Liability and Relief of Accountable Officers

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A. Introduction

The concept that a person should be held accountable for funds in his or her care is not peculiar to the government. If you get a job as a cashier at your local supermarket and come up short at the end of the day, you will probably be forced to make up the shortage from your own pocket. The store manager does not have to prove the loss was your fault. The very fact that the money is not there is sufficient to make you liable. Of course, if your cash register is emptied by an armed robber and you are in no way implicated, you will be off the hook.

Just like the private business enterprise, the government loses money in many ways. It is lost; it is stolen; it is paid out improperly; it is embezzled. Sometimes the money is recovered; often it is not. If government funds are lost because of some employee's misconduct or carelessness, and if the responsible employee is not required to make up the loss, the result is that the taxpayer ends up paying twice for the same thing, or paying for nothing.

When you accept the job at the supermarket, you do so knowing perfectly well that you will be potentially liable for losses. There is no reason why the government should operate any differently. If anything, there is a stronger case for the liability of government employees since they are, in effect, trustees for the taxpayers (themselves included). As the Comptroller General once stated, "A special trust responsibility exists with regard to public monies and with this special trust goes personal financial responsibility." B-161457, October 30, 1969. This chapter will explore these concepts-the liability and relief of government officers and employees who are entrusted with public funds or who have certain specific responsibilities in their disbursement. In government language, they are called "accountable officers."[1]

[1] This chapter deals solely with accountability for funds by those classified as accountable officers. Other types of accountability-accountability by employees who are not accountable officers or accountability for property *other than* funds-are covered in Chapter 13.

B. General Principles

1. The Concepts of Liability and Relief

a. Liability

The concept of accountability for public funds in the form of strict personal liability evolved during the 19th century. Its origins can be traced to a number of congressional enactments, some dating back to the Nation's infancy. The legislation establishing the Department of the Treasury in 1789 included a provision directing the Comptroller of the Treasury to "direct prosecutions for all delinquencies of officers of the revenue" (1 Stat. 66). A few years later, in 1795, Congress authorized the Comptroller to require "any person who has received monies for which he is accountable to the United States" to render "his accounts and vouchers, for the expenditure of the said monies," and to commence suit against anyone failing to do so (1 stat. 441).

In 1846, Congress mandated that all government officials safeguard public funds in their custody. The statute provided that—

> "all public officers of whatsoever character, be, and they are hereby, required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the government, to be transferred or paid out . . . ."

Act of August 6, 1846, ch. 90, § 6, 9 Stat. 59,60. This statute still exists, in modernized form, at 31 U.S.C. § 3302(a).

These are civil provisions. Congress also addressed fiscal accountability in a variety of criminal statutes. An important one is the Act of June 14, 1866, ch. 122, 14 Stat. 64, which declared it to be the duty of disbursing officers to use public funds entrusted to them "only as . . . required for payments to be made. . . in pursuance of law," and made it a felony for a disbursing officer to, among other things, "apply any portion of the public money intrusted to him" for any purpose not prescribed by law.[2]

The strict liability of accountable officers became firmly established in a series of early Supreme Court decisions. In 1845, the Court upheld liability in a case where money had been stolen with no fault or negligence on the part of the accountable officer. In an often-quoted passage, the Court said:

> "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public?"

United States v. Prescott, 44 U.S. (3 How.) 578, 588–89 (1845). While some might view this passage as unduly cynical of human nature, it makes the important point that the laws relating to the liability and relief of accountable officers are intended not only to give the officers incentive to guard against theft by others, but also to protect against dishonesty by the officers themselves.

An 1872 case, United States v. Thomas, 82 U.S. (15 Wall.) 337, recognized that the liability announced in Prescott, while strict, was not absolute. In that case, the Court refused to hold a customs official liable for funds which had been forcibly taken by Confederate forces during the Civil War. In formulating its conclusion, the Court recognized two exceptions to the strict liability rule:

> "[N]o rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part."

[2] This statute also still exists and is found at 18 U.S.C. § 653. Other provisions of the Criminal Code relevant to accountable officers include 18 U.S.C. §§ 643 (failure to render accounts), 648 (misuse of public funds), and 649 (failure to deposit). The four provisions of Title 18 cited in this note apply to "all persons charged with the safe-keeping, transfer, or disbursement of the public money." 18 U.S.C. § 649(b).

Id. at 352. The exceptions, however, are limited. In Smythe v. United States, 188 U.S. 156 (1903), the Court reviewed its precedents, including Prescott and Thomas, and upheld the liability of a Mint official for funds which had been destroyed by fire, finding the loss attributable neither to "overruling necessity" nor to a public enemy.

The standard that has evolved from the cases and statutes noted is one of strict liability. It is often said that an accountable officer is, in effect, an "insurer" of the funds in his or her charge. E.g., 64 Comp. Gen. 303,304 (1985); 54 Comp. Gen. 112, 114 (1974); 48 Comp. Gen. 566,567 (1969); 6 Comp. Gen. 404,406 (1926); United States v. Heller, 1 F. Supp. 1, 6 (D. Md. 1932). The liability is automatic, and arises by operation of law at the momenta physical loss occurs or an erroneous payment is made. 70 Comp. Gen. 12, 14 (1990); 54 Comp. Gen. at 114.

Apart from whatever statutory provisions may exist from time to time, an accountable officer's strict liability is based on public policy. E.g., Prescott, 44 U.S. at 587–88 ("The liability of the defendant. . . arises out of . . . principles which are founded upon public policy"); Heller, 1 F. Supp. at 6 (strict liability "is imposed as a matter of public policy").

b. Surety Bonding

The early cases based liability on two grounds. One, as noted above, was public policy, a consideration no less important now than it was then. The second basis was the terms of the officer's bond. Prior to 1972, the fidelity bonding of accountable officers was required by law. See, e.g., 22 Comp. Gen. 48 (1942); 21 Comp. Gen. 976 (1942). As an examination of the statement of the case in decisions such as Prescott, Thomas, and Smythe will reveal, the terms of the bond were very similar to, and in fact were derived from, the 1846 "keep safely" legislation quoted above. Thus, while the bond gave the government a more certain means of recovery, it did not impose upon accountable officers any duties that were not already required by statutes

[3]The bonding requirement had been for the protection of the government, not the accountable officer. Under the bonding system, if the United States was compensated for a loss by the bonding company, the company succeeded to the rights of the United States and could seek reimbursement from the accountable officer. 68 Comp. Gen. 470, 471 (1989); B-186922, April 8, 1977.

In a 1962 report, GAO concluded that bonding was not cost-effective,[4] and recommended legislation to repeal the bonding requirement. Review of the Bonding Program for Employees of the Federal Government, B-8201, March 29, 1962. Congress repealed the requirement in 1972, and accountable officers are no longer bonded. 31 U.S.C. $9302. The last sentence of 31 U.S.C. § 9302 states explicitly that the prohibition on requiring surety bonds "does not affect the personal financial liability" of individual officers or employees. Thus, elimination of the bonding requirement has no effect on the legal liability of accountable officers. 54 Comp. Gen. 112 (1974); B-191440, May 25, 1979.

c. Relief

The early cases and statutes previously noted made no mention of relief from liability.[5] "Relief" in this context means art action, taken by someone with the legal authority to do so, which absolves an accountable officer from liability for a loss. Prior to the World War 11 period, with limited exceptions for certain accountable officers of the armed forces, an accountable officer had but two relief options available. First, a disbursing officer could bring an action in what was then the Court of Claims under 28 U.S.C. 52512. Of course, the officer would probably need legal representation and would incur other expenses, none of which were reimbursable. Second, and this became the most common approach, was private relief legislation, a burdensome process for amounts which were often relatively small. There was no mechanism for providing relief at the administrative level, however meritorious the case. 4 Comp. Gen. 409 (1924); 27 Comp. Dec. 328 (1920).

Starting in 1941, Congress enacted a series of relief statutes, and there is now a comprehensive statutory scheme for the administrative relief of accountable officers who are found to be without fault. The major portion of this chapter deals with the application of this legislation.

It is important to distinguish between liability and relief. It is not the denial of relief that makes an accountable officer liable. The basic

[4] Originally, accountable officers had to pay for their own bonds. 33 Comp. Gen. 7 (1953). Legislation effective January 1, 1956, authorized the government to pay (69 Stat. 618).

[5] The "public enemy" situation dealt with in the Thomas case is not an example of relief. It is an example of a situation in which liability does not attach to begin with.

legal liability of art accountable **officer** arises automatically by virtue of the loss and is not affected by any lack of fault or negligence on the officer's part; relief is a separate process, and may take lack of fault into consideration to the extent authorized by the governing **statute.**[6] 54 **Comp. Gen.** 112 (1974); **B-167126,** August 28, 1978.

2. Who Is an Accountable Officer?

An accountable officer is any government officer or employee who by reason of his or her employment is responsible for or has custody of government funds. 62 **Comp. Gen.** 476,479 (1983); 59 **Comp. Gen.** 113, 114 (1979); **B-188894,** September 29, 1977. Accountable **officers** encompass such officials as certifying officers, **civilian** and military disbursing officers, collecting officers, and other employees who by virtue of their employment have custody of government funds. With rare **exceptions,**[7] other officials who may have a role in authorizing expenditures (contracting officers, for example) are not accountable officers for purposes of the laws discussed in this chapter, although they may be made accountable in varying degrees by agency regulation. See **B-241856.2,** September 23, 1992.

a. Certifying Officers

Accountability for public funds in civilian agencies rests primarily with the **certifying** officer, a government **officer** or employee whose job is or includes certifying vouchers (including voucher schedules or invoices used as vouchers) for payment. A certifying officer differs from other accountable officers in one key respect: the certifying officer has no public funds in his or her physical custody. Rather, accountability is based on the **nature** of the function. A certifying officer's liability, discussed in detail later in this chapter, is prescribed by 31 U.S.C. § 3528. In brief, certifying **officers** are responsible for the

[6] **While** the generalizations in the text are true, as discussed later in this chapter, passage of time can eliminate the government's **ability** to enforce liability in improper payment cases, even without relief. In order to protect the government's position, agencies should move promptly to address an accountable officer's liability. Implications in a few cases such as 70 **Comp. Gen.** 616,622-23 (1991), that an agency can never enforce an accountable officer's liability for an improper payment **unless** it has **first** submitted the matter to GAO are misleading. See GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, **chap. 8, which** describes agencies' specific responsibilities in this area.

[7] **On a few occasions, GAO has treated an official** who directs the **making** of **an expenditure as** accountable even though not **falling** into one of the traditional categories of accountable **officer.** 61 **Comp. Gen.** 260,266 (1982) (**illegal** entertainment expenditures "must be paid by the. . . **officials** who authorized the expenditures"); 37 **Comp. Gen.** 360, 361 (1957) (cost of greeting cards "is a **personal** expense to be borne by the officer who ordered and sent the cards"); 7 **Comp. Gen.** 481,482 (1928) (same).

legality of proposed payments, and are liable for the amount of illegal or improper payments resulting from their certifications.

A great many government officials make official "certifications" of one type or another, but this does not make them "certifying officers" for purposes of accountability and liability. The concepts of accountability and relief discussed in this chapter apply only to "authorized certifying officers" who certify vouchers upon which moneys are to be paid out by disbursing officers in discharging a debt or obligation of the government. 23 Comp. Gen. 953 (1944). This may in appropriate circumstances include the head of a department or agency. 31 U.S.C. § 3325(a)(1); 21 Comp. Gen. 976, 979 (1942); 40 Op. Att'y Gen. 284 (1943). An authorized certifying officer must be so designated in writing. 31 U.S.C. § 3325(a)(1).

Thus, an employee who "certified" overtime assignments in the sense of a timekeeper verifying that employees worked the hours of overtime claimed could not be held liable for resulting overpayments under an accountable officer theory. B-197109, March 24, 1980. Similarly, art official who certifies that long-distance telephone calls are necessary for official business as required by 31 U.S.C. § 1348(b) is not an accountable officer. 65 Comp. Gen. 19, 20–21 (1985). The same approach applies to various post-certification administrative actions, the rule being that once a voucher has been duly certified by an authorized official, subsequent administrative processing does not constitute certification for purposes of 31 U.S.C. $3528.55 Comp. Gen. 388,390 (1975). For example, the Comptroller General has held that 31 U.S.C. § 3528 does not apply to an "approving officer" who approves vouchers after they have been duly certified. 21 Comp. Gen. 841 (1942).

b. Disbursing Officers

A disbursing officer is an officer or employee of a federal department or agency, civilian or military, designated to disburse moneys and render accounts in accordance with laws and regulations governing the disbursement of public funds. The term is essentially self-defining. As one court has stated:

> "We do not find the term 'disbursing officer' statutorily defined, probably because it is self-definitive. It can mean nothing except an officer who is authorized to disburse funds of the United States."

Romney v. United States, 167 F.2d 521,526 (D.C. Cir. 1948), cert. denied, 334 U.S. 847.

Whether an employee is a "disbursing officer" depends more on the nature of the person's duties than on the title of his or her position. In some cases, the job title will be "disbursing officer." This is the title for the disbursing officers of the Treasury Department who disburse for most civilian agencies under 31 U.S.C. $3321. For the military departments, which generally do their own disbursing, the title maybe "finance and accounting officer." As a general proposition, any employee to whom public funds are entrusted for the purpose of making payments from those funds will be regarded as a disbursing officer. See B-151 156, December 30, 1963.

There may be more than one disbursing officer for a given transaction. Military disbursing operations provide an example. The account is often held in the name of a supervisory official such as a Finance and Accounting Officer, with the actual payment made by some subordinate (agent, cashier, deputy, etc.). Both are regarded as disbursing officers for purposes of liability and relief although, as we will discuss later, the standards for relief differ. E.g., 62 Comp. Gen. 476, 479–80 (1983); B-245127, September 18, 1991.

c. Cashiers

A cashier is an officer or employee of a federal department, agency, or corporation who, having been recommended by the head of the activity, has been designated as a cashier by the officer responsible for making disbursements and is thereby authorized to perform limited cash disbursing functions or other cash operations. Treasury Financial Manual (TFM), Vol. I, § 4-3020. Cashiers must be designated in writing. Id. $4-3025.

With respect to disbursing functions under 31 U.S.C. 53321, cashiers are divided into five categories: (1) Class A Cashier (may not advance imprest funds to another cashier except an alternate); (2) Class B Cashier (may advance imprest funds to alternate or subcashier); (3) Class D Cashier (receives funds solely for change-making purposes); (4) Subcashier (may receive imprest funds from a Class B or D cashier and is under supervision of same local office); and (5) Alternate to a Cashier or Subcashier (functions during absence of principal cashier but may act simultaneously if required by work load). Fuller descriptions may be found in the Treasury Department's supplement to the TFM entitled Manual of Procedures and Instructions for Cashiers Operating Under 31 U.S.C. 3321 (July 1985).

Cashiers who are authorized to make payments from funds advanced to them are regarded as a category of disbursing officer. They are personally liable for any loss or shortage of funds in their custody unless relieved by proper authority. Further discussion of the role and responsibilities of cashiers maybe found in I TFM Chapter 4-3000 and in the Cashiers Manual.

For the most part, a cashier will be operating with funds advanced by his or her own employing agency. In some situations, however, such as an authorized interagency agreement, the funds maybe advanced by another agency. Liability and relief are the same in either case. 65 Comp. Gen. 666, 675–77 (1986).

d. Collecting Officers

Collecting officers are those who receive or collect money for the government, such as Internal Revenue collectors or Customs collectors. Collecting officers are accountable for all money collected. E.g., 59 Comp. Gen. 113, 114 (1979); 3 Comp. Gen. 403 (1924); 1 Comp. Dec. 191 (1895); B-201673 et al., September 23, 1982. For example, an Internal Revenue collector is responsible for the physical safety of taxes collected, must pay over to the government all taxes collected, and must make good any money lost or stolen while in his or her custody unless relieved. E.g., 60 Comp. Gen. 674 (1981). However, under a lockbox arrangement whereby tax payments are mailed to a financial institution at a post office box and then wired to a Treasury account, Internal Revenue Service officials are not accountable for funds in the possession of the financial institution since they do not gain custody or control over those funds. B-223911, February 24, 1987.

The clerk of a bankruptcy court, if one has been appointed under 28 U.S.C. § 156(b), is the accountable officer with respect to fees paid to the court, as prescribed by 28 U.S.C. $1930, by parties commencing a case under the Bankruptcy Code. 28 U.S.C. § 156(f). This provision, added in 1986, essentially codified the result of two GAO decisions issued the previous year, 64 Comp. Gen. 535 (1985) and B-217236, May 22, 1985.

In some situations, certain types of receipts maybe collected by a contractor. Since the contractor is not a government officer or employee, the various accountable officer statutes discussed throughout this chapter do not apply, and the contractor's liability is governed by the terms of the contract. For example, a parking service contract with the General Services Administration required the contractor to collect parking fees at certain government buildings and to remit those fees to GSA on a daily basis. One day, instead of remitting the receipts, an official of the contractor took the money home in a paper bag and claimed to have been robbed in a parking lot near her residence. When GSA withheld the amount of the loss from contract payments, the contractor tried to argue that the risk of loss should fall upon the government. The Claims Court disagreed. Since the contract terms were clear and the contractor failed to comply, the contractor was held responsible for the loss. Miracle Contractors, Inc. v. United States, 5 Cl. Ct. 466 (1984).

The Department of Agriculture has statutory authority to use volunteers to collect user fees in national forests. The volunteers, private individuals, are to be bonded, with the cost of the bonds paid by the Department. 16 U.S.C. § 460l-6a(k). In 68 Comp. Gen. 470 (1989), GAO concurred with the Department that the volunteers could be regarded as agents of the Forest Service and, as such, eligible for relief for non-negligent losses. The practical significance of this decision is that it would be difficult to recruit volunteers if they faced potential liability for non-negligent losses, a possibility that would exist even under a surety bond. Id. at 471.

e. Other Agents and Custodians

Occasionally, officers and employees who do not fit into any of the preceding categories, and who may not even be directly involved in government fiscal operations, are given custody of federal funds and thereby become accountable officers for the funds placed in their charge. Note in this connection that the "safekeeping" mandate of 31 U.S.C. § 3302(a) (made unmistakably clear by reference to the original 1846 language quoted earlier), applies to any government employee, regardless of job description, to whom public funds are entrusted in connection with the performance of government business. See, e.g., B-170012, February 3, 1972.

Examples of employees in this general custodial category include: a special messenger delivering cash to another location, B-188413, June 30, 1977; a messenger sent to the bank to cash checks, B-226695, May 26, 1987; State Department employees responsible for packaging and shipping funds to an overseas embassy, B-193830, October 1, 1979; an officer in charge of a laundry operation on an Army base who had been advanced public funds to be held as a change fund, B-155149, October 21, 1964; and a Department of Energy special counsel with control over petroleum overcharge refunds, B-200170, April 1, 1981.

As with disbursing officers, there maybe more than one accountable officer in a given case, and the concept of accountability is not limited to the person in whose name the account is officially held nor is it limited to the person or persons for whom relief is officially requested. For example, accounts in the regional offices of the U.S. Customs Service are typically held in the name of the Regional Commissioner. While the Regional Commissioner is therefore an accountable officer with respect to that account, subordinate employees who actually handle the funds are also accountable officers. B-197324, March 7, 1980; B-193673, May 25, 1979. The same principle applies to the various service centers of the Internal Revenue Service. E.g., 60 Comp. Gen. 674 (1981).

As demonstrated by the Customs and IRS situations, as well as the many cases involving military finance and accounting officers, a supervisory official will bean accountable officer if that official has actual custody of public funds, or if the account is held in the official's name, regardless of who has physical custody. Absent these factors, however, a supervisor is not an accountable officer and does not become one merely because he or she supervises one. E.g., B-214286, July 20, 1984; B-194782, August 13, 1979.

In each case, it is necessary to examine the particular facts and circumstances to determine who had responsibility for or custody of the funds during the relevant stages of the occurrence or transaction. Thus, in B-193830, October 1, 1979, money shipped from the State Department to the American Embassy in Paraguay never reached its destination. While the funds were chargeable to the account of the Class B cashier at the Embassy, the State Department employees responsible for packaging and shipping the funds were also accountable officers with respect to that transaction. In another case, a new Class B cashier had been recommended at a Peace Corps office in Western Samoa, and had in fact been doing the job, but his official designation was not made until after the loss in question. Since the new cashier, even though not yet formally designated, had possession of the funds at the time of the loss, he was an accountable officer.

However, since the former cashier retained responsibility for the imprest fund until formally replaced, he too was an accountable officer. B-188881, May 8, 1978.

In sum, any government officer or employee who physically handles government funds, even if only occasionally, is accountable for those funds while in his or her custody.

It maybe impossible, although this will happen only in extremely rare cases, to specify exactly who the proper accountable officer is. For example, the Drug Enforcement Administration used a flash roll of 650$100 bills and discovered that 15 bills had been replaced by counterfeits scattered throughout the roll. (The “roll” was actually a number of stacks.) The roll had been used in a number of investigations and in each instance, the transactions (transfers from cashier to investigators, returns to cashier, transfers between different groups of investigators) were recorded on receipts and the money was counted. While it was thus possible to determine precisely who had the roll on any given day, there was no way to determine when the substitution took place and hence to establish to whom the loss should be attributed. B-191891, June 16, 1980.

3. Funds to Which Accountability Attaches

When we talk about the liability of accountable officers, we deliberately use the broad term “public funds.” As a general proposition, for purposes of accountability, “public funds” consists of three categories: appropriated funds, funds received by the government from nongovernment sources, and funds held in trust. It is important to emphasize that when we refer to certain funds as “nonaccountable” in the course of this discussion, all we mean is that the funds are not subject to the laws governing the liability and relief of accountable officers. Liability for losses may still attach on some other basis.

a. Appropriated Funds

Appropriated funds are accountable funds. The funds may be in the Treasury, which is where most appropriated funds remain pending disbursement, or they maybe in the form of cash advanced to a government officer or employee for some authorized purpose.

(1) Imprest funds

The definitions of the various types of cashier refer primarily to the use of "imprest funds." An imprest fund is essentially a petty cash fund. More specifically, it is a freed-cash fund (i.e., a freed dollar amount) advanced to a cashier for cash disbursements or other cash requirement purposes as specifically authorized. An imprest fund may be either a stationary fund, such as a change-making fund, or a revolving fund. Tressury Financial Manual (TFM), Vol. I, $4-3020.

Imprest funds are commonly used for such things as small purchases, travel advances, and authorized emergency salary payments. Guidance on the use of imprest funds may be found in GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 6.8, I TFM chapter 4-3000, and the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 13.4. Agencies using imprest funds are required to issue implementing regulations. I TFM § 4-3030; FAR, 48 C.F.R. § 13.403(c). Except to the extent specified in an agency's own regulations (e.g., B-220466 et al., December 9, 1986), there are no subject matter limitations on the kinds of services payable from imprest funds. 65 Comp. Gen. 806 (1986).

Imprest funds of the revolving type are replenished to the freed amount as spent or used. As replenishment are needed, replenishment vouchers are submitted through the certifying officer to the disbursing officer. Replenishment vouchers must be supported by receipts or other evidence of the expenditures.

At any given time, an imprest fund may consist of cash, uncashed government checks, and other documents such as unpaid reimbursement vouchers, sales slips, invoices, or other receipts for cash payments. An imprest fund cashier must at all times be able to account for the full amount of the fund. I TFM § 4-3040.80. For example, if a cash box containing a $1,000 imprest fund disappears, and at the time of disappearance the box contained $500 in cash and $500 in receipts for which reimbursement vouchers had not yet been issued, the loss to the government is the full $1,000 and the cashier is accountable for that full amount. A cashier's failure to keep adequate records, thus making proper reconciliation impossible, is negligence. B-189084, January 15, 1980.

Loss of a replenishment check before it reaches the cashier is not a situation requiring relief of the cashier. The proper procedure in such a situation is to report the loss to the disbursing office which issued the check to obtain a replacement. B-203025, October 30, 1981.

If in the government's interests, a checking account maybe setup in a private bank for imprest fund disbursements as long as adequate control procedures are developed. B-1 17566, April 29, 1959. Use of depositary accounts must be approved by the agency head or designee, is authorized only for cash withdrawal transactions, and should be limited to situations in which there is "strong justification. " I TFM $4-3040.60. The account maybe interest-bearing, in which event any interest earned must be deposited in the Treasury as miscellaneous receipts. Id.

The method of imprest fund accountability changed starting with fiscal year 1985. Prior to that time, funds advanced to cashiers by Treasury disbursing officers were not "charged" to the agency's appropriations at the time of the advance but were carried on the disbursing officers' records of accountability. The cashiers were regarded as agents of the disbursing officers. In fact, it was common to refer to cashiers as "agent cashiers." E.g., A-89775, March 21, 1945. Charges were made to the applicable appropriation or fund accounts only when replenishment checks were issued. Relief requests had to be submitted through the Treasury's Chief Disbursing Officer.

In 1983, the Treasury Department proposed removing imprest fund advances from the disbursing officers' accountability inasmuch as the transactions were beyond the disbursing officers' control. GAO concurred. B-212819-O. M., May 25, 1984. The current. procedures are discussed in 70 Comp. Gen. 481 (1991). In brief, the charge to the agency's appropriation is now made at the time of the initial advance. However, since the advance does not qualify as an obligation under 31 U. S. C., § 1501, the charge must be in the form of a "commitment." or "reservation." In general, the actual obligation occurs when the advance is used and the cashier seeks replenishment. The preliminary charge is necessary to protect against violating the Antideficiency Act. Except for certain procedural matters (relief requests are no longer processed through the applicable disbursing officer), the changes have no effect on the cashier's liability as an accountable officer.

An alternative approach to managing imprest funds is the "third-party draft" procedure described in I TFM §4-3040.70. In brief, an agency may, with written approval from its Treasury Financial Center, retain a contractor to provide the agency with payment instruments, not to exceed a face value of $1,000 each, drawn on the contractor's account. The agency then uses these drafts for its imprest fund transactions, and reimburses the contractor for properly payable drafts which the contractor has paid. Since the funds being disbursed from the imprest fund under this system are not government funds, personal liability does not attach to the cashier. Id.; GAO Policy and Procedures Manual, title 7, § 6.8.B.

(2) Flash rolls

Law enforcement officers on undercover assignments frequently need a supply of cash to support their operations, for example, to purchase contraband or to use as a gambling stake. This money, often advanced from an imprest fund, is called a "flash roll." By the very nature of the activities involved, flash roll money is at high risk to begin with.

It is clear that a flash roll in the hands of a law enforcement agent retains its status as government funds. Garcia v. United States, 469 U.S. 70 (1984) (flash roll held to be money of the United States for purposes of 18 U.S.C. § 2114, which makes it a criminal offense to assault a custodian of government money). However, flash roll money will be accountable in some situations and nonaccountable in others, depending on the nature of the loss. If the loss is within the risk inherent in the operation, such as the suspect absconding with the money, it is not viewed as an "accountable officer" loss but maybe handled internally by the agency. If the agency, under its internal investigation procedures, finds the agent with custody of the funds to have been negligent, it should hold the agent liable to the extent provided in its regulations. Otherwise, it may simply record the loss as a necessary expense against the appropriation which financed the operation. If, on the other hand, the loss occurs in the course of the operation but is unrelated to carrying out its purpose, the accountable officer laws apply. The decision first recognizing this distinction is 61 Comp. Gen. 313 (1982), applying it in the context of Drug Enforcement Administration undercover operations.[8]

[8] Prior decisions, such as B-192010, August 14, 1978, which had treated all flash roll losses as accountable officer losses, were modified accordingly. 61 Comp. Gen. at 316.

The fact pattern in the Garcia case illustrates the nonaccountable situation. A Secret Service agent had been given a flash roll to buy counterfeit currency from suspects in Miami. The agent met the suspects in a park. One of the suspects pulled a semi-automatic pistol and demanded the money. Other Secret Service agents rushed to the scene and apprehended the suspects, one of whom was trying to run off with the money. Of course there was no loss since the money was recovered. If the second suspect had gotten away with the money, however, the loss could have been treated as an expense of the operation, without the need to seek relief for anyone. GAO decisions finding flash roll losses "nonaccountable" under the standards of 61 Comp. Gen. 313 are B-238222, February 21, 1990 (suspect stole flash roll during drug arrest); B-232253, August 12, 1988 (informant stole money provided to rent undercover apartment); and B-205426, September 16, 1982 (federal agent robbed at gunpoint while trying to purchase illegal firearms).

An example of a case which remains subject to the accountable officer laws is B-218858, July 24, 1985. A federal agent, posing as a narcotics trafficker, stopped at a telephone booth to make a call. Two women approached the booth, which did not have a door. One diverted the agent's attention while the other picked his pocket. The loss, while certainly incident to the undercover operation, was unrelated to its central purpose. Relief was granted. Other cases are:

- 64 Comp. Gen. 140 (1984) (agent set shoulder bag containing flash money on airport counter and left it unattended for several minutes while making ticket arrangements; relief denied).
- B-210507, April 4, 1983 (briefcase containing funds stolen when agent set it down in coffee shop for 15–20 seconds to remove jacket; relief granted).
- B-220492, December 10, 1985 (agent left funds in glove compartment while making phone call in high crime area; agency found him negligent).

As 64 Comp. Gen. 140 and B-210507 point out, losses which occur while flash money is being transported to the location where it is intended to be used are at best incidental to the operation and are thus governed by the accountable officer laws.

The conspicuous display of a flash roll is not in and of itself negligence where necessary to the agent's undercover role. B-194919, November 26, 1980.

(3) Travel advances

Travel advances are authorized by 5 U.S.C. 55705. The statute expressly directs the recovery, from the traveler or from his or her estate, of advances not used for allowable travel expenses.

A travel advance is "based upon the employee's prospective entitlement to reimbursement" (B-178595, June 27, 1973), and is essentially for the convenience of the traveler. If it were not authorized, the traveler would have little choice but to use personal funds and then seek reimbursement at the end of the travel. Travel advances in the hands of the traveler are regarded as nonaccountable and hence not governed by the accountable officer laws. Rather, they are treated as loans for the personal benefit of the traveler. As such, if the funds are lost or stolen while in the traveler's custody, regardless of the presence or absence of fault attributable to the traveler, the funds must be recovered as provided by 5 U.S.C. $5705, and the accountable officer relief statutes do not apply. 54 Comp. Gen. 190 (1974); B-206245, April 26, 1982; B-183489, June 30,1975. The same principle applies to traveler's checks. 64 Comp. Gen. 456, 460 (1985).

In many cases, a messenger or some other clerical employee picks up the funds for the traveler. If the funds are lost or stolen while in the intermediary's custody, and use of the intermediary was the traveler's choice, the intermediary is the agent of the traveler and the traveler, having constructively received the funds, remains liable. B-204387, February 24, 1982; B-200867, March 30, 1981. However, if use of the intermediary is required by agency or local policy, then the intermediary is the agent of the government and the traveler is not liable. 67 Comp. Gen. 402 (1988).

Even though the accountable officer relief statutes do not apply, it may be possible to effectively "relieve" the non-negligent traveler by considering a claim under the Military Personnel and Civilian Employees' Claims Act of 1964,31 U.S.C. $3721, to the extent permissible under the agency's implementing regulations. B-208639, October 5, 1982; B-197927, September 12, 1980.

Travel advances returned to government custody for reasons such as postponement of the travel regain their status as accountable funds, and an employee receiving custody of these funds is governed by the laws relating to the liability and relief of accountable **officers.** **B-200404,** February 12, 1981; **B-170012,** March 14, 1972; **B-170012,** May 3, 1971. Also, where an advance greatly exceeds the employee's legitimate travel expense needs and it is clear that the excess is intended to be used for operational purposes, the excess over reasonable needs may be treated as accountable funds and not part of the 'loan." **B-196804,** July 1, 1980.

b. Receipts

In our definitions of governmental receipts and offsetting collections in Chapter 2, we noted that the government receives funds from **nongovernment** sources (a) from the exercise of its sovereign powers (e.g., tax collections, customs duties, court frees), and (b) from a variety of business-type activities (e.g., sale of publications). These collections, whether they are to be deposited in the Treasury as miscellaneous receipts or credited to some agency appropriation or fund, are accountable funds from the moment of receipt. Some examples are 64 **Comp. Gen.** 535 (1985) (fees paid to bankruptcy court); 60 **Comp. Gen.** 674 (1981) (tax collections); **B-2001** 70, April 1, 1981 (petroleum overcharge refunds); **B-194782,** August 25, 1980 (recreational fee collections).

c. Funds Held in Trust

When the government holds private funds in a trust capacity, it is obligated, by virtue of its fiduciary duty, to pay over those funds to the rightful owners at the proper time. Thus, although the funds are not appropriated funds, they are nevertheless accountable funds. The principle has been stated as follows:

> "[T]he same relationship between an accountable officer and the United States is required with respect to trust funds of a private character obtained and held for some particular purpose sanctioned by law as is required with respect to public funds."

6 **Comp. Gen.** 515, 517 (1927). The Court of Claims said the same thing in Woog v. United States, 48 Ct. Cl. 80 (1913).

A common example is the Department of Veterans Affairs "Personal Funds of Patients" (PFOP) account. Patients, upon admission to a VA hospital, may deposit personal funds in this account for safekeeping and use as needed. Upon release, the balance is returned to the patient. Patient funds in the PFOP account have been consistently treated as accountable funds. 68 Comp. Gen. 600 (1989); 68 Comp. Gen. 371 (1989); B-226911, October 19, 1987; B-221447, April 2, 1986; B-215477, November 5, 1984; B-208888, September 28, 1984.

Another example is private funds of litigants deposited in a registry account of a court of the United States, to be held pending distribution by order of the court in accordance with 28 U.S.C. 552041 and 2042. These are also accountable funds under the trust fund concept. 64 Comp. Gen. 535 (1985); 6 Comp. Gen. 515 (1927); B-200108/B-198558, January 23, 1981. See also Osborn v. United States, 91 U.S. 474 (1875) (court can summarily compel restitution of funds improperly withdrawn from registry account by former officers).

Other situations applying the trust fund concept are 67 Comp. Gen. 342 (1988) (Indian trust accounts administered by Bureau of Indian Affairs); 17 Comp. Gen. 786 (1938) (United States Naval Academy laundry fund); B-190205, November 14, 1977 (foreign currencies accepted in connection with accommodation exchanges authorized by 31 U.S.C. § 3342); and A-22805, November 30, 1929 (funds taken from prisoners at the time of their confinement, to be held in their behalf). See also 69 Comp. Gen. 314 (1990) (BIA may contract with private bank for ministerial aspects of trust fund disbursements, but government disbursing officer must retain responsibility for managerial and judgmental aspects).

Not all nongovernment funds in the custody of a government official are held in a trust capacity. For example, in B-164419 -0. M., May 20, 1969, GAO distinguished between funds of a foreign government held by the United States incident to a cooperative agreement (trust funds), and funds of a private contractor held by a government official for safekeeping as a favor to the contractor. The latter situation was a mere bailment for the benefit of the contractor, and the official was not an accountable officer with respect to those funds.

d. Items Which Are the Equivalent of Cash

The concepts of accountability and liability discussed in this chapter apply primarily to money. However, for reasons which should be apparent, accountability also attaches to certain non-cash items which are negotiable by the bearer or are otherwise the equivalent of cash. Examples are:

- Traveler's checks in the custody of an accountable officer. 64 Comp. Gen. 456 (1985); B-235147.2, August 14,1991.
- Food stamps. B-221580, October 24, 1986 (non-decision letter).
- Government Transportation Requests. B-239387, April 24, 1991.
- Military payment certificates. B-127937-O. M., August 2, 1956.
- Treasury bonds with interest coupons attached. B-190506, November 28,1977, affirmed on reconsideration, B-190506, December 20, 1979.

In the second decision in B-190506, it was contended that loss of the bonds did not really result in a loss to the government because neither the bonds nor the coupons had been cashed and a "stop notice" had been placed with the Federal Reserve Bank. GAO could not agree, however, since the bonds were bearer bonds and the stop notice does not completely extinguish the government's liability to pay on them. (The Treasury Department no longer issues coupon bonds, although many older ones are still outstanding.)

4. What Kinds of Events Produce Liability?

The generic term for losses which trigger an accountable officer's liability is "fiscal irregularity." See GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 8.2. Fiscal irregularities are divided into two broad categories: (1) physical loss or deficiency, and (2) illegal or improper payment. Since, as we will see, the relief statutes are expressly tied to these categories, the proper classification of a fiscal irregularity is the essential first step in determining which statute to apply.

A working definition of "physical loss or deficiency" maybe found in B-202074, July 21, 1983:

> "In sum, 'physical loss or deficiency' includes such things as loss by theft or burglary, loss in shipment, and loss or destruction by fire, accident, or natural disaster. It also includes the totally unexplained loss, that is, a shortage or deficiency with absolutely no evidence to explain the disappearance. . . . Finally, . . . losses resulting from fraud or embezzlement by subordinate finance personnel may. . . be treated as physical losses."

This definition has been repeated in several subsequent decisions such as 70 Comp. Gen. 616,621 (1991) and 65 Comp. Gen. 881,883 (1986). A loss resulting from a bank failure would also be treated as a physical loss. See 18 Comp. Gen. 639 (1939); 20 Op. Att'y Gen. 24 (1891).

The second type of fiscal irregularity is the "illegal, improper, or incorrect payment." 31 U.S.C. §§ 3527(c), 3528(a)(4). The keyword here is "payment"—"the disbursement of public funds by a disbursing officer or his subordinate." B-202074, July 21, 1983. Improper payments include such things as payments obtained by fraud, whether by nongovernment persons or by government employees other than subordinate finance personnel; erroneous payments or overpayments resulting from human or mechanical error attributable to the government; payments prohibited by statute; and disbursements for unauthorized purposes. The legislative history of 31 U.S.C. § 3527(c), the improper payment relief statute for disbursing officers, describes an improper payment as a payment "which the Comptroller General finds is not in strict technical conformity" with the law. Excerpts from the pertinent committee reports are quoted in 49 Comp. Gen. 38,40 (1969) and in B-202074, cited above.

A loss resulting from an uncollectible personal check maybe an improper payment or a physical loss, depending on the circumstances. If the loss results from an authorized check-cashing transaction, it is an improper payment because government funds were disbursed to the bearer. 70 Comp. Gen. 616 (1991). However, if the check is tendered to pay an obligation owed to the United States or to purchase something from the government, the loss, to the extent an accountable loss exists, would be a physical loss. In this connection, Treasury regulations provide:

> "All checks received by any Government officer are accepted subject to collection. If any check cannot be collected in full or is lost or destroyed before collection, the administrative agency concerned is responsible for obtaining the proper payment. A payment by check is not effective unless and until the full proceeds have been received."

I Treasury Financial Manual $5-2010. If a personal check is accepted subject to collection, and if the government does not exchange value for the check, any resulting loss is not a loss within the scope of the accountable officer laws and may be adjusted administratively by the agency. If, however, an accountable officer purports to accept a personal check in satisfaction of an obligation due the United States (rather than for collection only), or if the government parts with something of value in exchange for the check (e.g., sale of government property), a resulting loss is treated as a physical loss. B-201673 et al., September 23, 1982. See also 3 Comp. Gen. 403

(1924); A-44019, March 15, 1934; A-24693, October 30,1929. The distinction is summarized in the following passage from B-201673:

"If a check tendered in payment of a free, duty, or penalty becomes uncollectible, it may be argued that the Government incurs a loss in the sense that it does not have money to which it was legally entitled, but it has not lost anything that it already had. When the check is in exchange for property, the Government has lost the property, the value of which is measured by the agreed-upon sales price. Of course, recovery of the property will remove or mitigate the loss."

The concept of B-201673 has also been applied to a check seized as forfeiture under the Currency and Foreign Transactions Reporting Act and subsequently returned as uncollectible. B-208398, September 29, 1983.

A conceptually similar case is B-216279, October 9, 1984. A teller at a Customs Service auction gave a receipt to a customer and negligently failed to collect the tendered funds. It was suggested that there was no loss because the teller never had physical possession of the funds. However, the applicable relief statute (31 U.S.C. § 3527) uses the terms "physical loss or deficiency" in the disjunctive, and there was clearly a deficiency in the teller's account to the extent of the property turned over in exchange for the lost payment.

While every fiscal irregularity by definition involves a loss or deficiency for which someone is accountable, not every loss or deficiency is a fiscal irregularity which triggers accountability. For example, an accountable officer is not liable for interest lost on collections which should have been deposited promptly but were not. 64 Comp. Gen. 303 (1985) (failure to deposit collections in designated depositary); B-190290, November 28, 1977 (increased interest charges on funds borrowed from Treasury, no net loss to United States).

Also, losses resulting from the imperfect exercise of judgment in routine business operations, where no law has been violated, do not create accountable officer liability. 65 Comp. Gen. 881 (1986) (loss to Internal Revenue Service Tax Lien Revolving Fund caused by sale of property for substantially less than amount for which it had been redeemed).

5. Amount of Liability

As a general proposition, the amount for which an accountable officer is liable is easy to determine: It is the amount of the physical loss or improper payment, reduced by any amounts recovered from the recipient (thief, improper payee, etc.). E.g., 65 Comp. Gen. 858, 863–64 (1986); B-194727, October 30, 1979.

There is an exception, discussed in 65 Comp. Gen. 858,863-64, in which amounts recovered from the recipient should not be used to reduce the amount of the accountable officer's liability. A loss may result from a series of transactions spanning several years, each transaction giving rise to a separate debt. By the time the loss is discovered, recovery from the accountable officer may be partially barred by the 3-year statute of limitations found in 31 U.S.C. § 3526(c). This, however, does not affect the indebtedness of the recipient which, in this situation, will exceed the liability of the accountable officer. Under the Federal Claims Collection Standards, a debtor owing multiple debts may specify the allocation of a voluntary partial payment. If the recipient/debtor fails to so specify, or if payment is involuntary, the collecting agency may allocate the money among the various debts in accordance with the best interests of the United States. Generally, "the best interests of the United States are clearly served by applying payments made by the recipients to the class of debt for which only the recipients are liable" (id. at 864), i.e., those for which recovery from the accountable officer is time-barred. Thus, in this type of situation, partial recoveries from the recipient should first be applied to the time-barred debt of the accountable officer until any such amounts have been recouped, and only thereafter used to reduce the accountable officer's remaining liability.

A judgment obtained against some third party (improper payee, thief, etc.) is only "potential unrealized value" and does not reduce the accountable officer's liability until it is actually collected. B-147747, December 28, 1961; B-194727, October 30, 1979 (non-decision letter),

The liability of an accountable officer does not include interest and penalties assessed against the recipient. B-235037, September 18, 1989.

The liability of an accountable officer resulting from the payment of fraudulent travel claims is the amount of the fraudulent payment and does not include non-fraudulent amounts paid for the same day(s). 70

Comp. Gem 463 (1991). Previously GAO had included both, under the so-called "tainted day" rule. The 1991 decision distinguishes fraudulent payees from fraudulent claimants, concluding that the tainted day rule does not apply to paid claims.

When determining the amount of a loss for which an accountable officer is to be held liable, the government does not "net" overages against shortages. In GAO'S view, such "netting" would weaken internal controls over the accounting for cash balances. B-2 12370, November 15, 1983; B-199447, March 17, 1981.[9] As noted in B-199447, overages must generally be deposited in the Treasury as miscellaneous receipts.

In almost all cases, the amount of an accountable officer's liability is precisely determinable at the outset. It maybe reduced by recoveries, but it will not increase. One exception is illustrated in B-239387, April 24, 1991, in which an agency held an employee accountable for a booklet of missing or stolen Government Transportation Requests. Because the amount of the government's loss could not be known until the GTRs were actually used and the government forced to honor them, additional liability accrued as each GTR was used overtime.

6. Effect of Criminal Prosecution

As we noted previously, the body of law governing the liability and relief of accountable officers is designed not only to induce proper care but also to protect against dishonesty by the officers themselves. This section summarizes the relationship between criminal prosecution and civil liability.

a. Acquittal

Acquittal in a criminal proceeding does not extinguish civil liability and does not bar subsequent civil actions to enforce that liability as long as they are remedial rather than punitive. Helvering v. Mitchell, 303 U.S. 391 (1938). The reason is the difference in burden of proof. Acquittal means only that the government was unable to prove guilt beyond a reasonable doubt, a standard higher than that for civil liability. "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been

[9] A statutorily authorized instance of "netting" gains and deficiencies in an account is 31 U.S.C. § 3342(c)(2) (certain check-cashing and exchange transactions), discussed later in this chapter.

settled." Id. at 397. See also B-239134, April 22, 1991 (non-decision letter) (conviction on only a portion of the loss).

The rules are the same for acquittal (or reversal of a conviction) by a military court-martial. Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979) (acquittal held not to bar agency from imposing civil liability and withholding pay of accountable officer).

It follows that an accountable officer's civil liability will be unaffected by the fact that a grand jury has refused to return an indictment. B-186922, April 8, 1977.

b. Order of Restitution

A court may order a defendant to make monetary restitution to the victim, either as part of the sentence (18 U.S.C. § 3556) or as a condition of probation (18 U.S.C. § 3563(b)(3)). In either case, the relevant terms and procedures are governed by 18 U.S.C. §§3663 and 3664. Restitution may be ordered in a lump sum or in installments. 18 U.S.C. § 3663(f). These are general criminal statutes, and would apply fully where the defendant is an accountable officer and the United States is the victim as well as the prosecutor.

The statutory scheme clearly recognizes the possibility of subsequent civil proceedings by the United States as victim against the accountable officer. Any amounts paid to a victim under a restitution order must be set off against amounts recovered in a subsequent civil action. 18 U.S.C. § 3663(e)(2). In such an action, the previously convicted defendant cannot deny the "essential allegations" of the offense. 18 U.S.C. § 3664(e).

Where restitution is ordered in full, payable in installments, it has been held that the victim may nevertheless obtain a civil judgment for the unpaid balance, even though there has been no default in the installment payments. Teachers Insurance and Annuity Association v. Green, 636 F. Supp. 415 (S. D.N.Y. 1986). "Future payments that do not fully compensate a victim in present value terms cannot be a bar to a civil judgment." Id. at 418. See also B-128437-O. M., August 3, 1956.

Where restitution is ordered in an amount less than the full amount of the loss, civil liability for the balance would remain, subject to the statutory setoff requirement. See 64 Comp. Gen. 303 (1985), reaching this result under a prior version of the legislation. The decision further suggests that, if the record indicates that the court thought it was ordering restitution in full, it might be desirable to seek amendment of the restitution order. Obviously, the fact of conviction precludes any consideration of administrative relief. Id. at 304.

The preceding paragraphs are presented from the perspective of restitution by the accountable officer. Similar principles would apply with respect to restitution by a responsible party other than the accountable officer. See, e.g., B-193673, May 25, 1979, modified on other grounds by B-201673 et al., September 23, 1982 (partial restitution by thief reduces amount of accountable officer's liability).

C. Physical Loss or Deficiency

1. Statutory Provisions

The two principal statutes authorizing administrative relief from liability for the physical loss or deficiency of public funds are 31 U.S.C. §§ 3527(a) and 3527(b). Subsection (a) applies to the civilian agencies and to accountable officers of the armed forces other than disbursing officers. Subsection (b) applies to disbursing officers of the armed forces.

a. Civilian Agencies

The physical loss or deficiency relief statute applicable to accountable officers generally, 31 U.S.C. § 3527(a), was originally enacted in 1947 (61 Stat. 720). Its justification, similar to that for all relief statutes, was summarized by the Senate Committee on Expenditures in the Executive Departments as follows:

> "The justification . . . is that, at the present time, relief of the kind with which this bill is concerned is required to be granted either through passage of a special relief bill by the Congress or by the filing of suit by the responsible person in the United States Court of Claims, the latter to be done at the personal expense of the responsible person. Both methods are costly and time consuming."

S. Rep. No. 379, 80th Cong., 1st Sess., reprinted in 1947 U.S. Code Cong. Service 1546.

Before the actual relief mechanism is triggered, two threshold issues must be satisfied. First, the loss must be a physical loss or deficiency and not an improper payment. 31 U.S.C. § 3527(a)(2). Second, the person for whom relief is desired must be an "accountable officer."[10] The legislative history confirms that this includes the general custodial category:

"There are many agents of the Government who do not disburse but who, nevertheless, are fully responsible for funds. . . entrusted to their charge and, for that reason, the committee bill has been broadened to include that class of personnel."

S. Rep. No. 379, 1947 U.S. Code Cong. Service at 1547.

Once it has been determined that there has been a physical loss or deficiency of "public money, vouchers, checks, securities, or records" for which an accountable officer is liable, the statute authorizes the Comptroller General to grant relief from that liability if the head of the agency involved makes two administrative determinations (31 U.S.C. § 3527(a)(1)), and if the Comptroller General agrees with those determinations (§ 3527(a)(3)).

First, the agency head must determine that the accountable officer was carrying out official duties at the time of the loss, or that the loss was attributable to the actor omission of a subordinate of the accountable officer. Note that this is stated in the disjunctive. The second part, loss attributable to a subordinate, is designed to cover the situation, found in several agencies such as the Internal Revenue Service and the Customs Service, in which the account is in the name of a supervisory official who does not actually handle the funds. In this situation, both persons are accountable, and relief of one does not necessarily mean relief of the other.

Second, the agency head must determine that the loss was not attributable to fault or negligence on the part of the accountable officer. This determination is necessary regardless of which part of the first determination applies. Thus, while lack of fault does not affect the automatic imposition of liability, it does provide the basis for relief.

[10] This statute will not apply to certifying officers since they do not have actual custody of funds. However, a certifying officer could conceivably have other duties or supervisory responsibilities and thus be accountable, and eligible for relief under 31 U.S.C. § 3527(a), in that capacity.

Generally, the requirement that the accountable officer must have been acting in the discharge of official duties does not present problems. Thus, in the typical case, the central question becomes whether GAO is able to concur with the administrative determination that the loss occurred without fault or negligence on the part of the accountable officer. In reviewing relief cases over the years, GAO has developed a number of standards, the application of which to a given case requires a careful analysis of the particular facts. Many factors may bear on the conclusion in any given case, and the result will be determined by the interrelationship of these factors.

Section 3527(a) applies to accountable officers of "an agency," defined in 31 U.S.C. § 101 as any "department, agency, or instrumentality of the United States Government. " Thus, section 3527(a) has been construed as applicable to the judicial branch (B-200108/B-198558, January 23, 1981; B-197021, May 9, 1980; B-191440, May 25, 1979; B-185486, February 5, 1976), and to agencies of the legislative branch (B-192503 -O. M., January 8, 1979, denying relief to a GAO employee). Whether it applies to the Senate or House of Representatives is unclear. It has also been construed as applicable to those government corporations which are subject to GAO's account settlement authority. B-88578, August 21, 1951; B-88578 -O. M., August 21, 1951.

b. Military Disbursing Officers

The need for physical loss relief authority for military disbursing officers became highlighted during World War I when several ships were sunk with funds and records on board. The first permanent administrative relief statute was enacted in 1919 and applied only to the Navy (41 Stat. 132). The Army received similar legislation in 1944 (58 Stat. 800). The two were combined in 1955 and expanded to cover all of the military departments (69 Stat. 687). The legislation is now codified at 31 U.S.C. § 3527(b). The origins of the 1919 law are described in 7 Comp. Gen. 374, 377–78 (1927); the statutory evolution is detailed in B-202074, July 21, 1983. The statute applies to both civilian and military personnel of the various military departments. B-151 156, December 30, 1963.

As with section 3527(a), two threshold issues must be satisfied before the relief mechanism comes into play. First, like section 3527(a), section 3527(b) applies only to physical losses or deficiencies and not to improper payments. 31 U.S.C. § 3527(b)(1)(B); 7 Comp. Gen. 374 (1927); 2 Comp. Gen. 277 (1922); B-202074, July 21, 1983. The statute was intended to authorize relief in appropriate cases for losses "such as losses by fire, ship sinkings, thefts or physical losses resulting from enemy action or otherwise." B-75978, June 1, 1948. Thus, a loss in shipment is cognizable under section 3527(b). B-200437, October 21, 1980. However, the making of a travel advance to an employee who terminated his employment without accounting for the advance is not a physical loss but rather "a payment voluntarily made by the disbursing officer in the course of his duties." B-75978, June 1, 1948.

Second–and here the two statutes differ-section 3527(b) applies only to disbursing officers and not to nondisbursing accountable officers. B-194782, August 13, 1979; B-194780, August 8, 1979; B-151 156, December 30, 1963; B-144467, December 19, 1960 ("while all disbursing officers are accountable officers, all accountable officers are not disbursing officers"). As each of the cited cases points out, physical loss relief for nondisbursing accountable officers of the military departments must be sought under 31 U.S.C. § 3527(a).

Section 3527(b) is also similar to section 3527(a) in that, once it has been determined that a loss is properly cognizable under the statute, the applicable agency head must determine that (1) the disbursing officer was carrying out official duties at the time of the loss or deficiency (prior versions of the statute, and hence many GAO decisions, use the military term "line of duty status"), and (2) the loss occurred without fault or negligence on the part of the disbursing officer. The first determination, 31 U.S.C. § 3527(b)(1)(A), does not expressly include the "loss attributable to subordinate" clause found in section 3527(a). However, it is applied in the same manner. See B-155149, October 21, 1964; B-151 156, December 30, 1963.

The administrative determinations are conclusive on GAO. 31 U.S.C. § 3527(b)(2). Thus, once the determinations are made, the granting of relief is mandatory. Unlike section 3527(a), if the situation is properly cognizable under section 3527(b), GAO has no discretion in the matter. Agency determinations on the threshold issues–what is a physical loss and who is a disbursing officer-are not conclusive. B-151156, December 30, 1963.

Section 3527(b) is not the "exclusive remedy" with respect to physical losses of military disbursing officers. It exists side-by-side with section 3527(a). Thus, for losses cognizable under 31 U.S.C. § 3527(b), the disbursing officer (or the applicable Secretary) has an option to proceed under either statute. B-151 156, December 30, 1963. Of course, for the most part there would be little to gain by electing to proceed under section 3527(a) if section 3527(b) is also available.

2. Who Can Grant Relief?

a. 31 U.S.C. § 3527(a)

The statute confers the authority to grant relief on the Comptroller General. At one time, every case, no matter how small the amount, involved an exchange of correspondence–a letter from the agency to GAO requesting relief, and a letter from GAO back to the agency granting or denying it. By 1969, after 20 years of experience under the statute, a set of standards had developed, and it became apparent that there was no need for GAO to actually review every case. In that year, GAO inaugurated the practice of setting a dollar amount, initially $150, below which agencies could apply the standards and grant or deny relief accordingly without the need to obtain formal concurrence from GAO.

GAO has raised the amount several times over the years and has used various formats to announce the increase.[11] The current ceiling is $3,000. B-243749, October 22, 1991. The authorization applies to physical losses or deficiencies and, with a few exceptions to be noted later, not to improper payments. 61 Comp. Gen. 646 (1982); 59 Comp. Gen. 113 (1979). As stated in 61 Comp. Gen. at 647:

> "For the most part, the law governing the physical loss or deficiency of Government funds is clear, and most cases center around the determination of whether there was any contributing negligence on the part of the accountable officer. Our numerous decisions in this area should provide adequate guidance to agencies in resolving most smaller losses."

The $3,000 limitation applies to "single incidents or the total of similar incidents which occur about the same time and involve the

[11] The $150 authorization was established by B-161457, August 1, 1969 (circular letter). It was raised to $500 in 1974. B-161457, August 14, 1974 (circular letter); 54 Comp. Gem 112 (1974). A 1983 revision to title 7 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies (7 GAO-PPM $28.14, TS No. 7-40, July 14, 1983) raised it to $750. Another revision of the Policy and Procedures Manual raised it to $1,000. 7 GAO-PPM § 8.9.C (TS No. 7-42, February 12, 1990).

same accountable officer." GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 8.9.C (1990). Thus, two losses arising from the same theft, one under the limit and one over, should be combined for purposes of relief. B-189795, September 23, 1977. In B-193380, September 25, 1979, an imprest fund cashier discovered a $300 shortage while reconciling her cash and subvouchers. A few days later, her supervisor, upon returning from vacation, found an additional $500 missing. Since the losses occurred under very similar circumstances, GAO agreed with the agency that they should be treated together for purposes of seeking relief. Another case, B-187139, October 25, 1978, involved losses of $1,500, $60, and $50. Since there was no indication that the losses were related, the agency was advised to resolve the $60 and $50 losses administratively. (The ceiling was $500 at the time of B-193380 and B-187139.)

Thus, in cases of physical loss or deficiency, it is necessary to request relief from GAO only if the amount involved is $3,000 or more. For below-ceiling losses, GAO's concurrence is, in effect, granted categorically provided the matter is properly cognizable under the statute, the agency makes the required determinations, and the administrative resolution is accomplished in accordance with the standards set forth in the GAO decisions. E.g., B-206817, February 10, 1983; B-204740, November 25, 1981. Each agency should maintain a central control record of its below-ceiling resolutions, should document the basis for its decisions, and should retain that documentation for subsequent internal or external audit or review. 7 GAO-PPM § 8.9.C (1990). Also, agencies should ensure the independence of the official or entity making the relief decisions. B-243749, October 22, 1991.

If an agency inadvertently submits a relief request to GAO for a below-ceiling loss, GAO's policy is simply to return the case with a brief explanation. E.g., B-214086, February 2, 1984. GAO will also provide any further guidance that may appear helpful.

As a practical matter, GAO's authorization for below-ceiling administrative resolution is relevant only where the agency believes relief should be granted. In these cases, the need for an exchange of correspondence is eliminated, and the relief process is quicker, more streamlined, and less costly. If the agency believes relief should not be granted, its refusal to support relief effectively ends the matter regardless of the amount. GAO will not review an agency's refusal to grant relief in a below-ceiling case. 59 Comp. Gen. 113,114 (1979).

b. 31 U.S.C. § 3527(b)

Like 31 U.S.C. § 3527(a), section 3527(b) also specifies the Comptroller General as the relieving authority. However, by virtue of the mandatory nature of section 3527(b), the monetary ceiling concept used in civilian relief cases has much less relevance to military disbursing officer losses.

By circular letter B-198451, February 5, 1981, GAO notified the military departments of a change in procedures under 31 U.S.C. § 3527(b). Since GAO has no discretion with respect to the agency determinations and relief is mandatory as long as the determinations are made, there is no need for GAO to review any of those determinations on a case-by-case basis. Thus, there is no need for the agency to submit a formal request for relief regardless of the amount involved. As long as the case is properly cognizable under 31 U.S.C. § 3527(b) (i.e., it involves a disbursing officer and a physical loss or deficiency), it is sufficient for purposes of compliance with the statute for the agency to make the required determinations and to retain the documentation on file for audit purposes. Of course, should there be a question as to whether a particular case is properly cognizable under the statute, GAO is available to provide guidance.

c. Role of Administrative Determinations

Both of the relief statutes described above require two essentially identical administrative determinations as prerequisites to granting relief. It is the making of those determinations that triggers the ability to grant relief. If the agency cannot in good faith make those determinations, the legal authority to grant administrative relief simply does not exist, regardless of the amount involved and regardless of who is actually granting relief in any given case. GAO will not review an agency's refusal to make the determinations under either statute, and has no authority to "direct" an agency to make them. In this sense, an agency's refusal to make the required determinations is final. The best discussion of this point is found in 59 Comp. Gen. 113 (1979) (case arose under section 3527(a) but point applies equally to both statutes).

While GAO's role under section 3527(a) is somewhat greater than under section 3527(b), that role is still limited to concurring with determinations made by the agency. GAO cannot make those determinations for the agency. If they are absent, whatever the reason, relief cannot be granted regardless of the apparent merits of the case. There are numerous decisions to this effect. A few of them are B-217209, December 11, 1984; B-204464, January 19, 1982; and B-197616, March 24, 1980. The determinations are as much required in below-ceiling cases as they are in cases submitted to GAO. 59 Comp. Gen. 113 (1979).

On occasion GAO has been willing to infer a determination that the loss occurred while the accountable officer was carrying out official duties where that determination was not expressly stated but the facts make it clear and there is no question that relief will be granted. E.g., B-244723, October 29, 1991; B-235180, May 11, 1989; B-199020, August 18, 1980; B-195435, September 12, 1979. However, the determination of no contributing fault or negligence will not be inferred but must be expressly stated. It is not sufficient to state that the investigative report did not produce affirmative evidence of fault or negligence. B-167126, August 9, 1976. Nor is it sufficient to state that there is "no evidence of willful misconduct." B-217724, March 25, 1985.

As a practical matter, it will simplify the relief process if the agency's request explicitly states all required determinations. It is best simply to follow the wording of the statute.

Agency determinations required by a relief statute must be made by an agency official authorized to do so. E.g., B-184028, October 24, 1975. Section 3527(a) requires determinations by the "head of the agency." Section 3527(b) specifies the "appropriate Secretary." Of course in most cases the authority under either statute will be delegated. It has been held that, absent a clear expression of legislative intent to the contrary, the authority to make determinations under these statutes may be delegated only to officials authorized by law to act in place of the agency head, or to an Assistant Secretary. 29 Comp. Gen. 151 (1949). Many agency heads have separate statutory authority to delegate and redelegate, and this of course will be sufficient. See, e.g., 22 U.S.C. § 2658 (Secretary of State). As far as GAO is concerned, the form of the delegation is immaterial although it should, of course, be in writing. Documentation of delegations need not be furnished to GAO, nor need it be specified in relief requests, but should be available if requested. 7 GAO-PPM § 8.9.B (1990).

If, under agency procedures, the determinations are made in the first instance by someone other than the designated official (e.g., aboard of inquiry), the relief request must explicitly state the designated official's concurrence. B-207062, July 20, 1982.

3. Standards for Granting Relief

a. Standard of Negligence

Again, it is important to distinguish between liability and relief. The presence or absence of negligence has nothing to do with an accountable officer's basic liability. The law is not that an accountable officer is liable for negligent losses. The officer is strictly liable for all losses, but may be relieved if found to be free from fault or negligence. It has frequently been stated that an accountable officer must exercise "the highest degree of care in the performance of his duty." E.g., 48 Comp. Gen. 566, 567–68 (1969); B-186922, August 26, 1976; B-182386, April 24, 1975. Statements of this type, however, have little practical use in applying the relief statutes.

In evaluating the facts to determine whether or not an accountable officer was negligent, GAO applies the standard of "reasonable care." 54 Comp. Gen. 112 (1974); B-196790, February 7, 1980. This is the standard of simple or ordinary negligence, not gross negligence. 54 Comp. Gen. at 115; B-158699, September 6, 1968. The standard has been stated as what the reasonably prudent and careful person would have done to take care of his or her own property of like description under like circumstances. B-209569, April 13, 1983; B-193673, May 25, 1979; Malone v. United States, 5 Ct. Cl. 486,489 (1869). This is an objective standard, that is, it does not vary with such factors as the age and experience of the particular accountable officer.

The doctrine of comparative negligence (allocating the loss based on the degree of fault) does not apply under the relief statutes. B-211962, July 20, 1983; B-190506, November 28,1977.

b. Presumption of Negligence/Burden of Proof

The mere fact that a loss or deficiency has occurred gives rise to a presumption of negligence on the part of the accountable officer. The presumption may be rebutted by evidence to the contrary, but it is the accountable officer's burden to produce the evidence. The government does not have to produce evidence to establish that the accountable officer was at fault in order to hold the officer liable. Rather, to be entitled to relief, the accountable officer must produce evidence to show that there was no contributing fault or negligence on his or her part, i.e., that he or she exercised the requisite degree of care.

This rule originated in decisions of the Court of Claims under 28 U.S.C. $2512, before any of the administrative relief statutes existed, and has been consistently followed. An early and often quoted statement is the following from Boggs v. United States, 44 Ct. Cl. 367,384 (1909):

"[T]here is at the outset a presumption of liability, and the burden of proof must rest upon the officer who has sustained the loss."

A later case quoting and applying Boggs is O'Neal v. United States, 60 Ct. Cl. 413 (1925). More recently, the court said:

"[T]he Government does not have the burden of proving fault or negligence on the part of plaintiff; plaintiff has the sole burden of proving that he was without fault or negligence in order to qualify for [relief]."

Serrano v. United States, 612 F.2d 525, 532–33 (Ct. Cl. 1979).

GAO follows the same rule, stating it in literally dozens of relief cases. E.g., 67 Comp. Gen. 6 (1987); 65 Comp. Gen. 876 (1986); 54 Comp. Gen. 112 (1974); 48 Comp. Gen. 566 (1969).[12]

The amount and types of evidence that will suffice to rebut the presumption vary with the facts and circumstances of the particular case. However, there must be affirmative evidence. It is not enough to rely on the absence of implicating evidence, nor is the mere administrative determination that there was no fault or negligence, unsupported by evidence, sufficient to rebut the presumption. E.g., 70 Comp. Gen. 12, 14 (1990); B-204647, February 8, 1982; B-167126, August 9, 1976.

[12]Many decisions prior to 1970, such as 48 Comp. Gen. 566, deal with postal employees. Since enactment of the Postal Reorganization Act of 1970, responsibility for the relief of postal employees is with the United States Postal Service. 39 U.S.C. § 2601; 50 Comp. Gen. 731 (1971); B-164786, October 8,1970. While the Comptroller General no longer relieves postal employees, the principles enunciated in the earlier decisions are nonetheless applicable to other accountable officers.

If the record clearly establishes that the loss resulted from burglary or robbery, the presumption is easily rebutted. But the evidence does not have to explain the loss with absolute certainty. If the evidence is not ail that clear, the accountable officer may still be able to rebut the presumption by presenting evidence tending to corroborate the likelihood of theft or showing that some factor beyond his control was the proximate cause of the loss. If such evidence exists, and if the record shows that the accountable officer complied fully with all applicable regulations and procedures, the agency's determination of no fault or negligence will usually be accepted and relief granted.

GAO will consider the results of a polygraph (lie detector) test as an additional factor in the equation, but does not regard those results, standing alone, as dispositive. This applies whether the results are favorable (B-206745, August 9, 1982; B-204647, February 8, 1982; B-142326, March 31, 1960; B-182829 -O. M., February 3, 1975) or unfavorable (B-209569, April 13, 1983; see also B-192567, August 4, 1983, aff'd upon reconsideration, B-192567, June 21, 1988).

Another situation in which the presumption is easily rebutted is where the accountable officer does not have control of the funds at the time of the loss. An example is losses occurring while the accountable officer is on leave or duty absence. As a practical matter, relief will be granted unless there is evidence of actual contributing negligence on the part of the accountable officer. B-196960, November 18, 1980; B-184028, March 2, 1976; B-175756-O. M., June 14, 1972. Of course, where contributing negligence exists, relief will be denied and the role of the presumption never comes into play. B-182480, February 3, 1975.

The presumption of negligence is occasionally criticized as unduly harsh. However, it is necessary both in order to preserve the concept of accountability and to protect the government against dishonesty as well as negligence. See B-167126, August 28, 1978; B-191440, May 25, 1979. As stated in one decision, the presumption of negligence—

"is a reasonable and legal basis for the denial of relief where the accountable officers have control of the funds and the means available for their safekeeping but the shortage nevertheless occurs without evidence of forcible entry or other conclusive explanation which would exclude negligence as the proximate cause of the loss."

B-166519, October 6, 1969. Indeed, if liability is strict and automatic, a legal presumption against the accountable officer is virtually necessary as a starting point.

c. Actual Negligence

If the facts indicate negligence on the part of the accountable officer, and if it appears that the negligence was the proximate cause of the loss, then relief must be denied.

One group of cases involves failure to lock a safe. It is negligence for an accountable officer to place money in a safe in an area which is accessible to others, and then leave the safe unlocked for a period of time when he or she is not physically present. *E.g.*, B-190506, November 28, 1977; B-139886, July 2, 1959. It is also negligence to leave a safe unattended in a "day lock" position. B-199790, August 26, 1980; B-188733, March 29,1979, aff'd, B-188733, January 17, 1980; B-187708, April 6, 1977. Compare B-180863, April 24, 1975, in which an accountable officer who had left a safe on "day lock" was relieved in view of her lack of knowledge or instruction regarding the day lock mechanism. Thus, an accountable officer who leaves a safe unlocked (either by leaving the door open or closing the door but not rotating the combination dial), and then leaves the office for lunch or for the night will be denied relief. B-204173, January 11, 1982, aff'd, B-204173, November 9, 1982; B-183559, August 28, 1975; B-180957, April 24, 1975; B-142597, April 29, 1960; B-181648-O.M., August 21, 1974.

Merely being physically present may not be enough. A degree of attentiveness, dictated by the circumstances and common sense, is also required. In B-17371 O-O. M., December 7, 1971, relief was denied where the cashier did not lock the safe while a stranger, posing as a building maintenance man, entered the cashier's cage ostensibly to repair the air conditioning system and erected a temporary barrier between the cashier and the safe.

Another group involves the failure to use available security facilities. As we will see in our discussion of agency security, a good rule-of-thumb for the accountable officer is: You do the best you can with what is available to you. Failure to do so, without compelling justification, does not meet the standard of reasonable care. Some examples in which relief was denied are:

- Funds disappeared from bar-locking file cabinet. Combination safe was available but not used. B-192567, June 21, 1988.
- Cashier left funds overnight in locked desk drawer instead of safe provided for that purpose. B-177730-O.M., February 9, 1973.
- Cashier left funds in unlocked drawer while at lunch instead of locked drawer provided for that purpose. B-161229-O. M., April 20, 1967.
- Accountable officer left unlocked cash box in safe to which several other persons had access. B-172614-O. M., May 4, 1971; B-167596-O. M., August 21, 1969.

Inattentiveness or simple carelessness which facilitates a loss may constitute negligence and thus preclude relief. 64 Comp. Gen. 140 (1984) (shoulder bag with money left unattended on airport counter for several minutes); B-233937, May 8, 1989 (bag With money set on ledge in crowded restaurant); B-208888, September 28, 1984 (evidence suggested that funds were placed on desk and inadvertently knocked into trash can); B-127204, April 13, 1956 (pay envelopes left on top of desk in cashier's cage 19 inches from window opening on hallway to which many persons had access).

The best way to know how much cash you have is to count it. Failure to do so where reasonable prudence would dictate otherwise is negligence. B-247581, June 4, 1992 (alternate cashier failed to count cash upon receipt from principal or upon return to principal); B-206820, September 9, 1982 (accountable officer handed money over to another employee without counting it or obtaining receipt); B-193380, September 25, 1979 (cashier cashed checks at bank and failed to count the cash received).

A deficiency in an accountable officer's account caused by the acceptance of a counterfeit note constitutes a physical loss for purposes of 31 U.S.C. § 3527(a). B-140836, October 3, 1960; B-108452, May 15, 1952; B-101301, July 19, 1951. Whether accepting counterfeit money is negligence depends on the facts of the particular case, primarily whether the counterfeit was readily detectable. B-239724, October 11, 1990; B-191891, June 16, 1980; B-163627-O. M., March 11, 1968. (Relief was granted in these three cases.) If the quality of the counterfeit is such that a prudent person in the same situation would question the authenticity of the bill, relief should not be granted. B-155287, September 5, 1967. Also, failure to check a bill against a posted list of serial numbers will generally be viewed as negligence. B-155287, September 5, 1967; B-166514-O.M., July 23, 1969. Finally, failure without compelling justification to use an available counterfeit detection machine is negligence. B-243685, July 1, 1991.

Other examples of conduct which does or does not constitute negligence are scattered throughout this chapter, e.g., the sections on compliance with regulations and agency security. In all cases, including those which cannot be neatly categorized, the approach is to apply the standard of reasonable care to the conduct of the accountable officer in light of all surrounding facts and circumstances. For example, in B-196790, February 7, 1980, a patient at a Veterans Affairs hospital, patient "X", had obtained a cashier's check from a bank on May 9, 1978. On September 12, 1978, another patient, patient "Y", presented the check at the hospital for deposit to patient X's personal funds account. On the following day, patient X withdrew the money and left. The bank refused to honor the check because, unknown to hospital personnel, patient X had gone to the bank on May 17, stated that he had never received the check, and the bank had refunded its face value. As noted in the decision, patient X had "cleverly managed to double his bank account by collecting the same funds twice." The issue was whether it was negligence for the hospital cashier to accept the check dated four months earlier or to permit patient X to withdraw the funds the day after the check was deposited. GAO considered the nature of a cashier's check, noted the absence of applicable regulations, applied the reasonable care standard, and granted relief, but recommended that the agency pursue further collection efforts against the bank.

d. Proximate Cause

An accountable officer maybe found negligent and nevertheless relieved from liability if it can be shown that the negligence was not the "proximate cause" of the loss or shortage. A precise definition of the term "proximate cause" does not exist. [13] The concept means that, first, there must be a cause-and-effect relationship between the negligence and the loss. In other words, the negligence must have contributed to the loss. However, as one authority notes, the cause of an event can be argued in a philosophical sense to "go back to the

[13] "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion." Prosser and Keeton, The Law of Torts, § 41 (5th ed. 1984).

dawn of human events" and its consequences can "go forward to eternity."[14] Obviously a line must be drawn someplace. Thus, the concept also means that the cause-and-effect relationship must be reasonably foreseeable; that is, a reasonably prudent person should have anticipated that a given consequence could reasonably follow from a given act.

Before proceeding, we must refer again to the accountable officer's burden of proof. The Court of Claims said, in Serrano v. United States, 612 F.2d 525, 531–32 (Ct. Cl. 1979):

> "It is argued that the. . . fault or negligence involved must be the proximate cause of the loss. Thus the Secretary . . . could not deny relief unless the loss was proximately attributable to plaintiff. This argument has no merit. If such an argument were to be accepted by this court, it would shift the burden of proof. . . to the Government. . . .
>
> "Shifting of the burden of proof, and forcing the Government to prove that plaintiff's conduct was a proximate cause of the loss, would be intolerable. This shift would negate the special responsibility that disbursing officers have in handling public funds." (Emphasis in original.)

Thus, the government does not have to prove causation anymore than it has to prove negligence. Rather, the accountable officer who has been negligent must, in order to be eligible for relief, show that some other factor or combination of factors was the proximate cause of the loss, or at least that the totality of evidence makes it impossible to fix responsibility.

In analyzing proximate cause, it may be helpful to ask certain questions. First, if the accountable officer had not been negligent, would the loss have occurred anyway? If the answer to this question is yes, the negligence is not the proximate cause of the loss and relief will probably be granted. However, it may not be possible to answer this question with any degree of certainty. If not, the next question to ask is whether the negligence was a "substantial factor" in bringing about the loss. If this question is answered yes, relief will probably be denied. A couple of simple examples will illustrate:

(a) An accountable officer leaves cash visible and unguarded on a desk top while at lunch, during which time the money disappears.

[14] Id.

There can be no question that the negligence was the proximate cause of the loss.

(b) As noted previously, failure to count cash received at a bank window is negligence. Suppose, however, that the accountable officer is attacked and robbed by armed marauders while returning to the office. The failure to count the cash, even though negligent, would not be the proximate cause of the loss since presumably the robbers would have taken the entire amount anyway.

A good illustration is B-201173, August 18, 1981. Twelve armed men in two Volkswagen minibuses broke into the West African Consolidated Services Center at the American Embassy in Lagos, Nigeria. They forcibly entered the cashier's office and proceeded to carry the safe down the stairs. The burglars dropped the safe while carrying it, the safe opened upon being dropped, and the burglars took the money and fled. The reason the safe opened when dropped was that the cashier had not locked it, clearly an act of negligence. However, even if the safe had been locked, the burglars would presumably have continued to carry it away, loaded it onto their minibus, and forcibly opened it somewhere else. Thus, the cashier's failure to lock the safe, while negligent, was not the proximate cause of the loss.

Proximate cause considerations are often relevant in cases involving weaknesses in agency security, and the topic is explored further under the Agency Security heading.

The following are a few additional examples of cases in which relief was granted even though the accountable officer was or may have been negligent, because the negligence was found not to be the proximate cause of the loss or deficiency.

- Accountable officer left safe combination in unlocked desk drawer. Burglars found combination and looted safe. Had this been the entire story, relief could not be granted. However, burglars also pried open locked desk drawers throughout the office. Thus, locking the desk drawer would most likely not have prevented the theft. B-229587, January 6, 1988.
- Accountable officer in Afghanistan negligently turned over custody of funds to unauthorized person. Money was taken by rioters in severe civil disturbance. Relief was granted because negligence was not the

proximate cause of the loss. (Whether the person holding the funds was or was not an authorized custodian was not a matter of particular concern to the rioters.) B-144148-O. M., November 1, 1960.

- Cashier discovered loss upon return from two-week absence. It could not be verified whether she had locked the safe when she left. However, time of loss could not be pinpointed, other persons worked out of the same safe, and it would have been opened daily for normal business during her absence. Thus, even if she had failed to lock the safe (negligence), proximate cause chain was much too conjectural. B-191942, September 12, 1979.

Even if there is a clearly identified intervening cause, relief may still be denied depending on the extent to which the accountable officer's negligence facilitated the intervening cause or contributed to the loss. In such a case, the negligence will be viewed as the proximate cause notwithstanding the intervening cause. The following cases will illustrate.

- Accountable officer failed to make daily deposits of collections as required by regulations. Funds were stolen from locked safe in burglary. Relief was denied because officer's negligence was proximate cause of loss in that funds would not have been in the safe to be stolen if they had been properly deposited. B-71445, June 20, 1949. See also B-203726, July 10, 1981; B-164449, December 8, 1969; B-168672 -0. M., June 22, 1970.
- Accountable officer negligently left safe on "day lock" position (door closed, dial or handle partially turned but not rotated, so that partial turning in one direction, without knowledge of combination, will permit door to open). Thief broke into premises, opened safe without using force, and stole funds. Relief was denied because negligence facilitated theft by making it possible for thief to open safe without force or knowledge of combination. B-188733, March 29, 1979, aff'd, B-188733, January 17, 1980.

e. Unexplained Loss or Shortage

The cases cited under the Actual Negligence heading all contained clear evidence of negligence on the part of the accountable officer. Absent a proximate cause issue, these cases are relatively easy to resolve. Such evidence, however, is not necessary in order to deny relief in the situation we refer to as the "unexplained loss or shortage." In the typical case, a safe is opened at the beginning of a business day and money is found missing, or an internal audit reveals a shortage in an account. There is no evidence of negligence or misconduct on the part of the accountable officer; there is no evidence of burglary or any other reason for the disappearance. All that is known with any certainty is that the money is gone. In other words, the loss or shortage is totally unexplained. In many cases, a formal investigation confirms this conclusion.

The presumption of negligence has perhaps its clearest impact in the unexplained loss situation. If the burden of proof is on the accountable officer to establish eligibility for relief, the denial of relief follows necessarily. Since there is no evidence to rebut the presumption, there is no basis on which to grant relief. The presumption and its application to unexplained losses were discussed in 48 Comp. Gen. 566, 567-68 (1969) as follows:

"While there is no positive or affirmative evidence of negligence on the part of [the accountable officer] in connection with this loss, we have repeatedly held that positive or affirmative evidence of negligence is not necessary, and that the mere fact that an unexplained shortage occurred is, in and of itself, sufficient to raise an inference or presumption of negligence. A Government official charged with the custody and handling of public moneys. . . is expected to exercise the highest degree of care in the performance of his duty and, when funds. . . disappear without explanation or evident reason, the presumption naturally arises that the responsible official was derelict in some way. Moreover, granting relief to Government officials for unexplained losses or shortages of this nature might tend to make such officials lax in the performance of their duties."[15]

The rationale is fairly simple. Money does not just getup and walk away. If it is missing, there is an excellent chance that someone took it. If the accountable officer exercised the requisite degree of care and properly safeguarded the funds, it is unlikely that anyone else could have taken the money without leaving some evidence of forced entry. Therefore, where there is no evidence to explain a loss, the leading probabilities are that the accountable officer either took the money or was negligent in some way that facilitated theft by someone else. Be that as it may, denial of relief in an unexplained loss case is not intended to imply dishonesty by the particular accountable officer; it means merely that there was insufficient evidence to rebut the applicable legal presumption. See B-122688, September 25, 1956.

Despite the strictness of the rule, there are many unexplained loss cases in which the presumption can be rebutted and relief granted. By

[15] A few additional examples are 70 Comp. Gen. 389 (1991); B-213427, December 13* 1983, aff'd upon reconsideration, B-213427, March 14, 1984; B-159987, September 21, 1966.

definition, the evidence will not be sufficient to "explain" the loss, otherwise there wouldn't bean unexplained loss to begin with. There is no simple formula to apply in determining the kinds or amount of evidence that will rebut the presumption. It is necessary to evaluate the totality of available evidence, including statements by the accountable officer and other agency personnel, investigation reports, and any relevant circumstantial evidence.

In some cases, for example, it may be possible to reasonably conclude that arty negligence that may have occurred was not the proximate cause of the loss. These cases tend to involve security weaknesses and are discussed under the Agency Security heading. The evidence, in conjunction with the lack of any evidence to the contrary and the agency's "no fault or negligence" determination, supports the granting of relief.

Since the burden of proof rests with the accountable officer, the accountable officer's own statements take on a particular relevance in establishing due care, and relief should never be denied without obtaining and carefully analyzing them, Naturally, the more specific and detailed the statement is, and the more closely tied to the time of the loss, the more helpful it will be. While the accountable officer's statement is obviously self-serving and may not be enough if there are no other supporting factors, it has been enough to tip the balance in favor of granting relief when combined with other evidence, however slight or circumstantial, which by itself would not have been sufficient.[16]

f. Compliance With Regulations

If a particular activity of an accountable officer is governed by a regulation, failure to follow that regulation will be considered negligence. If that failure is the proximate cause of a loss or deficiency, relief must be denied. 70 Comp. Gen. 12 (1990); 54 Comp. Gen. 112, 116 (1974). The relationship of this rule to the standard of reasonable care discussed earlier is the premise that the prudent person exercising the requisite degree of care will become familiar with, and will follow, applicable regulations. Indeed, it has

[16] E.g., B-242830, September 24, 1991 (cashier's statement supported by another employee; safe had been opened for only one transaction in early afternoon); B-214080, March 25, 1986 (cashier made sworn and unrefuted statement to local police and Secret Service); B-210017, June 8, 1983 (cashier's statement corroborated by witness); 5188733, March 29,1979 (forcible entry to office but not to safe itself; cashier's statement that he locked safe on day of robbery accepted).

been stated that accountable officers have a duty to familiarize themselves with pertinent Treasury Department and agency rules and regulations. B-229207, July 11, 1988; B-193380, September 25, 1979.

Treasury Department regulations on disbursing, applicable to all agencies for which Treasury disburses under 31 U.S.C. §3321, are found in the Treasury Financial Manual. Treasury regulations governing cashiers are found in I TFM Part 4, Chapter 3000, and in the Treasury Department's TFM supplement entitled Manual of Procedures and Instructions for Cashiers. The Treasury manuals establish general requirements for sound cash control, and failure to comply may result in the denial of relief. E.g., 70 Comp. Gen. 12 (1990) (cashier, contrary to Cashiers' Manual, kept copy of safe combination taped to underside of desk pull-out panel).

The same principle applies with respect to violations of individual agency regulations and written instructions. E.g., B-193380, September 25, 1979 (cashier Violated agency regulations by placing the key to a locked cash box in an unlocked cash box and then leaving both in a locked safe to which more than one person had the combination). The decision further pointed out that oral instructions to the cashier to leave the cash box unlocked could not be considered to supersede published agency regulations. However, if agency regulations are demonstrably ambiguous, relief may be granted. B-169848-O. M., December 8, 1971.

Negligence will not be imputed to an accountable officer who fails to comply with regulations where full compliance is prevented by circumstances beyond his or her control. This recognizes the fact that compliance is sometimes up to the agency and beyond the control of the individual. For example, violating a regulation which requires that funds be kept in a safe is not negligence where the agency has failed to provide the safe. B-78617, June 24, 1949.

Also, as with other types of negligence, failure to follow regulations will not prevent the granting of relief if the failure was not the proximate cause of the loss or deficiency. B-229207, July 11, 1988; B-229587, January 6, 1988; B-185666, July 27, 1976; Libby v. United States, 81 F. Supp. 722, 727 (Ct. Cl. 1948). In B-185666, for example, a cashier kept her cash box key and safe combination in a sealed envelope in an unlocked desk drawer, in violation of the

Treasury Cashiers' Manual. Relief was nevertheless granted because the seal on the envelope had not been broken and the negligence could therefore not have contributed to the loss.

While failure to comply with regulations is generally considered negligence, the converse is not always true. To be sure, the fact that an accountable officer has complied with all applicable regulations and instructions is highly significant in evaluating eligibility for relief. It is not conclusive, however, because the accountable officer might have been negligent in a matter not covered by the regulations. In a 1979 case, an accountable officer accepted a $10,000 personal check at a Customs auction sale and turned over the property without attempting to verify the existence or adequacy of the purchaser's account. The check bounced. It was not clear whether existing regulations applied to that situation. Even without regulations, however, accepting a personal check for a large amount without attempting verification was viewed as not meeting the standard of reasonable care, and relief was denied. B-193673, May 25, 1979, modified on other grounds, B-201673 et al., September 23, 1982.

g. Losses in Shipment

Government funds are occasionally lost or stolen in shipment. The Postal Service or other carrier is the agent of the sender, and funds in shipment remain in the "custody" of the accountable officer who shipped them until delivered, notwithstanding the fact that they are in the physical possession of the carrier. B-185905-O. M., April 23, 1976. Thus, a loss in shipment is a physical loss for which an accountable officer is liable.

For the most part, relief for losses in shipment is the same as relief for other losses, and the rules discussed in this chapter with respect to negligence and proximate cause apply. For example, relief was denied in one case because transmitting cash by ordinary first-class mail rather than registered or certified mail was held not to meet the reasonable care standard. B-164450-O. M., September 5, 1968.

However, relief for losses in shipment differs from relief for other losses in one important respect. A loss in shipment is not viewed as an "unexplained loss" and there is no presumption of negligence. B-164450-O. M., September 5, 1968. The reason for this distinction is that there is no basis to infer negligence when a loss occurs while funds are totally beyond the control of the accountable officer. Thus, where funds are lost in shipment, in the absence of positive evidence of fault or negligence, an accountable officer will be relieved if he or she conformed fully with applicable regulations and procedures for the handling and safeguarding of the funds and they were nevertheless lost or stolen. B-142058, March 18, 1960; B-126362, February 21, 1956; B-119567, January 10, 1955; B-95504, June 16,1950.

The Government Losses in Shipment Act (GLISA), 40 U.S.C. §§ 721–729, authorizes agencies to file claims with the Treasury Department for funds or other valuables lost or destroyed in shipment. The Treasury Department has a revolving fund for the payment of these claims and has issued regulations, found at 31 C.F.R. Parts 361 and 362, to implement the statute. The Treasury Department will generally disallow a claim unless there has been strict compliance with the statute and regulations. See, e.g., B-200437, October 21, 1980. “

If a loss in shipment occurs, the agency should first consider filing a claim under the Government Losses in Shipment Act, and should seek relief only if this fails, Denial of a GLISA claim should prompt further inquiry since it suggests the possibility that someone at the point of shipment may have been negligent, but it will not automatically preclude the granting of relief. For example, it is possible for a claim to be denied for reasons that do not suggest negligence. In B-126362, February 21, 1956, the accountable officer had reimbursed the government from personal funds, and a claim under GLISA was denied because there was no longer any loss. GAO nevertheless granted relief and the accountable officer was reimbursed.

Disallowance of a GLISA claim for failure to strictly comply with the regulations carries with it an even stronger suggestion of negligence, but it is still appropriate to examine the facts and circumstances of the particular case to evaluate the relationship of the noncompliance to the loss. For example, GAO granted relief in B-191645, October 5, 1979, despite the denial of a GLISA claim, because there was no question that the funds had arrived at their initial destination although they never reached the intended recipient. Even if there had been negligence at the point of shipment, it could not have been the proximate cause of the loss. See also B-193830, October 1, 1979, and B-193830, March 30, 1979 (both cases arising from the same loss).

h. Fire, Natural Disaster

Earlier in this chapter, we noted the Supreme Court’s conclusion in United States v. Thomas, 82 U.S. (15 Wall.) 337,352 (1872), that strict liability (and hence the need for relief) would not attach in two situations: funds destroyed by an "overruling necessity" and funds taken by a "public enemy," provided there is no contributing fault or negligence by the accountable officer. The Court gave only one example of an "overruling necessity":

> "Suppose an earthquake should swallow up the building and safe containing the money, is there no condition implied in the law by which to exonerate the receiver from responsibility?"

Id. at 348. We are aware of no subsequent judicial attempts to further define "overruling necessity," although some administrative formulations have used the term "acts of God." E.g., 48 Comp. Gen. 566,567 (1969). Thus, at the very least, assuming no contributing fault or negligence, an accountable officer is not liable for funds lost or destroyed in an earthquake, and hence there is no need to seek relief. Contributing negligence might occur, for example, if an accountable officer failed to periodically deposit collections and funds were therefore on hand which should not have been. See B-71445, June 20, 1949.

GAO granted relief in one case involving an earthquake, B-229 153, October 29, 1987, in which most of the funds were recovered. While arguably there was no need to seek relief in that case, it makes no difference as a practical matter since relief would be granted as a matter of routine unless there is contributing negligence, in which event the accountable officer would be liable even under Thomas.

Whatever the scope of the "overruling necessity" exception, it is clear that it does not extend to destruction by fire, even though money destroyed by fire is no longer available to be used by anyone else and can be replaced simply by printing new money. In Smythe v. United States, 188 U.S. 156, 173–74 (1903), the Supreme Court declined to apply Thomas and expressly rejected the argument that an accountable officer's liability for notes destroyed by fire should be limited to the cost of printing new notes. See also 1 Comp. Dec. 191 (1895), in which the Comptroller of the Treasury similarly declined to apply the Thomas exception to a loss by fire. Thus, a loss by fire is a physical loss for which the accountable officer is liable, but for which relief will be granted under 31 U.S.C. § 3527 if the statutory conditions are met. Examples are B-212515, December 21, 1983, and B-203726, July 10, 1981.

i. Loss by Theft

If money is taken in a burglary, robbery, or other form of theft, the accountable officer will be relieved of liability if the following conditions are met:

1. There is sufficient evidence that a theft took place;[17]

2. There is no evidence implicating, or indicating contributing negligence by, the accountable officer; and

3. The agency has made the administrative determinations required by the relief statute.

The fact patterns tend to fall into several well-defined categories.

(1) Burglary: forced entry

Forced entry cases tend to be fairly straightforward. In the typical case, a government office is broken into while the office is closed for the night or over a weekend, and money is stolen. Evidence of the forced entry is clear. As long as there is no evidence implicating the accountable officer, no other contributing fault or negligence, and the requisite administrative determinations are made, relief is granted. A few examples follow:[18]

- Burglars broke into the welding shop at a government laboratory, took a blowtorch and acetylene tanks to the administrative office and used them to cut open the safe. B-242773, February 20, 1991.
- Cashier's office was robbed over a weekend. Office had been forcibly entered, but there was no evidence of forced entry into the safe. Federal Bureau of Investigation found no evidence of negligence or breach of security by any government personnel associated with the office. B-193174, November 29, 1978.
- Persons unknown broke front door lock of Bureau of Indian Affairs office in Alaska and removed safe on sled. Sled tracks led to an abandoned building in which the safe was found with its door removed. B-182590, February 3, 1975.

[17] The mere designation of a loss as a "burglary" without supporting evidence is not enough to remove it from the "unexplained loss" category. E.g., B-210358, July 21, 1983.

[18] There are numerous forced entry cases in which GAO granted relief under similar circumstances. A few additional examples are 5230607, June 20, 1988; B-205428, December 31, 1981; 8-201651, February 9, 1981.

- Unsecured bolt cutters found on premises used to remove safe padlock. No contributing negligence because there was no separate facility in which to secure the tools. B-202290, June 5, 1981.

The same principles apply to theft from a hotel room. 69 Comp. Gen. 586 (1990); B-229847, January 29, 1988.

(2) Armed robbery

In this situation, one or more individuals, armed or credibly pretending to be armed, robs an accountable officer. Again, as long as there is no evidence implicating the accountable officer and no contributing negligence, relief is readily granted, The accountable officer is not expected to risk his or her life by resisting. Some illustrative cases follow:[19]

- Gunman entered cashier's office, knocked cashier unconscious, and robbed safe. B-235458, August 23, 1990.
- Man entered cashier's office in a veterans hospital and handed cashier a note demanding all of her $20 bills. Although he did not display a weapon, he said he was armed. B-191579, May 22, 1978. Avery similar case is B-237420, December 8, 1989 (man gave cashier note indicating bomb threat; upon running off with the money, he left a second note saying "no bomb").

Depending on the circumstances, it is not necessary that the thief be, or pretend to be, armed. An example is the common purse-snatching incident. B-197021, May 9, 1980; B-193866, March 14, 1979.

(3) Riot, public disturbance

This category includes the popular pastime of ransacking American embassies. The Supreme Court's second exception in United States v. Thomas (see Fire, Natural Disaster heading) to an accountable officer's strict liability is funds taken by a "public enemy." That case concerned the Civil War. As with the "overruling necessity" exception, we are aware of no further definition of "public enemy" in this context, and the cases cited here have consistently been treated as accountable officer losses. In any event, relief is routinely granted

[19]Some other examples are B-217773, March 18, 1985; B-21 1945, July 18, 1983; B-201126, January 27, 1981.

unless there is contributing negligence. Thus, GAO granted relief in the following cases:[20]

- Funds taken during attack on American Embassy in Tehran, Iran. B-229753, December 30, 1987; B-194666, August 6, 1979 (separate attacks, both occurring in 1979).
- Armed soldiers forced entry into U.S. Information Agency compound in Beirut, Lebanon, and looted safe. B-195435, September 12, 1979.
- Safes looted by Cuban detainees during prison riot. B-232252, January 5, 1989; B-230796, April 8, 1988.

(4) Evidence less than certain

In all of the cases cited above dealing with forced entry, armed robbery, or rioting, the fact that a theft had taken place was beyond question. However, there are many cases in which the evidence of theft is not all that clear. The losses are unexplained in the sense that what happened cannot be determined with any certainty. The problem then becomes whether the indications of theft are sufficient to classify the loss as a theft and to rebut the presumption of negligence.

These tend to be the most difficult cases to resolve. The difficulty stems from the fact, which we have noted previously, that the accountable officer laws are designed to protect the government against dishonesty as well as negligence. On the one hand, an accountable officer who did all he or she could to safeguard the funds should be relieved of liability. But on the other hand, the application of the relief statutes should not provide a blueprint for (or absolution from) dishonesty. Recognizing that complete certainty is impossible in many if not most cases, the decisions try to achieve a balance between these two considerations. Thus, GAO gives weight to the administrative determinations and to statements of the individuals concerned, but these factors cannot be conclusive and the decision will be based on all of the evidence. Other relevant factors include how and where the safe combination was stored, when it was last changed, whether the combination dial was susceptible of observation while the safe was being opened, access to the safe and to the facility itself, and the safeguarding of keys to cash boxes.

[20] Further examples are B-249372, August 13, 1992 (Somalia); B-230606.2, September 611988 (Iran); B-227422, June 18, 1987 (Tripoli); B-207059, July i, 1982 (Chad); B-190205, November 14, 1977 (Zaire).

For example, in B-198836, June 26, 1980, funds were kept in the bottom drawer of a four-drawer file cabinet. Each drawer had a separate key lock and the cabinet itself was secured by a steel bar and padlock. Upon arriving at work one morning, the cashier found the bottom drawer slightly out of alignment with several pry marks on its edges. A police investigation was inconclusive. GAO viewed the evidence as sufficient to support a conclusion of burglary and, since the record contained no indication of negligence on the part of the cashier, granted relief.

In another case, a safe was found unlocked with no signs of forcible entry. However, there was evidence that a thief had entered the office door by breaking a window. The accountable officer stated that he had locked the safe before going home the previous evening, and there was no evidence to contradict this or to indicate any other negligence. GAO accepted the accountable officer's uncontroverted statement and granted relief, B-188733, March 29, 1979. See also B-210017, June 8, 1983.

In B-170596-O. M., November 16, 1970, the accountable officer stated that she had found the padlock on and locked in reverse from the way she always locked it. Her statement was corroborated by the agency investigation. In addition, the lock did not conform to agency specifications, but this was not the cashier's responsibility. She had used the facilities officially provided for her. Relief was granted.

Relief was also granted in B-170615-O. M., November 23, 1971, reversing upon reconsideration B-170615 -O. M., December 2, 1970. In that case, there was some evidence that the office lock had been pried open but there were no signs of forcible entry into the safe. This suggested the possibility of negligence either in failing to lock the safe or in not adequately safeguarding the combination. However, the accountable officer's supervisor stated that he (the supervisor) had locked the safe at the close of business on the preceding workday, and two safe company representatives provided statements that the safe was vulnerable and could have been opened by anyone with some knowledge of safe combinations.

The occurrence of more than one loss under similar circumstances within a relatively short time will tend to corroborate the likelihood of theft. B-199021, September 2, 1980; B-193416, October 25, 1979. In B-1 99021, two losses occurred in the same building within several weeks of each other. All agency security procedures had been followed and the record indicated that the cashier had exercised a very high degree of care in safeguarding the funds. In B-193416, the first loss was totally unexplained and the entire cash box disappeared a week later. The safe combination had been kept in a sealed envelope in a "working safe" to which other employees had access. Although the seal on the envelope was not broken, an investigation showed that, while the combination could not be read by holding the envelope up to normal light, it could be read by holding it up to stronger light. In neither case was there any evidence of forcible entry or of negligence on the part of the accountable officer. Balancing the various relevant factors in each case, GAO granted relief.

The disappearance of an entire cash box will also be viewed as an indication of theft. However, this factor standing alone will not be conclusive since there is nothing to prevent a dishonest employee from simply taking the whole box rather than a handful of money from it. Signs of forced entry to the safe or file cabinet will naturally reinforce the theft conclusion. E.g., B-229136, January 22, 1988; B-186190, May 11, 1976. Far more difficult are cases in which a cash box disappears with no signs of forcible entry to the container in which it was kept. Note the various additional factors viewed as relevant in each of the following cases:

- B-223602, August 25, 1986. Police were able to open file cabinet with a different key, and other thefts had occurred around the same time. Relief granted.
- B-189658, September 20, 1977. Safe was not rated for burglary protection and could have been opened fairly easily by manipulating the combination dial. Relief granted.
- B-189896, November 1, 1977. Supervisor's secretary maintained a log of all safe and bar-lock combinations, a breach of security which could have resulted in the compromise of the combination. Relief granted.
- B-173133-O. M., December 10, 1973. Cashier locked safe and checked it in the presence of a guard. Several other employees had access to the safe combination. Relief granted. Multiple access also contributed

to the granting of relief in B-217945, July 23, 1985, and B-212605, April 19, 1984.[21]

- B-183284, June 17, 1975. Safe was malfunctioning at time of loss. Relief granted.
- B-211649, August 2, 1983. Extensive security violations attributable to agency. Relief granted. A similar case is B-197799, June 18, 1980.
- B-185666, July 27, 1976. Some evidence of forced entry to door of cashier's office but not to safe or safe drawer. Cash box later found in men's room. Negligence by cashier in improperly storing keys and safe combination in unlocked desk drawer not proximate cause of loss since seal on envelope was found intact. Relief granted.
- B-191942, September 12, 1979. Cash box disappeared during two-week absence of cashier. Even assuming cashier negligently failed to lock safe prior to her absence, there was no way to establish this as the proximate cause of the loss since box had been kept in a 'working safe" which would have been opened daily in her absence. Relief granted.
- B-182480, February 3, 1975. Cashier went on leave without properly securing key to file cabinet or entrusting it to an alternate. Relief denied.
- B-184028, March 2, 1976. Cashier had been experiencing difficulty trying to lock the safe and stated she might have left it unlocked inadvertently. Relief denied,

To summarize the "cash box" cases, the disappearance of art entire cash box suggests theft but is not conclusive. In such cases, even though the cause of the loss cannot be definitely attributed, relief will probably be granted if there is uncontroverted evidence that the safe was locked, no other evidence of contributing fault or negligence on the part of the accountable officer, and especially if there are other factors present tending to corroborate the likelihood of theft. In no case has relief been granted based solely on the fact that a cash box disappeared; without more, it is simply another type of unexplained loss for which there is no basis for relief.

(5) Embezzlement

The term "embezzlement" means the fraudulent misappropriation of property by someone to whom it has lawfully been entrusted. Black's

[21] A key inquiry in this type of case, and a crucial factor in deciding whether to grant or deny relief, is the extent to which the accountable officer is responsible for the non-exclusive access to the safe combination.

Law Dictionary 522 (6th ed. 1990). Losses due to embezzlement or fraudulent acts of subordinate finance personnel, acting alone or in collusion with others, are treated as physical losses and relief will be granted if the statutory conditions are met. B-202074, July 21, 1983, at 6; B-21 1763, July 8, 1983; B-133862-O. M., November 29, 1957; B-101375 -O. M., April 16, 1951.

An illustrative group of cases involves the embezzlement of tax collections, under various schemes, by employees of the Internal Revenue Service. In each case the IRS pursued the perpetrators, and most were prosecuted and convicted. The IRS recovered what it could from the (now former) employees, and sought relief for the balance for the pertinent supervisor in whose name the account was held. In each case, GAO agreed with the "no fault or negligence" determination and granted relief. B-2441 13, November 1, 1991; B-226214 et al., June 18, 1987; B-215501, November 5, 1984; B-192567, November 3, 1978; B-191722, August 7, 1978; B-191781, June 30, 1978.

The accountable officer in each of the IRS cases was a supervisor who did not actually handle the funds. The approach to evaluating the presence or absence of negligence when the accountable officer is a supervisor is to review the existence and adequacy of internal controls and procedures and to ask whether the accountable officer provided reasonable supervision. If internal controls and management procedures are reasonable and were being followed, relief will be granted. As noted in B-2262 14, the standard does not expect perfection and recognizes that a clever criminal scheme can outwit the most carefully established and supervised system.

Losses resulting from the fraudulent acts of other than subordinate finance personnel (e.g., payments on fraudulent vouchers) are not physical losses but must be treated as improper payments. 2 Comp. Gen. 277 (1922); B-202074, July 21, 1983; B-76903, July 13, 1948; B-133862 -O. M., November 29, 1957.

j. Agency Security

In evaluating virtually any physical loss case, physical security-the existence, adequacy, and use of safekeeping facilities and procedures–is a crucial consideration. The Treasury Department's Manual of Procedures and Instructions for Cashiers sets forth many of the requirements. For example, the cashiers' manual provides that safe combinations should be changed annually, whenever there is a change of cashiers, or when the combination has been compromised, and prescribes procedures for safeguarding the combination. It also reflects what is perhaps the most fundamental principle of sound cash control—that an employee with custody of public funds should have exclusive control over those funds. In addition, agencies should have their own specific regulations or instructions tailored to individual circumstances.

The first step in analyzing the effect of a security violation or deficiency is to determine whether the violation or deficiency is attributable to the accountable officer or to the agency. Two fundamental premises drive this analysis: (1) the accountable officer is responsible for safeguarding the funds in his or her custody; and (2) the agency is responsible for providing adequate means to do so. Adequate means includes both physical facilities and administrative procedures.

Basically, if the accountable officer fails to use the facilities and procedures that have been provided, this failure will be viewed as negligence and, unless some other factor appears to be the proximate cause of the loss, will preclude the granting of relief. Several examples have been previously cited under the Actual Negligence heading.

Another element of the accountable officer's responsibility is the duty to report security weaknesses to appropriate supervisory personnel. E.g., 63 Comp. Gen. 489,492 (1984), rev'd on other grounds, 65 Comp. Gen. 876 (1986). If the agency fails to respond, a loss attributable to the reported weakness is not the accountable officer's fault. E.g., B-235147.2, August 14, 1991; B-208511, May 9, 1983.

Ultimately, an accountable officer can do no more than use the best that has been made available, and relief will not be denied for failure to follow adequate security measures which are beyond the accountable officer's control. E.g., B-226947, July 27, 1987 (U.S. Mint employees stole coins from temporarily leased facility which was incapable of adequate security); B-207062, May 12, 1983 (agent kept collections in his possession because, upon returning to office at 4:30 p.m., he found all storage facilities locked and all senior officials had left for the day); B-210245, February 10, 1983 (lockable gun cabinet was the most secure item available); B-186190, May 11, 1976 (funds kept in safe with padlock because combination safe, which had been ordered, had not yet arrived); B-78617, June 24, 1949 (agency failed to provide safe). Of course, the accountable officer is expected to act to correct weaknesses which are subject to his or her control. B-127204, April 13, 1956.

The principle that relief will be granted if the agency fails to provide adequate security and that failure is viewed as the proximate cause of the loss manifests itself in a variety of contexts. One group of cases involves multiple violations. In B-182386, April 24, 1975, imprest funds were found missing when a safe was opened for audit. The accountable officer was found to be negligent for failing to follow approved procedures. However, the agency's investigation disclosed a number of security violations attributable to the agency. Two cashiers operated from the same cash box; transfers of custody were not documented; the safe combination had not been changed despite several changes of cashiers; at least five persons knew the safe combination. The agency, in recommending relief, concluded that the loss was caused by "pervasive laxity in the protection and administration of the funds . . . on all levels." GAO agreed, noting that the lax security "precludes the definite placement of responsibility" for the loss, and granted relief.

In several later unexplained loss cases (no sign of forcible entry, no indication of fault or negligence on the part of the accountable officer), GAO has regarded overall lax security on the part of the agency, similar to that in B-182386, as the proximate cause of the loss and thus granted relief. B-243324, April 17, 1991; B-229778, September 2, 1988; B-226847, June 25, 1987; B-217876, April 29, 1986; B-211962, December 10, 1985; B-211649, August 2, 1983. All of these cases involved numerous security violations beyond the accountable officer's control, and several adopt the "pervasive laxity" characterization of B-182386.

However, in order for relief to be granted, security weaknesses attributable to the agency need not rise to the level of "pervasive laxity" encountered in the cases cited in the preceding paragraph. Thus, relief will usually be granted where several persons other than the accountable officer have access to the funds through knowledge of the safe combination since "multiple access" makes it impossible to attribute the loss to the accountable officer. B-235072, July 5, 1989; B-228884, October 13, 1987; B-214080, March 25, 1986; B-211233, June 28, 1983; B-209569, April 13, 1983; B-196855, December 9, 1981; B-199034, February 9, 1981. Additional cases are cited in our earlier discussion of missing cash boxes.

If multiple access to a safe will support the granting of relief for otherwise unexplained losses, it follows that multiple access to a cash box or drawer will have the same effect. The Treasury cashiers' manual provides that cashiers should never work out of the same cash box or drawer. Violation of this requirement, where beyond the control of the accountable officer, is a security breach which, in appropriate cases, has supported the granting of relief. B-227714, October 20, 1987; B-204647, February 8, 1982. If it is necessary for more than one cashier to work out of the same safe, the safe should preferably have separate built-in locking drawers rather than removable cash boxes. B-191942, September 12, 1979.

The following security deficiencies have also contributed to the granting of relief:

- Safe malfunctioning, defective, or otherwise not secure. B-221447, June 1, 1987; B-215477, November 5, 1984; B-183284, June 17, 1975.
- Cash box could be opened with other keys. B-203646, November 30, 1981; B-197270, March 7, 1980.
- Failure to change safe combination as required by Treasury regulations, B-21 1233, June 28, 1983; B-196855, December 8, 1981. (Both cases also involve multiple access.)
- Safe combination and key to cash drawer were kept in an unlocked desk drawer. B-177963-O. M., March 21, 1973. (The result would most likely be different if the violation were the fault of the accountable officer or if the accountable officer passively acquiesced in the breach. See B-185666, July 27, 1976.)
- Crimping device used to seal cash bags did not use sequentially numbered seals and was accessible to several employees. B-246988, February 27, 1992.

The preceding cases are mostly unexplained losses. It naturally follows that security violations of the type noted will contribute to rebutting the presumption of negligence in cases where there is clear evidence of theft. In B-184493, October 8, 1975, for example, there was evidence of forced entry to the office door but not to the safe. The record showed that, despite the accountable officer's best efforts, it was impossible for him to shield the dial from observation while opening the safe. In view of the office layout, the position of the safe, and the number of persons allowed access to the office, GAO granted relief.[22] Other examples are B-180664-O. M., April 23, 1974 (multiple access to safe), and B-170251 -O. M., October 24, 1972 (insecure safe).

If there is evidence of negligence on the part of the accountable officer in conjunction with security deficiencies attributable to the agency, the accountable officer's negligence must be balanced against the agency's negligence. Relief may be granted or denied based largely on the proximate cause analysis. As with the unexplained loss cases, relief has been granted in a number of cases where the agency's violations could be said to amount to "pervasive laxity." B-235147.2, August 14, 1991; B-197799, June 19, 1980; B-182386, April 24, 1975; B-169756 -O. M., July 8, 1970. Similarly, agency security violations which do not amount to pervasive laxity may support the granting of relief. Such violations must either be the proximate cause of the loss or make it impossible to attribute the loss to the accountable officer. In a 1971 case, for example, a cashier kept the combinations to three safes on an adding machine tape in her wallet. The agency failed to change the combinations after the wallet was stolen. Also, safe company representatives stated that one safe was vulnerable and could readily have been opened. The fact that only the vulnerable safe had been robbed supported the conclusion that the stolen combinations had not been used. B-170615-O. M., November 23, 1971. Other cases in which agency security violations were found to override negligence by the accountable officer are B-232744, December 9, 1988 (safe combination not changed despite several requests by accountable officer following possible compromise); B-205985, July 12, 1982 (multiple access, safe combination not changed as required); B-199128, November 7, 1980 (multiple access); B-191440, May 25, 1979 (two cashiers working out of same drawer).

The result in these cases should not be taken too far. Poor agency security does not guarantee relief; it is merely another factor to consider in the proximate cause equation. Another relevant factor is the nature and extent of the accountable officer's efforts to improve the situation.

[22] An explanation of this type may or may not be sufficient, depending on the Particular facts. See B-170012, August 11, 1970; B-127204, April 13,1956.

Where security weaknesses exist, a supervisor will normally be in a better position to take or initiate corrective action, and a supervisor who is also an accountable officer maybe found negligent for failing to do so. 63 Comp. Gem 489 (1984), reversed upon reconsideration (new evidence), 65 Comp. Gen. 876 (1986); 60 Comp. Gen. 674,676 (1981). However, anew supervisor should not be held immediately responsible for the situation he or she inherited. B-209715, April 4, 1983 (supervisor relieved in pervasive laxity situation where loss occurred only a week after he became accountable).

A close reading of the numerous security cases reveals the somewhat anomalous result that an accountable officer who works in a sloppy operation stands a much better chance of being relieved than one who works in a well-managed office. True as this may be, it would be wrong to hold accountable officers liable for conditions beyond their control. Rather, the solution lies in the proper recognition and implementation of the responsibility of each agency, mandated by the Federal Managers' Financial Integrity Act of 1982,31 U.S.C. § 3512(c)(1), to safeguard its assets against loss and misappropriation.

k. Extenuating Circumstances

Since relief under 31 U.S.C. §§ 3527(a) and (b) is a creature of statute, it must be granted or denied solely in accordance with the statutory conditions. When Congress desires that "equitable" concerns be taken into consideration, it expressly so states. Examples are waiver statutes such as 5 U.S.C. § 5584 and 10 U.S.C. $2774. In contrast, the physical loss relief statutes do not authorize the granting of relief on the basis of equitable considerations or extenuating or mitigating circumstances.

Thus, where an accountable officer has been found negligent, the following factors have been held not relevant, nor are they sufficient to rebut the presumption of negligence:

- Heavy work load. 67 Comp. Gen. 6 (1987); 48 Comp. Gen. 566 (1969); B-241201, August 23,1991.
- Good work record; long period of loyal and dependable service; evidence of accountable officer's good reputation and character. B-204173, November 9, 1982; B-170012, August 11, 1970; B-158699, September 6, 1968.
- Inexperience; inadequate training or supervision. 70 Comp. Gen. 389 (1991); B-189084, January 3, 1979; B-191051, July 31,1978.

- Financial hardship of having to repay loss. B-241478, April 5, 1991; B-216279.2, December 30, 1985.
- Acceptance of extra duties by the accountable officer; shortage of personnel. B-186127, September 1, 1976.

D. Illegal or Improper Payment

1. Disbursement and Accountability

In order to understand the laws governing liability and relief for improper payments, and how the application of those laws has evolved over the last quarter of the 20th century, it is helpful to start by Summarizing, from the accountability perspective, a few points relating to how the federal government disburses its money.

a. Statutory Framework: Disbursement Under Executive Order 6166

For most of the 19th century and the early decades of the 20th century, federal disbursement was decentralized. Each agency had its own disbursing office(s), and the function was performed by a small army of disbursing officers and clerks (who were accountable officers) scattered among the various agencies and throughout the country. In part, the reason for this was the primitive state of communication and transportation then existing. One of the weaknesses of this system was that, in many cases, vouchers were prepared, examined, and paid by the same person. 20 Comp. Dec. 859,869 (1914). This resulted in the growth of large disbursing offices in several agencies, some of which exceeded in size that of the Treasury Department. Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1939, at 98.

From the perspective of accountability for improper payments, the modern legal structure of federal disbursing evolved in three major steps. First, Congress enacted legislation in 1912 (37 Stat. 375), the remnants of which are found at 31 U.S.C. § 3521(a), to prohibit disbursing officers from preparing and auditing their own vouchers. With this newly mandated separation of voucher preparation and examination from actual payment, payment was accomplished by having some other administrative official "certify" the correctness of the voucher to the disbursing officer. The 1912 legislation was thus the genesis of what would later become a new class of accountable officer-the certifying officer.

Disbursing officers remained accountable for improper payments, the standard now reflecting the more limited nature of the function. Since the 1912 law was intended to prohibit the disbursing officer from duplicating the detailed voucher examination already performed by the "certifying officer," disbursing officers were held liable only for errors apparent on the face of the voucher, as well as, of course, payments prohibited by law or for which no appropriation was available. 20 Comp. Dec. 859 (1914). In a sense, the 1912 statute operated in part as a relief statute, with credit being allowed or disallowed in the disbursing officer's account based on the application of this standard. E.g., 4 Comp. Gen. 991 (1925); 3 Comp. Gen. 441 (1924).

The second major step in the evolution was section 4 of Executive Order No. 6166, signed by President Roosevelt on June 10, 1933. The first paragraph of section 4, codified at 31 U.S.C. § 3321(a), consolidated the disbursing function in the Treasury Department, eliminating the separate disbursing offices of the other executive departments. The second paragraph, 31 U.S.C. § 3321(b), authorizes Treasury to delegate disbursing authority to other executive agencies for purposes of efficiency and economy. The third paragraph gave new emphasis to the certification function:

> "The Division of Disbursement [Treasury Department] shall disburse moneys only upon the certification of persons by law duly authorized to incur obligations upon behalf of the United States. The function of accountability for improper certification shall be transferred to such persons, and no disbursing officer shall be held accountable therefor."

The following year, Executive Order No. 6728, May 29, 1934, exempted the military departments, except for salaries and expenses in the District of Columbia, from the centralization. This exemption, and an exemption for the United States Marshals Service which originated in a 1940 reorganization plan, are codified at 31 U.S.C. § 3321(c). Executive Order 6166 provided the framework for the disbursing system still in effect today. Apart from the specified exemptions, the certifying officer is now an employee of the spending agency, and the disbursing officer is an employee of the Treasury Department.

Disbursing officers continued to be liable for their own errors, as under the 1912 legislation. E.g., 13 Comp. Gen. 469 (1934). However, a major consequence of Executive Order 6166 was to make the certifying officer an accountable officer as well. The certifying officer became liable for improper payments "caused solely by an improper certification as to matters not within the knowledge of or available to the disbursing officer." 13 Comp. Gen. 326,329 (1934). See also 15 Comp. Gen. 986 (1936); 15 Comp. Gen. 362 (1935).

Over the next few years, confusion and disagreement developed as to the precise relationship of certifying officers and disbursing officers with respect to liability for improper payments. In the Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1940, at pages 63–66, GAO summarized the problem and recommended legislation to specify the allocation of responsibilities "to provide the closest possible relationship between liability and fault" (id. at 64).

The third major evolutionary step was the enactment of Public Law 77-389,55 Stat. 875 (1941) to implement GAO's recommendation. Section 1,31 U.S.C. § 3325(a), reflects the substance of the third paragraph of Executive Order 6166, § 4, quoted above. It requires that a disbursing officer disburse money only in accordance with a voucher certified by the head of the spending agency or an authorized certifying officer who, except for some interagency transactions, will also bean employee of the spending agency. As with the amended Executive Order 6166 itself, section 3325(a) does not apply to disbursements of the military departments except for salaries and expenses in the District of Columbia. 31 U.S.C. § 3325(b). The rest of the statute, which we will discuss in detail later, delineates the responsibilities of certifying and disbursing officers, and provides a mechanism for the administrative relief of certifying officers. (Comparable authority to relieve disbursing officers from liability for improper payments was not to come about until 1955.) Further detail on the federal disbursement system maybe found in I Treasury Financial Manual, Chapter 4, and GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, chapter 6.

It should be apparent that control of the public treasury must repose in the hands of federal officials. However, this does not mean that every task in the disbursement process must be performed by a government employee. For example, GAO has advised that the Bureau of Indian Affairs is authorized as a matter of law to contract with a private bank to perform certain ministerial or operational aspects of disbursing Indian trust fund money, such as printing checks, delivering checks to payees, and debiting amounts from accounts. However, in order to comply with 31 U.S.C. $$3321 and 3325, a federal disbursing officer must retain managerial and judgmental responsibility. 69 Comp. Gen. 314 (1990). The decision concluded:

> "[W]e see no reason to object to a contractual arrangement whereby a private contractor provides disbursement services, so long as a government disbursing officer remains responsible for reviewing and overseeing the disbursement operations through agency installed controls designed to assure accurate and proper disbursements." Id. at 278.

To intrude further into this responsibility would require clear statutory authority. E.g., B-210545-O. M., June 6, 1983 (Indian Health Service would need statutory authority to use fiscal intermediaries to pay claims by providers; memorandum cites examples of such authority in Medicare Legislation).

b. Automated Payment Systems

The statutory framework we have just described came into existence at a time when all disbursing was done manually. The certifying officer and his or her staff would review the supporting documentation for each payment voucher. The certifying officer would then sign the voucher, certifying to its legality and accuracy, and send it on to the disbursing officer. Many disbursements are still processed manually. However, the increased use of automated payment systems has changed the way certifying officers must operate. Perhaps the clearest example is payroll certification. A certifying officer may be asked to certify a grand total accompanied by computer tapes containing payrolls involving millions of dollars. There is no way the certifying officer can verify that each payment is accurate and legal. Even if it were reasonably possible, the cost of doing it would be prohibitive.

With the onslaught of the computer age, it was natural and inevitable to ask how accountability would function in a computerized environment. Since many of the assumptions of a manual system were unrealistic under an automated system, something had to change. GAO reviewed the impact of computerization in a report entitled New Methods Needed for Checking Payments Made by Computers, FGMSD-76-82 (November 7, 1977). The report recognized that, while the certifying officer's basic legal liability remains, the conditions under which a certifying officer maybe relieved under an automated payment system must be different to reflect the new realities. The approach to relief in this context stems from the following premises discussed in the report:

(1) In automated systems, evidence that the payments are accurate and legal must relate to the system rather than to individual transactions.

(2) Certifying and disbursing officers should be provided with information showing that the system on which they are largely compelled to rely is functioning properly.

(3) Reviews should be made at least annually, supplemented by interim checks of major system changes, to determine that the automated systems are operating effectively and can be relied on to produce payments that are accurate and legal.

The report then concluded:

> "In the future, when a certifying or disbursing officer requests relief from an illegal, improper, or incorrect payment made using an automated system, GAO will continue to require the officer to show that he or she was not negligent in certifying payments later determined to be illegal or inaccurate. However, consideration will be given to whether or not the officer possessed evidence at the time of the payment approval that the system could be relied on to produce accurate and legal payments. In cases in which the designated assistant secretary or comparable official provides the agency head and GAO with a written statement that effective system controls could not be implemented prior to voucher preparation and certifies that the payments are otherwise proper, GAO will not consider the absence of such controls as evidence of negligence in determining whether the certifying official should be held liable for any erroneous payment prior to receipt of an advance decision. Of course, the traditional requirements that due care be exercised in making the payments and that diligent effort be made to recoup any erroneous payments will still be considered in any requests for waiver of liability. Also, should the certifying official fail to take reasonable steps to establish adequate controls for future payments, the reasons for such failure will be taken into account in any requests for waiver of liability concerning such future payments." FGMSD-76-82 at 17–18.

A few years later, the concepts and premises of the GAO report were explored and reported, with implementing recommendations, in a key study by the Joint Financial Management Improvement Program entitled Assuring Accurate and Legal Payments-The Roles of Certifying Officers in Federal Government (June 1980).[23] Further guidance from the internal control perspective may be found in OMB Circulars A-123 and A-127, title 7 of the GAO Policy and Procedures Manual, and a GAO pamphlet entitled Critical Factors in Developing Automated Accounting and Financial Management Systems (1987).

Thus, in considering requests for relief under an automated payment system where verification of individual transactions is impossible as a practical matter, the basic question will be the reasonableness of the certifying officer's reliance on the system to continually produce legal and accurate payments. B-178564, January 27, 1978 (confirming the conceptual feasibility of using automated systems to perform preaudit functions under various child nutrition programs). See also B-201965, June 15, 1982. Contexts in which system reliance is relevant are discussed in 69 Comp. Gen. 85 (1989) (automated "ZIP plus 4" address correction system) and 59 Comp. Gen. 597 (1980) (electronic funds transfer program).

Regardless of what system is used, there is of course no authority to make known overpayments. B-205851, June 17, 1982; B-203993-O. M., July 12, 1982.

c. Statistical Sampling

Statistical sampling is a procedure whereby a random selection of items from a universe is examined, and the results of that examination are then projected to the entire universe based on the laws of probability. In 1963, the Comptroller General held that reliance on a statistical sampling plan for the internal examination of vouchers prior to certification would not operate to relieve a certifying officer from liability for improper or erroneous payments. 43 Comp. Gen. 36 (1963). GAO recognized in the decision that an adequate statistical sampling plan could produce overall savings to the government, but was forced to conclude that it was not authorized under existing law.

In response to this, Congress enacted legislation in 1964, now found at 31 U.S.C. §§ 3521(b)–(d). The statute authorizes agency heads, upon determining that economies will result, to prescribe the use of adequate and effective statistical sampling procedures in the

[23] The JFMIP is a joint undertaking of GAO, the Office of Management and Budget, the Treasury Department, and the Office of Personnel Management.

prepayment examination of disbursement vouchers. GAO has applied this authority, for example, to conclude that agencies may use statistical sampling for the long-distance telephone call certifications required by 31 U.S.C. § 1348(b), which are a necessary prerequisite to certifying the payment vouchers. 63 Comp. Gen. 241 (1984); 57 Comp. Gen. 321 (1978).

As originally enacted, 31 U.S.C. § 3521(b) was limited to vouchers not exceeding $100. A 1975 amendment to the statute removed the $100 limit and authorized the Comptroller General to prescribe maximum dollar limits. The current limit is $2,500. GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 7.4.E (1990). For further guidance, see the Policy and Procedures Manual, title 7, Appendix III, and GAO, Program Evaluation and Methodology Division, Using Statistical Sampling (April 1986). For vouchers over the prescribed limit, unless GAO has approved an exception (7 GAO-PPM App. HI, sec. B), 43 Comp. Gen. 36 would continue to apply.

The relevance of all this to accountable officers is spelled out in the statute. A certifying or disbursing officer acting in good faith and in conformity with an authorized statistical sampling procedure will not be held liable for any certification or payment on a voucher which was not subject to specific examination because of the procedure. However, this does not affect the liability of the payee or recipient of the improper payment, and relief may be denied if the agency has not diligently pursued collection action against the recipient. 31 U.S.C. §§ 3521(c), (d).

GAO has approved the use of statistical sampling to test the reliability of accelerated payment or "fast pay" systems. E.g., 60 Comp. Gen. 602,606 (1981). In 67 Comp. Gen. 194 (1988), GAO for the first time considered the use of statistical sampling for post-payment audit in conjunction with "fast pay" procedures. The question arose in connection with a General Services Administration proposal to revise its procedures for paying and auditing utility invoices. GAO approved the proposal in concept, subject to several conditions: (1) the economic benefit to the government must exceed the risk of loss; (2) the plan must provide for a meaningful sampling of all invoices not subject to 100 percent audit; and (3) the plan must provide a reliable and defensible basis for the certification of payments. GAO then considered and approved GSA's specific plan in 68 Comp. Gen.

618 (1989). As a general proposition, however, approaching the problem through system improvements is preferable to an alternative that involves relaxing controls or audit requirements. 7 GAO-PPM § 7.4.F (1990).

d. Provisional Vouchers and Related Matters

Apart from questions of automation or statistical sampling, proposals arise from time to time, prompted by a variety of legitimate concerns, to expedite or simplify the payment process. Proposals of this type invariably raise the potential for overpayments or erroneous payments. Therefore, their consequences in terms of the liability and relief of certifying and disbursing officers must always be considered.

A 1974 case involved a proposal by the Environmental Protection Agency for the certification of "provisional vouchers" for periodic payments under cost-type contracts. Under the proposal, monthly vouchers certified for payment would be essentially unaudited except for basic mathematical and cumulative cost checks, subject to adjustment upon audit when the contract is completed. Under this system, as with statistical sampling, some errors could escape detection. However, certifying officers would not have the benefit of the protection afforded by the statistical sampling legislation. Since there would be a complete audit upon contract completion, the provisional vouchers could be certified upon a somewhat lesser standard of prepayment examination, but GAO pointed out that any such system should provide, at a minimum, for periodic audit of the provisional vouchers. To better protect the certifying officers, GAO suggested following a Defense Department procedure under which "batch audits" of accumulated vouchers are conducted as frequently as deemed necessary based on the reliability of each contractor's accounting and billing procedures, but not less than annually, again subject to final audit upon contract completion. B-180264, March 11, 1974.

In order to meet processing deadlines, time and attendance forms are often "certified" by appropriate supervisory personnel before the end of the pay period covered, raising the possibility that information for the latter days of the pay period may turn out to be erroneous. Since necessary adjustments can easily be made in the subsequent pay period and since the risk of loss to the government is viewed as remote, the provisional certification of payroll vouchers based on these "provisional" time and attendance records is acceptable. B-145729, August 17, 1977 (internal memorandum).

Simplification plans may be prompted by nothing more exotic than understaffing of audit resources. In B-201408, April 19, 1982, an agency proposed an "audit resources utilization plan" whereby it would (1) attempt to identify high risk contractors through preaward questionnaires; (2) for low risk contracts below a monetary limit, substitute desk audits for field contract audits; and (3) encourage the use of systems audits where possible. GAO found no "conceptual objection" to the proposal, noting that the final audits discussed in B-180264 did not necessarily have to be field audits, but emphasized that high risk contractors should be subject to contract audits in all cases. The decision also discusses the certifying officer's role.

Another type of simplification proposal involves lessening the degree of scrutiny on small payments. For example, the Department of Veterans Affairs is authorized to reimburse certain low-cost supplies furnished to veterans under statutory training and rehabilitation programs. Experience taught the VA that participants could reasonably be expected to incur at least $35 of reimbursable supply expenses. The VA proposed to waive documentation and review requirements on invoices of up to $35 for miscellaneous supplies, and to pay essentially unsupported invoices up to that amount.[24] GAO concurred, but added that the VA should be able to demonstrate that prior audits have not revealed a significant number of false or inappropriate claims, and that it has internal controls adequate to detect multiple claims for the same individual. B-221949, June 30, 1987. An unstated consequence of the decision is that a certifying officer who relied on the system, assuming it was setup in accordance with the specified criteria, would be relieved from liability should any of the payments turn out to be erroneous.

One of the precedents relied on in B-221949 is B-179724, January 14, 1974, holding that, in certain circumstances, a cash register checkout tape identifying at least the general category for each item is sufficient documentation for small purchase certifications. The rationale was the reality of commercial practice:

"Certain businesses selling consumer type products, such as grocery stores and hardware stores, whose sales frequently comprise small numbers of items having low unit costs, do not as a matter of ordinary business practice provide customers

[24] Invoices may be used in place of vouchers to support disbursements as long as they Con* all required information. GAO Policy and procedures Manual for Guidance of Federal Agencies, title 7,$ 6.2.C (1990); I Treasury Financial Manual $4-2025.20.

receipts containing detailed descriptions for each item. It is impractical to develop more detailed descriptive type receipts for such purchases."

As with B-221949, the unstated consequence is that an accountable officer relying on the decision and otherwise exercising due care would be relieved from liability for improper payments.

e. Facsimile Signatures and Electronic Certification

Signature devices other than the traditional pen-and-ink signature are called "facsimile signatures." The term has been defined as "an impression of a signature made by a rubber stamp, metal plate, or other mechanical contrivance." B-194970, July 3, 1979. As a general proposition, there is no prohibition on the use of facsimile signatures on financial documents as long as adequate controls and safeguards are observed. The rule was stated as follows in B-481 23, November 5, 1965 (non-decision letter):

"Generally, an acceptable facsimile of a signature may be made by a robber stamp impression or maybe reproduced on a metal plate or by other mechanical contrivances, the validity of which is derived from a signed original. An otherwise proper document may be so authenticated mechanically with the knowledge and consent or under an express delegation of authority from the signer of the original provided that appropriate safeguards are observed in those respects."

The rule has statutory recognition. In any federal statute unless otherwise specified, the term "signature" includes "a mark when the person making the same intended it as such." 1 U.S.C. s 1; 65 Comp. Gen. 806,810 (1986).

When facsimile signatures are to be used by government officials, the safeguards should include:

- Standards for the authorization of the use of facsimile signatures.
- An enumeration of the types of documents on which facsimile signatures may be used.
- Physical control of the signature device to prevent unauthorized use.
- Notification to officials authorized to use facsimile signatures that use of a signature device in no way lessens their responsibility or liability.

B-140697, October 28, 1959 (approving use of facsimile signatures in the execution of contracts). Other cases approving the use or acceptance of facsimile signatures are 40 Comp. Gen. 5 (1960) (use by Air Force on purchase orders for small purchases); 33 Comp. Gen. 297 (1954) (certification of invoice bearing only rubber stamp signature of vendor); B-194970, July 3, 1979 (certification of voucher/purchase order bearing only facsimile signature of contracting officer); B-150395, December 21, 1962 (use by Navy on purchase orders); B-104590, September 12, 1951 (use on vouchers in federal educational grant programs); B-126776-O.M., March 5, 1956 (use by Army on certificates of availability of government quarters and/or mess in support of military travel vouchers).[25]

A more recent case held that payment could be certified on the basis of a contractor's facsimile ("fax") invoice, again provided that the agency has adequate internal controls to guard against fraud and overpayments. B-242185, February 13, 1991, citing several cases authorizing the acceptance of carbon copies.

One place where facsimile signatures are not permitted is the Standard Form 210, the signature/designation card for certifying officers which must be filed with the Treasury Department and which must bear the certifying officer's original, manual signature. I Treasury Financial Manual § 4-2040 .30e.

Most of the cases cited thus far have involved relatively primitive devices such as rubber stamps or signature machines. When we move into the realm of computerized data transmission, the equipment is far more sophisticated but the underlying principles are the same-there is no prohibition but there must be adequate safeguards.

In the 1980s, GAO and the Treasury Department began to consider the feasibility of electronic certification of payment vouchers. In a 1984 memorandum to one of GAO's audit divisions, GAO's General Counsel agreed with the Treasury Department that there is no specific legal requirement that a certifying officer's certification be limited to writing on paper. Then, applying the precedent of the earlier rubber stamp cases, the memorandum concluded that electronic certification, with adequate safeguards, was not legally objectionable. The "signature" could bean appropriate symbol adopted by the certifying officer, which should be unique, within the certifying officer's sole control or custody, and capable of verification by the disbursing officer. B-216035-O. M., September 20, 1984. Treasury subsequently developed a proposal for a prototype electronic certification system,

[25]An early case, B-36459, April 6, 1944, suggesting that use of facsimile signatures somehow required GAO approval has not been followed and should be *disregarded.*

which GAO found to adequately satisfy the statutory requirements for voucher certification and payment. B-216035-O.M., September 25, 1987.[20]

f. GAO Audit Exceptions

"Taking an exception" is a device GAO uses to formally notify an accountable officer of a fiscal irregularity which may result in personal liability. Today, this device is very rarely used. At one time, accountable officers had to submit all of their account documents to GAO, and GAO "settled" the accounts (31 U.S.C. § 3526(a)) by physically examining each piece of paper. Exceptions were common during that era. The nature of the process has evolved in recent decades in recognition of the increased responsibility of agencies in establishing their own financial systems and controls. Account settlement now is more a matter of systems evaluation and the review of administrative surveillance and the effectiveness of collection and disbursement procedures. Examination of individual transactions by GAO is minimal. See 7 GAO-PPM § 8.5 (1990). However, fiscal irregularities still come to GAO's attention in various ways (through its normal audit activities, agency irregularity reports, etc.), and GAO may invoke the exception procedure when warranted by the circumstances. The process is summarized in 7 GAO-PPM § 8.6 (1990). Examples are noted in 65 Comp. Gen. 858,861 (1986) (massive travel fraud scheme), and B-194727, October 30,1979 (fraudulent misappropriation of mass transit grant funds by government employee).

The first step in the exception process is the issuance of a "Notice of Exception" to the agency concerned. The issuance of a Notice of Exception does not itself constitute a definite determination of liability. It has been described as "in the nature of a challenge to the propriety of a certifying officer's action in certifying the voucher for payment." B-69611, October 27, 1947, The certifying or disbursing officer, through his or her agency, then has the opportunity to respond to the exception. It is the accountable officer's responsibility to establish the propriety of the payment. 13 Comp. Gen. 311 (1934). If the reply to the exception is satisfactory, the exception is withdrawn. E.g., B-78091, November 2, 1948. If the reply does not

[26] A related issue is the use of electronic technology in creating obligations under 31 U.S.C. §1501. The topic is covered, with citations, in Chapter 7.

provide a satisfactory basis to remove the exception, the item is "disallowed" in the account.

Technically, the term "disallowance" applies only to disbursing officers since a certifying officer does not have physical custody of funds and does not have an "account" in the same sense that a disbursing officer does. Thus, strictly speaking, GAO 'disallows an expenditure" in the account of a disbursing officer and "raises a charge" against a certifying officer. See 32 Comp. Gen. 499, 501 (1953); A-48860, April 14,1950. For account settlement purposes, a certifying officer's "account" consists of the certified vouchers and supporting documents on the basis of which payments have been made by a disbursing officer and included in the disbursing officer's account for a particular accounting period. B-147293-O. M., February 21, 1962.

The taking of an exception does not preclude submission of a relief request under applicable relief legislation. As a practical matter, if the agency has been unable to respond satisfactorily to the Notice of Exception, the likelihood of there being adequate basis for relief is diminished correspondingly. However, as in 65 Comp. Gen. 858, it can happen, and the possibility should therefore not be dismissed.

2. Certifying Officers

a. Duties and Liability

As we have seen, a certifying officer is the official who certifies a payment voucher to a disbursing officer. The responsibility and accountability of certifying officers are specified in 31 U.S.C. § 3528(a), part of the previously noted 1941 legislation enacted to clarify the roles of accountable officers under Executive Order 6166. The certifying officer is responsible for (1) the existence and correctness of the facts stated in the certificate, voucher, and supporting documentation; (2) the correctness of computations on the voucher; and (3) the legality of a proposed payment under the appropriation or fund involved. The statute further provides that a certifying officer will be accountable for the amount of any "illegal, improper, or incorrect" payment resulting from his or her false or misleading certification, as well as for any payment prohibited by law or which does not represent a legal obligation under the appropriation or fund involved.

There is a recurring appropriation act provision, discussed in Chapter 4 under the heading "Employment of Aliens," which bars the use of appropriated funds to pay the compensation of a government employee who is not a United States citizen, subject to certain exceptions. The provision applies only to employees whose post of duty is in the continental United States. Thus, a certifying officer (or disbursing officer) in the continental United States must be a U.S. citizen unless one of the exceptions applies, There is no comparable requirement applicable to employees outside the continental United States. B-206288 -O. M., August 4, 1982.

A certifying officer must normally be an employee of the agency whose funds are being spent, but may be an employee of another agency under an authorized interagency transaction or agreement. 59 Comp. Gen. 471 (1980); 44 Comp. Gen. 100 (1964).

A certifying officer is liable the moment an improper payment is made as the result of an erroneous or misleading certification. E.g., 54 Comp. Gen. 112, 114 (1974). This is true whether the certification involves a matter of fact, a question of law, or a mixed question of law and fact. 55 Comp. Gen. 297, 298 (1975) (citing several other cases). As a general proposition, the government looks first to the certifying officer for reimbursement even though some other agency employee may be liable to the certifying officer under administrative regulations. 32 Comp. Gen. 332 (1953); 15 Comp. Gen. 962 (1936). Also, the certifying officer's liability does not depend on the government's ability or lack of ability to recoup from the recipient of the improper payment. 31 Comp. Gen. 17 (1951); 28 Comp. Gen. 17, 20 (1948). What this means is that the government is not obligated to seek first to recoup from the recipient, although it frequently does so, and of course any recovery from the recipient will reduce the certifying officer's liability, at least in most cases.

Occasionally there may be two certifying officers involved with a given payment, so-called "successive certifications." The rule is that the responsibility of the certifying officer certifying the basic voucher is not diminished by the subsequent action. GAO stated the principle as follows in a letter to the Secretary of the Treasury, B-142380, March 30, 1960, quoted in 67 Comp. Gen. 457,466 (1988):

"Where the certifying officer who certifies the voucher and schedule of payments is different from the certifying officer who certifies the basic vouchers, . . . the certifying officer who certifies the basic vouchers is responsible for the correctness of such vouchers and the certifying officer who certifies the voucher-schedule is responsible only for errors made in the preparation of the voucher-schedule."

An illustration of how this principle may apply is 55 Comp. Gen. 388 (1975), involving the liability of General Services Administration certifying officers under interagency service and support agreements with certain independent agencies. Under the arrangement in question, the agency would assume certification responsibility for the basic expenditure vouchers, but they would be processed for final payment through GSA, with GSA preparing and certifying a master voucher and schedule to be accompanied by a master magnetic tape. Again quoting the above passage from B-142380, GAO concluded that the legal liability of the GSA certifying officer would be limited to errors made in the final processing.

Similarly, the statutory accountability does not apply to an official who certifies an "adjustment voucher" used to make adjustments between accounts or funds in the Treasury in respect of an obligation already paid and which therefore does not involve paying money out of the Treasury to discharge an obligation. 23 Comp. Gen. 953 (1944). Although certification even in this situation should not be reduced to a "matter of form," the accountability would attach to the certifying officer who certified the basic payment voucher. See 23 Comp. Gen. 181, 183–84 (1943).

The function of certification is not perfunctory, but involves a high degree of responsibility. 55 Comp. Gen. 297,299 (1975); 20 Comp. Gen. 182, 184 (1940). This responsibility is not alleviated by the press of other work. B-147747, December 28, 1961.[27] It also involves an element of verification, the extent of which depends on the circumstances. For example, a voucher for goods or services should be supported by evidence that the goods were received or the services performed, 39 Comp. Gen. 548 (1960). Generally, an independent investigation of the facts is not contemplated. E.g., 28 Comp. Gen. 571 (1949). Similarly, where proper administrative safeguards exist, certifying officers need not examine time, attendance, and leave

[27]But see B-138601, January 18, 1960, in which the volume of work taken into consideration in a somewhat extreme case.

records in order to certify the correctness of amounts shown on payrolls submitted to them. 31 Comp. Gen. 17 (1951).[28] A 1982 decision, 61 Comp. Gen. 477, reviewed the safeguards proposed by a Bonneville Power Administration certifying officer for certifying recurring payments to a regional planning body, and found them adequate to satisfy 31 U.S.C. 53528.

Whatever else the certifying officer's verification burden may or may not involve, it certainly involves questioning items on the face of vouchers or supporting documents which simply do not look right. For example, a certifying officer who certifies a voucher for payment in the full amount claimed, disregarding the fact that the accompanying records indicate an outstanding indebtedness to the government against which the sum claimed is available for offset, is accountable for any resulting overpayment. 28 Comp. Gen. 425 (1949). Similarly, certifying a voucher in the full amount within a prompt payment discount period without taking the discount will result in liability for the amount of the lost discount. However, a certifying officer is not liable for failing, even if negligently, to certify a voucher within the time discount period. 45 Comp. Gen. 447 (1966).

A clear illustration of a certifying officer's responsibility and liability occurred when a Department of Transportation employee fraudulently misappropriated more than $850,000 in 1977. The fraud was discovered by virtue of the employee's ostentatious purchases, including several luxury automobiles and a "topless" bar in Washington, D.C. The employee was found guilty and sent to jail. However, investigation revealed negligence on the part of a Department certifying officer. The employee had perpetrated the fraud by inserting his own name on six payment vouchers for Urban Mass Transportation Administration grants. Each voucher contained a list of approximately ten payees with individual amounts, and the total amount, and each had been certified by the certifying officer. The negligence occurred in one of two ways. If the employee inserted his own name and address on the voucher before presenting it to the certifying officer, the certifying officer was negligent in not spotting the name of an individual (whose name he should have known) with

[28] Many of the cases noted in the text, such as 31 Comp. Gen. 17, arose under manual systems. While they would still apply under a manual system, it is important to keep in mind the previously discussed differences in approach between manual and automated systems.

an address in suburban Maryland on a list of payees the rest of which were mass transit agencies. If the employee presented a partial voucher and added his own name after it was certified, the total as presented to the certifying officer could not have agreed with the sum of the individual amounts, and the certifying officer was negligent in not verifying the computation. GAO raised exceptions to the certifying officer's account, and advised the Department of Transportation that it must proceed with collection action against the certifying officer for the full amount of the excepted payments less any amounts recovered from the employee or through the sale of assets, like the topless bar, which the Justice Department seized. See B-194727, October 30, 1979. Apparently in view of the clear negligence, relief was never requested.

At this point, it should be noted that no one involved in the process remotely expects that the government will be able to recover several hundred thousand dollars from a certifying officer, or from any other accountable officer, except perhaps one who has him(her)self stolen the money. However, the burden of having to repay even a portion in cases of losses of this size sends an important message and reinforces the certain if indeterminable deterrent effect of the statute.

Certifying officers should not certify payment vouchers that are unsupported by pertinent documentation indicating that procedural safeguards regarding payment have been observed. Vouchers that are deficient in this regard should be returned to the appropriate administrative officials for proper approvals and supporting documents. B-179916, March 11, 1974.

An area in which a certifying officer's duty to question is minimal is payments to a contractor determined under a statutory or contractual disputes procedure. In the absence of fraud or bad faith by the contractor, a payment determination made under a disputes clause procedure is final and conclusive and may not be questioned by a certifying officer, GAO, or the Justice Department. S&E Contractor, Inc. v. United States, 406 US. 1 (1972); B-201408, April 19, 1982. It does not follow that any administrative settlement is entitled to the same effect. In B-239592, August 23, 1991, GAO found that an "informal settlement" of a personnel action between an agency and one of its employees was without legal authority, and found the certifying officer liable for the unauthorized payments. (A subsequent letter, B-239592.2, September 1, 1992, clarified that this meant the authorized certifying officer, not an official who had signed certain documents as "approving official" but was not responsible for determining the legality of the payment.)

A different issue involving an administrative settlement arose in 67 Comp. Gen. 385 (1988). After an investigation by federal and state officials, the Forest Service determined that it was responsible for a fire in a national forest in Oregon, and reimbursed the state for fire suppression expenses incurred under a cooperative agreement. Subsequently, a private landowner sued for damages resulting from the same fire, and the court made a finding of fact that the Forest Service was not liable. The certifying officer was concerned that the court's finding might have the effect of invalidating the prior payment to Oregon and making him liable for an erroneous payment. The decision concluded that the payment was proper when made, and that the court finding did not impose any duty on the certifying officer to reopen and reexamine it.

A certifying officer has the statutory right to seek and obtain an advance decision from the Comptroller General regarding the lawfulness of any payment to be certified. 31 U.S.C. $3529. This procedure will insulate against liability. Following the advice of agency counsel, on the other hand, does not guarantee protection against liability. E.g., 55 Comp. Gen. 297 (1975). Having said this, we do not wish to imply that consulting agency counsel is a pointless gesture. On the contrary, it is to be encouraged. Seeking internal legal advice prior to certification of matters on which the certifying officer is unsure will in many cases obviate any need for an advance decision. In other cases it may help define those situations in which consulting GAO may be desirable.

As a final note, the Treasury Department has published a supplement to the Treasury Financial Manual entitled Now That You're a Certifying Officer (1983). Written expressly for certifying officers, it provides a good overview of the importance of the job and the responsibilities which accompany it.

b. Applicability of 31 U.S.C. § 3528

There are two major exceptions to 31 U.S.C. § 3528(a). First, it applies only to the executive branch. While section 3528(a) is not limited by its terms to the executive branch, 31 U.S.C. § 3325(a), the basic requirement that disbursing officers disburse only upon duly certified vouchers, is expressly limited to the executive branch, and sections

3325(a) and 3528(a) originated as sections 1 and 2 of the same 1941 enactment. Thus, GAO has concluded that 31 U.S.C. § 3528(a) does not apply to the legislative branch. 21 Comp. Gen. 987 (1942); B-191036, July 7, 1978; B-236141.2, February 23, 1990 (internal memorandum). See also B-39695, March 27, 1945. It has also been held that 31 U.S.C. § 3325(a) does not apply to the judicial branch. B-6061/A-51607, April 27, 1942. It follows that section 3528(a) would be equally inapplicable to the judicial branch. B-236141.2, cited above.

The second major exception, previously noted, is the exemption contained in 31 U.S.C. § 3528(d) for the military departments except for salaries and expenses in the District of Columbia.

Some legislative branch agencies now have their own legislation patterned after 31 U.S.C. $3528. Those that do not, as well as the military departments, nevertheless have the authority, within their discretion, to create their own certifying officers and to make them accountable by administrative regulation. The degree of accountability is up to the agency. The 1990 memorandum cited above, B-2361 41.2, contains a detailed discussion. An arrangement of this type can include a mechanism for administrative relief. Id. However, relief would have to be granted or denied by the agency itself, not by GAO. 21 Comp. Gen. at 989; B-191036, July 7, 1978. Also, a system of certifying officer accountability established by an agency exempt from 31 U.S.C. § 3528 would not automatically eliminate the statutory accountability of the disbursing officer, who remains the primary accountable officer. 22 Comp. Gen. 48, 51 (1942); 21 Comp. Gen. at 988–89; B-213720, October 2,1984.

Notwithstanding 31 U.S.C. § 3528(d), it is possible for section 3528 to apply to military departments, albeit only in rare situations. The exemption "was intended to relate to the functions of actually disbursing funds-to the paying of vouchers, etc." B-24356, March 18, 1942, quoted in 44 Comp. Gen. 818,820 (1965). Thus, if a situation were to occur in which a military disbursing officer were functioning as a certifying officer with the actual disbursement to be made by another agency, such as Treasury, section 3528 would apply. For example, prior to the Treasury Department's recertification procedures for replacement checks, discussed later in this chapter, the military departments issued their own replacement checks by virtue of a specific delegation from Treasury under 31 U.S.C.

§ 3331(f). Replacement checks beyond the scope of the delegation had to be issued by Treasury, with the military disbursing officer functioning essentially as a certifying officer. Relief for losses in these cases was handled under 31 U.S.C. 33528. The case with the most detailed discussion is B-215380 et al., July 23,1984.

c. Relief

Informally known as the Certifying Officers' Relief Act, 31 U.S.C. § 3528(b) establishes a mechanism for the administrative relief of certifying officers governed by 31 U.S.C. § 3528(a). There are two standards for relief. The Comptroller General may relieve a certifying officer from liability for an illegal, improper, or incorrect payment upon determining that—

(1) the certification was based on official records and the certifying officer did not know, and by reasonable diligence and inquiry could not have discovered, the actual facts; or

(2) the obligation was incurred in good faith, the payment was not specifically prohibited by statute, and the United States received value for the payment.

Under either standard, relief may be denied if the agency fails to diligently pursue collection action against the recipient of the improper payment. 31 U.S.C. § 3528(b)(2).

Unlike the physical loss relief statutes previously discussed, 31 U.S.C. § 3528(b) does not require administrative determinations by the agency as a prerequisite to relief. The determinations under section 3528(b) are made by the Comptroller General. Also, the relief standards under section 3528(b) are stated in the alternative; relief may be granted if either of the two standards can be established. It makes no difference whether the improper payment is discovered by GAO or the agency concerned. B-137435-O. M., October 14, 1958. Relief is discretionary (the statute says "may relieve"), although no case has been discovered in which a certifying officer who met either of the standards was not relieved.

There is no special form of request under 31 U.S.C. § 3528(b). Relief may be requested by the agency on behalf of the certifying officer, or directly by the certifying officer. See, e.g., 31 Comp. Gen. 653 (1952) for an example of the latter. Relief requests must present sufficient information to permit GAO to make one of the required findings. E.g., B-191900, July 21, 1978.

One of the objectives of 31 U.S.C. s 3528(b) was to reduce the volume of private relief legislation recommended on behalf of certifying officers. The legislative history of the statute indicates that art agency should seek relief from GAO before considering relief legislation. As to those "less meritorious cases" in which relief maybe denied, relief legislation remains art available option. 30 Comp. Gen. 298 (1951).

The first relief standard, 31 U.S.C. § 3528(b)(1)(A), relates essentially to the certification of incorrect facts, and permits relief if the certification was based on official records and if the certifying officer did not know, and could not reasonably have learned, the actual facts. GAO has never attempted to formulate a general rule as to what acts may support relief from the certification of incorrect facts. Rather, the approach is as stated in 55 Comp. Gen. 297, 299–300 (1975):

"[W]e have sought to apply the relief provisions by considering the practical conditions and procedures under which certifications of fact are made. Consequently, the diligence to be required of a certifying officer before requests for relief under the act will be considered favorably is a matter of degree dependent upon the practical conditions prevailing at the time of certification, the sufficiency of the administrative procedures protecting the interest of the Government, and the apparency of the error."

For example, Social Security Administration certifying officers who certify large numbers of awards each month may, apart from obvious errors, rely on the award documents presented for certification. B-119248-O. M., April 14, 1954.

In B-237419, December 5, 1989, relief was granted to a Forest Service certifying officer who certified the refund of a timber purchaser's cash bond deposit without knowing that the refund had already been made, The certifying officer had followed proper procedures by checking to see if the money had been refunded, but did not discover the prior payment because it had not been properly recorded. Also, the agency was pursuing collection efforts against the payee.

Another case in which relief was granted under subsection (b)(l)(A) is B-246415, July 28, 1992. A certifying officer paid a contract invoice to a financing institution to which payments had been assigned under the Assignment of Claims Act without discovering that the contract file contained a prior assignment. The contracting officer had erroneously acknowledged the second assignment when he should have either rejected it or invalidated the first one. The agency remained liable to the first assignee and was unable to recover the improper payment from the second. The certifying officer had checked the contract file, and neither agency procedures nor reasonable diligence required her to keep looking once she found what appeared on its face to be a properly acknowledged assignment. The case also illustrates how an agency (the Panama Canal Commission in this case) should respond to a loss-by reviewing its procedures to determine if they can be improved, within reason, to prevent recurrence. In this instance, the agency began requiring that contract files include a "milestone" log, and that assignments be tabbed in the file and reviewed prior to acknowledgment.

As a general rule, a certifying officer may not escape liability for losses resulting from improper certification merely by stating either that he was not in a position to determine that each item on a voucher was correctly stated, or that he must depend on the correctness of the computations of his subordinates. A certifying officer who relies upon statements and computations of subordinates must assume responsibility for the correctness of their statements and computations, unless it can be shown that neither the certifying officer nor his or her subordinates, in the reasonable exercise of care and diligence, could have known the true facts. 55 Comp. Gen. 297, 299 (1975); 26 Comp. Gen. 578 (1947); 20 Comp. Gen. 182 (1940).

In 49 Comp. Gen. 486 (1970), a certifying officer asked if he would be held accountable where his own agency would not tell him exactly what he was being asked to certify. The agency took the position that the expenses in question were confidential and could be disclosed only to those with a need to know, which did not include the certifying officer. GAO disagreed. The situation would be different if the agency were operating under "unvouchered expenditure" authority such as 31 U.S.C. § 3526(e)(2). Under that type of authority, a certifying officer who is not informed of the objector purpose of the expenditure is not accountable for its legality. 24 Comp. Gen. 544 (1945). In the case at hand, however, the agency had no such authority, Therefore, the certifying officer would not be protected against liability if he certified a voucher without knowing what it represented. As GAO pointed out several years later, any other answer would defeat the purpose of the certification requirement, which is to protect the United States against illegal or erroneous payments. 55 Comp. Gen. 297,299 (1975). Except for statutorily authorized unvouchered expenditures, "I don't know and they wouldn't tell me" cannot be sufficient.

The second relief standard, 31 U.S.C. § 3528(b)(1)(B), contains three elements, all of which must be satisfied-obligation incurred in good faith, payment not specifically prohibited, United States received value for the payment. If a certifying officer qualifies for relief under this standard, it becomes irrelevant whether he or she could also have qualified under the first standard. This is particularly useful because, in many cases, what would constitute reasonable diligence and inquiry for purposes of the frost standard is far from clear.

There is no simple formula for determining good faith. One authority attempts to define the term as follows:

> "Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud. . . . Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry."

Black's Law Dictionary 693 (6th ed. 1990). An important factor in evaluating good faith for purposes of 31 U.S.C. § 3528 is whether the certifying officer had, or reasonably should have had, doubt regarding the propriety of the payment and, if so, what he or she did about it. Whether the certifying officer reasonably should have been in doubt depends on a weighing of all surrounding facts and circumstances and cannot be resolved by any "hard and fast rule." 70 Comp. Gen. 723, 726 (199 1). In many cases; good faith is found simply by the absence of any evidence to the contrary. Id.

At one time, the failure to obtain an advance decision from GAO on matters considered doubtful was viewed as an impediment to establishing good faith. E.g., 14 Comp. Gen. 578,583 (1935). Depending on the circumstances, following the advice or instructions of some administrative official in lieu of seeking an advance decision may not constitute "reasonable inquiry" under the first relief standard of 31 U.S.C. $3528.31 Comp. Gen. 653 (1952). However, it has become increasingly recognized that consulting agency counsel is a relevant factor in demonstrating good faith under the second standard. B-191900, July 21, 1978; B-127160, April 3, 1961.

To understand the second element— "no law specifically prohibited the payment"—it is helpful to note the language of the original 1941 enactment, which was "the payment was not contrary to any statutory provision specifically prohibiting payments of the character involved" (55 Stat. 875–76). This means statutes which expressly prohibit payments for specific items or services. 70 Comp. Gen. 723,726 (1991); B-191900, July 21,1978. An example would be 40 U.S.C. § 34, which prohibits the rental of space in the District of Columbia without specific authority. 46 Comp. Gen. 135 (1966).[29] Other examples are 31 U.S.C. § 1348(a) (telephones in private residences) and 44 U.S.C. § 3702 (newspaper advertisements).

Under this interpretation, the phrase "no law specifically prohibited the payment" is not the same as the more general "payment prohibited by law." It does not include violations of general fiscal statutes such as the Antideficiency Act (31 U.S.C. § 1341) or the general purpose statute (31 U.S.C. § 1301(a)). B-142871-O. M., September 15, 1961.[30]

The third element, value received, normally implies the receipt of goods or services with a readily determinable dollar value. E.g., B-241879, April 26, 1991 (automatic data processing equipment maintenance contract extended without proper delegation of procurement authority, services were performed). However, in appropriate circumstances, an intangible item may constitute value received where the payment in question has achieved a desired program result. B-191900, July 21, 1978; B-127160, April 3, 1961.

[29] Although the statute is no longer construed as prohibiting the rental of short-term conference facilities, it is still an example of a specific prohibition as contemplated by 31 U.S.C. 33528.

[30] One case B-222048, February 10, 1987, implying that an Antideficiency Act violation would preclude relief under 31 U.S.C. § 3528(b)(1)(B), is inconsistent with the weight of authority as discussed in the text.

3. Disbursing Officers

a. Standards of Liability and Relief

As with certifying officers, the responsibilities and accountability of disbursing officers are mandated by statute. A disbursing officer in the executive branch must (1) disburse money only in accordance with vouchers certified by the head of the spending agency or an authorized certifying officer, and (2) examine the vouchers to the extent necessary to determine that they are (a) in proper form, (b) certified and approved, and (c) correctly computed on the basis of the facts certified. The disbursing officer is accountable for these functions, except that accountability for the correctness of computations lies with the certifying officer. 31 U.S.C. § 3325(a).[31] Disbursing officers render their accounts quarterly. 31 U.S.C. § 3522(a)(1).

The administrative relief provision for disbursing officers is 31 U.S.C. § 3527(c), enacted in 1955 (69 Stat. 687). The Comptroller General is authorized to relieve present or former disbursing officers from liability for deficiencies in their accounts resulting from illegal, improper, or incorrect payments, upon determining that the payment was not the result of bad faith or lack of reasonable care by the disbursing officer. The determination may be made by the agency and concurred in by GAO, or it may be made by GAO on its own initiative. " As in the case of certifying officers, relief maybe denied if the agency concerned fails to diligently pursue collection action against the recipient of the improper payment.

The statute further provides that the granting of relief under section 3527(c) does not affect the liability or authorize the relief of the beneficiary or recipient of the improper payment, nor does it diminish the government's duty to pursue collection action against the beneficiary or recipient. 31 U.S.C. § 3527(d)(2).

In contrast with the certifying officer relief statute, 31 U.S.C. § 3527(c) is not limited to the executive branch. E.g., B-200108/B-198558,

[31] Since 31 U.S.C. § 3325(a) originated as part of the 1941 legislation designed to clarify responsibilities under 31 U.S.C. § 3321(a) (Executive Order 6166), and since section 3321(a) does not apply to the military departments except for salaries and expenses in the District of Columbia, section 3325(a) has the same exemption, found at 31 U.S.C. § 3325(b). Military disbursing officers are nevertheless fully accountable.

January 23, 1981 (judicial branch). Within the executive branch, it applies to military and civilian agencies alike.[32] Thus, the relief authority of 31 U.S.C. § 3527(c) is not limited only to those disbursing officers whose duties are prescribed by 31 U.S.C. § 3325(a).

The relief statute contemplates the consideration of individual cases and does not authorize the blanket relief of unknown disbursing officers for unknown amounts. B-165743, May 11, 1973.

Once it is determined that there has been an improper payment for which a disbursing officer is accountable, and that relief is desired, the primary issue is whether the payment was or was not the result of bad faith or lack of reasonable care on the part of the disbursing officer. "Bad faith" is difficult to define with any precision. It is somewhere between negligence and actual dishonesty, and closer to the latter. One authority gives us the following:

> "The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term 'bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . ."

Black's Law Dictionary 139 (6th ed. 1990). Bad faith cases tend to be relatively uncommon. Far more common are cases invoking the reasonable care standard, This standard-whether the disbursing officer exercised reasonable care under the circumstances-is the legal definition of negligence, and is the same standard applied in physical loss cases. 65 Comp. Gen. 858, 861–62 (1986); 54 Comp. Gen. 112 (1974).

The determination of whether a payment was or was not the result of bad faith or lack of due care must be made on the basis of the facts and circumstances surrounding the particular payment in question. A high error rate in the disbursing office involved does not automatically establish lack of due care in the making of a particular payment, nor does a low error rate and a record of an exemplary operation automatically establish due care. B-141038-O. M., November 17,

[32] Apart from the absence of any limiting language in the statute itself, this is clear from references to Defense Department input in the legislative history. S. Rep. No. 1185, 84th Cong., 1st Sess. 3 (1955); H.R. Rep. No. 996, 84th Cong., 1st Sess. 2 (1965).

1959; B-136027-O. M., June 13, 1958. The continued existence of an "inherently dangerous" procedure, however, does indicate lack of due care on the part of the responsible disbursing officer. B-162629 -O.M., November 9, 1967.

It is difficult, if not impossible, to state hard and fast rules applicable inflexibly to all cases involving relief under the provisions of 31 U.S.C. § 3527(c). What maybe considered good faith and the exercise of due care in one set of circumstances may not be so considered in another. However, it maybe stated generally that GAO will grant relief where (1) the agency has made proper efforts to collect from the recipient of the improper payment, (2) the agency has determined that the payment was not the result of bad faith or lack of due care on the part of the disbursing officer, and (3) no evidence to the contrary is available. Also, relief may be granted without the administrative determination where due care and the absence of bad faith are evident from the facts.

Actual negligence which contributes to an improper payment will, of course, preclude the granting of relief. For example, making a payment on the basis of documents which have been obviously altered, without first seeking clarification, is not the exercise of due care. B-233276, October 31, 1989, aff'd upon reconsideration, B-233276, June 20, 1990; B-138593-O.M., February 18, 1959; B-13591 O-O. M., July 14, 1958. Similarly, relief was denied in the following cases:

- Disbursing officer made duplicate payments on voucher schedule covering payments already made. Disbursing officer had requested guidance on new procedures, and "duplicate" schedule with instructions had been sent to her in response to that request, with a cover letter clearly stating that the schedule covered payments previously made. The payment could only have been due to lack of due care. B-142051, March 22, 1960.
- Disbursing officer continued to pay New Mexico gasoline tax after State Attorney General and Judge Advocate General had both concluded that the United States was not liable for the tax. Although the disbursing officer was aware of the rulings, he claimed that he had not received specific instructions to stop paying. B-135811, May 29, 1959.

- Disbursing **officer** reimbursed **imprest** fund on the basis of fictitious requisitions not supported by dealers' invoices or delivery slips. **B-137723-O.M.**, December 10,1958.

As with physical losses, failure to follow applicable regulations is generally regarded as negligence, and if an improper payment is attributable to that failure, relief will be denied. 54 **Comp. Gen.** 112, 116 (1974); 44 **Comp. Gen.** 160 (1964). Compliance with regulations **will** help establish due care, but the mere fact of compliance with regulations which are clearly **insufficient** may not always satisfy the standard. **B-192558,** December 7, 1978.

The concept of proximate cause is also applicable, and relief is appropriate where any negligence that may have existed was not the proximate cause of the improper payment. In one case, for example, local operating procedures at a military installation were found inadequate because they permitted personal checks to be cashed without checking identification cards. However, since the **cashiers** checked ID cards on their own initiative, and did so in the case for which relief was sought, the inadequacy could not have contributed to the loss. **B-221415,** March 26, 1986. For other examples, see **B-227436, July** 2, 1987, and **B-217663,** July 16, 1985.

The essence of negligence is the existence of a duty to exercise reasonable care in a particular situation and the violation of that duty. **In B-188744,** July 15, 1977, a Bureau of Indian Affairs disbursing **officer** erroneously made a payment to the wrong heir. Unknown to him, the probate and title determinations on which he had based the payment had been reopened and revised. Under established procedures, the disbursing officer was neither required nor expected to verify inheritance determinations. Since the verification was not within the scope of his duty, and was not something anyone in his position would reasonably be expected **to** do, there was no lack of due care. See also **B-137223** -O. **M.,** January 18, 1960. Thus, negligence will generally not be imputed to a disbursing officer where payment is made on the basis of facts of record upon which the disbursing officer is or reasonably can be expected to rely, even though such facts are subsequently found to be erroneous. This assumes that there is nothing on the face of the documents presented to the disbursing officer which should reasonably have alerted him or her that something appeared to be wrong.

A disbursing officer is accountable for payments made by his or her subordinates. However, relief may be granted under 31 U.S.C. § 3527(c) if the improper payment was not the result of bad faith or lack of due care attributable to the disbursing officer personally. B-141038-O.M., November 17, 1959. Where the actual disbursement is made by a subordinate, relief for the supervisory disbursing officer requires a showing that the disbursing officer exercised adequate supervision. Adequate supervision in this context means that the disbursing officer (1) maintained an adequate system of controls and procedures to avoid errors, and (2) took appropriate steps to ensure that the system was effective and was being followed at the time of the payment in question. E.g., 62 Comp. Gen. 476,480 (1983). A relief request must contain sufficient information to enable an independent evaluation. B-235037, September 18, 1989.

GAO has not attempted to define the elements of an adequate supervisor system. There can in fact be no freed formula, as the system will vary based on such factors as the size of the disbursing operation and the types of payments or transactions involved. Nevertheless, several elements which commonly appear in good systems can be identified (although no single case lists them as such):

(1) Compliance with agency regulations. For example, a military disbursing office will need to ensure compliance with any pertinent directives of the Defense Department, the particular military department involved, and the parent command.

(2) Locally developed instructions (often called standard operating procedures or SOPS) tailored to the needs of the particular disbursing office. Relief requests should include copies of any relevant SOPS. While SOPS are extremely helpful, the lack of a written SOP will not in and of itself cause a system to “flunk” the relief standard. E.g., B-215226, April 16, 1985.

(3) Training. This includes both initial training for new personnel and periodic refresher training, again tailored to the needs of the particular office. Training in this context does not necessarily mean formal classroom training, but may be in the form of on-the-job training and may include such devices as reading files which are circulated periodically and especially when pertinent changes occur.

(4) Periodic review or inspection by the supervisor. The forms this may take will vary with the size and nature of the operation.

The adequacy of a supervisory system is not, nor could it realistically be, measured against a zero-error standard. Many cases have made the point that a skillfully executed criminal scheme can occasionally outwit an adequate and well-supervised system. E.g., B-241880, August 14, 1991; B-202911, June 29, 1981. Similarly, human error will occur even in the most carefully established and supervised system. The best system cannot be expected to eliminate or detect every clerical error by a subordinate. E.g., B-224961, September 8, 1987; B-212336, August 8, 1983.

The cases also recognize that, in a large operation, the supervisory disbursing officer cannot reasonably be expected to personally review every check that is issued or every cash payment that is made. E.g., B-215734, November 5, 1984 (check cashed with fraudulent endorsement); B-194877, July 12, 1979 (amounts of two payments inadvertently switched, resulting in overpayment to one payee); B-187180, September 21, 1976 (wrong amounts inserted on checks). Thus, it is possible for a supervisor to be relieved for an error by a subordinate which, if attributable to the disbursing officer personally, would have resulted in the denial of relief. We previously cited several cases denying relief for payments made on the basis of obviously altered documents. These were cases in which the disbursing officer saw or should have seen the documents. Relief has been granted for similar losses occurring in otherwise adequate systems under which the supervisor was not required to see, and in fact did not see, the altered document. B-141038-O. M., November 17, 1959.

Where the subordinate who made the payment is also an accountable officer (a cashier, for example), the standard for relieving the subordinate is whether the individual complied with established procedures and whether anything occurred which should reasonably have made the individual suspicious that something was wrong. E.g., B-233997.3, November 25, 1991; B-241880, August 14, 1991. Depending on the particular facts, in cases involving two disbursing officers accountable for a payment, one a supervisor and the other a subordinate, it is possible for relief to be granted to both, denied to both, or granted to one and denied to the other. Examples of cases applying the above standards in which relief was granted to the supervisor but not the subordinate are B-231503, June 28, 1988 (cashier failed to observe annotations on voucher), and B-214436, April 6,1984 (agency declined to seek relief for subordinate who had failed to follow established procedures).

In our coverage of physical loss cases, we emphasized the importance of statements by the accountable officer. The principle applies equally in improper payment cases. The existence of adequate controls and procedures is usually documented, but this is not always the case, and the passage of time may make it impossible to locate a copy of the specific version of the SOPS in effect at the time of the payment. Also, testimony of the accountable officer(s) and other involved persons is often the only way of establishing how the controls and procedures were being implemented at the time of the payment. While the disbursing officer's own statement is obviously not disinterested and cannot be regarded as conclusive, it is always given appropriate weight and, as with unexplained loss cases, has often been enough to tip the balance in favor of relief where the record contains no controverting evidence or where documentary evidence is no longer available. Examples are B-234962, September 28, 1989; B-215226, April 16, 1985; B-217637, March 18, 1985; B-216726, January 9, 1985; B-215833, December 21, 1984; and B-212603 et al., December 12, 1984.

Finally, a disbursing officer has the same statutory right as a certifying officer to obtain an advance decision from the Comptroller General. 31 U.S.C. $3529. Obviously, if the decision is to serve the purpose of protecting the disbursing officer, the request must include the facts which gave rise to the doubt. 20 Comp. Gen. 759 (1941). Following administrative advice in lieu of seeking a GAO decision may, depending on the circumstances, bear upon the issue of whether the disbursing officer exercised due care. E.g., 49 Comp. Gen. 38 (1969). We previously noted that consulting agency counsel will help a certifying officer establish good faith. There is no reason why it should not equally help a disbursing officer establish good faith and due care, although it may not be enough if the advice received flies in the face of contrary information in the hands of the disbursing officer. E.g., 65 Comp. Gen. 858 (1986), aff'd upon reconsideration, B-217114.5, June 8, 1990. Whichever course of action is chosen, the disbursing officer faced with a doubtful payment needs to do something. The road to relief will be very difficult if a disbursing officer who is admittedly in doubt proceeds to make the payment without consulting either GAO or appropriate agency officials. See 23 Comp. Gen. 578 (1944).

b. Some Specific Applications

The federal government disburses money in an immense variety of situations-payments to employees (salary, allowances, awards), payments to contractors, payments under assistance programs, payments to various claimants, etc. Every situation in which proper payments can be made presents the potential for improper payments, resulting from such things as fraud, government error, or the misapplication of legal authority or limitations. To illustrate some of the situations that may arise, we present here a selection of improper payments for which relief has been sought under 31 U.S.C. § 3527(c). In each case, the relief question was approached by applying the principles and standards discussed in Section D.3.a.

In view of the differences in disbursement systems between the military departments and the civilian agencies, a large proportion of the cases involve military disbursing officers, and several would be certifying officer cases if they occurred in civilian agencies. A few of the situations can arise only in the military departments.

(1) Fraudulent travel claims

Cases under this heading range from single payments to massive schemes. They involve two distinct situations–fraudulently obtained travel advances and payments based on fraudulent travel vouchers.

In B-240654, February 6, 1991, an imposter, using falsified travel orders and a phony military identification card, obtained travel advances at six Air Force bases totalling nearly $74,000. The Air Force was able to identify the imposter and he was arrested, but committed suicide before trial. In another case, an individual stole an identification card from an athletic locker at the Pentagon and used it to obtain travel advances at several Army installations. The fraud was successful because the thief bore a sufficient resemblance to the card's owner. B-217440/B-217440.2, April 16, 1985; B-217440, February 13, 1985. The losses in these cases were attributed to skillfully executed criminal activities. Other cases involving fraudulently obtained travel advances include B-246371, June 23, 1992; B-234962, September 28, 1989; B-221395, March 26, 1986; and B-210648, March 15, 1984.

The second group of cases is similar except that the fraudulent document is a travel voucher rather than a travel order. Several related cases involve a conspiracy carried out over several years by employees of the Army Corps of Engineers. Basically, the employees presented vouchers based on fraudulent lodging receipts, often provided by friends or relatives. The scheme eluded detection for several years until it was discovered that the providers of the receipts, who had "verified" the accuracy of the receipts to the Corps, were themselves participants in the fraud. The disbursing officer in one district was relieved in part, but relief was denied for payments made after he had received information putting him on notice of the possibility of fraud. 65 Comp. Gen. 858 (1986). In another district, the disbursing officer stopped making payments immediately upon being advised of the investigation, and was relieved in full. B-217114.2, February 3, 1988,

A simpler situation is B-215737, November 5, 1984, in which an individual presented to an Army cashier a travel voucher which had been issued to someone else. Relief was granted to the Finance and Accounting Officer, but denied to the cashier because she failed to compare the name on the presenter's identification card with the (different) name on the voucher. Some additional fraudulent travel voucher cases are B-229274, January 15, 1988; B-222915, September 16, 1987; B-213824, July 13, 1987; and B-224832, July 2, 1987.

(2) Other cash payments fraudulently obtained

It maybe noted, somewhat cynically, that if there is a way to obtain cash from the federal government, someone will try to do it fraudulently. In some cases, losses can be prevented by the exercise of due care. In 68 Comp. Gen. 371 (1989), for example, an individual deposited two "Greenback Money Drafts" in the patients' account at a VA hospital. These are drafts, resembling checks, which the issuing bank provides to various public places. A person with an account in the issuing bank can sign one of the forms and cash it elsewhere. The back of the form explicitly states, "You must call [the issuing bank] before cashing," so that the bank can verify the existence of the account and the sufficiency of funds. In this instance, the cashier accepted the drafts without calling the issuing bank, the patient withdrew the funds shortly thereafter, and it was subsequently discovered that the drafts had been fraudulently negotiated. Relief was denied because of the cashier's negligent failure to follow the explicit printed instructions.

In another case, relief was denied to a cashier who made a cash payment to a courier without requiring any identification. The courier turned out to be an **imposter. B-178953,** August 2, 1973.

In many cases, due care will not prevent the loss, and relief is granted. Illustrative cases involving miscellaneous military cash payments, similar to the travel advance cases noted above, are **B-245127,** September 18,1991 **(transient/reaccession** payment); **B-226174,** June 18, 1987 (casual payment); **B-215226,** April 16, 1985 (special reenlistment bonus); and **B-209717.2,** July 1, 1983 (military pay voucher with separation orders). Relief was denied to a cashier in another casual payment case, **B-227209,** August 5, **1987,** for neglecting to spot inconsistencies on the face of the voucher.

(3) Military separation vouchers

The cases under this heading involve overpayments on military separation vouchers attributable to government error rather than fraud on the part of the recipient. In each case, the supervisory disbursing officer was relieved, illustrating the previously noted proposition that even a well-established and carefully supervised system of controls and procedures cannot be expected to totally eliminate human error.

In **B-230842,** April 13, 1988, and **B-227412,** July 2, 1987, a cashier made an overpayment by using the amount from the wrong block on the voucher. In **B-228946,** January **15,** 1988, the cashier **failed** to clear a previous transaction from her adding machine. In all three cases, the agency sought relief for the supervisor while holding the cashier liable. Similar cases are **B-222685,** June 20, 1986; **B-221453,** June 18, 1986; and **B-212293,** November 21, 1983. Relief has been granted to the cashier in cases where the cashier followed applicable procedures and the error was attributable to someone else. **E.g.,** **B-226614,** May 6, 1987; **B-221471,** January 7, 1986.

(4) **Assignment** of contract payments

Under the Assignment of Claims Act, 31 U.S.C. **§ 3727** and 41 U.S.C. **§ 15,** when a contractor assigns future contract payments to a financing institution (assignee), the assignee must file written notice of the assignment and a copy of the assignment with the pertinent disbursing officer. Once this is done, the government's obligation is to make future payments to the assignee, and payments made directly to the contractor are erroneous.

In B-213720, October 2, 1984, an assignment under an Army Corps of Engineers contract was properly filed with the disbursing officer, who acknowledged receipt but neglected to retain a copy. Also, a copy was inexplicably not placed in the contract file. A few months later, an invoice was submitted clearly stating that payment should be made to the assignee bank. A voucher examiner functioning as a certifying officer failed to make appropriate inquiry to confirm the existence of the assignment, and instead followed the advice of the purchasing agent to pay the contractor. The disbursing officer then made payment to the contractor, notwithstanding the information on the face of the invoice indicating the existence of an assignment. Since the Army voucher examiner was not a statutory certifying officer, primary liability remained with the disbursing officer. Given the disbursing officer's failure to retain a copy of the assignment and to verify the proper payee, relief was denied.

In other cases in which a military finance and accounting officer is responsible for both certifying and disbursing functions, relief has been granted where the errors are solely those of subordinates and there is no lack of due care attributable to the disbursing officer personally. B-216246, May 22, 1985 (voucher examiner/certifying officer failed to follow standard operating procedures, nothing on face of voucher to suggest existence of assignment); B-214273, December 11, 1984 (unknown clerk had misfiled notice of assignment, office processed over 3,000 vouchers a month and could pre-audit only on random basis).

(5) Improper purpose/payment beyond scope of legal authority

Most improper purpose and similar cases will be certifying officer cases. Those that involve disbursing officers are either military cases or disbursements by imprest fund cashiers. The point to remember is that relief is governed by the standards of 31 U.S.C. § 3527(c), and the fact that a payment is unauthorized does not automatically indicate lack of due care.

Several imprest fund cashiers have been relieved where the vouchers were proper on their face and included approvals by appropriate agency officials, including a contracting officer. B-221940, October 7, 1987 (refreshments at seminar); B-211265, June 28, 1983 (air purifier); B-203553, February 22, 1983 (air purifier). Prior approvals of similar purchases may also be relevant in establishing due care. 61 Comp. Gen. 634,637 (1982). Note that the purchase in each case was not plainly illegal. (Refreshments may be authorized under the Government Employees Training Act and air purifiers are authorized in some situations.)

In B-217668, September 12, 1986, relief was denied to an Army Finance and Accounting Officer who purchased beer for troops engaged in a joint military exercise. While the beer could have been purchased with nonappropriated funds (or–dare we suggest-paid for by the individuals who drank it), it is not an appropriate use of the taxpayers' money. The decision recognized that relief might nevertheless be possible if the standards for relief of a supervisor under 31 U.S.C. § 3527(c) were met, but the record did not contain sufficient information to enable an independent judgment.

4. Check Losses

a. Check Cashing Operations

Check cashing by disbursing officers is governed by 31 U.S.C. $3342. Subsection (a) authorizes disbursing officers to:

"(l) cash and negotiate negotiable instruments payable in United States currency or currency of a foreign country;

'(2) exchange United States currency, coins, and negotiable instruments and currency, coins, and negotiable instruments of foreign countries; and

"(3) cash checks drawn on the Treasury to accommodate United States citizens in a foreign country [only if presented by a payee who is a United States citizen and satisfactory local banking facilities are not available]."

Transactions under subsections (a)(1) and (a)(2) are authorized for official purposes or to accommodate certain classes of persons, including government personnel, hospitalized veterans, contractors working on government projects, and authorized nongovernment agencies operating with government agencies. 31 U.S.C. § 3342(b). These are sometimes called "accommodation transactions." The statute applies to legislative branch (and presumably judicial branch) agencies as well as executive branch agencies. 64 Comp. Gen. 152 (1984). The Treasury Department is authorized to issue implementing regulations and may delegate that authority to other agencies. 31 U.S.C. § 3342(d).

Of particular relevance here are 31 U.S.C. §§ 3342(c)(2) and (c)(3):

'(2) The head of an agency having jurisdiction over a disbursing official may offset, within the same fiscal year, a deficiency resulting from a transaction under subsection (a) of this section with a gain from a transaction under subsection (a). A gain in the account of a disbursing official not used to offset deficiencies under subsection (a) shall be deposited in the Treasury as miscellaneous receipts.

"(3) Amounts necessary to adjust for deficiencies in the account of a disbursing official because of transact'ions under subsection (a) of this section are authorized to be appropriated."

One important application of the offsetting authority of 31 U.S.C. § 3342(c)(2) is losses resulting from certain foreign currency exchange transactions, and cases involving this application are noted later in this chapter. However, nothing in the statute limits it to foreign exchange transactions. The offsetting authority applies by its terms to "a deficiency resulting from a transaction under subsection (a)," and this includes check cashing operations as authorized by subsections (a)(1) and (b).

Decisions rendered shortly after the statute was enacted applied it to uncollectible checks cashed over forged endorsements and explicitly recognized the statute as a form of relief. The first such case was 27 Comp. Gen. 211 (1947), stating at 213:

"Since the cashing of a check is an operation authorized under the act, any loss arising out of such transaction properly may be considered as coming within the purview of the term 'any deficiencies' for which relief is contemplated under the act." .

This holding was followed in 27 Comp. Gen. 663 (1948). The original version of 31 U.S.C. 53342, enacted in 1944 (58 Stat. 921), did not include the offsetting authority. See B-39771, September 26, 1950. It was added in 1953 (67 Stat. 62). Thus, the "relief" referred to in 27 Comp. Gen. 211 and 27 Comp. Gen. 663 was simply the authority to use agency appropriations to adjust the deficiencies. Both cases involved the Army, which at the time received annual appropriations for this purpose. The Army was thus in a position to invoke the statute, and the adjustments had the effect of relieving the disbursing officers.

For the next four decades, the principles established by 27 Comp. Gen. 211 saw little use, and check cashing losses during that period were mostly treated as improper payments requiring relief under whatever authorities were available (31 U.S.C. § 3527(c) since 1955). A 1991 decision to the Air Force, 70 Comp. Gem 616, changed this and, in effect, reverted to the approach of 27 Comp. Gen. 211, now augmented by the offsetting authority. After reviewing precedent and legislative history, the decision concluded that-

> "section 3342 may be applied to check cashing losses. Thus, an agency may use section 3342 to offset losses from cashing uncollectible checks with gains from other section 3342(a) activities."

Offsetting under section 3342(c)(2) is done on a fiscal-year basis. Art uncollectible check becomes a deficiency not when it is cashed by the disbursing officer, but when it is dishonored and returned to be charged to the disbursing officer's account. If these events occur in different fiscal years, the deficiency is chargeable to the latter year. B-120737, December 27, 1954. If an item is charged as a deficiency in one year and collected in a subsequent year, the collection should be charged to the fiscal year account in which the collection is made regardless of the fiscal year in which the deficiency was charged. Id.

For checks cashed within the authority of 31 U.S.C. $3342, following the procedures of that statute eliminates the need to pursue relief under 31 U.S.C. § 3527(c). If there is a net gain in an account for a given fiscal year, the net gain is deposited in the Treasury as miscellaneous receipts, and that ends the matter. If there is a net loss, and the agency is able to make an adjustment from an available appropriation, the adjustment clears the disbursing officer's account and similarly ends the matter. A net loss resulting from the application of 31 U.S.C. § 3342(c) is not an Antideficiency Act violation. 61 Comp. Gen. 649 (1982).

It must be emphasized that 31 U.S.C. § 3342 does not make an agency's appropriations available for these adjustments. It merely authorizes appropriations for that purpose. For disbursing officers within the Department of Defense, permanent authority exists to use appropriated funds for "losses in the accounts of disbursing officials and agents in accordance with law." 10 U.S.C. § 2781(2). Civilian agencies will need comparable authority which may be in the form of permanent legislation, specific appropriations, or specific language in a lump-sum appropriation (for example, "including adjustments as authorized by 31 U.S.C. § 3342").

The July 199 1 decision made two other very important points. First, the offsetting authority of 31 U.S.C. § 3342 is discretionary. An agency is not required to use it, but retains the option of refusing to adjust a disbursing officer's account, in which event the relief avenue of 3 1 U.S.C. § 3527(c) remains available.

Second, while good faith and due care are prerequisites to relief under 31 U.S.C. § 3527(c), section 3342 contains no comparable requirement. Thus, the use of section 3342 does not require findings of good faith and due care. Decisions stating or implying the contrary, such as 27 Comp. Gen. 2 11, were modified to that extent. Be that as it may, it is undesirable as a matter of policy to use 31 U.S.C. § 3342 to relieve a disbursing officer for losses attributable to bad faith or lack of due care, and an agency is well within its discretion to decline use of those procedures in such cases.

The discretion to use 31 U.S.C. § 3342 applies only to checks cashed within the scope of the statute. Losses resulting from checks cashed beyond the scope of that authority (i.e., not for an official purpose or for a person not within one of the classes specified in subsection 3342(b)) may not be offset or adjusted under the authority of section 3342, but are improper payments for which administrative relief is available only under 31 U.S.C. § 3527(c). 70 Comp. Gen. 420 (1991); B-12760%O.M., May 28, 1956.

The losses under consideration-uncollectible check losses resulting from check cashing operations-fall into several distinct but related fact patterns. Cases cited below which predate GAO's July 199 1 decision are all section 3527(c) relief cases resolved under the principles and standards previously discussed; all could now be resolved under the offset and adjustment authority of 31 U.S.C. § 3342.

1. Uncollectible personal check. Cases in this category tend to involve either of two general situations:

- Thief steals someone else's personal checks and cashes them in conjunction with stolen or fraudulent identification. B-246418, February 3, 1992; B-240440, March 27, 1991; B-212588, August 14, 1984.
- Thief cashes checks from a fraudulently established checking account in the name of some other real or fictitious person. B-229827, January 14, 1988; B-221415, March 26, 1986; B-220737/B-220981, December 10, 1985.

2. Fraudulent endorsement of government check. In this situation, a thief steals a legitimately issued government check (paycheck, tax refund check, etc.) and cashes it with the aid of stolen or fraudulent identification. E.g., B-227436, July 2, 1987; B-216726, January 9, 1985; and B-214436, April 6, 1984.

3. Fraudulent alteration of amount on government check. If the amount is fraudulently raised by the payee, the liability of the disbursing officer is the difference between the original amount and the fraudulent amount. B-228859, September 11, 1987. If the amount is altered and the check cashed by someone other than the payee, the disbursing officer's liability is the full amount of the payment. B-221 144, April 22, 1986.

The opportunity for fraudulent alteration of amounts naturally decreases when the amount is also spelled out in words on the face of the check. 62 Comp. Gen. 476, 481 (1983). However, spelling the amount out in words is not required on government checks, and Treasury checks generally do not do so. See I Treasury Financial Manual § 4-5050.45c (T/L 496). If a disbursing officer is in compliance with the TFM and applicable agency regulations, relief will not be denied solely because the amount is not written out in words. 65 Comp. Gen. 299 (1986); B-209697, November 21, 1983.

4. Postal money order. The authority of 31 U.S.C. § 3342(a)(1) is not limited to checks but applies to "negotiable instruments" generally, which includes postal money orders. E.g., B-217663, July 16, 1985 (fraudulent alteration of amount); B-213874, September 6,1984 (forged endorsement).

b. Duplicate Check Losses

A duplicate check loss, as we use the term here, is a loss resulting when (1) a payee claims nonreceipt of an original check, (2) the government issues a replacement check, and (3) both checks are negotiated.

Replacement checks are issued under the authority of 31 U.S.C. $3331. If an original check "is lost, stolen, destroyed in any part, or is so defaced that the value to the owner or holder is impaired," the Secretary of the Treasury may issue a replacement check, and may delegate that authority to other agencies. 31 U.S.C. §§ 3331(b), (f). The Secretary has discretionary authority to require an indemnification agreement from the owner or holder prior to issuing the replacement check. Id. § 3331(e).

The current system for issuing replacement checks, developed by the Treasury Department in the mid- 1980s, is reflected in 31 C.F.R. Parts 245 and 248, I Treasury Financial Manual Chapter 4-7000, and TFM Bulletin No. 83-28 (August 2, 1983).[33] In brief, upon receipt of a claim for loss or nonreceipt of an original check, the spending agency may certify anew payment. 31 C.F.R. $245.5. In agencies for which Treasury disburses, an agency certifying officer certifies the replacement check to a Treasury disbursing officer. For agencies which do their own disbursing, most notably the military departments, the "recertification" is an internal procedure based on agency as well as Treasury regulations. The replacement check, which has a different serial number from the original check, is called a "recertified check." Formerly, most replacement checks were 'substitute checks" with the same serial number as the original check. With the implementation of the recertification procedure, Treasury announced that substitute checks would generally no longer be available. TFM Bulletin No. 83-28, para. 2.[34]

The Treasury regulations specify the responsibilities of the payee. If the original check shows up before the claimant receives the replacement check, the claimant should notify the agency and follow the agency's instructions. 31 C.F.R. § 245.8(a). If the original check shows up after receipt of the replacement check, the claimant is to return the original to the issuing agency. "Under no circumstances

[33] Prior approaches had produced Complex problems and were unsatisfactory. See 62 Comp. Gen. 91 (1982) and GAO report Millions Paid Out in Duplicate and Forged Government Checks, AFMD-81-68 (October 1, 1981).

[34] The regulations now use the term "substitute check" only in 31 C.F.R. p@ 248 in the context of "depositary checks, " checks drawn on accounts maintained in depositary banks in U.S. territories or foreign countries.

should both the original and replacement checks be cashed." Id. § 245.8(b).

Payees do not always read Treasury regulations, however, and sometimes cash both checks. Since the agency's obligation is to make payment once, cashing both checks results in an erroneous payment for which some accountable officer is liable unless relieved. In the most common situation, the payee cashes both checks. The first check satisfies the government's original obligation, and issuing the replacement check is an authorized transaction. Thus, the loss occurs "when the second check is wrongfully presented and paid. (The actual sequence in which the payee negotiates the original check and the replacement check is immaterial.)" 62 Comp. Gen. 91,94 (1982). Depending on the agency and the nature of the error, the proper relief statute will be either 31 U.S.C. § 3528 (certifying officer) or 31 U.S.C. § 3527(c) (disbursing officer). For the military departments, even though they may employ a "recertification" procedure, the proper statute is section 3527(c). 66 Comp. Gen. 192, 194 (1987).

GAO's frost relief decision under the recertification procedure was 65 Comp. Gen. 811 (1986). Relief for a duplicate check loss is granted if (1) the accountable officer followed applicable regulations and procedures, (2) there is no indication of bad faith, and (3) the agency has pursued or is pursuing adequate collection action to recover the overpayment. Id. at 812. This is essentially the same standard that had been applied under the former "substitute check" system. E.g., 65 Comp. Gen. 812,813 (1986); 62 Comp. Gen. 91,97 (1982). A few more recent cases applying this standard are 70 Comp. Gen. 298 (1991) (Navy); B-237343, January 23,1991 (Army); and B-232773, January 12, 1989 (Defense Logistics Agency). Of course, relief cannot be granted until a loss actually occurs. 70 Comp. Gen. 9, 12 (1990); 66 Comp. Gen. 192, 194 (1987). The documentation required to support a relief request in a duplicate check case is spelled out in B-221720, May 8, 1986, and includes such things as copies of both checks, the claim of nonreceipt, the agency's stop payment request, Treasury's debit voucher, and documentation of collection efforts.

If the disbursing officer is a supervisor and the duplicate check is actually issued by a subordinate, both are accountable officers for purposes of liability and relief. 62 Comp. Gen. 476, 479–80 (1983); B-213471 et al., January 24, 1984; B-212576 et al., December 2, 1983. The relief standards are those set forth in Section D.3.a of this chapter for improper payments generally. As with other relief situations, lack of due care, failure to follow established procedures for example, will not preclude relief if it was not the proximate cause of the loss. 70 Comp. Gen. 298 (1991); B-225932, March 27, 1987.

Treasury regulations encourage, but do not require, the agency to obtain a signed statement from the claimant before issuing or certifying a replacement check. I TFM § 4-7060.20a. If the agency's own regulations require the statement, failure to obtain it will generally be regarded as lack of due care. Relief is granted or denied based on application of the proximate cause concept. 70 Comp. Gen. 298 (1991); B-225932, March 27, 1987. If the statement is obtained but turns out to be a misrepresentation, it is not the accountable officer's fault. B-247062, June 9, 1992. In 70 Comp. Gen. 9 (1990), GAO advised the Navy that it could waive its own requirement for claimant statements where a box containing over 4,600 checks was lost en route to the Philippines, and obtaining individual statements prior to issuing replacement checks would have caused undue delay and hardship.

GAO has expressed concern over issuing replacement checks prematurely, that is, without giving the original check a reasonable time to arrive. While the timing is essentially a matter of agency discretion, it is also a factor which may bear upon the issue of due care. 63 Comp. Gen. 337 (1984). Timing should include risk assessment. Thus, a shorter waiting period maybe appropriate where the payee has a continuing relationship with the agency and recoupment by offset is therefore presumably easier. I TFM § 4-7060 .20e; B-2261 16, February 20, 1987. As a general proposition, GAO will not question awaiting period of at least 3 working days. 63 Comp. Gen. 337; I TFM § 4-7060.20a. For checks mailed prior to the actual payment date, the 3-day period may include mailing days. B-230658, June 14, 1988. Awaiting period of less than 3 days needs to be specifically justified. See B-215433/B-215515, July 2, 1984. A good example is B-246369, February 3, 1992 (payee who was in Virginia could not have received original check inadvertently mailed to Florida).

It is possible, although the cases are (and should be) rare, for duplicate check losses to occur with checks issued to a bank under direct deposit procedures. Recoupment efforts should be directed against the bank which made the error, leaving it to the bank to then recover from the individual depositor as an independent transaction. B-215431/B-215432, January 2, 1985. Related decisions arising from the same set of losses are B-215432.3, August 22, 1991 (finally granting relief upon documentation of collection efforts), and B-215432 et al., July 6, 1984.

An agency's internal controls and procedures form an important line of defense against duplicate check losses. One agency, for example, will issue a recertified check prior to obtaining the status of the original check only if the employee has sufficient funds in his or her retirement account to cover a potential loss, and requires specific clearances upon termination of employment. These procedures, GAO commented, "will better safeguard federal funds." B-232615, September 28, 1988. Agencies should also develop guidelines for dealing with persons requesting several replacement checks within a relatively short time period. Three replacement check requests within an 11-month period, for example, should trigger some concern. B-221398, September 19, 1986. Guidelines may include such things as counseling employees to take advantage of direct deposit procedures and delaying recertification until the status of the original check has been determined. The exact content of any such guidelines is up to the agency. B-217947/B-226384, March 27, 1987; B-220500, September 12, 1986. Indemnification agreements may be desirable in some circumstances, even where not required. See 66 Comp. Gen. 192, 194–95 (1987). Chargeback data received from Treasury should be processed and forwarded to the pertinent finance office as promptly as possible. B-226316 et al., April 9, 1987.

Cases occasionally present variations on the factual theme, but the basic relief approach is the same. E.g., B-226769, July 29, 1987 (agency issued replacement for wrong check); B-195396, October 1, 1979 (agency inadvertently issued two replacement checks).

In our coverage of physical losses, we discussed the dollar amount GAO has established, currently $3,000, below which agencies may grant relief without the need for GAO involvement. In October 1991, GAO started extending the limit selectively to certain categories of improper payments, one of which is duplicate check losses. For duplicate check losses not exceeding $3,000, agencies may grant or deny relief administratively, without the need for GAO concurrence, in accordance with applicable statutes, regulations, and GAO decisions. B-243749, October 22, 1991 (civilian); B-244972, October 22, 1991 (military).[35] Section C.2 of this chapter contains more detail on how the $3,000 limit operates.

In the cases cited and discussed thus far, it was the payee who negotiated both checks. Where the original check is fraudulently negotiated by someone else, the situation is a bit different. Here, the replacement check rather than the original check satisfies the government's obligation to the payee, and the loss results from negotiating the original check. 66 Comp. Gen. 192, 194 (1987). More precisely, the loss results from payment on the original check since there is nothing improper or incorrect in issuing it. Id. If forgery is established, Treasury will seek to recover from the bank which negotiated the check. See B-232772, October 17, 1989.

c. Errors in Check Issuance Process

The October 1991 decisions just cited authorizing administrative resolution of duplicate check losses not exceeding $3,000 extended the authorization to another category of erroneous payments-those resulting from "mechanical and/or clerical errors during the check issuance process." Thus, agencies may grant or deny relief for losses in this category within the monetary ceiling, as with duplicate check losses, in accordance with applicable statutes, regulations, and GAO decisions. B-243749, October 22, 1991 (civilian); B-244972, October 22, 1991 (military). The relief standards are the same as those previously discussed for other types of improper or erroneous payments.

Cases under this heading may result from any type of check payment-salary payments, payments to contractors, benefit payments, etc.—and include a variety of fact patterns. A few cases involving erroneous tax refund checks will illustrate. In each case, the disbursing officer was a director of one of Treasury's regional financial centers (formerly called disbursing centers), a supervisory official. In B-241098/B-241137, December 27, 1990, the printing system rejected two checks and automatically produced substitutes; the printing operator failed to remove and void the original checks; the originals and substitutes were issued and cashed by the payees. In B-187180, September 21, 1976, a keypunching error transposed two numerals, resulting in issuance of a check for $718 instead of the

[35] The process actually started with a limited authorization for the Army, B-214372, October 9, 1987, revoked by the more inclusive B-244972.

correct amount of $178. In B-235037, September 18, 1989, an overpayment was made due to an error during the "typing operation and proof reading process." Relief was granted in the first two cases by applying the standards for relieving a supervisor; in the third, it was denied because the request contained neither a description of relevant controls and procedures nor statements by the individuals concerned.

One more tax refund case illustrates the immutable law that anything that can happen will happen. A tax refund check intended for John and Ruth Puncsak of San Francisco was drawn payable to "J. and R. Puncsak," and erroneously sent to Joe and Rose Puncsak, also of San Francisco, who were not entitled to a refund but instead owed money to the Internal Revenue Service. The check was cashed, Joe and Rose claiming that they endorsed the check but then lost it. GAO advised the IRS to raise a charge against the account of the responsible accountable officer. B-112491, April 17, 1953. (Since this case predated the enactment of 31 U.S.C. § 3527(c), there was no way to consider administrative relief.)

As B-241098/B-241137 demonstrates, most mechanical errors are not purely mechanical, but involve human error as well, such as failure to spot the error during a verification process. Also, many of these cases involve the issuance of duplicate checks, the difference between these and the previously discussed duplicate check losses being that these losses do not result from a claim of nonreceipt but from the simultaneous issuance of duplicate checks attributable to government error. Similar cases involving other types of payments are B-239371, June 13, 1990; B-239094, June 13, 1990; B-237082 et al., May 8, 1990; B-235044 et al., March 20, 1990; and B-235036, October 17, 1989. Some factual variations follow:

- Machine that stuffs checks into envelopes was misaligned, obscuring the names and addresses. Treasury decided to shred the original checks and reissue them. One of the originals was inadvertently delivered rather than shredded, causing a duplicate payment. B-245586, November 12, 1991.
- Due to mechanical failure, a check printing machine failed to advance a voucher schedule and a second check was issued to a person with the same name but different middle initial than the correct payee. A clerk failed to notice the error during verification. In view of the volume of work at the disbursing center, the error was viewed as the

type that will occasionally escape even in a well-established and carefully supervised system. B-195106, July 12, 1979.

- Malfunction of feed mechanism on printing machine caused one check to skip, printing the inscription on the next check. The first check was replaced without noticing the duplicate; both checks were issued. Relief was granted on the same basis as in B-195106. B-212431, November 21, 1983.

"Clerical error" means human error without contributing mechanical malfunction. Relief standards remain the same. The cases noted in the following groupings, as with the last three tax refund cases cited above, are intended to illustrate factual variations.

1. Payment of wrong amount. The person preparing a check for a military separation voucher misread a dollar sign as the number "8," and printed a check for $899 instead of the correct amount of $99. B-238863, July 11, 1991. A voucher examiner preparing a partial payment to a contractor erroneously used the total amount due on the contract instead of the amount of the partial payment. B-227410, August 18, 1987.

2. Payment to wrong person. A clerk consolidating two contract payment vouchers in a single check payable to a credit union erroneously listed only one account number, causing an overpayment to one contractor and necessitating a replacement check to the other. B-238802, December 31, 1990. Further examples are B-234197, March 15, 1989 (misreading of documents resulted in payment to subcontractor instead of prime contractor); B-229126, November 3, 1987 (keypunch error generated payment to wrong contractor); B-212336, August 8, 1983 (voluntary child support allotment paid to wrong person due to error in assignment of organization code); B-192109, June 3, 1981 (check issued to wrong person with slightly different name than correct payee); B-194877, July 12, 1979 (amounts of two checks inadvertently switched).

3. Duplicate payment. Treasury Financial Center was issuing replacements for a batch of mutilated checks. One mutilated check became separated from the rest and was erroneously released along with its replacement. A computer operator had failed to verify each replacement check against the corresponding mutilated check. Because controls were in place which would have prevented the error had they been followed, and considering the large volume of work at

the disbursing center, relief was granted to the disbursing officer, the center's director. (The computer operator is not an accountable officer.) B-231551, September 12, 1988.

Most duplicate payments are recovered, but many either are not or involve the expense of collection action or litigation. Especially in the area of payments to contractors, duplicate payment losses can involve large amounts. GAO surveyed a number of agencies in the mid- 1980s, and emphasized the importance of adequate internal controls. E.g., General Services Administration Needs to Improve its Internal Controls to Prevent Duplicate Payments, GAO/AFMD-85-70 (August 20, 1985); Strengthening Internal Controls Would Help the Department of Justice Reduce Duplicate Payments, GAO/AFMD-85-72 (August 20, 1985). A case involving a duplicate payment to a contractor in which relief was granted on the basis of adequate controls is B-24 1019.2, February 7, 1992.

5. Statute of Limitations

The accounts of accountable officers must be settled by GAO within three years "after the date the Comptroller General receives the account." 31 U.S.C. § 3526(c)(1). Once this 3-year period has expired, no charges may be raised against the account except for losses due to fraud or criminal action on the part of the accountable officer. Id. § 3526(c)(2). Enacted in 1947 (61 Stat. 101), this legislation effectively operates as a limitation on establishing an accountable officer's liability for improper expenditures. As the Defense Department pointed out in recommending the legislation, a time limitation is desirable because passage of time diminishes the chances of recovering from the payee or recipient, leaving the liability solely with the accountable officer. S. Rep. No. 99, 80th Cong., 1st Sess. (1947), reprinted in 1947 U.S. Code Cong. Serv. 1075, 1077–78.

Unlike other statutes of limitations which merely affect the remedy (for example, by barring the commencement of legal proceedings), 31 U.S.C. § 3526(c) completely eliminates the debt. B-181466, November 19, 1974 (non-decision letter). Once an account has been settled, it cannot be reopened (except for fraud or criminality, as noted above), and the authority to grant or deny relief no longer exists. Thus, an accountable officer can escape liability for an improper expenditure if the government does not raise a charge against the account within the 3-year period. E.g., 62 Comp. Gen. 498 (1983); B-223372, December 4, 1989; B-198451.2, September 15, 1982. Once an accountable officer's liability has been timely established, section 3526(c) does not limit the government's recovery from that officer. 31 U.S.C. § 3526(c)(4)(B).

The statute of limitations of 31 U.S.C. § 3526(c) applies only to improper payments and not to physical losses or deficiencies. 60 Comp. Gen. 674 (1981). An accountable officer's liability for a physical loss or deficiency is wholly independent of anyone's "raising a charge" against that officer's account.

The original version of 31 U.S.C. § 3526(c) was enacted at a time when all accounts were physically transmitted to GAO for settlement, GAO reviewed every piece of paper, and then issued a certificate of settlement to the accountable officer, "disallowing" credit for questionable items. As a result of changes in audit methods, this is no longer done. Rather, accounts are now retained by the various agencies, and an account is regarded as settled by operation of law at the end of the 3-year period except for unresolved items. GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 8.7.

To reflect these changes in audit procedures, the date a "substantially complete" account is in the hands of the agency and available for audit is now generally considered as the point from which the 3-year period begins to run. E.g., B-181466, July 10, 1974 (non-decision letter). Assuming that supporting documents are available at the end of the time period covered by an accountable officer's statement of accountability, this will usually mean the date on which that statement of accountability is certified. 7 GAO-PPM § 8.7. There are situations, however, in which the 3-year period does not begin to run until some later date. Where a loss is due to fraud, the period begins when the loss is discovered and reported to appropriate agency officials. B-239802, April 3, 1991; B-239122, February 21, 1991. Where an agency has no way of knowing that an improper payment has occurred until it receives a debit voucher from the Treasury Department (duplicate check losses, for example), the 3-year period begins to run when the agency receives the debit voucher. B-226393, April 29, 1988. If the date of receipt cannot be determined, the date of the debit voucher is used. Id.[36]

If art irregularity has not been resolved by the agency within two years from the time the statute of limitations begins to run, the irregularity should at that time be reported to GAO. This maybe in the form of a relief request or a copy of the agency's irregularity report. This is designed to provide adequate time to consider a relief request or to otherwise prevent expiration of the statute of limitations where necessary. 7 GAO-PPM § 8.4.C. See also, e.g., 62 Comp. Gen. 476, 480 (1983); B-227538, July 8, 1987; B-217741, October 15, 1985. Of course, nothing prevents an agency from seeking relief sooner if appropriate.

As noted above, the 3-year limitation does not apply to losses attributable to fraud or other criminal action by the accountable officer. 31 U.S.C. § 3526(c)(2). It is automatically suspended during war. Id. § 3526(c)(3). And it may be suspended by the Comptroller General with respect to a specific item to get additional evidence or explanation necessary to settle an account. Id. § 3526(g). This may be in the form of a timely Notice of Exception (B-2261 76, May 26, 1987), or other written notification (B-239592, August 23, 1991; B-239140, July 12, 1991). The mere submission of a relief request within the 3-year period, however, is not enough. 62 Comp. Gen. 91, 98 (1982); B-220689, September 24,1986.

Finally, 31 U.S.C. § 3526(c) deals solely with the liability of an accountable officer. It has no effect on the liability of the payee or recipient of an improper payment. It does not establish a limitation on recoveries against the improper payee or recipient, nor does it affect the agency's obligation to pursue collection action against the payee or recipient. 31 U.S.C. § 3526(c)(4)(A); Arnold v. United States, 404 F.2d 953 (Ct. Cl. 1968); B-205587, June 1, 1982.

[36] Prior decisions had not been entirely clear on precisely which date to use. E.g., B-220689, September 24, 1986 (date of debit voucher); B-213874, September 6, 1984 (inclusion in statement of accountability). B-226393 established the propositions stated in the text and modified prior decisions accordingly.

E. Other Relief Statutes

The relief statutes discussed thus far—31 U.S.C. §§ 3527(a), (b), (c), and 3528—are the ones most commonly encountered and will cover the vast majority of cases. Several others exist, however. Our listing here is not intended to be complete.

1. Statutes Requiring Affirmative Action

The statutes in this group are similar to 31 U.S.C. §§ 3527 and 3528 in that they require someone to actually make a relief decision.

a. United States Claims Court

The relief authority of the Claims Court is found in two provisions of law:

> "The United States Claims Court shall have jurisdiction to render judgment upon any claim by a disbursing officer of the United States or by his administrator or executor for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records, or other papers in his charge, " 28 U.S.C. $1496.

> "Whenever the United States Claims Court finds that any loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the General Accounting Office shall allow the officer such amount as a credit in the settlement of his accounts. " 28 U.S.C. $2512.

These provisions, which originated together in legislation enacted in 1866 (14 Stat. 44), predate all of the other relief statutes and were once the only relief mechanism available apart from private relief legislation. The Supreme Court has termed the Claims Court legislation "a very curious provision" in that it permits a disbursing officer to establish a defense to a claim which "the government can only establish judicially in some other court." United States v. Clark, 96 U.S. (6 Otto) 37, 43 (1877). In effect, it authorizes the Claims Court to render a declaratory (as opposed to money) judgment. Ralcon, Inc. v. United States, 13 Cl. Ct. 294,300 (1987). Now, in view of the comprehensive scheme of administrative relief Congress has enacted, the Claims Court statute is rarely used.

b. Legislative Branch Agencies

Since 31 U.S.C. $3728, the primary certifying officer relief statute, does not apply to the legislative branch, Congress has enacted specific statutes for several legislative branch agencies authorizing or requiring the designation of certifying officers, establishing their accountability, and authorizing the Comptroller General to grant relief. Patterned after 31 U.S.C. $3728, they are: 2 U.S.C. § 142b (Library of Congress); 2 U.S.C. § 142e (Congressional Budget Office);

2 U.S.C. § 142f (Office of Technology Assessment); and 44 U.S.C. § 308 (Government Printing Office).

c. Savings Bond Redemption Losses

Losses resulting from the redemption of savings bonds are replaced from the fund used to pay claims under the Government Losses in Shipment Act. 31 U.S.C. § 3126(a). The statute further provides that "an officer or employee of the Department of the Treasury is relieved from liability to the United States Government for the loss when the Secretary [of the Treasury] decides that the loss did not result from the fault or negligence of the. . . officer, or employee." Relief is mandatory if the government does not give the officer or employee written notice of his or her liability or potential liability within 10 years from the date of the erroneous payment. Id.

2. statutes Providing "Automatic" Relief

The statutes in this group either (1) provide that taking a certain authorized action which might otherwise be regarded as creating a loss will not result in accountable officer liability, or (2) authorize the resolution of certain losses in such a manner as not to produce liability.

a. Waiver of Indebtedness

Many statutes authorize the government to waive the recovery of indebtedness resulting from various overpayments or erroneous payments if certain conditions are met. Waiver statutes commonly include a provision to the effect that accountable officers will not be held liable for any amounts waived. For example, the statutes authorizing waiver of overpayments of pay and allowances require that full credit be given in the accounts of accountable officers for any amounts waived under the statute. 5 U.S.C. § 5584(d) (civilian employees); 10 U.S.C. § 2774(d) (military personnel); 32 U.S.C. § 716(d) (National Guard). Once waiver is granted, the payment is deemed valid and there is no need to consider the question of relief. E.g., B-184947, March 21, 1978. This result applies even where relief has been denied under the applicable relief statute. B-177841-O. M., October 23, 1973.

Examples of comparable provisions in other waiver statutes are 5 U.S.C. § 8129(c) (overpayments under Federal Employees Compensation Act), 38 U.S.C. § 5302(d) (overpayment of veterans' benefits) and 42 U.S.C. § 404(c) (Social Security Act).

b. Compromise of Indebtedness

Under the Federal Claims Collection Act, if a debt claim is compromised in accordance with the statute and implementing regulations, no accountable officer will be held liable for the portion unrecovered by virtue of the compromise. 31 U.S.C. § 371 l(d).

c. Foreign Exchange Transactions

Earlier in this chapter we discussed 31 U.S.C. § 3342(c), which authorizes, with respect to activities authorized under section 3342(a), losses to be offset against gains on a fiscal-year basis, and also authorizes appropriations to make adjustments for net losses. Our prior discussion was in the context of check cashing operations. Another important use of 31 U.S.C. § 3342(c) is accounting for certain foreign exchange losses. To implement this authority in the foreign exchange area, the Treasury Department has issued regulations (Treasury Department Circular No. 830 and I Treasury Financial Manual Chapter 4-9000), and has established an account entitled "Gains and Deficiencies on Exchange Transactions" (I TFM § 4-9090.10). As with the check cashing context, the relevant point here is that the use of 31 U.S.C. § 3342(c) accomplishes the necessary account adjustment and obviates the need to seek relief for any accountable officer.

One use of the Gains and Deficiencies account is the adjustment of losses due to exchange rate fluctuations. E.g., 64 Comp. Gen. 152 (1984) (restoration of losses in Library of Congress foreign currency accounts attributable to currency devaluations); 61 Comp. Gen. 649 (1982) (determination of proper exchange rate); B-245760, January 16, 1992 (devaluation of Laotian currency). However, in order to use the Gains and Deficiencies account, losses must result from "disbursing officer transactions" of the type authorized by 31 U.S.C. § 3342(a). 45 Comp. Gen. 493 (1966). In that case, the American Embassy in Cairo had made a payment for certain property in Egyptian pounds. The sales agreement was not executed and the money was refunded. At the time of the refund, the exchange rate had changed and the same amount of Egyptian pounds was worthless in U.S. dollars, resulting in a loss to the account. GAO agreed with the Treasury Department that the loss resulted from an administrative collection and not from a disbursing officer transaction, and should therefore be borne by the relevant program appropriation rather than the Gains and Deficiencies account.

GAO has also considered the use of the Gains and Deficiencies account in a number of cases invoking Vietnamese and Cambodian currency after the American evacuation from those countries in the mid-1970s. 56 Comp. Gen. 791 (1977), overruled in part by 61 Comp. Gen. 132 (1981) (piaster currency physically abandoned or left in accounts in Vietnam chargeable to Gains and Deficiencies); B-197708, April 8, 1980 (Vietnamese and Cambodian currency received by Treasury from U.S. disbursing officers at exchange rate in effect at time of evacuation subsequently became valueless; loss held to be of the type contemplated by 31 U.S.C. § 3342(c)). However, U.S. currency which was thought to have been burned but which subsequently turned up in the United States had to be treated as a physical loss. 56 Comp. Gen. at 793–96. (Relief was granted for this loss under 31 U.S.C. § 3527(a) in B-209978, July 18, 1983.)

d. Check Forgery Insurance Fund

The Check Forgery Insurance Fund is a revolving fund the purpose of which is to make replacement payments to payees whose Treasury checks have been lost or stolen and cashed over a forged endorsement in limited situations. 31 U.S.C. $3343. Before the Fund may be used, four conditions must be satisfied: (1) the check is lost or stolen without fault of the payee; (2) the check is subsequently negotiated over the payee's forged endorsement; (3) the payee did not participate in any part of the proceeds of the check; and (4) recovery from the forger or other liable party has been or will be delayed or unsuccessful.[37] Id. § 3343(b). Any recoveries are restored to the Fund. Id. § 3343(d).

A forged endorsement for purposes of the statute has been held to include an unauthorized endorsement purported to be made in a representative capacity. Strann v. United States, 2 Cl. Ct. 782 (1983) (plaintiffs attorney endorsed tax refund check without authority). The third condition, participation in the proceeds, does not require a knowing participation. Koch v. Department of Health, Education, and Welfare, 590 F.2d 260 (8th Cir. 1978); Duden v. United States, 467 F.2d 924 (Ct. Cl. 1972). In Duden, for example, the plaintiffs former husband endorsed her name on a tax refund check and subsequently paid her part of the proceeds for support. She had no way of knowing that the payment came from those proceeds. While the endorsement was held not to be a forgery under the facts involved, the court also

[37] To facilitate prosecution, GAO has advocated the enactment of a federal misdemeanor law for forged Treasury checks. Forgery of U.S. Treasury Checks—Federal Misdemeanor Law Needed, GAO/GGD-84-6 (November 17, 1983).

noted that the plaintiff's participation in the proceeds would preclude recovery from the Check Forgery Insurance Fund. 467 F.2d at 930.

The bank presenting a check to the Treasury for payment guarantees the genuineness of prior endorsements. 31 C.F.R. $240.5. Thus, in many cases, the government will be able to recover from the presenting bank. E.g., Olson v. United States, 437 F.2d 981, 986–87 (Ct. Cl. 1971), cert. denied, 404 U.S. 939.

There is no mention of accountable officers in 31 U.S.C. $3343. However, a payment from the Check Forgery Insurance Fund means that only one payment is charged to the appropriations of the agency incurring the original obligation, with the effect that no accountable officer of that agency incurs any liability. See B-10929, February 1, 1972.

e. Secretary of the Treasury

Enacted in 1947 (61 Stat. 730), 31 U.S.C. § 3333 provides that the Secretary of the Treasury will not be liable for payments made "in due course and without negligence" of checks drawn on the Treasury or a depositary, or other obligations guaranteed or assumed by the United States, and that the Comptroller General "shall credit" the appropriate accounts for such payments. At one time, many duplicate check losses were handled under 31 U.S.C. $3333. See 62 Comp. Gen. 91 (1982). It was Treasury's practice to accumulate the cases and submit them in groups, e.g., B-1 15388, October 12, 1976, and B-71585, February 24, 1948, with credit being allowed as a matter of routine. With the development of Treasury's previously discussed recertification procedure, much of the need to invoke 31 U.S.C. § 3333 evaporated. While many of the earlier cases involved an exchange of correspondence between Treasury and GAO, nothing in the statute requires it, especially since GAO no longer maintains accounts and "relief" is mandatory anyway.

f. Other Statutes

There are several other statutes affecting the liability of accountable officers in a variety of contexts. A few of them are:

- 5 U.S.C. $8321. Accountable officers are not liable for payments in violation of statutes prescribing forfeiture of retirement annuities or retired pay as long as the payments are made "in due course and without fraud, collusion, or gross negligence." The reason for this statute was to avoid having to deny relief under 31 U.S.C. § 3528(b) for payments made in good faith solely because the payments are specifically prohibited by law. B-122068, March 18, 1955.

- 31 U.S.C. § 3521(c). Previously noted, this statute protects accountable officers from liability for losses under an authorized statistical sampling procedure.
- 42 U.S.C. § 659(f). Disbursing officers are not liable for payments under garnishment process which is "regular on its face" and in compliance with 42 U.S.C. § 659. See 61 Comp. Gen. 229 (1982).

F. Procedures

1. Reporting of Irregularities

Agencies are required to document each fiscal irregularity that affects the account of an accountable officer, regardless of how it is discovered. The report is retained as part of the account records and a copy provided to the accountable officer and, in certain situations, to GAO. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 8.4.B. The contents of the report are set forth in 7 GAO-PPM § 8.12.A, and include such things as a description of how the irregularity occurred and a description of any known procedural deficiencies and corrective action.

The agency's next job is to attempt to resolve the irregularity, most importantly by pursuing collection action against the improper payee or recipient where possible. Recovery of the funds of course ends the matter. If the funds cannot be recovered and the case is one in which the agency may grant relief without GAO involvement, consideration of relief is the next step. If the matter is resolved administratively in either of these ways, the record should be further documented as specified in 7 GAO-PPM § 8.12.B (required administrative determinations, etc.). There is no need to report resolved irregularities to GAO.

If the irregularity cannot be resolved administratively within two years after the date the account is available for audit, and if the loss exceeds the monetary limit established for administrative resolution, the agency should then submit to GAO either a copy of the updated irregularity report or a relief request if appropriate. 7 GAO-PPM § 8.4.C. This 2-year guideline is especially important for improper payments in view of the 3-year statute of limitations of 31 U.S.C. § 3526(c). Thus, below-ceiling losses need not be reported to GAO at all; above-ceiling losses should be reported only if unresolved at the end of the 2-year period. Of course, the agency may request relief sooner if desired.

2. Obtaining Relief

The GAO official designated to exercise the Comptroller General's authority under the various relief statutes is the Associate General Counsel, Accounting and Financial Management Division, Office of General Counsel. Relief requests where GAO action is necessary should be addressed to GAO's Office of General Counsel. The request may be in simple letter format and should include all items specified in 7 GAO-PPM § 8.12.C. These include a copy of the irregularity report, a description of collection actions taken, and any required administrative determinations. Of particular importance is a written statement by the accountable officer or a notation that the accountable officer chooses not to submit a separate statement. Relief will be granted or denied in the form of a letter addressed to the official who submitted the request.

In arty case in which GAO has denied relief, the agency, or the accountable officer through appropriate administrative channels, may ask GAO to reconsider. GAO will not hesitate to reverse a decision shown to be wrong. Any request for reconsideration should set forth the errors which the applicant believes have been made, and should include evidence (not mere unsupported allegations) to support the basis for relief, for example, that the original denial failed to consider certain evidence or to give it appropriate weight or relied too heavily on other evidence in the record. Denials of relief are often based not so much on the merits of the case but simply on the failure of the original request to include sufficient information to enable an independent evaluation. Of course, if the agency cannot or is unwilling to make a required statutory determination, there is nothing GAO can do and a request for reconsideration is pointless.

3. Payments of $100 or Less

In B-161457, July 14, 1976, a circular letter to all department and agency heads, disbursing and certifying officers, the Comptroller General advised as follows:

"[I]n lieu of requesting a decision by the Comptroller General for items of $25 or less, disbursing and certifying officers may hereafter rely upon written advice from an agency official designated by the head of each department or agency. A copy of the document containing such advice should be attached to the voucher and the propriety of any such payment will be considered conclusive on the General Accounting Office in its settlement of the accounts involved."

The amount has since been raised to $100.7 GAO-PPM § 8.3. This does not preclude a certifying or disbursing officer from seeking a decision if deemed necessary since the entitlement to advance decisions is statutory, but it does provide a means for simplifying the payment of very small amounts. An accountable officer is not liable for a payment made under this authority even if the payment is subsequently found to be improper or erroneous. The $100 threshold applies equally to questions arising after payment has been made. 61 Comp. Gen. 646,648 (1982).

4. Relief vs. Grievance Procedures

Federal employees have the right to organize and to bargain collectively with respect to conditions of employment. 5 U.S.C. §7102. Collective bargaining agreements may include negotiated grievance procedures, which may in turn provide for dispute resolution by binding arbitration. Id. §7122. The Federal Labor Relations Authority decides questions over an agency's duty to bargain in good faith under 5 U.S.C. § 7105(a)(2)(E). Agencies have a duty to bargain in good faith to the extent not inconsistent with federal law. Id. §7117. The FLRA also decides appeals alleging that an arbitration award is contrary to federal law. Id. §7122.

Since the authority to relieve accountable officers is provided by statute, both GAO and the FLRA have determined that negotiated grievance procedures may not be used as a substitute for making the relief decision. B-213804, August 13, 1985; National Treasury Employees Union and Internal Revenue Service, 14 F. L.R.A. 65 (No. 15, 1984). The same result applies to the State Department's separate statutory grievance procedures. 67 Comp. Gen. 457 (1988).

However, a grievance procedure may encompass an agency head's determination that an accountable officer is negligent, as distinguished from the actual relief decision. National Treasury Employees Union and Internal Revenue Service, 33 F. L.R.A. 229 (No. 26, 1988), citing 59 Comp. Gen. 113 (1979) for the proposition that GAO's statutory role does not arise until after the agency head has made the requisite determination.

G. Collection Action

1. Against Recipient

A person who receives money from the government to which he or she is not entitled, however innocently, has no right to keep it. The recipient is indebted to the government, and the agency making the improper or erroneous payment has a duty to attempt to recover the funds, wholly independent of any question of liability or relief of an accountable officer. The duty to aggressively pursue collection action and the means of doing so are found primarily in the Federal Claims Collection Act, 31 U.S.C. ch. 37, subch. II, and the Federal Claims Collection Standards, 4 C.F.R. Parts 101 –105, the details of which are covered elsewhere in this publication. Indeed, many of the statutes we have previously discussed emphasize that the relief process does not diminish this duty. E.g., 31 U.S.C. §§ 3333(b), 3343(e), 3526(c)(4), 3527(d)(2).

Recovery from the improper payee or recipient removes the accountable officer's liability regardless of whether relief has or has not been sought because there is no longer any loss. However, merely "flagging" the retirement account of an employee who has received an overpayment, for possible collection at some unpredictable future time, is not enough as it would delay indefinitely the final settlement of the account. 31 Comp. Gen. 17 (1951).

In a sense, the recipient and the unrelieved accountable officer share an element of joint liability. The occasional decision has referred to this as "joint and several" liability, but it has been pointed out that this is incorrect. E.g., B-228946, January 15, 1988. If two debtors are "jointly and severally" liable, the creditor has the option of collecting the full amount from either, with the debtor who pays then having a right of contribution against the remaining debtor(s). Certainly no one would suggest that someone who has defrauded the government and repays the debt has any right of contribution against the accountable officer. Also, under joint and several liability, the creditor may seek to collect a portion from each debtor. The agency in an accountable officer loss has no such option. B-212602, April 5, 1984. The agency's first obligation is to seek recovery from the recipient. The recipient of an improper payment is liable for the full amount, with any amounts collected used to reduce the accountable officer's liability. Id.; 30 Comp. Gen. 298,300 (1951). See also 62 Comp. Gen. 476, 478–79 (1983); 54 Comp. Gen. 112,114 (1974).

So strong is this duty to seek recovery from the improper payee or recipient that the two primary relief statutes for improper payments explicitly authorize GAO to deny relief if the agency has failed to diligently pursue collection action against the recipient. 31 U.S.C. §§ 3527(c) (disbursing officers), 3528(b)(2) (certifying officers). GAO is extremely reluctant to deny relief solely on the basis of inadequate collection action because often the failure is attributable to the agency rather than the accountable officer. However, it has been done. E.g., B-234815, October 3, 1989 (disbursing officer failed to initiate collection action despite repeated advice from agency counsel).

Adequate collection action means compliance with the Federal Claims Collection Act and Standards. 62 Comp. Gen. 476, 478–79 (1983); B-233870, May 30, 1989. A single demand letter is not enough. 62 Comp. Gen. 91,98 (1982). Resort to the Federal Claims Collection Act and Standards includes those collection measures, as and to the extent authorized, which result in collection of less than the full amount, for example, compromise. A compromise, including one by the Justice Department, not only resolves the claim against the recipient but operates as well to relieve the accountable officer for any amounts unrecovered because of the compromise. 31 U.S.C. § 371 l(d); 65 Comp. Gen. 371 (1986). Whether or not the accountable officer is entitled to relief does not affect the compromise authority. B-154400-O. M., January 29, 1968; B-156846-O. M., October 25, 1967. However, 31 U.S.C. § 371 l(d) does not apply to any liability which may fall upon one who is not an accountable officer. B-235048, April 4, 1991. The authority to suspend or terminate collection action is also available, but only in accordance with the claims collection act and regulations. 67 Comp. Gen. 457, 464 (1988); B-212337, February 17, 1984; B-21 1660, December 15, 1983. Unlike compromise, the termination of collection action against the recipient does not eliminate the accountable officer's liability for any unrecovered balance. 67 Comp. Gen. at 464.

Adequate collection action also requires referral of the claim to the appropriate collection office within the agency without undue delay. GAO has advised the Army, for example, that a delay of more than three months will generally not be regarded as diligent. 65 Comp. Gen. 812 (1986).

While diligent collection action is a necessary element of the relief equation, the fact that collection efforts have been unsuccessful, however diligent, does not by itself provide the basis for relieving the accountable officer. B-141838, February 8, 1960; B-l 14042, October 31, 1956.

2. Against Accountable Officer

If a loss cannot be recovered from the thief or other improper payee or recipient, and relief cannot be granted to the accountable officer, the accountable officer becomes indebted to the government for the amount involved. At that point, it is the agency's responsibility to initiate collection action against the accountable officer in accordance with the Federal Claims Collection Act and Standards. E.g., B-177430, October 30, 1973.

If the accountable officer is still employed by the government, additional statutes come into play. Offset against salary is prescribed by 5 U.S.C. § 5512(a):

> "The pay of an individual in arrears to the United States shall be withheld until he has accounted for and paid into the Treasury of the United States all sums for which he is liable."

This statute does not apply to ordinary debtors but only to accountable officers. 37 Comp. Gen. 344 (1957); 23 Comp. Gen. 555 (1944); 26 Op. Att'y Gen. 77 (1906). It has also been held that the provisions of 5 U.S.C. § 5512(a) are mandatory and cannot be waived. 64 Comp. Gen. 606 (1985); 39 Comp. Gen. 203 (1959); 19 Comp. Gen. 312 (1939).

The application of 5 U.S.C. § 5512(a) to certain military accountable officers is limited by 37 U.S.C. § 1007(a), which prohibits withholding the pay "of an officer" under section 5512 unless the indebtedness is "admitted by the officer or shown by the judgment of a court, or upon a special order issued in the discretion of the Secretary concerned." Subsection 1007(a) applies to "officers," meaning commissioned or warrant officers, and not to enlisted personnel or civilian accountable officers. 37 Comp. Gen. 344,348 (1957). The admission maybe oral or written but, if oral, should be clear and unequivocal and preferably witnessed. 42 Comp. Gen. 83 (1962). The discretion to apply 5 U.S.C. § 5512(a) exists only in the absence of an admission or court judgment. Id.

The original version of 5 U.S.C. § 5512(a), enacted in 1828 (4 Stat. 246), provided that "no money shall be paid" to the person in arrears until the debt is repaid. Thus, several early decisions exist for the somewhat barbaric proposition that the statute requires complete stoppage of pay. E.g., 9 Comp. Gen. 272 (1930); 7 Comp. Gen. 4 (1927). While these and similar early decisions have not been explicitly overruled, the current view is that the statute will be satisfied by withholding in reasonable installments. 64 Comp. Gen. 606 (1985); B-180957-O. M., September 25, 1979. Collection in installments is also authorized when operating under 37 U.S.C. § 1007(a). 42 Comp. Gen. 83,85 (1962). For employees no longer on the payroll, offset under 5 U.S.C. § 5512(a) has been held to embrace collection from retirement funds to the extent authorized. Parker v. United States, 187 Ct. Cl. 553,559 (1969); 39 Comp. Gen. 203,206 (1959). GAO has also approved "flagging" the retirement account of an accountable officer still on the payroll. B-217114, February 29, 1988.

When applying 5 U.S.C. § 5512(a) or 37 U.S.C. § 1007(a), the procedures to be followed are those prescribed by 4 C.F.R. §§ 102.3 and 102.4 for administrative offsets under 31 U.S.C. $3716.64 Comp. Gen. 142 (1984).

If pay is withheld under 5 U.S.C. § 5512(a), the statute provides a means to obtain judicial review of the indebtedness. Under 5 U.S.C. § 5512(b), GAO is required, upon the request of the individual or his or her agent or attorney to immediately report the balance due to the Attorney General, and the Attorney General is required within 60 days to order suit to be commenced against the individual. This provision was part of the original 1828 legislation, several decades prior to either the Tucker Act or the establishment of the Court of Claims, at a time when there was no other means available for the accountable officer to initiate judicial proceedings. It now exists as one way among several. Installment deductions are not required to stop during the litigation; if the accountable officer prevails, amounts collected are refunded. 64 Comp. Gen. 606, 608 (1985). Sample referrals under 5 U.S.C. § 5512(b) are 64 Comp. Gen. 605 (1985); B-217114.7, May 6, 1991; and B-220492, December 10, 1985.

H. Restitution, Reimbursement, and Restoration

1. Restitution and Reimbursement

In the present context, restitution means the repayment of a loss by an accountable officer from personal funds; reimbursement means the refunding to an accountable officer of amounts previously paid in restitution. Prior to 1955, there was no statutory authority to permit the reimbursement of an accountable officer who had made restitution to the government for a physical loss. Once an accountable officer made restitution (if, for example, the agency required it), the decisions held that there was no longer a deficiency in the account for which relief could be considered. 27 Comp. Gen. 404 (1948); B-101301, July 19, 1951.

Legislation in 1955 (69 Stat. 626) amended what is now 31 U.S.C. § 3527(a) and 31 U.S.C. § 3527(b) to expressly authorize reimbursement of the accountable officer for any amounts paid in restitution, if relief is granted. Accordingly, restitution by the accountable officer in physical loss cases is no longer an impediment to the granting of relief. E.g., B-155149, October 21, 1964; B-126362, February 21, 1956. The 1955 legislation amended only the physical loss relief statutes. There is no comparable reimbursement authority in the improper payment relief statutes, 31 U.S.C. §§ 3527(c) and 3528. B-226393, April 29, 1988; B-223840, November 5, 1986; B-128557, September 21,1956.

An obvious limitation on the reimbursement authority was illustrated in B-187021, January 19, 1978. An imprest fund cashier sought reimbursement, claiming that she had discovered money missing from her cash box and replaced it from personal funds. However, by virtue of her actions in initially concealing the loss, she was unable to show that the loss had in fact ever occurred. Since the loss could not be established, reimbursement was denied. Thus, an accountable officer should always report a loss before making restitution.

2. Restoration

Restoration of an account suffering a loss or deficiency-an accounting adjustment to restore the shortage with funds from some other source–is authorized under two provisions of law, 31 U.S.C. §§ 3527(d) and 3530. The Comptroller General is required by 31 U.S.C. § 3530(c) to prescribe implementing regulations. These are found in title 7 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies, § 8.14.

a. Adjustment Incident to Granting of Relief

If relief is granted under either 31 U.S.C. § 3527(a) or 31 U.S.C. § 3527(c), GAO may authorize restoration of the account. Restoration is accomplished by charging either an appropriation specifically available for that purpose or, if there is no such appropriation, the appropriation or fund available for the accountable function. The charge is made to the fiscal year in which the adjustment is made, and not the fiscal year in which the loss occurred. 31 U.S.C. § 3527(d). Subsection (d) applies only to subsections (a) and (c), and not to subsection (b) (military disbursing officers). However, the military departments have separate authority in 10 U.S.C. §§ 2777(b) and 2781. There is no restoration provision in 31 U.S.C. $3528.

Whenever account adjustment is deemed necessary, the agency should include in its relief request a citation (account symbol) to the appropriation it proposes to charge. 7 GAO-PPM § 8.14.A. In cases where agencies are authorized to grant relief without GAO involvement, they may also exercise the restoration authority of 31 U.S.C. § 3527(d) without GAO involvement. Id. § 8.14.C.

A 1957 decision, 37 Comp. Gen. 224, considered the application of 31 U.S.C. § 3527(d) where one agency is disbursing funds on behalf of other agencies. State Department disbursing officers overseas, acting under delegations from the Treasury Department, were authorized to receive and disburse funds on behalf of other government agencies as well as the State Department. If the services were sufficiently extensive to warrant reimbursement, State charged the "user" agencies. Construing 31 U.S.C. § 3527(d), the Comptroller General held that losses in such a situation for which relief was granted but which could not be related to the functions of any particular agency or agencies should be charged to State Department appropriations because they were the appropriations available for the accountable function. "This phraseology clearly is intended to mean the appropriation of the department or agency to which the expenses of carrying on the particular disbursing function are chargeable." Id. at

226. Such adjustments could then be considered as part of the costs of the disbursing function for purposes of determining charges assessed against the user agencies and thus distributed to all user agencies in the same manner as other costs. Id. Twenty years later, GAO reached the same result with respect to losses of United States currency incident to the 1975 evacuation from Vietnam. 56 Comp. Gen. 791, 796–97 (1977).

b. Other Situations

If a loss is due to fault or negligence by an accountable officer, and the agency head determines that the loss is uncollectible, the amount of the loss maybe restored by a charge to the appropriation or fund available for the expenses of the accountable function. 31 U.S.C. § 3530(a). Uncollectible includes uncollectible from the accountable officer. E.g., B-177910, February 20, 1973. As with adjustments under 31 U.S.C. § 3527(d), section 3530(a) requires the loss to be charged to the appropriation available for the fiscal year in which the adjustment is made (appropriation "currently available"). This authority applies (1) where relief is denied, or (2) where the agency does not seek relief, the uncollectibility determination being required in either event. Representative cases are B-235405, March 19, 1990; B-219246, September 9, 1985; B-188715, January 31, 1978; and B-167827, February 4, 1975.

Assuming the statutory conditions are met, adjustments under 31 U.S.C. § 3530 are made directly by the agency with no need for specific authorization or concurrence from GAO. 7 GAO-PPM § 8.14.D. Restoration under section 3530 is merely an accounting adjustment and does not affect the accountable officer's personal liability. 31 U.S.C. § 3530(b). Thus, although the adjustment is premised on a determination of uncollectibility, collection efforts should resume if warranted by future developments.

The statutes described above, 31 U.S.C. §§ 3527(d) and 3530, will cover most situations in which restoration is needed in that relief is mostly either granted or denied or not sought. There are, however, situations in which neither statute applies. For example, a thief fraudulently obtained over $10,000 from the patients trust account at a VA hospital. He was convicted and ordered to make restitution. The restitution order was lifted 3 years later, but the VA had by then recovered only a small portion of the loss. The VA decided that pursuing the thief any further would be fruitless, and it had previously determined that there had been no fault or negligence by the accountable officer.

The VA was faced with a dilemma. Clearly the loss had to be restored since the trust account consisted of money belonging to patients, and just as clearly VA's operating appropriations were the only available source. The problem was how to get there. Since the 3-year statute of limitations on account settlement (31 U.S.C. § 3526(c)) had expired, relief could no longer be considered, so 31 U.S.C. § 3527(d) could riot be used. Equally unavailing was 31 U.S.C. § 3530 since the loss did not result from the accountable officer's fault or negligence. However, since the VA had an undisputed obligation as trustee to return the trust funds to their rightful owners upon demand, the loss could be viewed as an expense of managing the trust fund. The solution therefore was to restore funds from the unobligated balance of VA's operating appropriation for the fiscal year in which the loss occurred. 68 Comp. Gen. 600 (1989). The authority to make adjustments from the unexpended balances of prior years' appropriations is now found in 31 U.S.C. § 1553(a). Once an account has been closed, generally 5 fiscal years after expiration, 31 U.S.C. § 1553(b) requires that the adjustment be charged, within certain limits, to current appropriations. Thus, the authority now found in 31 U.S.C. § 1553 may provide an alternative if neither 31 U.S.C. § 3527(d) nor 31 U.S.C. § 3530 is available. Of course, if the account to be restored has itself been closed pursuant to 31 U.S.C. §§ 1552(a) or 1555, restoration is no longer possible.