

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548**FILE:** B-219161**DATE:** October 2, 1985**MATTER OF:** Department of Education: Recording of obligations under the Guaranteed Student Loan Program**DIGEST:**

The Department of Education administers a variety of entitlement programs within the Guaranteed Student Loan Program. In recording and reporting obligations, the Department should: (1) treat loan guarantees as contingent liabilities, recording obligations as default payments are required; and (2) record obligations under subsidy provisions of the program based on best estimates of payment requirements, making any adjustments as they become necessary. Since both types of obligations are authorized by law, recording such mandatory obligations, even if in excess of available funds, would not violate the Antideficiency Act.

This responds to a request by the Deputy Under Secretary for Planning, Budget and Evaluation, Department of Education (Department) for our opinion as to the proper method for recording and reporting obligations for certain program activities under the Guaranteed Student Loan Program. Specifically, the Department has requested that we review its traditional method of recording and reporting obligations for the "mandatory" or entitlement portions of the Guaranteed Student Loan Program, and that we determine whether current practices are consistent with the requirements of the Antideficiency Act, 31 U.S.C. § 1341 (1982). As discussed in further detail below, it is our view that the Department should cease its current practice of limiting the recording and reporting of actual and estimated obligations for entitlement payments to the level of available budgetary resources. The Department would not violate the Antideficiency Act if the total obligations it records for these mandatory payments exceed available resources.

BACKGROUND

The Student Loan Guarantee Program, was established by the Congress in part B of title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1071-87-2 (1982). Through the program, the Federal Government provides a

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variety of assistance to qualifying borrowers, lenders, and to State and nonprofit institutions, through loan guarantees, interest subsidies, payment of benefits, and allowances. Some program activities are carried out at the discretion of the Secretary of Education. See, e.g., 20 U.S.C. § 1078(f) (special payments to State and nonprofit institutions for administrative costs). Others, although administered by the Secretary, constitute entitlements, for which beneficiaries qualify by meeting the criteria specified in the Act. See, e.g., 20 U.S.C. § 1078 (interest subsidy); 20 U.S.C. § 1080 (default payments under loan guarantee agreements); 20 U.S.C. § 1087 (loan repayments at death, disability or bankruptcy of borrower).

The Department's submission, in describing its current practices for recording and reporting obligations under the mandatory provisions of the Guaranteed Student Loan Program, distinguishes between obligations arising from loan guarantees and those arising from subsidies:

- "1. Sections 430 and 431 [of the Higher Education Act of 1965, 20 U.S.C. §§ 1080-81] direct the Secretary to pay the lender upon the default of student borrowers. Section 437 directs the Secretary to repay loans in case of the death, disability, or bankruptcy of student borrowers. Obligations are recorded and reported upon the receipt and approval of claims for payment. Obligations are not made and are not recorded or reported in excess of available budgetary resources.
- "2. Section 428(a)(3)(A) [20 U.S.C. § 1078(a)(3)(A)] directs the Secretary to pay a portion of the interest due to the lender on behalf of student borrowers. Section 438(b)(1) [20 U.S.C. § 1087-1(b)(1)] directs the payment of special allowances to lenders. Recorded and reported obligations are estimates based on an estimate of outstanding loans at the end of each quarter. Payments occur in the following quarter, at which time adjustments are made to the amounts of previously recorded estimated obligations. Obligations in excess of resources are not reported." (Emphasis in original.)

The Department states that obligations are considered "recorded" when posted in the Department's financial accounting system, and are "reported" by inclusion in the official reports of the Department.

According to the Department, it is difficult to estimate in advance the specific amount that it will be required to pay out under the mandatory portion of the Guaranteed Student Loan Program, as costs of the program are directly affected by changes in economic conditions. The Department states that it frequently seeks--and is provided--supplemental appropriations in cases where its estimates prove to be low. Where supplemental appropriations are not provided in sufficient amounts, or are not timely enacted, the Department (1) ceases all obligational activity and payments under its discretionary programs, and (2) limits the recording and reporting of obligations for mandatory activities to the amount of available budgetary authority. The Department's submission seeks our views as the propriety of this latter action and whether it may obligate funds for mandatory expenditures in excess of available budgetary authority without violating the Antideficiency Act.

DISCUSSION

The first issue concerns the manner in which the Department has been and should be recording actual and, where appropriate, estimated mandatory obligations arising under the Guaranteed Student Loan Program. These mandatory obligations are of two types--loan guarantees and subsidies--and each will be considered in turn.

Recording Obligations Arising From Loan Guarantees.
This Office has previously addressed the question of obligating funds under Federal loan guarantee programs. In a recent case involving the Farmers Home Administration's guaranteed loan programs, we stated the rule that loan guarantees are to be accounted for as contingent liabilities, with no recordable obligation arising until a default has occurred and the Government's liability established:

" * * * Our Office has taken the position that a loan guarantee is only a contingent liability that does not meet the criteria for a valid obligation under 31 U.S.C. § 200. Ordinarily, when a loan is guaranteed by the Federal Government, an obligation is only recorded if, and when, the borrower defaults--and a Federal outlay is necessarily required to honor the guarantee. This will not usually take place, if at all, in the same fiscal year in which the loan guarantee was initially approved. * * * Thus, we have held that it is not necessarily required that funds be available in the underlying revolving fund, or

elsewhere, before the agency may approve a loan guarantee so long as the guarantee itself is authorized and within whatever annual monetary limits Congress has placed on it." 60 Comp. Gen. 700, 703 (1981).

See also B-214172, February 20, 1985; 58 Comp. Gen. 138, 147 (1978).

As we understand the Department's procedures for recording and reporting obligations arising out of its loan guarantee program, they conform in part to the principles set forth in the quoted decision. That is, the Department does not record an obligation until one of the contingencies set forth in the statute (loan default, or the death, disability, or bankruptcy of the borrower) has occurred. This is the correct procedure. However, we do not believe that the Department can legitimately refuse to record an obligation once one of the contingencies has occurred, even if the Department does not have sufficient budgetary resources to liquidate the total obligations so recorded. Under the terms of the statute (and presumably the loan guarantee agreement as well), the Department becomes legally obligated to reimburse the beneficiary of the guarantee for any loss it has suffered once it has verified that the borrower has defaulted, or that any one of the other contingencies has occurred. The nature of the Department's obligation in this respect is clearly set forth in 20 U.S.C. § 1080 as follows:

"Upon default by the student borrower on any loan covered by Federal loan insurance pursuant to this part * * *, the insurance beneficiary shall promptly notify the Secretary, and the Secretary shall if requested (at that time or after further collection efforts) by the beneficiary * * * pay to the beneficiary the amount of the loss sustained by the insured upon that loan as soon as that amount has been determined."^{1/}

Our holding in 39 Comp. Gen. 422 (1959), which involved a similar issue, is relevant here. In that decision we said the following:

^{1/} Of course, even under this provision the Department might not be able to make the required payment on a defaulted loan until sufficient funds were available for it to do so. The unavailability of funds, however, should not have any impact on the agency's responsibility to record obligations as they occur.

"The general rule is that expenditures are properly chargeable to the appropriation for the fiscal year in which the liability therefor was incurred. There can be no doubt but that when administrative action is taken to grant pay increases effective on a specified date, there is imposed a legal liability upon the Government for payment of the additional compensation. Such action is sufficient to create an obligation against the appropriation current at the time the liability is incurred. The fact that the appropriation thereby obligated may be insufficient to discharge the obligation is immaterial insofar as determining when the obligation arises and the appropriation properly chargeable therewith. See 17 Comp. Gen. 664; 18 id. 363; 31 id. 608, 38 id. 81." 39 Comp. Gen. at 424-25.

The decision also stated that an agency's failure to properly record and report obligations as they occur "would violate the reporting requirements" of 31 U.S.C. § 1501(b). Id. at 425.

Similarly, when the borrower of a guaranteed student loan defaults, the Department becomes legally liable to pay the beneficiary of its guarantee and a valid obligation is thus created. The Department does not have the authority or the discretion, for whatever reason, to alter the date on which the Government's obligation to honor its guarantee actually arises by artificially changing the manner in which the obligation is recorded.

Recording Subsidy Payments. The second category of obligations at issue here are those resulting from mandatory program payments to lenders, including interest subsidies, under 20 U.S.C. § 1078(a), and special allowances, under 20 U.S.C. § 1087-1(b)(1). Unlike loan guarantees which are contingent liabilities until loan default or some other triggering event has occurred, these subsidy payments are in the nature of firm obligations of an indeterminate amount. As is true of other entitlement programs, these obligations arise by operation of law. Because, however, the number of eligible beneficiaries will vary--depending on external factors--the exact amount of the Government's obligation cannot be determined in advance (although it may of course, be estimated). Under the statute, the Department is legally obligated to pay these amounts to the lender. See 20 U.S.C. §§ 1078(a)(3)(A), 1087-1(b)(3).

In similar cases involving subsidy or other entitlement programs, our decisions have emphasized that the Government's "obligation" is the full amount required for payment under the applicable statute, even though that actual amount may not be finally determined until later. Thus, in B-164031(3).150, September 5, 1974, we held in essence that the obligation of the Secretary of Health, Education, and Welfare to make quarterly grant entitlement payments to States arose by operation of law, and that an erroneous estimate recorded by the Secretary did not alter this obligation. Similarly, in 63 Comp. Gen. 525 (1984) we held that when amounts are payable to recipients based on a statutory formula, the actual amount that is ultimately determined to be payable under the formula may be treated as obligated whether or not formal recordation has occurred. It has been our underlying position in these and other cases that under 31 U.S.C. § 1501(a)(5)(A),^{2/} the appropriate amount to be recorded initially as an obligation is the agency's best estimate of the Government's ultimate liability under the relevant entitlement legislation. See B-212145, September 27, 1983; 63 Comp. Gen. 525 (1984). Subsequent adjustments to the recorded estimate should be made if necessary.^{3/}

^{2/} This section reads as follows:

"(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of--

* * * * *

(5) a grant or subsidy payable--

(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law * * *."

^{3/} In an earlier case, we stated that we had no objection to the Civil Aeronautics Board's recording of obligations for mail rate subsidy payments at the time of payment rather than as obligations arose. B-126372, September 18, 1956. We stated that estimates of finalized obligations should not be recorded as obligations under the predecessor to 31 U.S.C. § 1501(a)(5). To the extent that decision is inconsistent with our opinion herein, it is overruled.

In accordance with the foregoing, it is our view that henceforth the Department should record obligations for mandatory subsidy payments (including special allowances) based on its best estimate of what those obligations are, even if the total of all such obligations exceeds available budgetary resources. Furthermore, if the estimate subsequently proves to be erroneous, the Department should make whatever adjustments are necessary so that the total of recorded obligations accurately reflects the actual amount of obligations incurred.

ANTIDEFICIENCY ACT

The remaining issue is whether the Department would violate the Antideficiency Act's prohibition on obligating or expending funds in excess of available appropriations if the obligations it records for either type of mandatory payment--guarantees or subsidies--exceeds available budgetary resources.^{4/} As indicated in the submission, the Department's past reluctance to record obligations for both types of activities in amounts exceeding available resources resulted from its desire to avoid any possible violation of the Antideficiency Act. The relevant portions of the Antideficiency Act are set forth at 31 U.S.C. § 1341(a)(1) as follows:

"An officer or employee of the United States Government * * * may not--

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

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

The prohibitions contained in the Antideficiency Act are not intended to ensure compliance with the provisions of 31 U.S.C. § 1501, which govern the largely ministerial task of recording obligations as they arise. See, e.g., B-133170, January 29, 1975. In fact, if an agency incurs obligations in excess of available appropriations without

^{4/} Since the analysis of this issue is essentially the same whether guarantee payments or subsidy payments are involved, they are discussed together.

authority to do so, the agency would be in violation of the Antideficiency Act regardless of whether the obligations were recorded by the agency. 62 Comp. Gen. 697, 700 (1983). Nevertheless, we do not believe that the Department would violate the Antideficiency Act if the obligations in question are incurred to fulfill the mandatory provisions of the Guaranteed Student Loan Program.

The prohibitions contained in the Antideficiency Act are directed at discretionary obligations entered into by administrative officers. See, e.g., 42 Comp. Gen. 272, 275 (1962); 63 Comp. Gen. 308, 312 (1984). As our Office has said, the Antideficiency Act specifically "provides an exception for obligations which are authorized by law to be made in excess of or in advance of appropriations." B-196132, October 11, 1974. See also 61 Comp. Gen. 586 (1982); B-156932, August 17, 1965.

Both types of mandatory obligations at issue here fall into the category of obligations authorized by, or perhaps even mandated by, law. Thus, when Congress authorizes the Department to extend loan guarantees in face amounts which may at any time far exceed available funding, and then requires the Department to promptly pay beneficiaries of those guarantees upon default by the borrower, it is expressly authorizing the Department to incur obligations in excess of or in advance of appropriations.^{5/}

^{5/} In this regard, we note that the Congress has historically provided supplemental appropriations to the Department to cover obligations in excess of amounts provided under the regular appropriation acts. See, e.g., H.R. Rep. No. 402, 97th Cong., 2d Sess. 11 (1982); S. Rep. No. 224, 96th Cong., 1st Sess. 83 (1979). See also H.R. Rep. No. 911, 98th Cong., 2d Sess. 122 (1984), which reads as follows:

"It is possible that the amount requested will not be adequate to cover the full year cost of the program as presently authorized due to changes in program participation and interest rates. Since this is an entitlement program, a supplemental budget request will be required if program appropriation levels are inadequate."

In clear recognition of the possibility that default payment obligations may exceed available resources, 20 U.S.C. § 1081(b) provides that if, at any time, moneys in the Student Loan Discount Fund (from which default payments are to be made) "are insufficient to make payments in connection with the default of any loan insured by the Secretary [of Education]", the Secretary is authorized, to the extent provided in advance in an appropriation act, to borrow needed funds from the Secretary of the Treasury. Thus, the statutory language itself contemplates the existence of a possible deficiency situation, providing another indication that the Antideficiency Act does not apply. See 61 Comp. Gen. 644, 650 (1982).

The situation with respect to subsidy payments is essentially the same. As stated earlier, the Department's obligation to pay interest subsidies (including special allowances) to lenders arises by operation of law and is mandated by the statute. None of the Department's administrative officers has any control over the amount the Department will be required to pay under the statutory provisions which state that the holder of a loan has a "contractual right" against the United States to receive these payments. 20 U.S.C. §§ 1078(a)(3)(A), 1087-1(b)(3). This is definitely not the type of discretionary expense the Antideficiency Act was intended to restrict, and clearly falls within the "unless authorized by law" exception contained in that Act.

To summarize, it is our position that the Department should record and report both types of mandatory obligations under the Guaranteed Student Loan Program as they arise regardless of the total amount of budgetary resources that are available. In doing so, the Department should record actual obligations or, where appropriate, its best estimate of what those obligations will be, making any adjustments that are subsequently required. The recording of such obligations by the Department, even if in excess of available funding, would not violate the Antideficiency Act.

for 
Comptroller General
of the United States