



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** National Technical Information Service - Use of  
Customer Advance Deposits For Operating  
Expenses

**File:** B-243710

**Date:** February 10, 1992

### DIGEST

Under 15 U.S.C. § 1526, funds advanced to the National Technical Information Service by its customers are not available for the Service's operating expenses unless directly related to services performed or to be performed. To the extent the Service incurred expenses exceeding its actual obligational authority it violated the Antideficiency Act and should report to the President and the Congress as required by 31 U.S.C. § 1351.

### DECISION

The Deputy General Counsel, Department of Commerce, asks whether the National Technical Information Service (Service or NTIS) may continue to charge obligations for its operating expenses against funds advanced by its customers for publications and other services. As discussed in more detail below, we conclude that under 15 U.S.C. § 1526 advanced funds are not available for operating expenses unless directly related to services performed or to be performed. Because in the past the Service charged expenses against these advances, it incurred obligations exceeding its obligational authority. It thus violated the Antideficiency Act, and should report to the President and the Congress as required by 31 U.S.C. § 1351.

### BACKGROUND

The National Technical Information Service, an operating unit of the Department of Commerce, acts as a clearinghouse for the collection and dissemination of scientific, technical and engineering information generated by various government agencies. 15 U.S.C. §§ 1152 and 3704b(e) (1988). The Service normally does not receive annual appropriations for its operating expenses. Rather, the Congress intended the Service to be self-sufficient, and authorized it to establish a schedule of fees for services performed or

documents provided, 15 U.S.C. § 1153, Section 1526 of 15 U.S.C. states that:

"payments for work or services performed or to be performed . . . shall be deposited in a special account or accounts which may be used to pay directly the costs of such work or services, to repay or make advances to appropriations or funds which do or will initially bear all or part of such costs, or to refund excess sums when necessary . . . ."

Under this statute the Service uses a Treasury deposit fund account to finance its operations. The Service receives not only reimbursements for goods and services it delivers, but also moneys advanced to it by customers before services or documents are provided. While some of these advances are for subscriptions to specific documents, other advances are provided by customers that anticipate a future need for various publications. Service customers provide these types of advance funds on account either for standing orders for particular types of documents or for documents to be ordered on an as-needed basis.

According to the submission, since 1979 the Service has incurred obligations to pay operating expenses and purchase inventory and charged them against funds advanced by customers. The Deputy General Counsel asserts that both the Service's statutory mandate to operate on a self-sustaining basis and congressional knowledge and acquiescence in this longstanding practice support the use of advanced funds. However, the Department's Office of Inspector General has challenged the Service's use of advanced funds for operating expenses on the basis that government accounting principles prohibit the use of advanced funds until they are earned. The Deputy General Counsel and the Inspector General also ask whether Antideficiency Act violations resulted from the Service's practice of using customers' advanced funds for operating expenses. We have been asked to resolve this dispute.

#### ANALYSIS

NTIS, like all other federal agencies, must use its funds in strict compliance with controlling statutes. Here, NTIS'

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<sup>1</sup>An example of a standing order is one for all reports of Department of Transportation investigations of airline accidents. Because the report's issuance depends upon the occurrence of airline accidents, there is no way of determining when a report will be prepared or its selling price.

use of funds is subject to the language of 15 U.S.C. § 1526. That statute directs NTIS to deposit "payments for work or services performed or to be performed" into a separate account. The funds in that account may be used for only three purposes: (1) to pay "directly the costs of such work or services"; (2) to reimburse other accounts that may initially bear those costs; or (3) to refund excess amounts to customers when necessary.

As the Inspector General's report recognizes, funds paid for subscriptions are payments for services "performed or to be performed" since the publications to be provided to the customer, and the charge for the publications, are known. Thus, under 15 U.S.C. § 1526, NTIS may use advance subscription payments to pay directly the costs of filling the subscription, which may include a portion of its operating expenses.

However, in our opinion, advances to cover future orders cannot be considered payment for work or services "performed or to be performed." At the time these advances are deposited with NTIS neither the exact publication to be ordered nor its cost is known. In fact, it is not certain (even in the case of a standing order) that NTIS will ever provide the customer with any publication. Only when a specific publication and its cost is identified may NTIS treat the advance it holds as payment for services "performed or to be performed."

Advances in this case are made for the administrative convenience of both NTIS and its customers in filling future orders. These funds are held by NTIS to cover the costs it may incur in the future to provide services to the specific customer, not to pay for current operating expenses, which necessarily cannot be the direct cost of work or services not yet ordered. We therefore agree with the Inspector General that NTIS has no authority to use customer advances to cover operating costs that are not directly related to a firm order.

Commerce's Office of General Counsel asserts that congressional acquiescence in the Service's administrative practice, as well as the Service's "statutory mandate to be self-sufficient are compelling reasons to eschew a strict reading of section 1526 and associated accounting principles." In response, we point out that the Service's mandate is merely a congressional policy, albeit included in statutory language: "[i]t is the policy of this chapter, to the fullest extent feasible . . . that each of the services and functions provided herein shall be self-sustaining or self-liquidating." 15 U.S.C. § 1153 (emphasis added). Further, by providing that moneys in NTIS' account may be used to reimburse another Commerce appropriation that

initially bears the costs of its operations, the Congress has provided at least one mechanism to deal with potential cash-flow problems.<sup>2</sup> Therefore, we do not view the self-sufficiency provision as authorizing NTIS to use funds that are not available to it under section 1526.

Asserting congressional acquiescence in the Service's use of advances, Commerce points to occasions when NTIS officials mentioned the undesirable practice of using customer advances for operating funds while testifying at congressional hearings. These hearings concerned a proposal to establish a revolving fund to provide initial working capital for the Service.<sup>3</sup> In connection with this proposal, GAO commented favorably on the need to establish a revolving fund and indicated that the Service had consistently used customer advances as working capital. GAO, Proposed National Technical Information Service Revolving Fund (RCED-83-218, B-212184, Aug. 25, 1983). However, the legislation which would have established a funded revolving fund for NTIS was not enacted by the Congress.

The legislative history of a later reform effort, the National Institute of Standards and Technology Authorization Act for Fiscal Year 1989, reveals that the House Committee on Energy and Commerce wanted to authorize the Service to use of "all its receipts for the acquisition, replacement and repair of capital equipment and inventories, as well as operating costs." H.R. Rep. No. 613, 100th Cong., 2d Sess., pt. 2, at 3 (1988). However, this amendment to 15 U.S.C. § 1152 also was not enacted.

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<sup>2</sup>The law also permits customer payments to be deposited in a working capital fund, established by another law, if NTIS (or whatever agency within Commerce performs its functions) is authorized to use that fund. 15 U.S.C. § 1526.

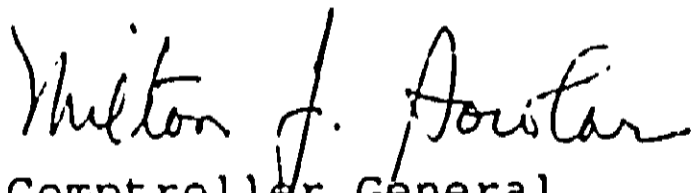
<sup>3</sup>At hearings on the proposed enactment, the Service's director stated that the "[e]stablishment of a revolving fund is necessary to permit [the Service] to stop the undesirable practice of having to use customer monies held in trust when we sustain periods of low cash flow. A revolving fund will allow NTIS to operate in a more businesslike environment." 1983 National Bureau of Standards authorization: Hearing Before the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, 97th Cong., 2d Sess. 120 and 131 (1982) (statement of Dr. Caponio). The memorandum from Commerce's Office of General Counsel accompanying the submission describes in detail the unsuccessful legislative efforts at establishing a revolving fund.

In our opinion, congressional acquiescence in the Service's use of customer advances is not demonstrated by these previously attempted legislative remedies or by testimony from NTIS officials that the Service is using advances as a source of working capital to remain solvent. As we stated in B-197439, Nov. 26, 1980,

"Congress is not required to act each time a statute is interpreted erroneously . . . . Congressional silence alone is not sufficient to adopt a controlling rule of law, or change the clear meaning of a statute. There must be persuasive circumstances, showing a clear design that congressional inaction be taken as acceptance of an interpretation of law."

In this case we do not know why the Congress did not enact NTIS' proposed legislation. However, we see no clear indication that Congressional inaction was intended as approval of NTIS' practice of using funds contrary to the provisions of 15 U.S.C. § 1526.

The Antideficiency Act prohibits officers or employees of the United States from incurring obligations exceeding the amount available for obligation in its applicable appropriation. 31 U.S.C. § 1341(a)(1). To the extent that NTIS charged its operating expenses to moneys that were not available for its use, and assuming no other funds were available to cover the obligations, NTIS violated the Antideficiency Act. To the extent violations have occurred they should be reported to the President and the Congress as required by 31 U.S.C. § 1351.

*for*   
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