

B-167710-O.M.

MAY 6 1976

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Nonappropriated Fund Activities

Incident to your preparation of a listing of nonappropriated fund activities of the Government which GAO is authorized to audit under title III of Pub. L. 93-604, the General Accounting Office Act of 1974, 31 U.S.C. 135 ("Act"), you have asked us to supply you with a workable definition of nonappropriated fund activities. For purposes of GAO's authority under the Act, nonappropriated fund and related activities are those which are "*** authorized or operated by an executive agency to sell merchandise or services to military or other Government personnel and their dependents, such as the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, Exchange Councils of the National Aeronautics and Space Administration, commissaries, clubs and theaters ***."

The limited scope of section 301(a) was highlighted by the Comptroller General's testimony during hearings on S.3013, which became the GAO Act. He stated at that time:

"The authority provided in section 301 would extend generally to instrumentalities that are established and operated under the control of an executive department or agency for the benefit of its personnel, and that are financed from sources other than appropriations.

"The GAO does not propose to undertake the general responsibility for auditing of nonappropriated fund activities. We believe the primary responsibility should rest with the operating agencies concerned.

* * * * *

"There has been some confusion over the types of funds and activities that would be subject to GAO review under this title, and, as now drafted, the

title possibly could be interpreted to authorize review by GAO of certain funds and activities that were never intended to be covered by this title.

"For example, the language of title III perhaps is broad enough to encompass the Smithsonian Institution. However, this was not our intent. Title III is only intended to authorize review of those funds and activities that, if they were operated in the private sector, would be profitmaking enterprises.

"Amended language was included in the House bill that, I believe, clarifies this intent." Hearings before the Subcommittee on Budgeting, Management, and Expenditures of the Committee on Government Operations, United States Senate, 93d Cong., 2d Sess., August 7, 1974, at 6 (emphasis added).

Any activities that utilize nonappropriated funds and reasonably fall within the above definition would be subject to GAO audit authority under the Act. Since you have advised us of difficulties encountered in classifying certain activities which various executive agencies may or may not consider to be nonappropriated fund activities, we have reviewed other materials, including the legislative history of the Act and court cases, to attempt to provide a more general standard for determining whether or not a particular activity is a nonappropriated fund activity.

It would appear that the bulk of the nonappropriated fund activities have been established in the military departments under the general regulatory authority in 10 U.S.C. 3061 and similar statutes. The most significant of such activities are the officers' clubs and post exchanges. Nonappropriated fund activities have been acknowledged in several statutes over the years, but we are unable to find any current statute specifically providing for or authorizing the creation of nonappropriated fund activities. Thus we conclude that such activities derive their existence from the general authority of Federal agencies to regulate their internal operations.

Among the statutes recognizing nonappropriated fund activities are: 5 U.S.C. 2105(c), which excludes employees of Armed Forces nonappropriated fund activities from coverage of certain Civil Service laws, but which " * * * does not affect the status of these nonappropriated fund activities as Federal instrumentalities;" 5 U.S.C. 8171 et seq., which makes certain employees of nonappropriated fund activities described in 5 U.S.C. 2105 eligible for compensation for disability or death under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq.; the Tucker Act, Pub. L. 91-350, 28 U.S.C. 1346, 1491, 31 U.S.C. 724a, which extends Federal court jurisdiction to

contract claims involving military and NASA exchanges;*/ and H.O. 11137, 5 U.S.C. 5922 note, which includes nonappropriated fund activity employees in the term "employee" as used in the Overseas Differentials and Allowances Act, 5 U.S.C. 5922.

No concise definition has emerged from the numerous court cases dealing with nonappropriated fund activities. However, certain attributes can be derived from statements by the respective courts. In the principal case, Standard Oil Company of California v. Johnson, 316 U.S. 481 (1942), the Supreme Court held that U.S. Army Post Exchanges were instrumentalities of the Federal Government and as such partook of the Government's immunity from State taxation. By extension to other areas, it has been held that nonappropriated fund activities share the Government's sovereign immunity from suits to enforce their contractual obligations, except as such immunity has been waived by statute. Jaeger v. United States, 394 F.2d 944 (D.C. Cir. 1968). Conversely, employees of nonappropriated fund activities have been held liable for their negligence under the Federal Tort Claims Act, 28 U.S.C. 2674. Fournier v. United States, 220 F. Supp. 752 (S.D. Miss. 1963); United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960). Thus we may conclude that an activity which cannot reasonably be considered to be an instrumentality of the United States (or of an agency thereof) is not a nonappropriated fund activity.

At least one court has attempted briefly to define a nonappropriated fund activity.. While deciding that the Chief of an Army accounting office was immune from suit to compel the reinstatement of a dismissed employee of a Bachelor Officers' Quarters, the court in Bowen v. Culotta, 294 F. Supp. 183 (E.D. Va. 1968), said:

"A non-appropriated fund activity is one to which the government has initially provided funds to permit it to begin operation. The governmental loan is repaid out of the profits earned by the activity. Thus, the activity is created by the government with governmental funds for governmental personnel, and is administered by governmental employees for the use and benefit of the United States." 294 F. Supp. at 185.

While this statement is perhaps too general to be of practical use in every case, we believe that it contains several elements which, when

*/ The House Report on the Tucker Act indicates that it originally was intended to cover all nonappropriated fund activities, but difficulty in defining nonappropriated fund activities led the Committee to limit the Act's coverage to the post exchanges. H.R. Rep. 91-933, 91st Cong., 2d Sess.

considered with the previously discussed material, provide essential clues for determining whether a particular activity is a nonappropriated fund activity. These elements are:

1. The activity is established under the authority or sanction of a Government agency with or without an initial advance of Government funds.
2. The activity is created and run by Government officers or employees.
3. The activity is operated for the benefit of Government officers or employees and/or their dependents.
4. The operations of the activity are financed by the proceeds therefrom rather than by appropriations.

For purposes of GAO audit, it is necessary to add the criteria set out in section 301(a) of the Act as quoted supra, pp. 1-2, in order to determine the activities which are subject to GAO audit.

Although we have suggested guidelines for determining whether or not an activity is a nonappropriated fund activity, their application must ultimately rest on a case-by-case evaluation of the characteristics of particular activities.

We note that OMB has established a study group coordinated by the Department of Defense to review nonappropriated fund activity procurement, as mandated by Pub. L. 93-400. The OMB report is to be submitted to the Congress by August 30, 1976, and it should shed further light on the issues discussed in this memorandum.

If you have questions or wish to discuss any matter further, please let us know.

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Index and Files
Index Digest

B-167710-O.M.

May 6-76

DIGEST

"Nonappropriated fund activities" are authorized or sanctioned by Government agencies, created and run by Government personnel for benefit of Government personnel sometimes with initial loan of Government funds, and are sustained with profits from operations, rather than appropriated funds. GAO audit authority over such activities pursuant to Pub. L. 93-604 includes only those authorized or operated by executive agencies to sell merchandise or services to military or other Government personnel or their dependents, such as military or NASA post exchanges, commissaries, clubs and theaters.