of that activity must be borne by that appropriation unless Congress specifically provides otherwise.

An early case in point is 2 **Comp. Gen.** 775 (1923). The American Jewelers' Protective Association offered to pay the salary and expenses of a customs agent for one year **on** the condition that the agent be assigned exclusively for that year to investigate jewelry smuggling. The Comptroller General found the arrangement improper, for the two reasons noted above. Whether the payments were to be made directly to the employee or to the agency by way of reimbursement was immaterial.

Most questions in this area involve schemes for private entities to pay official travel expenses. From the sheer number of cases GAO has considered, one cannot help feeling that the bureaucrat must indeed be a beloved creature. Prior to 1991, a long series of decisions established the proposition that donations from private sources for official travel to conduct government business constituted an unlawful augmentation unless the employing agency had **statutory** authority to accept gifts. If the agency had such authority, the donation could be made to the agency, not the individual employee, and the agency would then reimburse the employee in accordance with applicable travel laws and regulations, with the allowances reduced as appropriate in the case of contributions in **kind**.⁸¹

⁸¹Some cases from this series are 59 **Comp. Gen.** 415 (1980); 55 **Comp. Gen.** 1293 (1976); 49 **Comp. Gen.** **572 (1970)**; **46 Comp. Gen.** 689 (1967); 36 **Comp. Gen.** 268 (1956); 26 **Comp. Dec.** 43 (1919).

One problem with this system was the lack of uniformity in treatment, varying with the agency's **statutory** authority. Congress addressed the situation in the Ethics Reform Act of 1989, Pub. L. No. 101-194, **§ 302**, 103 Stat. 1716, 1745, codified at 31 U.S.C. § 1353. Subsection (a) provides as follows:

“Notwithstanding any other provision of law, the Administrator of General Services, in consultation with the Director of the **Office** of Government Ethics, shall prescribe by regulation the conditions under which an agency in the executive branch (including an independent agency) may accept payment, or authorize an employee of such agency to accept payment on the agency's behalf, from non-Federal sources for travel, subsistence, and related expenses with respect to the attendance of the employee (or the spouse of such employee) at any meeting or similar function relating to the **official** duties of the employee. Any cash payment so accepted shall be credited to the appropriation applicable to such expenses. In the case of a payment in kind so accepted, a pro rata reduction **shall** be made in any entitlement of the employee to payment from the Government for such expenses.”

GSA's implementing regulations, published on March 8, 1991 (56 Fed. Reg. 9878), are found at 41 C.F.R. **Parts** 304-1 and 304-2. Thus, as long as acceptance complies with the statute and regulations, there is no longer an augmentation problem. The existence or lack of separate statutory authority to accept gifts is immaterial,

Another relevant statute, which seemingly overlaps 31 U.S.C. **§ 1353** to some extent but was left untouched by it, is 5 U.S.C. § 4111, enacted as part of the Government Employees Training Act. Under this provision, an employee may accept (1) contributions and awards incident to training in **nongovernment** facilities, and (2) payment of travel, subsistence, and other expenses incident to attendance at meetings, but only if the donor is a tax-exempt nonprofit **organization**.⁸² If an employee receives a contribution in cash or in kind under this section, travel and subsistence allowances are subject to an “appropriate reduction.”

Section 4111 authorizes the employee to accept the donation. It does not authorize the agency to accept the donation, credit it to its appropriations, and then reimburse the employee. 55 **Comp. Gen.**

⁸²The rules under 5 U.S.C. § 4111 are stated and applied in a number of sources in addition to the cases cited in the text. See, for example, B-171751, February 11, 1971, and two GAO reports involving the Agency for International Development (**Travel Practices: Private Funding of AID Employees' Travel**, GAO/NSIAD-87-92, March 1987, and **Travel Practices: Use of Airline Bonus Coupons and Privately Funded Travel by AID Employees**, GAO/NSIAD-86-26, November 1985).

1293 (1976). An employee who receives an authorized donation after the government has already paid the **travel** expenses cannot keep everything. The employee must refund to the government the amount by which his or her allowances would have been reduced had the donation been received before the allowances were paid. **The** agency may then **credit** this refund to its travel appropriation as **an** authorized repayment. **Id.** at 1294-95.

The statute requires an “appropriate reduction” in travel payments in order to preclude the agency from paying for something that has already been reimbursed by an authorized private organization. An employee being reimbursed on an “actual expense” basis should not be claiming items which would duplicate private reimbursements. Thus, the agency is not required to reduce the actual expense entitlement by the **value** of provided meals. 64 **Comp. Gen. 185** (1985). However, the value of subsistence items furnished in kind must be deducted where the employee is being reimbursed on a per diem basis. **Id.** at 188; 49 **Comp. Gen. 572,576** (1970).

The authority conferred by 5 U.S.C. § 4111 is expressly limited to organizations exempt from taxation under section 501 (c)(3) of the **Internal Revenue Code**, 26 U.S.C. § 501(c)(3) (religious, charitable, **scientific**, educational, etc.). It does not extend to organizations which may be tax-exempt under other portions of § 501. **B-225986**, March 2, 1987. Also, it does not **apply** to an organization whose application for exemption under § 501(c)(3) has not yet been approved; subsequent approval is not retroactive for purposes of 5 U.S.C. § 4111. **B-225264**, November 24, 1987 (non-decision letter).

Donations made under the express condition that they be used for some unauthorized purpose should be returned to the donor. 47 **Comp. Gen. 319** (1967).

(2) Promotional and other travel-related items

In recent years, commercial airlines and others have devised a variety of schemes, which change from time to time, to reward frequent customers. Promotional materials awarded to customers may take various forms—bonus trips, reduced-fare coupons, cash, merchandise, credits toward future goods or services, etc. Government employees traveling on government business are eligible for these promotional items the same as anyone else. There is,

however, one important distinction. “Anyone else” may keep them; the government employee, with certain exceptions, may not.

The fundamental principle underlying the decisions and regulations in this area is that any benefit, cash payment or otherwise, received by a government employee from private sources incident to or resulting from the performance of **official** duty is regarded as having been received on behalf of the government and is the property of the **government**.⁸³ It should also be noted that the promotional items are not really “gifts”; they are more in the nature of benefits “earned” as a result of the expenditure of federal funds, **B-216052**, January 29, 1985 (non-decision letter). While the cases are not “augmentation of appropriations” cases, they are sufficiently related to the subject matter of this section to warrant brief treatment here.

GAO’s “leading case” in this area is 63 **Comp. Gen.** 229 (1984), and many of the points noted below will be found in that decision. In addition, the basic rules are reflected in the Federal Property Management Regulations (**FPMR**), 41 C.F.R. § 101-25.103, and Federal Travel **Regulations (FTR)**, 41 C.F.R. Parts 301-1 and 301-3.

The primary rule is that, except as noted below, promotional items or benefits of any type received by a government employee resulting in whole or in part from **official** travel are the property of the government and may not be retained by the employee for personal use. 63 **Comp. Gen.** 229.⁸⁴ The fact that the individual obtains the benefit through a combination of official and personal travel is immaterial. **Id.**⁸⁵ An employee wishing to take advantage of **promotional benefits should** maintain separate accounts for official and personal travel. **FTR**, 41 C.F.R. § 301-1.6(f)(1). Whether the benefit is transferable or nontransferable is also immaterial. 63 **Comp. Gen.** 229, 232–33; **B-215826**, January 23, 1985.

⁸³There are common-sense exceptions to this. For example, a 1977 Justice Department opinion, summarized in **B-199656**, March 21, 1984 (non-decision letter), held that a government employee may retain a public service award in the form of cash from a private organization even though the service was performed as a government employee.

⁸⁴See also 69 **Comp. Gen.** 643 (1990); 67 **Comp. Gen.** 79 (1987); 59 **Comp. Gen.** 203, 206 (1980); **B-210717.2**, February 24, 1984; **B-199656**, July 15, 1981; GAO report, Use of Airline Bonus Coupons and Privately Funded Travel by AID Employees, **GAO/NSIAD-86-26** (November 1985).

⁸⁵See also **B-215826**, January 23, 1985; **B-212559**, February 24, 1984; **B-235185**, August 18, 1989 (non-decision letter); **B-218524**, April 1, 1986 (non-decision letter).

Items such as promotional coupons that provide for future free or reduced-cost travel should be integrated into the agency's travel plans. **FPMR, 41 C.F.R. § 101-25.103-2(b)**. Merchandise items which the receiving agency cannot use must be disposed of in accordance with General Services Administration regulations. *Id.* §§ **101-25.103-2(d)**, 101-25.103-4.

Since the benefit is the property of the government from the moment the employee receives it, an employee who uses it for personal travel or other personal use becomes indebted to the government for the full value of the benefit received. 63 **Comp. Gen.** 233 (1984); **B-216822**, March 18, 1985.⁸⁶

The typical bonus program is not automatic, but requires the traveler to submit an application and, in some cases, pay a fee. An employee who has paid such a fee maybe reimbursed, not to exceed the amount of expected savings to the government. **FTR, 41 C.F.R. § 301-1.6(f)(2)**; 63 **Comp. Gen.** 229,231.

The employee may retain two types of promotional "gift":

- Merchandise items of nominal intrinsic value (pens, pencils, note pads, calendars, etc.). 63 **Comp. Gen.** 229,233,
- Benefits which have no value to the government, such as free upgrades to first class. 63 **Comp. Gen.** 229, 232; **B-212559**, February 24, 1984. The free upgrade should be used only for official travel. **B-223387-O.M.**, August 22, 1986.

In addition, the Federal Travel Regulations were amended in 1989 to permit an employee, subject to agency approval, to obtain premium-class accommodations through the redemption of frequent traveler benefits.⁸⁷

⁸⁶ At the time **B-216822** was issued, the indebtedness could not be waived. The waiver statute, ⁵ U.S.C. § 5584, has since been amended to include debts arising from travel or transportation allowances, so this portion of the decision should be disregarded.

⁸⁷ 41 C.F.R. § 301.3.3 3(d)(3)(ii)(F), added by 54 Fed. Reg. 47523,47524 (November 15, 1989). GAO supported the amendment. See 67 **Comp. Gen.** 79,83 (1987); **B-235185**, August 18, 1989 (non-decision letter). Prior to the amendment, such a redemption would not have been authorized under the guidelines set forth in the decisions. See GAO report, Frequent Fliers: Use of Airline Bonus Awards by AID Employees, **GAO/NSIAD-86-217** (September 1986).

An employee may keep a prize won in a contest or lottery sponsored by an air carrier if the contest was open to the general public and not limited to ticket-holding passengers. **B-199656**, July 15, 1981.

Also, there is no problem with the acceptance of life insurance benefits offered to federal employees by travel management contractors **at** no additional cost to the government where the government would receive no financial benefit by declining. **B-222234**, December 9, 1986.

Similarly, if an employee chooses to charge official travel expenses to a personal credit card and subsequently receives a cash or credit rebate on purchases made with that card, the employee may keep the entire rebate since it is not directly related to **official** travel. **B-236219**, May 4, 1990. As the decision suggests, the answer would presumably be different if the rebate were based solely on use of the card for official travel.

Denied boarding compensation (compensation paid by an air carrier when a passenger is involuntarily “bumped”) is payable to the government and not to the individual employee. 59 **Comp. Gen.** 95 (1979); **B-227280**, October 14, 1988; **B-224590**, November 10, 1986; **B-148879**, July 20, 1970, affirmed upon reconsideration, **B-148879**, August 28, 1970; **FTR**, 41 C.F.R. § 301-3.5(b). Since this is not a gift, but is more in the nature of damages, it must be deposited into miscellaneous receipts. 41 **Comp. Gen.** 806 (1962); **FTR**, *supra*. However, an employee who voluntarily vacates his or her seat and takes a later flight may retain overbooking compensation received from the airline, subject to offset for any additional travel expenses caused by the employee’s voluntary action. 59 **Comp. Gen.** 203 (1980); **B-196145**, January 14, 1980.

A strange result occurs if a federal agency makes a mandatory space requisition that forces an airline to “bump” a passenger who turns out to be another federal employee. The airline can charge the agency for the overbooking compensation it is required to pay. 62 **Comp. Gen.** 519 (1983). The bumped employee turns the money into his or her employing agency, which in turn deposits it in the Treasury. The net result is the transfer of the amount of the overbooking compensation from the requisitioning agency to the general fund of the Treasury. While 62 **Comp. Gen.** 519 did not expressly address the case of a bumped federal employee, there is no apparent reason why the result

should be any different since the airline is entitled to be made whole in either case.

4. Other Augmentation Principles and Cases

AS pointed out earlier in our introductory comments, the augmentation theory is relevant in a wide variety of contexts. The most common applications are the areas previously discussed—the spectrum of situations involving the miscellaneous **receipts** statute and the acceptance of gifts. This portion of the discussion will present a sampling of cases to illustrate other applications of the **theory**.

Another way of stating the augmentation rule is that when Congress appropriates funds for an activity, the appropriation represents a limitation Congress has **fixed** for that activity, and all expenditures for that activity must come from that appropriation absent express authority to the **contrary**. Thus, a federal institution is normally not eligible to receive grant funds from another federal institution. It is not necessary for the grant statute to expressly exclude federal institutions as eligible grantees; the rule **will** apply based on the augmentation theory unless the grant statute expressly includes federal institutions. 57 **Comp. Gen.** 662,664 (1978); 23 **Comp. Gen.** 694 (1944); **B-1** 14868, April 11, 1975.

The improper treatment of reimbursable transactions may result in an augmentation. Thus, if a given reimbursement must be credited to the appropriation that “earned” it, i.e., that financed the **transaction**, and that appropriation has expired, crediting the reimbursement to current funds is an improper augmentation. An example of this type of transaction is the Economy Act, 31 U.S.C. §1535.

An agency may have the option of crediting reimbursements either to current funds or to the appropriation which financed the transaction. An example here is the Arms Export Control Act (Foreign Military Sales Act). Even here, however, crediting a reimbursement to an account which bears no relationship to the transaction would be an unauthorized augmentation. **B-132900-O.** M., November 1, 1977. Several statutes applicable to the Defense Department provide similar options. For a detailed discussion of these statutes, see **B-179708-O.** M., December 1, 1975; **B-179708-O.M.**, July 21, 1975; GAO report entitled Reimbursements to Appropriations: Legislative Suggestions for Improved Congressional Control, **FGMSD-75-52** (November 1, 1976).

Failure to recover all required costs in a reimbursable Economy Act transaction improperly **augments** the appropriations of the ordering agency. 57 **Comp. Gen.** 674,682 (1978).

Similarly, treating a transaction which should be reimbursed as **nonreimbursable** may result in an improper augmentation. For example, an agency receives appropriations to do its own work, not that of another agency. Accordingly, as a general proposition, interdepartmental loans of **personnel** on a **nonreimbursable** basis improperly augment the appropriations of the receiving agency. 65 **Comp. Gen.** 635 (1986); 64 **Comp. Gen.** 370 (1985).

Reimbursement by one agency to another in situations which are not the proper subject of an Economy Act agreement or where reimbursement is not otherwise statutorily authorized is improper for several reasons: It is an unauthorized transfer of appropriations; it violates 31 U.S.C. §1301(a) by using the reimbursing agency's appropriations for other than their intended purpose; and it is an improper augmentation of the appropriations of the agency receiving the reimbursement. (The cases do not always cite **all** of these **theories**; they again illustrate the close interrelationship of the various **concepts** discussed throughout this publication.) The situation arises, for example, when agencies attempt to use the Economy Act for a "service" which is a normal part of the providing agency's mission and for which it receives appropriations.

To illustrate, an agency acquiring land cannot reimburse the Justice Department for the legal expenses incurred incident to the acquisition because these are regular administrative expenses of the Justice Department for which it receives appropriations. 16 **Comp. Gen.** 333 (1936). Similarly, an agency cannot reimburse the Treasury Department for the administrative expenses incurred in making disbursements on its account. 17 **Comp. Gen.** 728 (1938).

Federal agencies may not reimburse the Patent **Office** for services performed in administering the patent and trademark laws since the Patent **Office** is required bylaw to furnish these **services** and receives appropriations for them. 33 **Comp. Gen.** 27 (1953). Nor may they reimburse the Library of Congress for recording assignments of copyrights to the United States. 31 **Comp. Gen.** 14 (1951). See also 40 **Comp. Gen.** 369 (1960) (Interior Department may not charge other agencies for the cost of conducting hearings incident **to** the

validation of unpatented mining claims, although it may charge for other services in connection with the validation which it is not required to furnish); **B-211953**, December 7, **1984** (General Services Administration may not seek reimbursement for costs of storing records which it is required by law to store **and** for which it receives appropriations).

The Merit Systems Protection Board may not accept reimbursement from other federal agencies for travel expenses of hearing **officers** to hearing sites away from the Board's regular **field** offices. **Holding** the hearings is not a service to the other agency, but is a Board function for which it receives appropriations. The inadequacy of the Board's appropriations to permit sufficient travel is legally irrelevant. 59 **Comp. Gen.** 415 (1980), **affirmed** upon reconsideration, 61 **Comp. Gen.** 419 (1982). Where an agency provides personnel to act as hearing officers for another agency, it maybe reimbursed if it is not required to provide the **officers** (**B-192875**, January 15, 1980), but may not be reimbursed if it is required to provide them (32 **Comp. Gen.** 534 (1953)).

Similar issues can arise when an agency is trying to decide which of **its** appropriations to use for a given object. In 68 **Comp. Gen.** 337 (1989), for example, the Railroad Retirement Board wanted to make performance awards to personnel in its Office of Inspector General, and was unsure whether to charge its appropriation for the **IG's** office or its general appropriation. A reasonable argument could be made to support either choice. Thus, the Board could make an election as long as it remained consistent thereafter. Since there was no indication that the **IG** appropriation was intended to be the exclusive funding source for the performance awards, using the general appropriation would not result in an improper augmentation of the **IG** appropriation.

A somewhat analogous situation could arise if an agency agrees to reduce or forgo receipts to which it is entitled, and the party owing those receipts agrees in return to make some expenditure which would otherwise have to be borne by a separate appropriation of the same agency. GAO examined such a situation in **B-77467**, November 8, 1950, involving the leasing of lands under the **Bankhead-Jones** Farm Tenant Act at reduced rentals on condition that the lessees in return perform certain improvements to the **land**. There was no augmentation in that case, however, since the statute expressly authorized the leasing with or without consideration and on such

terms as the Secretary of Agriculture determined would best accomplish the purposes of the act.

The following cases illustrate other situations which GAO found would result in unauthorized augmentations:

- The Customs Service may not charge the party-in-interest for travel expenses of customs employees incurred incident to official duties performed at night or on a Sunday or holiday. 43 **Comp. Gen.** 101 (1963); 3 **Comp. Gen.** 960 (1924). See also 22 **Comp. Dec.** 253 (1915).
- Department of Energy may not use overcharge refunds collected from oil companies to pay the administrative expenses of its Office of Hearings and Appeals. **B-200170**, April 1, 1981.
- Proposal for airlines to reimburse Treasury to permit Customs Service to hire additional staff to reduce clearance delays at Miami airport was unauthorized in that it would augment appropriations made by Congress for that service. 59 **Comp. Gen.** 294 (1980).

F. Lump-Sum Appropriations

1. The Rule-General Discussion

A lump-sum appropriation is one that is made to cover a number of **specific** programs, projects, or items. (The number maybe as small as two.) In contrast, a line-item appropriation is available only for the specific object described.

Lump-sum appropriations come in many forms. Many smaller agencies receive only a single appropriation, usually termed “Salaries and Expenses” or “Operating Expenses.” All of the agency’s operations must be funded from this single appropriation. **Cabinet-level** departments and larger agencies receive several appropriations, often based on broad object categories such as “operations and maintenance” or “research and development.” For purposes of this discussion, a lump-sum appropriation is simply one that is available for more than one specific object.

In earlier times when the federal government was much smaller and federal programs were (or at least seemed) much simpler, very **specific** line-item appropriations were more common. In recent

decades, however, as the federal budget has grown in both size and complexity, a lump-sum approach has become a virtual necessity. For example, an appropriation act for an establishment the size of the Defense Department structured solely on a line-item basis would rival the telephone directory in bulk.

The amount of a **lump-sum** appropriation is not derived through guesswork. It is the result of a lengthy budget and appropriation process. The agency first submits its appropriation request to Congress through the **Office** of Management and Budget, supported by detailed budget justifications. Congress then reviews the request and enacts an appropriation which maybe more, less, or the same as the amount requested. Variations from the amount requested are usually explained in the appropriation act's legislative history, most often in committee reports.

All of this leads logically to a question which can be phrased in various ways: How much flexibility does an agency have in spending a lump-sum appropriation? Is it legally bound by its original budget estimate or by expressions of intent in legislative history? How is the agency's legitimate need for administrative flexibility balanced against the constitutional role of the Congress as controller of the public purse?

The answer to these questions is one of the most important principles of appropriations law. The rule, simply stated, is this: Restrictions on a lump-sum appropriation contained in the agency's budget request or in legislative history are not legally binding on the department or agency unless they are carried into (**specified** in) the appropriation act itself, or unless some other statute restricts the agency's spending flexibility. Of course, the agency cannot exceed the total amount of the lump-sum appropriation, and its spending must not violate other applicable statutory restrictions. The rule applies equally whether the legislative history is mere acquiescence in the agency's budget request or an affirmative expression of intent.

The rule recognizes the agency's need for flexibility to meet changing or unforeseen circumstances, yet **preserves** congressional control in several ways. First, the rule merely says that the restrictions are not legally binding. The practical wisdom of making the expenditure is an entirely separate question. An agency that disregards the wishes of its oversight or appropriations committees will most likely be called

upon to answer for its digressions before those committees next year. An agency that fails to “keep faith” with the Congress may **find** its next appropriation reduced or limited by line-item restrictions. That Congress is fully aware of this relationship is evidenced by the following statement from a 1973 House Appropriations Committee report:

“In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the **detailed justifications** which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose **confidence** in the requests made and probably result in reduced appropriations or line item appropriation **bills**.”⁸⁸

Second, restrictions on an agency’s spending flexibility exist through the operation of other laws. For example, a “**Salaries and Expenses**” appropriation may be a large lump sum, but much of it is in fact **nondiscretionary** because the salaries of agency employees are **fixed by law**.⁸⁹ Third, reprogramming arrangements with the various committees provide another safeguard against abuse. Finally, Congress always holds the ultimate trump card. It has the power to make any restriction legally binding simply by including it in the appropriation **act**.⁹⁰ Thus, the treatment of lump-sum appropriations may be regarded as yet another example of the efforts of our legal and political systems to balance the conflicting objectives of executive flexibility and congressional **control**.⁹¹

⁸⁸Report of the House Committee on Appropriations on the 1974 Defense Department appropriation bill, H.R. Rep. No. 662, 93d Cong., 1st Sess. 16 (1973).

⁸⁹Fisher, Presidential Spending Power 72 (1975).

⁹⁰For possible limitations on this statement, see *New York V. United States*, — U.S. —, 112 S. Ct. 2408, 2426 (1992); *Nevada v. Skinner*, 884 F.2d 445, 447 (9th Cir. 1989).

⁹¹The effort has not always been free from controversy. One senator, concerned with what he felt was excessive flexibility in a 1935 appropriation, tried to make his point by suggesting the following:

“Section 1. Congress hereby appropriates \$4,880,000,000 to the President of the United States to use as he pleases.

“Sec. 2. Anybody who does not like it is fined \$1,000.”

79 Cong. Rec. 2014 (1935) (remarks of Sen. Arthur Vandenberg), quoted in Fisher, supra note 89, at 62–63.

Two common examples of devices Congress uses when it **wants** to restrict an agency's spending flexibility are line-item appropriations and earmarks. Another approach is illustrated by the **following** provision, the most restrictive we have seen, from the 1988 continuing resolution:

"Amounts and authorities provided by this resolution shall be in **accordance** with the reports accompanying the bills as passed by or reported to the House and the Senate and in the Joint Explanatory Statement of the Conference accompanying this Joint **Resolution.**"⁹²

The 1983 appropriation act for the Department of Housing and Urban Development contained this restriction:

"Where appropriations in titles I and 11 of this Act are expendable for travel **expenses** and no **specific** limitation has been **placed** thereon, the expenditures for such travel expenses may not exceed the amounts set forth **therefor** in the budget estimates submitted for the appropriations. . . ." ⁹³

A provision prohibiting the use of a construction appropriation to start any new project for which an estimate was not included in the budget is discussed in 34 **Comp. Gen.** 278 (1954).

Also, the availability of a lump-sum appropriation maybe restricted by provisions appearing in statutes other than appropriation acts, such as authorization acts. For example, if **an** agency receives a line-item authorization and a lump-sum appropriation pursuant **to** the authorization, the line-item restrictions and earmarks in the authorization act will apply just as if they appeared in the appropriation act itself. The topic is discussed in more detail, with citations, in Chapter 2.

2. Specific Applications

a. Effect of Budget Estimates

Perhaps the easiest case is the effect of the agency's own budget estimate. The rule here was stated in 17 **Comp. Gen.** 147, 150 (1937) as follows:

⁹²Pub. L. No. 100-202, §107, 101 Stat. 1329, 1329-434 (1987).

⁹³Pub. L. No. 97-272, §401, 96 Stat. 1160, 1178 (1982).

“The amounts of individual items in the estimates presented to the **Congress** on the **basis** of which a lump sum appropriation is enacted are not binding on **administrative** officers unless carried into the appropriation act **itself**.”

See also **B-63539**, June 6, 1947; **B-55277**, January 23, 1946; **B-35335**, July, 17, 1943; **B-48120-O**, M., October 21, 1948.

It follows that the lack of a specific budget request will not preclude an expenditure from a lump-sum appropriation which is otherwise **legally** available for the item in question. To illustrate, the Administrative **Office** of the U.S. Courts asked for a supplemental appropriation of \$11,000 in 1962 for necessary salaries and expenses of the Judicial Conference in revising and improving the federal rules of practice and procedure. The House of Representatives did not allow the increase but the Senate included the full amount. The bill went to conference but the conference was delayed and the agency needed the money. The Administrative **Office** then asked whether it **could** take the \$11,000 out of **its** regular 1962 appropriation even though it had not specifically included this item in its 1962 budget request. Citing 17 **Comp. Gen.** 147, and noting that the study of the federal rules was a continuing **statutory** function of the Judicial Conference, the Comptroller General concluded as follows:

“**[I]n** the absence of a specific limitation or prohibition in the appropriation under consideration as to the amount which maybe expended for revising and improving the Federal Rules of practice and procedure, you would not be **legally** bound by your budget estimates or absence thereof.

“If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts thereof submitted in the budget estimates, such control may be effected by limiting such **items** in the appropriation act itself. Or, by a general provision of law, the availability of appropriations could be limited to the items and the amounts contained in the budget estimates. In the absence of such limitations an agency’s lump-sum appropriation is legally available to carry out the functions of the agency.”

This decision is **B-149163**, June 27, 1962. See also 20 **Comp. Gen.** 631 (1941); **B-198234**, March 25, 1981; **B-69238**, September 23, 1948. The same principle would **apply** where the budget request was for an amount less than the amount appropriated, or for zero. 2 **Comp. Gen.** 517 (1923); **B-126975**, February 12, 1958.

b. Restrictions in Legislative History

The issue raised in most of the decisions results from changes to or restrictions on a **lump-sum** appropriation imposed during the legislative process. The “leading case” in this area is 55 **Comp. Gen.** 307 (1975), the so-called “LTV case.” The Department of the Navy had selected the McDonnell Douglas Corporation to develop a new fighter aircraft. LTV Aerospace Corporation protested the selection, arguing that the aircraft McDonnell Douglas proposed violated the 1975 Defense Department Appropriation Act. The appropriation in question was a lump-sum appropriation of slightly over \$3 billion under the heading “Research, Development, Test, and Evaluation, Navy.” This appropriation covered a **large** number of projects, including the fighter aircraft in question. The conference report on the appropriation act had stated that \$20 million was being provided for a Navy combat fighter, but that “[adaptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided.” It was conceded that the McDonnell Douglas aircraft was not a derivative of the Air Force fighter and that the Navy’s selection was not in accord with the instructions in the **conference** report. The issue, therefore, was whether the conference report was legally binding on the Navy. In other words, did Navy act illegally in choosing not to follow the conference report?

The ensuing decision is GAO’s most comprehensive statement on the legal availability of lump-sum appropriations. Pertinent excerpts are set forth below:

“[Congress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for ‘unforeseen developments, changing requirements, . . . and legislation enacted subsequent to appropriations.’ [Citation omitted.] This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to **preserve** spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but **rather** to leave it to the agencies to ‘keep faith’ with the Congress. . . .

“On the other hand, when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency’s use of funds, it does so by means of explicit statutory language. . . .

“Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what **can** be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and

indicia in committee reports and other legislative **history** as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies. . . .

. . . .

We further point out that Congress itself **has** often recognized the reprogramming flexibility of executive agencies, and we think it is at least implicit in such [recognition] that Congress is well aware that agencies are not legally bound to follow what is **expressed** in Committee reports when those expressions are not explicitly carried over into the statutory language. . . .

. . . .

We think it follows from the above discussion that, as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of **illuminating** the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there.

. . . .

“As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The Executive branch. . . has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty.”

55 **Comp. Gen.** at 318,319,321,325. Accordingly, GAO concluded that Navy’s award did not **violate** the appropriation act and the contract therefore was not illegal.

The same volume of the Comptroller General’s decisions contains another often-cited case, 55 **Comp. Gen.** 812 (1976), the Newport News case. This case also involved the Navy. This time, Navy wanted to exercise a contract option for construction of a nuclear powered guided missile frigate, designated **DLGN 41**. The contractor, Newport News Shipbuilding and Dry Dock Company, argued that exercising the contract option would violate the **Antideficiency** Act by obligating more money than Navy had in its appropriation.

The appropriation in question, Navy’s “Shipbuilding and Conversion” appropriation, provided “for the **DLGN** nuclear powered guided missile frigate program, \$244,300,000, which shall be available only for construction of **DLGN 41** and for advance procurement funding

for DLGN 42 . . . “ The committee reports on the appropriation act and the related authorization act indicated that, out of the \$244 million appropriated, \$152 million was for construction of the DLGN 41 and the remaining \$92 million was for long lead time activity on the DLGN 42. It was clear that, if the \$152 million specified in the committee reports for the DLGN 41 was legally binding, obligations resulting from exercise of the contract option would exceed the available appropriation.

The Comptroller General applied the “LTV principle” and held that the \$152 million was not a legally binding limit on obligations for the DLGN 41. As a matter of law, the entire \$244 million was legally available for the DLGN 41 because the appropriation act **did** not include any restriction. Therefore, in evaluating potential violations of the **Antideficiency Act**, the relevant appropriation amount is the total amount of the lump-sum appropriation minus sums already obligated, not the lower figure derived from the legislative **history**.⁹⁴ As the decision recognized, Congress could have imposed a **legally** binding limit by the very simple device of appropriating a specific amount only for the DLGN 41, or by incorporating the committee reports in the appropriation language,

This decision illustrates another important point: The terms “lump-sum” and “line-item” are relative concepts. The \$244 million appropriation in the Newport News case could be viewed as a line-item appropriation in relation to the broader “Shipbuilding and Conversion” category, but it was also a lump-sum appropriation in relation to the two specific vessels included. This factual distinction does not affect the applicable legal principle. As the decision explained:

“Contractor urges that LTV is **inapplicable** here since LTV involved a lump-sum appropriation whereas the DLGN appropriation is a more specific ‘line item’ appropriation. While we recognize the factual distinction drawn by Contractor, we nevertheless believe that the principles set forth in LTV are equally applicable and **controlling** here. . . . [I]mplicit in our holding in LTV and in the other authorities cited is the view that dollar amounts in appropriation acts are to be interpreted differently from statutory words in general. This view, in our opinion, pertains whether the dollar amount is a lump-sum appropriation available for a large number

⁹⁴Of course, all this meant was that there would be 00 Antideficiency Act violation at the time the option was exercised. The decision recognized that subsequent actions could still produce a violation. 55 *Comp. Gen.* at 826.



of items, as in LTV, or, as here, a more **specific** appropriation available for only two items.” 55 *Comp. Gen.* at 821–22.

A precursor of LTV and Newport News provides another interesting illustration. In 1974, controversy and funding uncertainties surrounded the Navy’s “Project Sanguine,” a communications system for sending command and control messages to submerged **submarines** from a single transmitting location in the United States. The Navy had requested \$16.6 million for Project Sanguine for FY 1974. The House deleted the request, the Senate restored it, the conference committee compromised and approved \$8.3 million. The Sanguine funds were included in a \$2.6 billion lump-sum Research and Development appropriation. Navy spent more than \$11 million for Project Sanguine in 1974. The question was whether Navy violated the **Antideficiency** Act by spending more than the \$8.3 million provided in the conference report. GAO found that it did not, because the conference committee’s action was not specified in the appropriation act and was therefore not legally binding. Significantly, the appropriation act did include a proviso prohibiting use of the funds for “full scale development” of Project Sanguine (not involved in the \$11 million expenditure), illustrating that Congress knows perfectly well how to impose a legally binding restriction when it desires to do so. GAO report, Legality of the Navy’s Expenditures for Project Sanguine During Fiscal Year 1974, LCD-75-315 (January 20, 1975); B-168482 -0. M., August 15, 1974.

Similarly, the Department of Health, Education, and Welfare received a \$12 billion lump-sum appropriation for public assistance in 1975. Committee reports indicated that \$9.2 million of this amount was being provided for research and development activities of the **Social and Rehabilitation Service**. Since this earmarking of the \$9.2 million was not carried into the appropriation act itself, it did not constitute a statutory limit on the amount available for the program. B-164031(3), April 16, 1975.

GAO has applied the rule of the LTV and Newport News decisions in a number of additional cases and reports, several of which involve variations on the basic theme.⁹⁵

⁹⁵See 64 *Comp. Gen.* 359 (1985); 59 *Comp. Gen.* 228 (1980); B-247853.2, July 20, 1992; B-231711, March 28, 1989; B-222853, September 29, 1987; B-204449, November 18, 1981; 5204270, October 13, 1981; B-202992, May 15, 1981; B-157356, August 17, 1978; B-159993, September 1, 1977; B-163922, October 3, 1975; Internal Controls: Funding of International Defense Research and Development Projects, GAO/NSIAD-91-27 (October 1990).

The treatment of lump-sum appropriations as described above has been considered by the Department of Justice and the courts as well as **GAO**, and **all** have reached the same result. For example, the Justice Department's Office of Legal Counsel concluded in one case that the Department could, in the Attorney General's discretion, reallocate funds within the same lump-sum appropriation in order to avoid an impending deficiency for the United States **Marshals** Service. **4B** OP. Off. Legal Counsel 701 (1980). Another case applying these principles is **4B** Op. **Off. Legal** Counsel 674 (1980).

The **United** States Court of Appeals for the District of Columbia Circuit **has** noted that lump-sum appropriations have a "well understood meaning" and stated the rule as follows:

"A **lump-sum** appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or **all** of the **permissible** objects **as** it sees fit."

International Union v. Donovan, 746 **F.2d** 855,861 (**D.C. Cir.** 1984), cert. denied, 474 U.S. 825. The court in that case refused to impose a "reasonable distribution" requirement on the exercise of the agency's discretion, and found that discretion unreviewable. *Id.* at 862-63. See also McCarey v. McNamara, 390 **F.2d** 601 (**3d Cir.** 1968); Blackhawk Heating & Plumbing Co. v. United States, 622 **F.2d** 539, 547 **n.6** (Ct. Cl. 1980).

One court, seemingly at odds with the weight of authority, has concluded that an agency was required by 31 **U.S.C. § 1301(a)** (purpose statute) to spend money in accordance with an earmark appearing **only** in legislative history. Blue Ocean Preservation Society v. Watkins, 767 **F. Supp.** 1518 (D. **Haw.** 1991). An additional factor in that case was that the agency had unsuccessfully sought congressional approval to reprogram the funds in question.

C. "Zero Funding" Under a Lump-Sum Appropriation

Does discretion under a lump-sum appropriation extend so far as to permit an agency to "zero fund" a particular program? Although there are few cases, the answer would appear, for the most part, to be yes, as long as the program is not mandatory and the agency uses the funds for other authorized purposes to avoid impoundment complications. **E.g.**, **B-209680**, February 24, 1983 (agency could properly decide not to fund a program where committee reports on appropriation stated that no funds were being provided for that

program, although agency would have been equally free **to** fund the program under the lump-sum appropriation); **B-167656**, June 18, 1971 (agency has discretion to discontinue a function funded under a lump-sum appropriation to cope with a shortfall in appropriations); **4B** Op. Off. Legal Counsel 701,704 **n.7** (1980) (same point).

The more difficult question is whether the answer is the same where there is no shortfall problem and where it is clear that Congress wants the program funded. In International Union v. Donovan, cited above, the court upheld an agency's decision to allocate no funds to a program funded by a lump-sum appropriation. Although there was in that case a "congressional realization, if not a congressional intent, that nothing would be expended" for the program in question, 746 **F.2d** at 859, it seems implicit from the court's discussion of applicable law that the answer would have been the same if legislative history had "directed" that the program be funded. The same result would seem to follow from 55 **Comp. Gen.** 812 (1976), discussed above, holding that the entire unobligated balance of a lump-sum appropriation should be considered available for one of the objects included in the appropriation, at least for purposes of assessing potential violations of the **Antideficiency Act**.

In **B-114833**, July 21, 1978, the Department of Agriculture wanted to use its 1978 lump-sum Resource Conservation and Development appropriation to fund existing projects rather than starting any new ones, even though Congress had expressly provided funds for certain new **RC&D** projects. Since the congressional action was stated in committee reports but not in the statute itself, the Department's proposed course of action was legally permissible.

An early decision reaching a different result is 1 **Comp. Gen.** 623 (1922). The appropriation in question provided for "rent of offices of the recorder of deeds, including services of cleaners as necessary, not to exceed 30 cents per hour, . . . \$6,000." The Comptroller General held that the entire \$6,000 could not be spent for rent. The decision stated:

"[S]ince [the appropriation act] provides that the amount appropriated shall cover both rent and cleaning services, it must be held that the entire amount can not be used for rent alone.

"... The law leaves to the discretion of the commissioners the question as to what portion of the amount appropriated shall be paid for rent and what portion shall be

paid for services of cleaners, but it does not vest in the **commissioners the discretion** to determine that the entire amount shall be paid for rent and that the cleaning services shall be left unprovided for, or be provided for from other funds.”

Id. at 624. Although this result may at **first** glance seem inconsistent **with** the authorities previously cited, it would not have been possible **as** a practical matter to rent **office** space and totally eliminate cleaning services, and the use of any other appropriation would have been clearly improper. A factor which apparently influenced the decision was that the “regular **office** force” was somehow being coerced to **do** the cleaning, and these were employees paid from a separate appropriation. Id. Thus, 1 **Comp. Gen.** 623 should be viewed **as** an exception **based on** its own particular circumstances.

