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G A O

Accountability ★ Integrity ★ Reliability

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Preface

We are pleased to present the first annual update of the third edition of Volume I of *Principles of Federal Appropriations Law.* Our objective in this publication is to present a cumulative supplement to the published third edition text that includes all relevant decisions from January 1 to December 31, 2004. After the third editions of the other volumes of *Principles* are published, they will also be updated annually. Each year the annual update will be posted electronically on GAO's Web site (www.gao.gov) under "GAO Legal Products." These annual updates will not be issued in hard copy and should be used as electronic supplements. Therefore, users should retain hard copies of the third edition volumes and refer to the cumulative updates for newer material. The page numbers identified in the annual update as containing new material are the page numbers in the hard copy of the third edition. New information appears as **bolded text**.

Forward

Page i – *Insert the following as footnote number 1 at the end of the first paragraph (after "GAO Legal Products."[1]):*

[1] **Recently, section 8 of the GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811, 814 (July 7, 2004), 31 U.S.C. § 702 note, changed GAO's name to the "Government Accountability Office." This change was made to better reflect GAO's current mission.** ***See*** **S. Rep. No. 108-216, at 8 (2003); H.R. Rep. No. 108-380, at 12 (2003). Therefore, any reference in this volume to the "General Accounting Office" should be read to mean "Government Accountability Office." The acronym "GAO" as used in the text now refers to the Government Accountability Office.**

Introduction

B. The Congressional "Power of the Purse"

Page 1-4 – *Replace footnote 6 with the following:*

[6] Numerous similar statements exist. *See, e.g.*, *Knote v. United States*, 95 U.S. 149, 154 (1877); ***Marathon Oil Co. v. United States*, 374 F.3d 1123, 1133–34 (Fed. Cir. 2004);** *Gowland v. Aetna*, 143 F.3d 951, 955 (5th Cir. 1998); *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *aff'd*, *Hart v. United States*, 118 U.S. 62 (1886); *Jamal v. Travelers Lloyds of Texas Insurance Co.*, 131 F. Supp. 2d 910, 919 (S.D. Tex. 2001); *Doe v. Mathews*, 420 F. Supp. 865, 870–71 (D. N.J. 1976).

Page 1-9 – *Replace the first paragraph with the following*:

In *Kansas v. United States*, 214 F.3d 1196, 1201–1202, n.6 (10th Cir. 2000), the court noted that there **were** few decisions striking down federal statutory spending conditions.[9] **However, there are two recent interesting examples of situations in which courts invalidated a spending condition on First Amendment grounds. I**n *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001), a conditional provision (contained in the annual appropriations for the Legal Service Corporation (LSC) since 1996) was struck down as inconsistent with the First Amendment. This provision prohibited LSC grantees from representing clients in efforts to amend or otherwise challenge existing welfare law. The Supreme Court found this provision interfered with the free speech rights of clients represented by LSC-funded attorneys.[10] **In *American Civil Liberties Union v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004), the court declared unconstitutional an appropriation provision forbidding the use of federal mass transit grant funds for any activity that promoted the legalization or medical use of marijuana, for example, posting an advertisement on a bus. Relying on *Legal Services Corp. v. Velasquez*, the court held that the provision constituted "viewpoint discrimination" in violation of the First Amendment. 319 F. Supp. 2d at 83–87.**

Page 1-10 – *Insert the following after the first partial paragraph:*

There have been some recent court cases upholding congressional actions attaching conditions to the use of federal funds that require states to waive their sovereign immunity from lawsuits under the Eleventh Amendment. In these cases, courts found the condition a legitimate exercise of Congress's spending power. For example, the court in *Barbour v. Washington Metropolitan Transit Authority*,

374 F.3d 1161 (D.C. Cir. 2004), upheld a statutory provision known as the "Civil Rights Remedies Equalization Act," 42 U.S.C. § 2000d-7, which clearly conditioned a state's acceptance of federal funds on its waiver of its Eleventh Amendment immunity to suits under various federal antidiscrimination laws. Among other things, the court rejected an argument based on *South Dakota v. Dole, supra*, that the condition was not sufficiently related to federal spending. The opinion observed that the Supreme Court has never overturned Spending Clause legislation on "relatedness grounds." 374 F.3d at 1168.

Similarly, two courts rejected challenges to section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1, which limits restrictions on the exercise of religion by persons institutionalized in a program or activity that receives federal financial assistance. *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Williams v. Bitner*, 285 F. Supp. 2d 593 (M.D. Pa. 2003). In *Charles v. Verhagen*, the court held that RLUIPA "falls squarely within Congress' pursuit of the general welfare under its Spending Clause authority." 348 F.3d at 607. The court also rejected the argument that the statute's restrictions could not be related to a federal spending interest because the state corrections program at issue received less than two percent of its budget from federal funding: "Nothing within Spending Clause jurisprudence, or RLUIPA for that matter, suggests that States are bound by the conditional grant of federal money only if the State receives or derives a certain percentage . . . of its budget from federal funds." *Id.* at 609.

Page 1-10 – *Replace the second paragraph with the following:*

For some additional recent cases upholding statutory funding conditions, **see *Biodiversity Associates v. Cables*, 357 F.3d 1152 (10th Cir.), *cert. denied*, ___ U.S. ___, 125 S. Ct. 54 (2004) (upholding an appropriations rider that explicitly superseded a settlement agreement the plaintiffs had reached with the Forest Service in environmental litigation);** *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000) (upholding the statutory requirement conditioning receipt of federal block grants used to provide cash assistance and other supportive services to low income families on a state's participation in and compliance with a federal child support enforcement program); *Litman v. George Mason University, supra* (state university's receipt of federal funds

was validly conditioned upon waiver of the state's Eleventh Amendment immunity from federal antidiscrimination lawsuits); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (acknowledging that although it originally agreed to the condition for receipt of federal Medicaid funds on state provision of emergency medical services to illegal aliens, California now viewed that condition as coerced because substantial increases in illegal immigration left California with no choice but to remain in the program to prevent collapse of its medical system; the complaint was dismissed for failure to state a claim upon which relief could be granted)**; and *Armstrong v. Vance*, 328 F. Supp. 2d 50 (D.D.C. 2004) and *Whatley v. District of Columbia*, 328 F. Supp. 2d 15 (D.D.C. 2004) (two related decisions upholding appropriations provisions that imposed a cap on the District of Columbia's payment of attorney fees awarded in litigation under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq*.). See also Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 Cornell L. Rev. 1 (November 2003), an article that provides more background on this general subject.**

Page 1-12 – *Replace the second bullet in the first paragraph with the following:*

- Agencies may not spend, or commit themselves to spend, in advance of or in excess of appropriations. 31 U.S.C. § 1341 (Antideficiency Act). **GAO has said that because the Antideficiency Act (ADA) is central to Congress's core constitutional power of the purse, GAO will not interpret general language in another statute, such as the "notwithstanding any other provision of law" clause, to imply a waiver of the ADA without some affirmative expression of congressional intent to give the agency the authority to obligate in advance or in excess of an appropriation. B-303961, Dec. 6, 2004.**

E. The Role of the Accounting Officers: Legal Decisions

2. Decisions of the Comptroller General

Page 1-42 – *Replace the third full paragraph with the following:*

For example, as we discussed earlier in this chapter, effective June 30, 1996, Congress transferred claims settlement authority under 31 U.S.C. § 3302 to the Director of the Office of Management and Budget (OMB). Congress gave the director of OMB the authority to delegate this function to such agency or agencies as he deemed appropriate. *See*, *e.g.*, **B-302996, May 21, 2004 (GAO no longer has authority to settle a claim for severance pay);** B-278805, July 21, 1999 (**the International Trade Commission was the appropriate agency to resolve the subject claims request)**.

Page 1-42 – *Replace the fourth full paragraph with the following:*

Other areas where the Comptroller General will decline to render decisions include questions concerning which the determination of another agency is by law "final and conclusive." Examples are determinations on the merits of a claim against another agency under the Federal Tort Claims Act (28 U.S.C. § 2672) or the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. § 3721). ***See, e.g.*, B-300829, Apr. 4, 2004 (regarding the Military Personnel and Civilian Employees' Claims Act).** Another example is a decision by the Secretary of Veterans Affairs on a claim for veterans' benefits (38 U.S.C. § 511). *See* 56 Comp. Gen. 587, 591 (1977); B-266193, Feb. 23, 1996; B-226599.2, Nov. 3, 1988 (nondecision letter).

The Legal Framework

B. Some Basic Concepts

1. What Constitutes an Appropriation

Page 2-20 – *Insert the following after the second full paragraph:*

Subsequent to the *Core Concepts* and *AINS* decisions, the Third Circuit Court of Appeals had occasion to weigh in on the issue of revolving funds in a non-Tucker Act situation in *American Federation of Government Employees (AFGE) v. Federal Labor Relations Authority (FLRA),* 388 F.3d 405 (3rd Cir. 2004). In that case, AFGE, representing Army depot employees, had proposed an amendment to the employees' collective bargaining agreement that would have required the Army to pay reimbursements of personal expenses incurred by the depot employees as a result of cancelled annual leave from a defense working capital fund. When the Army objected that it had no authority to use the working capital fund for personal expenses, AFGE appealed to FLRA. FLRA agreed with the Army and ruled that the provision was "nonnegotiable." Citing FLRA decisions, Comptroller General decisions, and federal court cases, FLRA concluded that the working capital fund, a revolving fund, is treated as a continuing appropriation and, as such, the fund was not available for reimbursement of personal expenses.

The court agreed with FLRA that the defense working capital fund consists of appropriated funds and is thus not available to pay the personal expenses of Army employees. The court, however, rejected what it called "FLRA's blanket generalization that revolving funds are always appropriations." *AFGE,* 388 F.3d at 411. Instead, the court applied a standard used by the Federal Circuit and the Court of Federal Claims when addressing the threshold issue of Tucker Act jurisdiction, a "clear expression" standard; that is, funds should be regarded as "appropriated" absent a "clear expression by Congress that the agency was to be separated from the general federal revenues." *Id.* at 410. The court observed in this regard:

> **"While that 'clear expression' standard arises in the context of Tucker Act jurisprudence, we think it accurately reflects the broader principle that one**

> **should not lightly presume that Congress meant to surrender its control over public expenditures by authorizing an entity to be entirely self-sufficient and outside the appropriations process. . . . For this reason, the courts have sensibly treated agency money as appropriated even when the agency is fully financed by outside revenues, so long as Congress has not clearly stated that it wishes to relinquish the control normally afforded through the appropriations process.**
>
> * * * * * * * * * *
>
> **"…[W]e think the correct rule is that the characterization of a government fund as appropriated or not depends entirely on Congress' expression, whatever the actual source of the money and whether or not the fund operates on a revolving rather than annualized basis."**

***Id.* at 410–411. In applying this standard to the particular funding arrangement at issue, the court determined that the defense working capital fund was not a nonappropriated fund instrumentality and upheld the FLRA decision. "What matters is how Congress wishes to treat government revenues, not the source of the revenues." *Id.* at 413.**

3. Transfer and Reprogramming

Page 2-24 – *Replace footnote 40 with the following:*

[40] 7 Comp. Gen. 524 (1928); 4 Comp. Gen. 848 (1925); 17 Comp. Dec. 174 (1910). Cases in which adequate statutory authority was found to exist **are B-302760, May 17, 2004 (the transfer of funds from the Library of Congress to the Architect of the Capitol for construction of a loading dock at the Library is authorized) and** B-217093, Jan. 9, 1985 (the transfer from Japan-United States Friendship Commission to Department of Education to partially fund a study of Japanese education **is authorized**).

C. Relationship of Appropriations to Other Types of Legislation

2. Specific Problem Areas and the Resolution of Conflicts

Page 2-69 – *Insert the following new paragraphs after the first full paragraph:*

Recently, two courts have interpreted appropriation restrictions to avoid repeal by implication: *City of Chicago v. Department of the Treasury*, 384 F.3d 429 (7th Cir. 2004), and *City of New York v. Beretta U.S.A. Corp.*, 222 F.R.D. 51 (E.D. N.Y. 2004). In the first case, the City of Chicago had sued the former Bureau of Alcohol, Tobacco, and Firearms under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to obtain access to certain information from the agency's firearms databases. The Court of Appeals for the Seventh Circuit held that the information was not exempt from disclosure under FOIA. *City of Chicago v. Department of the Treasury,* 287 F.3d 628 (7th Cir. 2002). The agency then appealed to the Supreme Court. While the appeal was pending, Congress enacted appropriations language for fiscal years 2003 and 2004 providing that no funds shall be available or used to take any action under FOIA or otherwise that would publicly disclose the information. Pub. L. No. 108-7, div. J, title VI, § 644, 117 Stat. 11, 473 (Feb. 20, 2003); Pub. L. No. 108-99, div. B, title I, 118 Stat. 3, 53 (Jan. 23, 2004). The Supreme Court remanded the case to the Seventh Circuit to consider the impact, if any, of the appropriations language. *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003). In *City of Chicago v. Department of the Treasury*, 384 F.3d 429 (7th Cir. 2004), the court decided that the appropriations language had essentially no impact on the case. Citing a number of cases on the rule disfavoring implied repeals (particularly by appropriations act), the court held that the appropriations rider did not repeal FOIA or otherwise affect the agency's legal obligation to release the information in question. The court concluded that "FOIA deals only peripherally with the allocation of funds—its main focus is to ensure agency information is made available to the public." *Id.* at 435. In this regard, the court repeatedly emphasized

the minimal costs entailed in complying with the access request and concluded that "there is no 'irreconcilable conflict' between prohibiting the use of federal funds to process the request and granting the City access to the databases." ***Id.***

The second case, ***City of New York v. Beretta U.S.A. Corp.*****, 222 F.R.D. 51 (E.D. N.Y. 2004), concerned access to firearms information that was subject to the same appropriations language for fiscal year 2004 in Public Law 108-199. In this case, the demand for access took the form of subpoenas seeking discovery of the records in a tort suit by the City of New York and others against firearms manufacturers and distributors. The court in** ***City of New York*** **denied the agency's motion to quash the subpoenas, which was based largely on the appropriations language. The court held that the appropriations language, which prohibited public disclosure, was inapplicable by its terms since discovery could be accomplished under a protective order that would keep the records confidential. 222 F.R.D. at 56–65.**

D. Statutory Interpretation: Determining Congressional Intent

1. The "Plain Meaning" Rule

Page 2-74 – *Replace the second full paragraph with the following:*

By far the most important rule of statutory construction is this: You start with the language of the statute. Countless judicial decisions reiterate this rule. *E.g.*, ***BedRoc Limited, LLC v. United States*****, 541 U.S. 176 (2004);** ***Lamie v. United States Trustee*****, 540 U.S. 526 (2004);** *Hartford Underwriters Insurance Co. v. Union Planters Bank,N.A.*, 530 U.S. 1 (2000); *Robinson v. Shell Oil Co. v.* 519 U.S. 337 (1997); *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992); *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 300 (1989). The primary vehicle for Congress to express its intent is the words it enacts into law. As stated in an early Supreme Court decision:

> "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used … ."

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). A somewhat better known statement is from *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

3. The Limits of Literalism: Errors in Statutes and "Absurd Consequences"

Page 2-80 – *Insert the following after the first paragraph:*

The Supreme Court's recent decision in *Lamie v. United States Trustee*, 540 U.S. 526 (2004), contained an interesting discussion of drafting errors and what to do about them. For reasons that are described at length in the opinion but need not be repeated here, the Court found an "apparent legislative drafting error" in a 1994 statute. 540 U.S. at 530. Nevertheless, the Court held that the amended language must be applied according to its plain terms. While the Court in *Lamie* acknowledged that the amended statute was awkward and ungrammatical, and that a literal reading rendered some words superfluous and could produce harsh results, none of these defects made the language ambiguous. *Id.* at 534–36. The Court determined that these flaws did not "lead to absurd results requiring us to treat the text as if it were ambiguous." *Id.* at 536. The Court also drew a distinction between construing a statute in a way that, in effect, added missing words as opposed to ignoring words that might have been included by mistake. *Id.* at 538.

Page 2-82 – *Insert the following after the third paragraph:*

Recent Supreme Court decisions likewise reinforce the need for caution when it comes to departing from statutory language on the basis of its apparent "absurd consequences." *See Lamie v. United States Trustee*, 540 U.S. 526, 537–38 (2004) ("harsh" consequences are not the equivalent of absurd consequences); *Barnhart v.*

***Thomas*, 540 U.S. 20, 28–29 (2003) ("undesirable" consequences are not the equivalent of absurd consequences).**

4. Statutory Aids to Construction

Page 2-84 – *Replace the first full paragraph with the following:*

Occasionally, the courts use the Dictionary Act to **assist in** resolv**ing** questions of interpretation. *E.g.*, ***Gonzalez v. Secretary for the Department of Corrections*, 366 F.3d 1253, 1263–64 (11th Cir. 2004) (applying the Dictionary Act's general rule that "words importing the singular include and apply to several persons, parties, or things," 1 U.S.C. § 1);** *United States v. Reid*, 206 F. Supp. 2d 132 (D. Mass. 2002) (an aircraft is not a "vehicle" for purposes of the USA PATRIOT Act); *United States v. Belgarde*, 148 F. Supp. 2d 1104 (D. Mont.), *aff'd*, 300 F.3d 1177 (9th Cir. 2001) (a government agency, which the defendant was charged with burglarizing, is not a "person" for purposes of the Major Crimes Act). Courts also hold on occasion that the Dictionary Act does not apply. *See* ***United States v. Ekanem*, 383 F.3d 40 (2nd Cir. 2004) ("victim" as used in the Mandatory Victims Restitution Act (MRVA) is not limited by the default definition of "person" in the Dictionary Act since that definition does not apply where context of MVRA indicates otherwise);** *Rowland v. California Men's Colony*, 506 U.S. 194 (1993) (context refutes application of the Title 1, United States Code, definition of "person").

5. Canons of Statutory Construction

Page 2-86 – *Replace the first full paragraph with the following*:

Like all other courts, the Supreme Court follows this venerable canon. *E.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001) ("it is, of course, true that statutory construction 'is a holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme'"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995) ("the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout"); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[a]mbiguity is a creature not of definitional possibilities but of statutory context"). ***See also Hibbs v. Winn*, ___ U.S. ___, 124 S. Ct. 2276, 2285 (2004) (courts should construe a statute so that "effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"); *General Dynamics Land Systems, Inc. v. Cline*,**

540 U.S. 581, 598 (2004) (courts should not ignore "the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it").

Page 2-87 – *Add the following bullet to the first full paragraph and revise the second bullet as follows:*

- **B-302335, Jan. 15, 2004: When read as a whole, the Emergency Steel Loan Guarantee Act of 1999, 15 U.S.C. § 1841 note, clearly appropriated loan guarantee programs funds to the Loan Guarantee Board and not the Department of Commerce.**

- **B-303961, Dec. 6, 2004: Despite use of the phrase "notwithstanding any other provision of law" in a provision of an appropriation act, nothing in the statute read as a whole or its legislative history suggested an intended waiver of the Antideficiency Act. *See also*** B-290125.2, B-290125.3, Dec. 18, 2002 (redacted) **(**viewed in isolation, the phrase "notwithstanding any other provision of law" might be read as exempting a procurement from GAO's bid protest jurisdiction under the Competition in Contracting Act; however, when the statute is read as a whole, as it must be, it does not exempt the procurement from the Act**)**.

Page 2-88 – *Add the following bullets to the first paragraph:*

- ***Hibbs v. Winn*, ___ U.S. ___, 124 S. Ct. 2276, 2285 (2004): "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context."**

- ***Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004): A statute should be construed so that, "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."**

Page 2-88 – *Replace the last paragraph as follows:*

Although frequently invoked, the no surplusage canon is less absolute than the "whole statute" canon. One important caveat, previously discussed, is that words in a statute will be treated as surplus and disregarded if they were included in error. *E.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (emphasis in original):

> "The canon requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute …'"

Citing *Chickasaw Nation*, the Court also recently observed that the canon of avoiding surplusage will not be invoked to create ambiguity in a statute that has a plain meaning if the language in question is disregarded. *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004).

Page 2-89 – *Replace the first and second paragraphs with the following*:

When words used in a statute are not specifically defined, they are generally given their "plain" or ordinary meaning rather than some obscure usage. *E.g.*, ***Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004); *BedRoc Limited, LLC v. United States*, 541 U.S. 176 (2004);** *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 476 (1994); *Mallard v. United States*, 490 U.S. 296, 301 (1989); 70 Comp. Gen. 705 (1991); 38 Comp. Gen. 812 (1959); B-261193, Aug. 25, 1995.

One commonsense way to determine the plain meaning of a word is to consult a dictionary. *E.g.*, *Mallard*, 490 U.S. at 301; *American Mining Congress v. EPA*, 824 F.2d 1177, 1183–84 & n. 7 (D.C. Cir. 1987). Thus, the Comptroller General relied on the dictionary in B-251189, Apr. 8, 1993, to hold that business suits did not constitute "uniforms," which would have permitted the use of appropriated funds for their purchase. *See also* **B-302973, Oct. 6, 2004;** B-261522, Sept. 29, 1995.

Page 2-90 – *Replace the second full paragraph with the following:*

Several different canons of construction revolve around these seemingly straightforward notions. Before discussing some of them, it is important to note once more that these canons, like most others, may or may not make sense to apply in particular settings. Indeed, the basic canon that the same words have the same meaning in a statute is itself subject to exceptions. In *Cleveland Indians Baseball Club*, the Court cautioned:

> "Although we generally presume that identical words used in different parts of the same act are intended to have the

> same meaning, … the presumption is not rigid, and the meaning [of the same words] well may vary with the purposes of the law."

532 U.S. at 213 (citations and quotation marks omitted). To drive the point home, the Court quoted the following admonition from a law review article:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them … has all the tenacity of original sin and must constantly be guarded against."

Id. ***See also General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 594–96 and fn. 8 (2004) (quoting the same law review passage, which it notes "has become a staple of our opinions").** Of course, all bets are off if the statute clearly uses the same word differently in different places. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997) ("[o]nce it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous").

Page 2-93 – *Replace the first full paragraph with the following:*

Likewise, a statute's grammatical structure is useful but not conclusive. ***Lamie v. United States Trustee*, 540 U.S. 526, 534–35 (2004) (the mere fact that a statute is awkwardly worded or even ungrammatical does not make it ambiguous). Nevertheless, the Court sometimes gives significant weight to the grammatical structure of a statute. For example, in *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003), the Court rejected the lower court's construction of a statute in part because it violated the grammatical "rule of the last antecedent." Also, i**n *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1991), the Court devoted considerable attention to the placement of the word "or" in a series of clauses. It questioned the interpretation proffered by one of the parties that would have given the language an awkward effect, noting: "In casual conversation, perhaps, such absentminded duplication and omission are possible, but Congress is not presumed to draft its laws that way." *Arcadia, Ohio*, 498 U.S. at 79. By contrast, in *Nobelman v. American Savings Bank*, 508 U.S. 324, 330 (1993), the Court rejected an interpretation, noting: "We

acknowledge that this reading of the clause is quite sensible as a matter of grammar. But it is not compelled."

Page 2-94 – *Replace the first full paragraph with the following:*

The same considerations apply to a statute's popular name and to the headings, or titles, of particular sections of the statute. *See* ***Intel Corp. v. Advanced Micro Devices, Inc.*, ___ U.S. ___, 124 S. Ct. 2466, 2470 (2004) ("A statute's caption . . . cannot undo or limit its text's plain meaning"). *See also*** *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 308–309 (2001); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). In *St. Cyr*, the Supreme Court concluded that a section entitled "Elimination of Custody Review by *Habeas Corpus*" did not, in fact, eliminate *habeas corpus* jurisdiction. It found that the substantive terms of the section were less definitive than the title. ***See also McConnell v. Federal Election Commission*, 540 U.S. 93, 180 (2003).**

Page 2-94 – *Replace the second full paragraph with the following:*

Preambles. Federal statutes often include an introductory "preamble" or "purpose" section before the substantive provisions in which Congress sets forth findings, purposes, or policies that prompted it to adopt the legislation. Such preambles have no legally binding effect. However, they may provide indications of congressional intent underlying the law. Sutherland states with respect to preambles:

> "[T]he settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms. In case any doubt arises in the enacted part, the preamble may be resorted to to help discover the intention of the law maker."

2A Sutherland, § 47:04 at 221–22.[80] **For a recent example in which the Court used statutory findings to inform its interpretation of congressional intent, see *General Dynamics Land Systems, Inc. v Cline*, 540 U.S. 581, 589–91 (2004).**

6. Legislative History

Page 2-102 – *Replace the first full paragraph with the following:*

Statements by the sponsor of a bill are also entitled to somewhat more weight. *E.g.*, *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951); *Ex Parte Kawato*, 317 U.S. 69, 77 (1942). However, they are not controlling. ***General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 597–99 (2004);** *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

Page 2-105 – *Add the following to the third full paragraph:*

- ***Doe v. Chao*, 540 U.S. 614, 621–23 (2004): Congress deleted from the bill language that would have provided for the type of damage award sought by the petitioner.**

See also ***F. Hoffman-La Roche Ltd v. Empagran S.A.*, ___ U.S. ___, 124 S. Ct. 2359, 2365 (2004);** *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416 423 (7th Cir. 1993); *Davis v. United States*, 46 Fed. Cl. 421 (2000).

7. Presumptions and "Clear Statement" Rules

Page 2-113 – *Replace the first full paragraph with the following:*

There is a strong presumption against waiver of the federal government's immunity from suit. The courts have repeatedly held that waivers of sovereign immunity must be "unequivocally expressed." *E.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992); ***Marathon Oil Co. v. United States*, 374 F.3d 1123, 1127 (Fed. Cir. 2004);** *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, 51 Fed. Cl. 60 (2001) and cases cited. Legislative history does not help for this purpose. The relevant statutory language in Nordic Village was ambiguous and could have been read, evidently with the support of the legislative history, to impose monetary liability on the United States. The Court rejected such a reading, applying instead the same approach as described above in its federalism jurisprudence:

> "[L]egislative history has no bearing on the ambiguity point. As in the Eleventh Amendment context, see *Hoffman*, *supra*, … the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in

> statutory text. If clarity does not exist there, it cannot be supplied by a committee report."

503 U.S. at 37.

Agency Regulations and Administrative Discretion

A. Agency Regulations

Page 3-2 – *Replace the second paragraph with the following:*

As a conceptual starting point, agency regulations fall into three broad categories. First, every agency head has the authority, largely inherent but also authorized generally by 5 U.S.C. § 301[1], to issue regulations to govern the internal affairs of the agency. Regulations in this category may include such subjects as conflicts of interest, employee travel, and delegations to organizational components. This statute is nothing more than a grant of authority for what are called "housekeeping" regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979); *Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998), *cert. denied*, 528 U.S. 826 (1999); *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). It confers "administrative power only." *United States v. George*, 228 U.S. 14, 20 (1913); **B-302582, Sept. 30, 2004;** 54 Comp. Gen. 624, 626 (1975). Thus, the statute merely grants agencies authority to issue regulations that govern their own internal affairs; it does not authorize rulemaking that creates substantive legal rights. *Schism v. United States*, 316 F.3d 1259, 1278–84 (Fed. Cir. 2002), *cert. denied*, **539 U.S. 910 (2003).**

1. The Administrative Procedure Act

Page 3-6 – *Replace the cite after the quoted language carried over from page 3-5 with the following paragraph:*

Richard J. Pierce, Jr., *Administrative Law Treatise*, § 7.4 at 442 (4th ed. 2000) (citations omitted). **Two recent decisions make clear that the courts will insist upon at least some ascertainable and coherent rationale: *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (the court remanded a rule to the agency because it was "frankly, stunned to find" that the agency had provided "*not one word* in the proposed or final rule" (emphasis in original) to explain a key aspect of its rule), and *International Union, United Mine Workers of America v. Department of Labor*, 358 F.3d 40, 45 (D.C. Cir. 2004) (finding that the agency's stated rationale to withdraw a proposed rule was disjointed and conclusory, the court returned the matter to the agency "so that it may either proceed with the . . . rulemaking or give a reasoned account of its decision not to do so").**

Page 3-9 – *Replace the second full paragraph with the following:*

As a starting point, anything that falls within the definition of a "rule" in 5 U.S.C. § 551(4) and for which formal rulemaking is not required, is subject to the informal rulemaking procedures of 5 U.S.C. § 553 unless exempt. This statement is not as encompassing as it may seem, since section 553 itself provides several very significant exemptions. These exemptions, according to a line of decisions by the U.S. Court of Appeals for the District of Columbia Circuit, will be "narrowly construed and only reluctantly countenanced." ***Jifry v. Federal Aviation Administration*, 370 F.3d 1174, 1179 (D.C. Cir. 2004);** *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001); *Asiana Airlines v. Federal Aviation Administration*, 134 F.3d 393, 396–97 (D.C. Cir. 1998); *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 969 F.2d 1141, 1144 (D.C. Cir. 1992); *New Jersey Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).[8] Be that as it may, they appear in the statute and cannot be disregarded. For example, section 553 does not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2).

Page 3-9 – *Replace footnote 8 with the following:*

[8] In *Utility Solid Waste Activities Group*, the court held that the "good cause" exemption in section 553(b) does not allow an agency to forego notice and comment when correcting a technical error in a regulation. 236 F.3d at 754–55. Likewise, the court held that agencies have no "inherent power" to correct such technical errors outside of the APA procedures. *Id.* at 752–54. **The decision in *Jifry* provides an example of a case upholding an agency's use of the good cause exemption based on emergency conditions involving potential security threats. *Jifry v. Federal Aviation Administration*, 370 F.3d at 1179.**

4. Waiver of Regulations

Page 3-21 – *Replace the first full paragraph with the following:*

Sometimes legislative regulations or the statutes they implement do explicitly authorize "waivers" in certain circumstances. Here, of course, the waiver authority is an integral part of the underlying statutory or regulatory scheme. Accordingly, courts give effect to such waiver provisions and, indeed, they may even hold that an agency's failure to consider or permit waiver is an abuse of discretion. However, the courts usually accord

considerable deference to agency decisions on whether or not to grant discretionary waivers. For illustrative cases, see ***BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003);** *People of the State of New York & Public Service Commission of the State of New York v. FCC*, 267 F.3d 91 (2nd Cir. 2001); *BellSouth Corporation v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999); *Rauenhorst v. United States Department of Transportation*, 95 F.3d 715 (8th Cir. 1996).

B. Agency Administrative Interpretations

1. Interpretation of Statutes

Page 3-29 – *Replace the second full paragraph with the following:*

In what is now recognized as one of the key cases in determining how much "deference" is due an agency interpretation, *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court formulated its approach to deference in terms of two questions. The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, the agency must of course comply with clear congressional intent, and regulations to the contrary will be invalidated. Thus, before you ever get to questions of deference, it must first be determined that the regulation is not contrary to the statute, a question of delegated authority rather than deference. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. **A recent example is *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), in which the Court declined to give *Chevron* deference, or any lesser degree of deference, to an agency interpretation that it found to be "clearly wrong" as a matter of statutory construction, since the agency interpretation was contrary to the act's text, structure, purpose, history, and relationship to other federal statutes.**

Page 3-30 – *Replace the second full paragraph with the following:*

When the agency's interpretation is in the form of a regulation with the force and effect of law, the deference, as we have seen, is at its highest.[30]

The agency's position is entitled to *Chevron* deference and should be upheld unless it is arbitrary or capricious. There should be no question of substitution of judgment. If the agency position can be said to be reasonable or to have a rational basis within the statutory grant of authority, it should stand, even though the reviewing body finds some other position preferable. *See*, ***e.g., Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004); *Barnhart v. Thomas*, 540 U.S. 20 (2003);** *Yellow Transportation*, *Inc. v. Michigan*, 537 U.S. 36 (2002); *Shalala v. Illinois Council on Long Term Care*, *Inc.*, 529 U.S. 1, 20–21 (2000); *American Telephone & Telegraph Corp. v. Iowa Utility Board*, 525 U.S. 366 (1999). *Chevron* deference is also given to authoritative agency positions in formal adjudication. *See Immigration & Naturalization Service v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (holding that a Bureau of Indian Affairs statutory interpretation developed in case-by-case formal adjudication should be accorded *Chevron* deference). For an extensive list of Supreme Court cases giving *Chevron* deference to agency statutory interpretations found in rulemaking or formal adjudication, see *United States v. Mead Corp.*, 533 U.S. 218, 231 at n.12 (2001).

Page 3-32 – *Replace the third bulleted paragraph with the following:*

- Evidence (or lack thereof) of congressional awareness of, and acquiescence in, the administrative position. *United States v. American Trucking Ass'n*, 310 U.S. 534, 549–50 (1940); *Helvering v. Winmill*, 305 U.S. 79, 82–3 (1938); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313–15 (1933); *Collins v. United States*, 946 F.2d 864 (Fed. Cir. 1991); *Davis v. Director*, *Office of Workers' Compensation Programs*, *Department of Labor*, 936 F.2d 1111, 1115–16 (10th Cir. 1991); 41 Op. Att'y Gen. 57 (1950); B-114829-O.M., July 17, 1974. **Interestingly, in *Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118 (2nd Cir. 2004), the court acknowledged the potential relevance of congressional acquiescence to a 30-year-old regulation, noting that Congress had amended the applicable statute seven times over the life of the regulation without expressing any disapproval of it. However, the court ultimately rejected the congressional acquiescence argument—according to the court, "affectionately known as the 'dog didn't bark canon'"—and held the regulation invalid. *Id.* at 130 and n.5.**

Page 3-33 – *Replace the first full paragraph with the following:*

More recent decisions further indicate that *Chevron* deference may extend beyond legislative rules and formal adjudications. Most notably, the Supreme Court observed in *dicta* in *Barnhart v. Walton*, 535 U.S. at 222, that *Mead Corp.* "denied [any] suggestion" in *Christensen* that *Chevron* deference was limited to interpretations adopted through formal rulemaking. The *Barnhart* opinion went on to say that:

> "In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."

Id. at 222.[33] ***See also General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004); *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002). Two additional decisions are instructive in terms of the limits of *Chevron*. In both cases the Court found that the issuances containing agency statutory interpretations were entitled to some weight, but not *Chevron* deference. *Raymond B. Yates, M.D., P.C., Profit Sharing Plan v. Hendon*, 541 U.S. 1 (agency advisory opinion); *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (internal agency guidance memoranda).**

Page 3-33 – *Replace the third full paragraph with the following:*

Circuit court decisions have added to the confusion. *See* ***Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2nd Cir. 2004) (the court found that a regulation was not entitled to *Chevron* deference, despite congressional acquiescence and even though the statute was ambiguous and the regulation was issued through notice and comment rulemaking, because evidence showed the agency intended the regulation to be only an "interpretive" as opposed to a "legislative" rule); *Doe v. United States*, 372 F.3d 1347, 1357–59 (Fed. Cir. 2004) (court applied *Chevron* deference to an Office of Personnel Management regulation issued under general rulemaking authority);** *James v. Von Zemenszky*, 301 F.3d 1364 (Fed. Cir. 2002) (ignoring *Barnhart* factors because the agency statutory interpretation

contained in a directive and handbook "f[e]ll within the class of informal agency interpretations that do not ordinarily merit *Chevron* deference"); *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173 (D.C. Cir. 2001) (holding that Federal Election Committee (FEC) advisory opinions are entitled to *Chevron* deference); *Matz v. Household International Tax Reduction Investment Plan*, 265 F.3d 572 (7th Cir. 2001) (holding that an Internal Revenue Service (IRS) statutory interpretation in an *amicus* brief, supported by an IRS Revenue Ruling and agency manual, was not entitled to *Chevron* deference); *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251 (11th Cir. 2001) (holding that a Department of Labor handbook was not due *Chevron* deference); *Teambank v. McClure*, 279 F.3d 614 (8th Cir. 2001) (holding that Office of the Controller of the Currency informal adjudications are due *Chevron* deference); *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000) (holding that FEC's probable cause determinations are entitled to *Chevron* deference). As Professor Pierce notes:

> "After *Mead*, it is possible to know only that legislative rules and formal adjudications are always entitled to *Chevron* deference, while less formal pronouncements like interpretative rules and informal adjudications may or may not be entitled to *Chevron* deference. The deference due a less formal pronouncement seems to depend on the results of judicial application of an apparently open-ended list of factors that arguably qualify as 'other indication[s] of a comparable congressional intent' to give a particular type of agency pronouncement the force of law."[34]

Page 3-35 – *Replace the last paragraph with the following:*

The deference principle does not apply to an agency's interpretation of a statute that is not part of its program or enabling legislation or is a statute of general applicability. *See Adams v. SEC*, 287 F.3d 183 (D.C. Cir. 2002); *Contractor's Sand & Gravel v. Federal Mine Safety & Health Commission*, 199 F.3d 1335 (D.C. Cir. 2000); *Association of Civilian Technicians v. Federal Labor Relations Authority*, 200 F.3d 590 (9th Cir. 2000). **In "split-jurisdiction" situations, where multiple agencies share specific statutory responsibility, courts have determined that *Chevron* deference is due to the primary executive branch enforcer and the agency accountable for overall administration of the statutory scheme. *See Martin v. Occupational Safety and Health***

***Review Commission*, 499 U.S. 144 (1991); *Collins v. National Transportation Safety Board*, 351 F.3d 1246 (D.C. Cir. 2003).**

2. Interpretation of Agency's Own Regulations

Page 3-38 – *Insert the following new paragraph after the quote at the top of the page:*

Recent cases according *Seminole Rock* deference to agency interpretations of their regulations include: *Entergy Services, Inc. v. Federal Energy Regulatory Commission*, 375 F.3d 1204, 1209 (D.C. Cir. 2004); *Castlewood Products, L.L.C. v. Norton*, 365 F.3d 1076, 1079 (D.C. Cir. 2004); *In re Sullivan*, 362 F.3d 1324, 1328 (Fed. Cir. 2004). In *WHX Corp. v. SEC*, 362 F.3d 854, 860 (D.C. Cir. 2004), the court did not defer to an agency interpretation because the interpretation rested entirely on staff advice and there was no formal agency precedent or official interpretative guideline on point.

C. Administrative Discretion

1. Introduction

Page 3-41 – *Replace the first full paragraph with the following:*

Under the Administrative Procedure Act (APA), action that is "committed to agency discretion by law" is not subject to judicial review. 5 U.S.C. § 701(a)(2). As the Supreme Court has pointed out, this is a "very narrow exception" applicable in "rare instances" where, quoting from the APA's legislative history, "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). As noted, the "no law to apply" exception is uncommon, and most exercises of discretion will be found reviewable at least to some extent.[37] *See* ***Raymond Proffitt Foundation v. Corps of Engineers*, 343 F.3d 199, 207 (3rd Cir. 2003);** *Drake v. Federal Aviation Administration*, 291 F.3d 59 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *City of Los Angeles v. Department of Commerce*, 307 F.3d 859 (9th Cir. 2002); *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1992).

Page 3-41 – *Replace footnote number 37 with the following:*

[37] However, agency inaction in declining to initiate enforcement or other regulatory action is subject to "a presumption of unreviewability," although that presumption is rebuttable. *Heckler v. Chaney*, 470 U.S. 821 (1985). Another obvious exception is if a statute explicitly precludes judicial review. *See Jordan Hospital, Inc. v. Shalala*, 276 F.3d 72 (1st Cir. 2002); *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001) (construction of World War II memorial); *Ismailov v. Reno*, 263 F.3d 851 (8th Cir. 2001) (refusal to extend deadline for asylum application). ***See also Ohio Public Interest Research Group, Inc. v. Whitman*, 386 F.3d 792 (6th Cir. 2004); *Godwin v. Secretary of Housing and Urban Development*, 356 F.3d 310 (D.C. Cir. 2004).**

Page 3-42 – *Insert the following new paragraphs after the last bulleted paragraph:*

Even where the APA does not flatly preclude judicial review, the courts will entertain a lawsuit under the Act only if it involves an "agency action" that is subject to redress under the Act. In *Norton v. Southern Utah Wilderness Alliance*, ___ U.S. ___, 124 S. Ct. 2373 (2004), the Court rejected a suit under the APA to compel the Interior Department to regulate the use of off-road vehicles on certain federal wilderness lands. The Court concluded that there was no legal mandate requiring the agency to take such action. The Court described the jurisdictional parameters of the APA as follows:

> **"The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.' 5 U.S.C. § 702. Where no other statute provides a private right of action, the 'agency action' complained of must be '*final* agency action.' § 704 (emphasis added). 'Agency action' is defined in § 551(13) to include 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*.' (Emphasis added.) The APA provides relief for a failure to act in § 706(1): 'The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.'**

> **"Sections 702, 704, and 706(1) all insist upon an 'agency action,' either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1)).**

124 S. Ct. at 2378. Thus, the Court held that in order to be viable, an APA claim seeking to compel an agency to act must point to "a *discrete* agency action that it is *required to take*." *Id.* at 2379 (emphasis in original). This standard precludes "broad programmatic attack[s]." *Id.* at 2379–80. The Court added:

> **"The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve."**

***Id.* at 2381.**

Availability of Appropriations: Purpose

Page 4-3 – *Replace part of the index for section 11 as follows:*

11. Lobbying, Publicity or Propaganda, and Related Matters
a. Introduction…….
b. Penal Statutes……..
c. Appropriation Act Restrictions…….
(1) Origin and general considerations……
(2) Self-aggrandizement……
(3) Covert propaganda…….
(4) Purely partisan materials…….
(5) Pending legislation: Overview……..
(6) Cases involving "grassroots" lobbying violations……
(7) Pending legislation: Cases in which no violation was found…….
(8) Pending legislation: Providing assistance to private lobbying groups…….
(9) Promotion of legislative proposals: Prohibited activity short of grass roots lobbying……
(10) Federal employees' communications with Congress……

A. General Principles

1. Introduction: 31 U.S.C. § 1301(a)

Page 4-6 – *Replace the fourth paragraph with the following:*

Simple, concise, and direct, this statute was originally enacted in 1809 (ch. 28, § 1, 2 Stat. 535, (Mar. 3, 1809)) and is one of the cornerstones of congressional control over the federal purse. Because money cannot be paid from the Treasury except under an appropriation (U.S. Const. art. I, § 9, cl. 7), and because an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used. Simply stated, 31 U.S.C. § 1301(a) says that public funds may be used only for the purpose or purposes for which they were appropriated. It prohibits charging authorized items to the wrong appropriation, and unauthorized items to any appropriation. ***See, e.g.*, B-302973, Oct. 6, 2004 (agency could not charge authorized activities such as cost comparison studies to an appropriation that specifically prohibits its use for such studies).** Anything less would

render congressional control largely meaningless. An earlier Treasury Comptroller was of the opinion that the statute did not make any new law, but merely codified what was already required under the Appropriations Clause of the Constitution. 4 Lawrence, First Comp. Dec. 137, 142 (1883).

2. Determining Authorized Purposes

Page 4-11 – *Replace the first full paragraph with the following:*

Once the purposes have been determined by examining the various pieces of legislation, 31 U.S.C. § 1301(a) comes into play to restrict the use of the appropriation to these purposes only, together with one final generic category of payments—payments authorized under general legislation applicable to all or a defined group of agencies and not requiring specific appropriations. For example, legislation enacted in 1982 amended 12 U.S.C. § 1770 to authorize federal agencies to provide various services, including telephone service, to employee credit unions. Pub. L. No. 97-320, § 515, 96 Stat. 1469, 1530 (Oct. 15, 1982). Prior to this legislation, an agency would have violated 31 U.S.C. § 1301(a) by providing telephone service to a credit union, even on a reimbursable basis, because this was not an authorized purpose under any agency appropriation. 60 Comp. Gen. 653 (1981). The 1982 amendment made the providing of special services to credit unions an authorized agency function, and hence an authorized purpose, which it could fund from unrestricted general operating appropriations. 66 Comp. Gen. 356 (1987). Similarly, a recently enacted statute gives agencies the discretion to use appropriated funds to pay the expenses their employees incur for obtaining professional credentials. 5 U.S.C. § 5757(a)**;** B-289219, Oct. 29, 2002. *See also* **B-302548, Aug. 20, 2004 (section 5757(a) does not authorize the agency to pay for an employee's membership in a professional association unless membership is a prerequisite to obtaining the professional license or certification).** Prior to this legislation, agencies could not use appropriated funds to pay fees incurred by their employees in obtaining professional credentials. *See*, *e.g.*, 47 Comp. Gen. 116 (1967). Other examples are interest payments under the Prompt Payment Act (31 U.S.C. §§ 3901–3907) and administrative settlements less than $2,500 under the Federal Tort Claims Act (28 U.S.C. §§ 2671 *et seq.*).

B. The "Necessary Expense" Doctrine

1. The Theory

Page 4-21 – *Replace the third paragraph with the following*:

In addition to recognizing the differences among agencies when applying the necessary expense rule, we act to maintain a vigorous body of case law responsive to the changing needs of government. In this regard, our decisions indicate a willingness to consider changes in societal expectations regarding what constitutes a necessary expense. This flexibility is evident, for example, in our analysis of whether an expenditure constitutes a personal or an official expense. As will be discussed more fully later in the chapter, use of appropriations for such an expenditure is determined by continually weighing the benefit to the agency, such as the **productivity, safety,** recruitment, and retention of a dynamic workforce and other considerations enabling efficient, effective, and responsible government. We recognize, however, that these factors can change over time. **B-302993, June 25, 2004 (modifying earlier decisions to reflect determination that purchase of kitchen appliances for use by agency employees in an agency facility is reasonably related to the efficient performance of agency activities, provides other benefits such as assurance of a safe workplace, and primarily benefits the agency, even though employees enjoy a collateral benefit);** B-286026, June 12, 2001(overruling GAO's earlier decisions based on reassessment of the training opportunities afforded by examination review courses); B-280759, Nov. 5, 1998 (overruling GAO's earlier decisions on the purchase of business cards). *See also* 71 Comp. Gen. 527 (1992) (eldercare is not a typical employee benefit provided to the nonfederal workforce and not one that the federal workforce should expect); B-288266, Jan. 27, 2003 (GAO explained it remained "willing to reexamine our case law" regarding light refreshments if it is shown to frustrate efficient, effective, and responsible government).

2. General Operating Expenses

Page 4-34 – *Replace the fifth full paragraph with the following:*

Outplacement assistance to employees may be regarded as a legitimate matter of agency personnel administration if the expenditures are found to benefit the agency and are reasonable in amount. 68 Comp. Gen. 127

(1988); B-272040, Oct. 29, 1997. The Government Employees Training Act authorizes training in preparation for placement in another federal agency under conditions specified in the statute. 5 U.S.C. § 4103(b). **Similarly, employee retirement education and retirement counseling, including individual financial planning for retirement, fall within the legitimate range of an agency's discretion to administer its personnel system and therefore are legitimate agency expenses. B-301721, Jan. 16, 2004.**

C. Specific Purpose Authorities and Limitations

5. Entertainment – Recreation – Morale and Welfare

Page 4-119 – *Replace the third paragraph with the following:*

The purchase of equipment for use in other than an established cafeteria may also be authorized **when the agency determines that the primary benefit of its use accrues to the agency by serving a valid operational purpose, such as providing for an efficient working environment or meeting health needs of employees, notwithstanding a collateral benefit to the employees. In B-302993, June 25, 2004, GAO approved the purchase of kitchen appliances, ordinarily considered to be personal in nature, for common use by employees in an agency facility. The appliances included refrigerators, microwaves, and commercial coffee makers. The agency demonstrated that equipping the workplace with these appliances was reasonably related to the efficient performance of agency activities and provided other benefits to the agency, including the assurance of a safe workplace. GAO also advised the agency that it should establish policies for uniform procurement and use of such equipment. In developing a policy, the agency should address the ongoing need for specific equipment throughout the building, the amount of the agency's appropriation budgeted for this purpose, price limitations placed on the equipment purchases, and whether the equipment should be purchased centrally or by individual units within headquarters. It is important that the policy ensure that appropriations are not used to provide any equipment for the sole use of an individual, and that the agency locate**

refrigerators, microwaves, and coffee makers acquired with appropriated funds only in common areas where they are available for use by all personnel. It should also be clear that appropriated funds will not be used to furnish goods, such as the coffee itself or microwaveable frozen foods, to be used in the kitchen area. These remain costs each employee is expected to bear.

The decision in B-302993, June 25, 2004, represented a departure from earlier cases which permitted such purchases under more restrictive circumstances where the agency could identify a specific need:

- **B-173149, Aug. 10, 1971: purchase of a set of stainless steel cooking utensils for use by air traffic controllers to prepare food at a flight service station where there** were no other readily accessible eating facilities and the employees were required to remain at their post of duty for a full 8-hour shift.

- B-180272, July 23, 1974: purchase of a sink and refrigerator to provide lunch facilities for the Occupational Safety and Health Review Commission where there was no government cafeteria on the premises.

- B-210433, Apr. 15, 1983: purchase of microwave oven by Navy facility to replace nonworking stove. Facility was in operation 7 days a week, some employees had to remain at their duty stations for 24-hour shifts, and there were no readily accessible eating facilities in the area during nights and weekends.

- B-276601, June 26, 1997: purchase of a refrigerator for personal food items of Central Intelligence Agency (CIA) employees. CIA headquarters facility was relatively distant from private eating establishments, the CIA did not permit delivery service to enter the facility due to security concerns, and the cafeteria served only breakfast and lunch.

Page 4-122 – *Replace the first full paragraph with the following:*

The decision at 60 Comp. Gen. 303 was expanded in B-199387, Mar. 23, 1982, to include small “samples” of ethnic foods prepared and served during a formal ethnic awareness program as part of the agency’s equal employment opportunity program. In the particular program being considered, the attendees were to pay for their own lunches, with the

ethnic food samples of minimal proportion provided as a separate event. Thus, the samples could be distinguished from meals or refreshments, which remain unauthorized. (The decision did not specify how many "samples" an individual might consume in order to develop a fuller appreciation.) **Compare that situation to the facts in B-301184, Jan. 15, 2004, where GAO found that the U.S. Army Corps of Engineers' appropriation was not available to pay for the costs of food offered at the Corps' North Atlantic Division's February 2003 Black History Month program. The evidence in the record, including the time of the program, the food items served, and the amounts available, indicated that a meal, not a sampling of food, was offered.**

Page 4-123 – *Insert the following after the first full paragraph:*

Similarly, GAO advised that serving refreshments purchased with appropriated funds to local children as part of the Forest Service's "Kid's Fishing Day" did not promote cultural awareness. While it may have been important that children learn to fish and appreciate the outdoors, such a goal did not advance federal EEO objectives. B-302745, July 19, 2004.

7. Firefighting and Other Municipal Services

Page 4-154 – *Insert the following after the first full paragraph:*

In B-302230, Dec. 30, 2003, GAO found the District of Columbia's 9-1-1 emergency telephone system surcharge as originally enacted to be an impermissible tax on the federal government because the legal incidence of the tax fell on the federal government. Subsequently, the District of Columbia amended its law such that the legal incidence of the tax falls on the providers of telephone service, not the users of telephone service. Thus, federal agencies could pay bills that itemize the surcharge that the vendors must pay. *Id.*

8. Gifts and Awards

Page 4-166 – *Replace the first full paragraph with the following:*

The Incentive Awards Act applies to civilian agencies, civilian employees of the various armed services and specified legislative branch agencies. 5 U.S.C. § 4501. Within the judicial branch, it applies to the United States Sentencing Commission. *Id.*[103] While it does not apply to members of the

armed forces, the Defense Department has very similar authority for military personnel in 10 U.S.C. § 1124.

Page 4-166 – *Replace footnote number 103 with the following:*

[103] The Sentencing Commission had not been covered prior to a 1988 amendment to the statute. *See* 66 Comp. Gen. 650 (1987). The Administrative Office of the United States Courts is no longer covered by the statute. Pub. L. No. 101-474, § 5(f), 104 Stat. 1100 (Oct. 30, 1990). **The District of Columbia is also no longer covered. When the District of Columbia Home Rule Act was enacted into law, Pub. L. No. 93-198, 87 Stat. 777 (Dec. 24, 1973), the Act provided for the continuation of federal laws applicable to the District of Columbia government and its employees (that for the most part were in title 5 of the United States Code) until such time as the District enacted its own laws covering such matters. The District has adopted a number of laws exempting its employees from various provisions of title 5, and sections 4501 through 4506 are specifically superseded. *See* D.C. Official Code, 2001 ed. §1-632.02.**

11. Lobbying and Related Matters

Page 4-188 – *Replace the title of section 11 with the following:*

11. Lobbying, Publicity or Propaganda, and Related Matters

Page 4-189 – *Insert the following after the first full paragraph:*

In addition to restrictions on lobbying, this section will explore restrictions on publicity or propaganda. Since 1951, appropriation acts have included provisions precluding the use of the appropriations for "publicity or propaganda." While Congress has never defined the meaning of publicity or propaganda, GAO has recognized three types of activities that violate the publicity or propaganda prohibitions: self-aggrandizement, covert propaganda, and materials that are purely partisan in nature.

Page 4-196 – *Insert the following as the first paragraph under "(1) Origin and general considerations":*

In addition to penal statutes imposing restrictions on lobbying, lobbying restrictions are found in appropriations acts. Restrictions on publicity or propaganda are found only in appropriations acts.

Page 4-197 – *Replace the first paragraph and quotation with the following:*

The publicity or propaganda prohibition made its first appearance in 1951. Members of Congress expressed concern over a speaking campaign promoting a national healthcare plan undertaken in the early 1950s by Oscar R. Ewing, the Administrator of the Federal Security Agency, a predecessor to the Department of Health and Human Services and the Social Security Administration. In reaction to this activity, Representative Lawrence R. Smith introduced the following provision, which was enacted in the Labor-Federal Security appropriation for 1952, Pub. L. No. 134, ch. 373, § 702, 65 Stat. 209, 223 (Aug. 31, 1951):

> **"No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not heretofore authorized by the Congress."**

Later versions of this provision prohibit activity throughout the government:

> **"No part of any appropriation contained *in this or any other Act* shall be used for publicity or propaganda purposes within the United States not heretofor authorized by the Congress."[117]**

Page 4-197 – *Replace footnote number 117 with the following:*

[117] ***See, e.g.,* the Transportation, Treasury, and related agencies' appropriations for 2005, Pub. L. No. 108-447, div. H, title VI, § 624, 118 Stat. 2809, 3278 (Dec. 8, 2004) (emphasis added).**

Page 4-198 – *Insert the following after the quotation and before the second full paragraph:*

Although the publicity and propaganda prohibition has appeared in some form in the annual appropriations acts since 1951, the prohibitions themselves provide little definitional guidance as to what specific activities are publicity or propaganda. GAO has identified three activities that are prohibited by the publicity or propaganda prohibition—self-aggrandizement, covert propaganda, and purely partisan materials.

Page 4-198 – *Replace the second full paragraph with the following:*

In evaluating whether a given action violates a publicity or propaganda provision, GAO will rely heavily on the agency's administrative justification. In other words, the agency gets the benefit of any legitimate doubt. GAO will not accept the agency's justification where it is clear that the action falls into one of **these categories**. Before discussing **these categories**, two threshold issues must be noted.

Page 4-199 – *Replace the first three paragraphs under "(2) Self-aggrandizement" and move the heading as follows:*

As noted above, the broadest form of the publicity and propaganda restriction prohibits the use of appropriated funds "for publicity or propaganda purposes not authorized by Congress." A fiscal year **2005** governmentwide variation limits these restrictions to activities "within the United States."[121]

(2) <u>Self-aggrandizement</u>

The Comptroller General first had occasion to construe this provision in 31 Comp. Gen. 311 (1952). The National Labor Relations Board asked whether the activities of its Division of Information amounted to a violation. Reviewing the statute's scant legislative history, the Comptroller General concluded that it was intended "to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question." *Id.* at 313. Therefore, the prohibition would not apply to the "dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws" for which an agency is responsible. *Id.* at 314. Based on this interpretation, GAO concluded that the activities of the Board's Division of Information were not improper. The only thing GAO found that might be questionable, the decision noted, were certain press releases reporting speeches of members of the Board.

Thus, 31 Comp. Gen. 311 established the important proposition that the statute does not prohibit an agency's legitimate informational activities. *See also* **B-302992, Sept. 10, 2004; B-302504, Mar. 10, 2004;** B-284226.2, Aug. 17, 2000; B-223098.2, Oct. 10, 1986**. It also established that the publicity or propaganda restriction prohibits "publicity of a nature tending to emphasize the importance of the agency or activity in question." 31 Comp. Gen. at 313. *See also* B-302504, Mar. 10, 2004;**

B-212069, Oct. 6, 1983. Such activity has become known as "self-aggrandizement."

Page 4-199 – *Replace footnote number 121 with the following:*

[121] **Pub. L. No. 108-447, div. H, title VI, § 624, 118 Stat. 2809, 3278 (Dec. 8, 2004).**

Page 4-200 – *Replace the first full paragraph with the following:*

In B-302504, Mar. 10, 2004, GAO considered a flyer and television and print advertisements that the Department of Health and Human Services (HHS) produced and distributed to inform Medicare beneficiaries of recently enacted changes to the Medicare program. While the materials had notable factual omissions and other weaknesses, GAO concluded that the materials were not self-aggrandizement because they did not attribute the enactment of new Medicare benefits to HHS or any of its agencies or officials.

Page 4-200 – *Replace the third full paragraph with the following:*

Other cases, in which GAO **specifically found no self-aggrandizement,** are B-284226.2, Aug. 17, 2000 (Department of Housing and Urban Development report and accompanying letter providing information to agency constituents about the impact of program reductions being proposed in Congress); B-212069, Oct. 6, 1983 (press release by Director of Office of Personnel Management excoriating certain Members of Congress who wanted to delay a civil service measure the administration supported); and B-161686, June 30, 1967 (State Department publications on Vietnam War). In none of these cases were the documents designed to glorify the issuing agency or official.

Page 4-202 – *Replace the first paragraph under the heading "(3) Covert propaganda" with the following:*

Another type of activity that GAO has construed as prohibited by the "publicity or propaganda not authorized by Congress" statute is "covert propaganda," defined as "materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency." B-229257, June 10, 1988. A critical element of the violation is concealment

from the target audience of the agency's role in sponsoring the material. *Id.;* **B-303495, Jan. 4, 2005; B-302710, May 19, 2004.**

Page 4-202 – *Insert the following after the second full paragraph:*

In B-302710, May 19, 2004, GAO found that the Department of Health and Human Services (HHS) violated the prohibition when it produced and distributed prepackaged video news stories that did not identify the agency as the source of the news stories. Prepackaged news stories, ordinarily contained in video news releases, or "VNRs," have become a popular tool in the public relations industry. The prepackaged news stories may be accompanied by a suggested script, video clips known as "B-roll" film which news organizations can use either to augment their presentation of the prepackaged news story or to develop their own news reports in place of the prepackaged story, and various other promotional materials. These materials are produced in the same manner in which television news organizations produce materials for their own news segments, so they can be reproduced and presented as part of a newscast by the news organizations. The HHS news stories were part of a media campaign to inform Medicare recipients about new benefits available under the recently enacted Medicare Prescription Drug, Improvement, and Modernization Act of 2003. HHS designed its prepackaged video news stories to be indistinguishable from video segments produced by private news broadcasters, allowing broadcasters to incorporate them into their broadcasts without alteration. The suggested anchor lead-in scripts included in the package facilitated the unaltered use of the prepackaged news stories, announcing the package as a news story by fictional news reporters. HHS, however, did not include any statement in the news stories to advise the television viewing audience, the target of the purported news stories, that the agency wrote and produced the prepackaged news stories, and the television viewing audiences did not know that the stories they watched on television news programs *about the government* were, in fact, prepared *by the government*. *See also* B-303495, Jan. 4, 2005 (prepackaged news stories produced by the Office of National Drug Control Policy were covert propaganda in violation of the prohibition).

Page 4-202 – *Insert the following after the last paragraph:*

In B-302992, Sept. 10, 2004, the Forest Service produced video and print materials to explain and defend its controversial land and resource management plan for the Sierra Nevada Forest. Because the video and print materials clearly identified the Forest Service and the Department of Agriculture as the source of the materials, GAO concluded that they did not constitute covert propaganda. *See also* B-301022, Mar. 10, 2004 (the Office of National Drug Control Policy was clearly identified as the source of materials sent to members of the National District Attorneys Association concerning the debate over the legalization of marijuana).

(4) <u>Purely partisan materials</u>

A third category of materials identified in GAO case law as violating the publicity or propaganda prohibition is purely partisan materials. To be characterized as purely partisan in nature, the offending materials must be found to have been "designed to aid a political party or candidate." B-147578, Nov. 8, 1962. It is axiomatic that funds appropriated to carry out a particular program would not be available for political purposes. *See* B-147578, Nov. 8, 1962.

It is often difficult to determine whether materials are political or not because "the lines separating the nonpolitical from the political cannot be precisely drawn." *Id.*; B-144323, Nov. 4, 1960. *See also* B-130961, Oct. 16, 1972. An agency has a legitimate right to explain and defend its policies and respond to attacks on that policy. B-302504, Mar. 10, 2004. A standard GAO applies is that the use of appropriated funds is improper only if the activity is "completely devoid of any connection with official functions." B-147578, Nov. 8, 1962. As stated in B-144323, Nov. 4, 1960:

> **"[The question is] whether in any particular case a speech or a release by a cabinet officer can be said to be so completely devoid of any connection with official functions or so political in nature that it is not in furtherance of the purpose for which Government funds were appropriated, thereby making the use of such funds …unauthorized. This is extremely difficult to determine in most cases as the lines separating the**

nonpolitical from the political cannot be precisely drawn.

"…As a practical matter, even if we were to conclude that the use of appropriated funds for any given speech or its release was unauthorized, the amount involved would be small, and difficult to ascertain; and the results of any corrective action might well be more technical than real."

While GAO has reviewed materials to determine whether they are partisan in nature, to date there are no opinions or decisions of the Comptroller General concluding that an agency's informational materials were so purely partisan as to constitute impermissible publicity or propaganda. In 2000, GAO concluded that an information campaign by the Department of Housing and Urban Development (HUD) using a widely disseminated publication, entitled *Losing Ground: The Impact of Proposed HUD Budget Cuts on America's Communities,* had not violated the prohibition. B-284226.2, Aug. 17, 2000. In the publication, HUD criticized what it called "deep cuts" in appropriations that were proposed by the House Appropriations Committee for particular HUD programs. The publications stated that, if enacted, the "cuts would have a devastating impact on families and communities nationwide." GAO found that this publication was a legitimate exercise of HUD's duty to inform the public of government policies, and that HUD had a right to justify its policies to the public and rebut attacks against those policies.

In B-302504, Mar. 10, 2004, GAO examined a flyer and print and television advertisements about changes to Medicare enacted by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (Dec. 8, 2003). The flyer contained information about new prescription drug benefits and price discount cards. GAO noted that while the materials contained opinion and notable factual omissions, the materials did not constitute impermissible publicity or propaganda. GAO explained:

"To restrict all materials that have some political content or express support of an Administration's policies would significantly curtail the recognized and

> **legitimate exercise of the Administration's authority to inform the public of its policies, to justify its policies and to rebut attacks on its policies. It is important for the public to understand the philosophical underpinnings of the policies advanced by elected officials and their staff in order for the public to evaluate and form opinions on those policies."**

***Id.* at 10.**

In B-302992, Sept. 10, 2004, GAO upheld the Forest Service's right to produce and distribute a brochure and video materials regarding its controversial policy on managing wildfire in the Sierra Nevada Forest. Because the materials sought to explain hundreds of pages of scientific data, official opinions, and documents of the Forest Service, they were not comprehensive and did not explain all the positive and negative aspects of the thinning policies adopted in its regional forest plan. GAO concluded that the Forest Service had the authority to disseminate information about its programs and policies and to defend those policies.

Apart from considerations of whether any particular law has been violated, GAO has taken the position in two audit reports that the government should not disseminate misleading information. In 1976, the former Energy Research and Development Administration (ERDA) published a pamphlet entitled *Shedding Light On Facts About Nuclear Energy.* Ostensibly created as part of an employee motivational program, ERDA printed copies of the pamphlet far in excess of any legitimate program needs, and inundated the state of California with them in the months preceding a nuclear safeguards initiative vote in that state. While the pamphlet had a strong pro-nuclear bias and urged the reader to "Let your voice be heard," the pamphlet did not violate any anti-lobbying statute because applicable restrictions did not extend to lobbying at the state level. B-130961-O.M., Sept. 10, 1976. However, GAO's review of the pamphlet found it to be oversimplified and misleading. GAO characterized it as propaganda not suitable for distribution to anyone, employees or otherwise, and recommended that ERDA cease further distribution and recover and destroy any undistributed copies. *See* GAO, *Evaluation Of the Publication and*

***Distribution Of "Shedding Light On Facts About Nuclear Energy,"* EMD-76-12 (Washington, D.C.: Sept. 30, 1976).**

In a later report, GAO reviewed a number of publications related to the Clinch River Breeder Reactor Project, a cooperative government/industry demonstration project, and found several of them to be oversimplified and distorted propaganda, and as such questionable for distribution to the public. However, the publications were produced by the private sector components of the Project and paid for with utility industry contributions and not with federal funds. GAO recommended that the Department of Energy work with the private sector components in an effort to eliminate this kind of material, or at the very least ensure that such publications include a prominently displayed disclaimer statement making it clear that the material was not government approved. GAO, *Problems With Publications Related To The Clinch River Breeder Reactor Project,* EMD-77-74 (Washington, D.C.: Jan. 6, 1978).

Page 4-203 – *Renumber section (4) as follows:*

(5) <u>Pending legislation: Overview</u>

Page 4-207 – *Renumber section (5) as follows:*

(6) <u>Cases involving "grassroots" lobbying violations</u>

Page 4-210 – *Renumber section (6) as follows:*

(7) <u>Pending legislation: Cases in which no violation was found</u>

Page 4-213 – *Renumber section (7) as follows:*

(8) <u>Pending legislation: Providing assistance to private lobbying groups</u>

Page 4-215 – *Renumber section (8) as follows:*

(9) <u>Promotion of legislative proposals: Prohibited activity short of grass roots lobbying</u>

Pages 4-218 to 4-219 – *Delete the entire section (9) entitled "Dissemination of political or misleading information"; the information contained therein has been integrated into the new section "(4) Purely partisan materials," above.*

Page 4-219 – *Insert the following after the third paragraph as a new section 11.c.(10):*

(10) Federal employees' communications with Congress

Since 1998, annual appropriations acts each year have contained a governmentwide prohibition on the use of appropriated funds to pay the salary of any federal official who prohibits or prevents another federal employee from communicating with Congress. *See* Pub. L. No. 105-61, § 640, 111 Stat. 1272, 1318 (1997). Specifically, this provision states:

> **"No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee."**

Pub. L. No. 108-199, div. F, title VI, § 618, 188 Stat. 3, 354 (Jan. 23, 2004); Pub. L. No. 108-7, div. J, title VI, § 620, 117 Stat. 11, 468 (Feb. 20, 2003). This provision has its antecedents in several older pieces of legislation, including section 6 of the Lloyd-La Follette Act of 1912, Pub. L. No. 336, ch. 389, 66 Stat. 539, 540 (Aug. 24, 1912), which stated:

> **"The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."**

Congress enacted section 6 in response to concern over executive orders by Presidents Theodore Roosevelt and Howard Taft that prohibited federal employees from contacting Congress except through the head of their agency. The legislative history of this provision indicates that Congress intended to advance two goals: to preserve the First Amendment rights of federal employees regarding their working conditions and to ensure that Congress had access to programmatic information from frontline federal employees. *See* H.R. Rep. No. 62-388, at 7 (1912); 48 Cong. Rec. 5634, 10673 (1912).

In B-302911, Sept. 7, 2004, GAO concluded that the Department of Health and Human Services violated this provision by paying the salary of the Director of the Centers for Medicare & Medicaid Services (CMS) who prohibited the CMS Chief Actuary from providing certain cost estimates of Medicare legislation to Congress. The Director specifically instructed the Chief Actuary not to respond to any requests for information and advised that there would be adverse consequences if he released any information to Congress. GAO recognized that certain applications of the provision could raise constitutional separation of powers concerns; however, there was no controlling judicial opinion declaring the provision unconstitutional. GAO found that the provision, as applied to the facts in this case, precluded the payment of the CMS Director's salary because he specifically prevented another employee from communicating with Congress, particularly in light of the narrow, technical nature of the information requested by Congress and Congress's need for the information in carrying out its constitutional legislative duties.

Page 4-227 – *Replace the third full paragraph with the following:*

A 1983 decision illustrates another form of information dissemination that is permissible without the need for specific statutory support. Military chaplains are required to hold religious services for the commands to

which they are assigned. 10 U.S.C. § 3547. Publicizing such information as the schedule of services and the names and telephone numbers of installation chaplains is an appropriate extension of this duty. Thus, GAO advised the Army that it could procure and distribute calendars on which this information was printed. 62 Comp. Gen. 566 (1983). Applying a similar rationale, the decision also held that information on the Community Services program, which provides various social services for military personnel and their families, could be included. *See also* **B-301367, Oct. 23, 2003 (affixing decals of the major units assigned to an Air Force base onto a nearby utility company water tower to inform the public of military activity in the area is a permissible use of appropriated funds)**; B-290900, Mar. 18, 2003 (approving the Bureau of Land Management's use of appropriated funds to pay its share of the costs of disseminating information under a cooperative agreement); B-280440, Feb. 26, 1999 (allowing the Border Patrol's use of appropriated funds to purchase uniform medals that, in part, served to advance "knowledge and appreciation for the agency's history and mission").

Page 4-232 – *Replace the first full paragraph with the following:*

A statute originally enacted in 1913, now found at 5 U.S.C. § 3107, provides:

> "Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose."

This provision applies to all appropriated funds. GAO has consistently noted certain difficulties in enforcing the statute. In GAO's first substantive discussion of 5 U.S.C. § 3107, the Comptroller General stated "[i]n its present form, the statute is ineffective." A-61553, May 10, 1935. The early cases[151] identified three problem areas, summarized in B-181254(2), Feb. 28, 1975.

Page 4-233 – *Insert the following after the second paragraph:*

The legislative history of section 3107 provides some illumination. While it is not clear what was meant by "publicity expert," there are indications that the provision would prohibit the use of press agents "to extol or to advertise" the agency or individuals within the agency. *See, e.g.,* 50 Cong. Rec. 4410 (1913) (comments of Representative Fitzgerald, chairman of the committee that reported the bill)). There are also indications that the provision should not interfere with legitimate information dissemination

regarding agency work or services. When some members expressed concern that the provision may affect the hiring of experts to "mak[e] our farm bulletins more readable to the public and more practical in their make-up," supporters indicated that such activities would not be restricted by passage of the provision. *Id.* at 4410 (colloquy between Representatives Lever and Fitzgerald).

Page 4-234 – *Insert the following after the first partial paragraph:*

GAO recently revisited the statute in B-302992, Sept. 10, 2004. The Forest Service had hired a public relations firm to help produce and distribute materials regarding its controversial land and resource management plan in the Sierra Nevada Forest, a plan consisting of hundreds of pages of scientific data and opinion. The Forest Service had hired the public relations firm to help make the plan's scientific content more understandable to the public and media. GAO concluded that the Forest Service had not violated section 3107. GAO said that section 3107 was not intended to impede legitimate informational functions of agencies, and does not prohibit agencies from paying press agents and public affairs officers to facilitate and manage dissemination of agency information. GAO stated:

> **"Instead, what Congress intended to prohibit with section 3107 is paying an individual 'to extol or to advertise' the agency, an activity quite different from disseminating information to the citizenry about the agency, its policies, practices, and products."**

B-302992, Sept. 10, 2004.

12. Membership Fees

Page 4-234 – *Replace the first full paragraph with the following and insert new footnote number 152a as follows:*

Appropriated funds may not be used to pay membership fees of an employee of the United States in a society or association. 5 U.S.C. § 5946. The prohibition does not apply if an appropriation is expressly available for that purpose, or if the fee is authorized under the Government Employees Training Act. Under the Training Act, membership fees may be paid if the fee is a necessary cost directly related to the training or a condition precedent to undergoing the training. 5 U.S.C. § 4109(b).[152a]

Page 4-234 – *Insert the following for new footnote number 152a:*

[152a] **The District of Columbia has specifically exempted its employees from the provisions of 5 U.S.C. § 5946 as well as the Government Employees Training Act, 5 U.S.C. §§ 4101 *et seq*. *See* D.C. Official Code, 2001 ed. §1-632.02.**

Page 4-239 – *Replace the second paragraph with the following:*

Compare that case with the decision in B-286026, June 12, 2001, in which the Pension Benefit Guaranty Corporation (PBGC) asked whether it could use appropriated funds to pay, as training costs, fees for actuary accreditation. PBGC employs a number of actuaries to calculate pension benefits. Although actuaries do not need a professional license for employment, as part of a collective bargaining agreement PBGC proposed to use training funds to send actuaries to the examination review courses, provide on-the-job study time, and pay for the accreditation examinations. PBGC determined that this course of study and testing would enhance the ability of the PBGC actuaries to carry out their assignments. PBGC has the discretion under the Government Employees Training Act to determine that the review courses constitute appropriate training for its actuaries. Accordingly, GAO agreed that PBGC has authority, under 5 U.S.C. § 4109(a), to use appropriated funds for review courses and on-the-job study time. However, there was no authority to pay the cost of the accreditation examination itself, since a licensing accreditation examination does not fall within the Government Employees Training Act's definition of training. In the absence of statutory authority, an agency may not pay the costs of its employees taking licensing examinations since professional accreditation is personal to the employee and should be paid with personal funds. Here, the actuarial accreditation belongs to the employee personally and would remain so irrespective of whether the employee remains with the federal government.

The PBGC decision, B-286026, June 12, 2001, predated enactment of 5 U.S.C. § 5757, which gave agencies the discretionary authority to reimburse employees for expenses incurred in obtaining professional credentials, including the costs of examinations. **In B-302548, Aug. 20, 2004, GAO determined that under 5 U.S.C. § 5757, an agency may pay only the expenses required to obtain the license or official certification needed to practice a particular profession. In that case, an employee who was a certified public accountant (CPA) asked her agency to pay for her membership in the California**

Society of Certified Public Accountants, which is voluntary and not a prerequisite for obtaining a CPA license in California. GAO held that payment for voluntary memberships in organizations of already credentialed professionals is prohibited under 5 U.S.C. § 5946, and section 5757 does not provide any authority to pay such fees where the membership in the organization is not a prerequisite to obtaining the professional credential. Section 5757 is discussed in more detail in this chapter in the next section on attorneys' expenses related to admission to the bar, and in section C.13.e on professional qualification expenses.

Page 4-242 – *Replace the first paragraph with the following:*

In 2001, section 1112 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1238 (Dec. 28, 2001) amended Title 5, United States Code, by adding a new section 5757. Under 5 U.S.C. § 5757(a), agencies may, at their discretion, use appropriated funds to pay expenses incurred by employees to obtain professional credentials, state-imposed and professional licenses, professional accreditations, and professional certifications, including the costs of examinations to obtain such credentials. This authority is not available to pay such fees for employees in or seeking to be hired into positions excepted from the competitive service because of the confidential, policy-determining, policymaking, or policy-advocating character of the position. 5 U.S.C. § 5757(b). Nothing in the statute or its legislative history defines or limits the terms "professional credentials," "professional accreditation," or "professional certification." Agencies have the discretion to determine whether resources permit payment of credentials, and what types of professional expenses will be paid under the statute. Thus, if an agency determines that the fees its attorneys must pay for admission to practice before federal courts are in the nature of professional credentials or certifications, the agency may exercise its discretion under 5 U.S.C. § 5757 and pay those fees out of appropriated funds. B-289219, Oct. 29, 2002. **Also, GAO has stated that under 5 U.S.C. § 5757 an agency may pay the expenses of employees' memberships in state bar associations when membership is required to maintain their licenses to practice law. *See* B-302548, Aug. 20, 2004 (note that this decision concerned membership in a certified public accountants' (CPA) professional organization that was not required as a condition of the CPA license).**

13. Personal Expenses and Furnishings

Page 4-260 – *Replace the first paragraph with the following:*

Neither the statute nor its legislative history defines the terms "professional credentials," "professional accreditation," and "professional certification." **T**he statute and the 1994 decision together appear to cover many, if not most, qualification expenses that GAO previously found to be personal to the employee, including actuarial accreditation (B-286026, June 12, 2001), licenses to practice medicine (B-277033, June 27, 1997), a Certified Government Financial Manager designation (B-260771, Oct. 11, 1995), and professional engineering certificates (B-248955, July 24, 1992). See also **B-302548, Aug. 20, 2004 (certified public accountant fees) and** section C.12.b of this chapter for a discussion of attorneys' bar membership fees.

15. State and Local Taxes

Page 4-289 – *Replace the second paragraph with the following:*

The rule that the government is constitutionally immune from a "vendee tax" but may pay a valid "vendor tax"—even if the government ultimately bears its economic burden—has been recognized and applied in numerous Comptroller General decisions. *E.g.*, **B-302230, Dec. 30, 2003; B-288161, Apr. 8, 2002;** 46 Comp. Gen. 363 (1966); 24 Comp. Gen. 150 (1944); 23 Comp. Gen. 957 (1944); 21 Comp. Gen. 1119 (1942); 21 Comp. Gen. 733 (1942). The same rule applies to state tax levies on rental fees. *See* 49 Comp. Gen. 204 (1969); B-168593, Jan. 13, 1971; B-170899, Nov. 16, 1970.

Availability of Appropriations: Time

B. The *Bona Fide* Needs Rule

8. Multiyear Contracts

Page 5-41 – *Replace the first full paragraph with the following:*

If an agency is contracting with fiscal year appropriations and does not have multiyear contracting authority, **one** course of action, apart from a series of separate fiscal year contracts, is a fiscal year contract with renewal options, with each renewal option (1) contingent on the availability of future appropriations and (2) to be exercised only by affirmative action on the part of the government (as opposed to automatic renewal unless the government refuses). *Leiter v. United States*, 271 U.S. 204 (1926); 66 Comp. Gen. 556 (1987); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 28 Comp. Gen. 553 (1949); B-88974, Nov. 10, 1949. The inclusion of a renewal option is key; with a renewal option, the government incurs a financial obligation only for the fiscal year, and incurs no financial obligation for subsequent years unless and until it exercises its right to renew. The government records the amount of its obligation for the first fiscal year against the appropriation current at the time it awards the contract. The government also records amounts of obligations for future fiscal years against appropriations current at the time it exercises its renewal options. The mere inclusion of a contract provision conditioning the government's obligation on future appropriations without also subjecting the multiyear contract to the government's renewal option each year would be insufficient. *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332 (1999). Thus, in 42 Comp. Gen. 272 (1962), the Comptroller General, while advising the Air Force that under the circumstances it could complete that particular contract, also advised that the proper course of action would be either to use an annual contract with renewal options or to obtain specific multiyear authority from Congress. *Id.* at 278.

Page 5-43 – *Insert the following after the quoted language in the first partial paragraph:*

Another course of action for an agency with fiscal year money to cover possible needs beyond that fiscal year is an indefinite-delivery/indefinite-quantity (IDIQ) contract. An IDIQ contract is a form of an indefinite-quantity contract, which provides for an

indefinite quantity of supplies or services, within stated limits, during a fixed period. 48 C.F.R. § 16.504(a). Under an IDIQ contract, actual quantities and delivery dates remain undefined until the agency places a task or delivery order under the contract. When an agency executes an indefinite-quantity contract such as an IDIQ contract, the agency must record an obligation in the amount of the required minimum purchase. At the time of award, the government commits itself to purchase only a minimum amount of supplies or services and has a fixed liability for the amount to which it committed itself. *See* 48 C.F.R. §§ 16.501-2(b)(3) and 16.504(a)(1). The agency has no liability beyond its minimum commitment unless and until it places additional orders. An agency is required to record an obligation at the time it incurs a legal liability. 65 Comp. Gen. 4, 6 (1985); B-242974.6, Nov. 26, 1991. Therefore, for an IDIQ contract, an agency must record an obligation for the minimum amount at the time of contract execution. In B-302358, Dec. 27, 2004, GAO determined that the Bureau of Customs and Border Protections' (Customs) Automated Commercial Environment contract was an IDIQ contract. As such, Customs incurred a legal liability of $25 million for its minimum contractual commitment at the time of contract award. However, Customs failed to record its $25 million obligation until 5 months after contract award. GAO determined that to be consistent with the recording statute, 31 U.S.C. § 1501(a)(1), Customs should have recorded an obligation for the contract minimum of $25 million against a currently available appropriation for the authorized purpose at the time the IDIQ contract was awarded.

9. Specific Statutes Providing for Multiyear and Other Contracting Authorities

Page 5-46 – *Replace the third full paragraph with the following:*

The Federal Acquisition Streamlining Act of 1994 (FASA) and related statutes extended multiyear contracting authority with annual funds to nonmilitary departments.[30] FASA authorizes an executive agency to enter into a multiyear contract for the acquisition of property or services for more than 1, but not more than 5 years, if the agency makes certain administrative determinations. 41 U.S.C. § 254c. Related laws extend this authority to various legislative branch agencies.[31] Through FASA and the related laws, Congress has relaxed the constraints of the *bona fide* needs rule by giving agencies the flexibility to structure contracts to fund the obligations up front, incrementally, or by using the standard *bona fide* needs rule approach. B-277165, Jan. 10, 2000. To the extent an agency

elects to obligate a 5-year contract incrementally, it must also obligate termination costs. ***Cf.* B-302358, Dec. 27, 2004 (since the contract at issue was an indefinite-delivery/indefinite-quantity contract, it was not subject to the requirements of 41 U.S.C. § 254c and the agency did not need to obligate estimated termination costs at the time of contract award).**

D. Disposition of Appropriation Balances

3. Expired Appropriations Accounts

Page 5-72 – *Replace the second full paragraph with the following:*

During the 5-year period, the expired account balance may be used to liquidate obligations properly chargeable to the account prior to its expiration.[50] The expired account balance also remains available to make legitimate obligation adjustments, that is, to record previously unrecorded obligations and to make upward adjustments in previously under recorded obligations. For example, Congress appropriated funds to provide education benefits to veterans under the so-called "GI bill," codified at 38 U.S.C. § 1662. Prior to the expiration of the appropriation, the Veterans Administration (VA) denied the benefits to certain Vietnam era veterans. The denial was appealed to the courts. The court determined that certain veterans may have been improperly denied benefits and ordered VA to entertain new applications and reconsider the eligibility of veterans to benefits. VA appealed the court order. Prior to a final resolution of the issue, the appropriation expired. GAO determined that, consistent with 31 U.S.C. § 1502(b),[51] the unobligated balance of VA's expired appropriation was available to pay benefits to veterans who filed applications prior to the expiration of the appropriation or who VA determined were improperly denied education benefits. 70 Comp. Gen. 225 (1991). **For a further discussion of the availability of funds between expiration and closing of an account, see B-301561, June 14, 2004 and** B-265901, Oct. 14, 1997.

4. Closed Appropriation Accounts

Page 5-73 – *Replace the third full paragraph with the following:*

Once an account has been closed:

> "[O]bligations and adjustments to obligations that would have been properly chargeable to that account, both as to purpose and in amount, before closing and that are not otherwise chargeable to any current appropriation account of the agency may be charged to any current appropriation account of the agency available for the same purpose."

31 U.S.C. § 1553(b)(1)**.** ***See also*** **B-301561, June 14, 2004.**