

**APPROPRIATIONS LAW FORUM 2011
YEAR-IN-REVIEW**

I. AVAILABILITY OF APPROPRIATIONS: PURPOSE

Statutory Construction

- *U.S. Secret Service—Statutory Restriction on Availability of Funds Involving Presidential Candidate Nominee Protection*, B-319009, Apr. 27, 2010

This opinion highlights the legal effect of incorporation by reference into an appropriations act of itemized spending limits for programs, projects and activities (PPAs) appearing in an explanatory statement.

In fiscal year 2009, the United States Secret Service (USSS) received a lump sum fiscal year appropriation for salaries and expenses as part of that year’s Department of Homeland Security appropriations act. Section 503(b) of the act imposed a reprogramming notification requirement on USSS. The language states:

“None of the funds provided by this Act . . . shall be available for obligation or expenditure for programs, projects, or activities through a reprogramming of funds in excess of \$5,000,000 or 10 percent, whichever is less, that: (1) augments existing programs, projects, or activities; . . . that would result in a change in existing programs, projects, or activities as approved by the Congress, unless the Committees on Appropriations of the Senate and the House of Representatives are notified 15 days in advance of such reprogramming of funds.”

Section 503(b) restricts the availability of funds for obligation by means of PPA reprogramming until proper notice is provided. Itemized amounts designated for PPAs, including an amount for the Presidential Candidate Nominee Protection PPA, were found in the explanatory statement of the accompanying conference report. Section 503(e) incorporated the itemized amounts in statute, providing that “such dollar amounts specified in this Act and accompanying explanatory statement shall be subject to the conditions and requirements . . . of this section.”

As a result, amounts set forth in the explanatory statement were incorporated by reference in the appropriations act, creating a fixed amount for section 503’s reprogramming reporting requirements and the Antideficiency Act.

- *Election Assistance Commission—Obligation of Fiscal Year 2004 Requirements Payments Appropriation*, B-318831, Apr. 28, 2010

In this decision, GAO reiterated that agencies must comply with the plain meaning in their appropriations. Here, GAO concluded that the Election Assistance Commission (EAC) violated the purpose statute, 31 U.S.C. § 1301(a), when it obligated funds for certain grant expenditures to an appropriation that was available only for requirements payments to the states. EAC justified its use of the requirements payment appropriation based on language in a conference report and the Office of Management and Budget (OMB) apportionment. However, the plain language of the appropriation was clear that the appropriation was available only for requirements payments. GAO explained that an agency violates the law if it obligates funds without proper budget authority even if the agency genuinely acts in reliance on an OMB apportionment. OMB itself advises agencies not to use its apportionments to determine the legality of using funds for a given purpose.

The grant expenditures should have been obligated to EAC's Salaries and Expenses appropriation, which was generally available for necessary expenses to carry out the Help America Vote Act, including grants. GAO explained that EAC should adjust its accounts consistent with the account closing law. If sufficient funds were unavailable, EAC should report an Antideficiency Act violation consistent with 31 U.S.C. § 1517. Alternatively, GAO suggested, EAC could request congressional ratification of its fiscal year 2004 actions. On September 29, 2010, EAC reported an Antideficiency Act violation to Congress and the President, and provided a copy to the Comptroller General. EAC noted that the agency had only been in existence for seven months at the time of the violation and relied on the General Services Administration for financial services support. EAC also was operating without a Chief Financial Officer, an Inspector General, a budget director, or federally-experienced financial staff. In its report, EAC stated that it was unable to correct the violation, but has taken steps to ensure the violation does not recur.

- *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part I*, B-319488, May 21, 2010

In this opinion, GAO relied on the common, ordinary meaning of the words in a statute in concluding that the National Aeronautics and Space Administration (NASA) did not violate a statutory prohibition on using funds to “create or initiate” a new program, project or activity (PPA).

The starting point of the analysis was an examination of the statutory language. The words “create” and “initiate” have no particular legal meaning, and the content of the prohibition did not indicate their definitions. In the absence of indications to the contrary, Congress is deemed to use words in their common, ordinary sense. One measure of the meaning of words is a standard dictionary, which GAO used to define “create” and “initiate.”

According to *The New Oxford American Dictionary*, “create” means “to bring something into existence” while “initiate” means “cause a process or action to begin.” Accordingly, GAO determined that Congress prohibited NASA from using its Exploration appropriation to bring into being a new PPA.

NASA created study teams whose activities centered on initial planning related to proposals in the President’s budget request. The teams held internal planning discussions and developed documents for OMB and for the Office of Science and Technology Policy. These documents contained preliminary plans for new programs and for items proposed in the President’s budget request. Some teams issued public requests for information to gather input from academia and industry for use in further planning activities, and two teams set up planning offices.

GAO examined NASA’s activities in light of the common meanings of the words “create” and “initiate” and concluded that NASA did not use its Exploration appropriation to bring into being a new PPA. All the activities at issue focused on planning; the teams did not create any new programs, set up new program offices, or hire or permanently reassign any staff. The teams did not award contracts or bind NASA to taking any future course of action. In addition, the activities were in response to requests for information from OMB and the Office of Science and Technology Policy. By law, the President must formulate a budget request, and agencies must develop appropriation requests as part of the budget process. 31 U.S.C. §§ 1105, 1108(b)(1). Planning activities are an essential part of the budget process. Thus, the prohibition against using funds to create or initiate a new PPA does not preclude the use of funds to conduct planning activities.

- *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*, B-320091, July 23, 2010

In a companion opinion to *NASA, Part I*, GAO determined that based on the common meaning of words contained in the applicable statute, the National Aeronautics and Space Administration (NASA) did not violate a statutory prohibition on using funds to terminate or eliminate a program, project, or activity (PPA). Congress prohibited NASA from using its Exploration appropriations “for the termination or elimination of any program, project or activity of the architecture for the Constellation program.” According to *The New Oxford American Dictionary*, the common meaning of “terminate” is “bring to an end,” while “eliminate” means “completely get rid of (something).” Thus, the statute prohibited NASA from using the Exploration appropriations to bring any Constellation PPA to an end, or to completely remove or get rid of any Constellation PPA.

NASA financial data showed that NASA continued to allocate funds across all Constellation PPAs in amounts consistent with the allocations provided in congressional committee reports and NASA’s public budget documents. In

continuing to obligate funds for all the various Constellation PPAs, NASA neither brought to an end, nor completely eliminated, any Constellation PPA. Although NASA announced shifts in priority for various Constellation expenditures, these shifts did not in themselves amount to a termination or elimination of a PPA. NASA had discretion in how it carried out the Constellation program consistent with Congress's statutory direction. Because NASA continued to obligate funds to carry out all of the Constellation PPAs, it did not violate the statutory prohibition.

- *Consumer Product Safety Commission—Period of Availability and Permissible Uses of Grant Program Appropriations*, B-319734, July 26, 2010

In determining the period of availability of the Consumer Product Safety Commission's (CPSC) appropriations, GAO weighed the language in an authorization act and the language in an appropriation act.

As a general matter, all appropriations in annual acts are construed to be available for obligation only during the fiscal year for which they were appropriated, unless the act expressly provides otherwise. In CPSC's case, the language of the fiscal year 2009 appropriation that funded CPSC's grant program to improve pool and spa safety differed from the language that Congress previously used to authorize that appropriation. The 2007 Virginia Graeme Baker Pool and Spa Safety Act (Safety Act) authorized to be appropriated, for each of fiscal years 2009 and 2010, \$2 million to be available until expended with any amounts remaining at the end of fiscal year 2010 creditable to CPSC's enforcement account. However, in CPSC's fiscal year 2009 appropriations for this grant program, Congress actually appropriated only \$2 million and specified that the funds were available until the end of fiscal year 2010. Here, the appropriations act, enacted subsequent to the Safety Act authorizing the appropriation, expressly made a lesser amount available for a shorter period. Thus the appropriations act controls.

GAO also noted that the fiscal year 2009 appropriations act states that the \$2 million appropriation is available to implement the grant program, "as provided by" the Safety Act grant program provision. GAO read this clause as more specifically defining the purpose for which the \$2 million is available. A general cross-reference like this in an annual appropriations act is insufficient to make the appropriation available under the terms of the act authorizing the appropriation. An act that authorizes appropriations does not appropriate any funds to any agency.

- *NeighborWorks America—Availability of Appropriations for Grants to Affordable Housing Centers of America*, B-320329, Sept. 29, 2010

In this decision, GAO stressed that words in an appropriations provision are construed in accordance with their plain meaning absent a specific statutory definition. NeighborWorks America, a federally-chartered nonprofit

organization, asked GAO whether its appropriations were available to make grants to Affordable Housing Centers of America (AHCOA) in light of section 418 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010. Section 418 prohibits the distribution of federal funds to "affiliates, subsidiaries, or allied organizations" of Association of Community Organizations for Reform Now (ACORN).

GAO's analysis began with the language of the statute and the meaning of the words "affiliates," "subsidiaries," and "allied organizations," none of which were defined in section 418 or its legislative history. When a word has a specific legal meaning, courts apply that meaning when construing a statute. Here, "affiliates" and "subsidiaries" were defined in *Black's Law Dictionary* and in other federal laws and regulations. Using these definitions, GAO determined that AHCOA, as presently configured, was not an affiliate or subsidiary of ACORN. Because "allied organization" had no particular legal meaning, however, GAO turned to another familiar rule of statutory construction—a word in a list is given more precise content by the neighboring words with which it is associated. GAO determined "allied organization" to mean a corporation with whom ACORN had a financial or organizational relationship, for example, through contracts and grants. After reviewing the record, GAO concluded that AHCOA was not presently an allied organization of ACORN.

GAO noted that NeighborWorks has a continuing responsibility in its grantmaking and oversight capacity to monitor any changes that might implicate the appropriations prohibition or GAO's conclusion. GAO did not opine on AHCOA's eligibility for any particular grant program or the value in making grants to AHCOA.

Personal Expenses

- *Architect of the Capitol—Availability of Funds for Battery Recharging Stations for Privately Owned Vehicles*, B-320116, Sept. 15, 2010

In this case, GAO emphasized the Congressional prerogative to make public funds available for personal expenses. The Architect of the Capitol (AOC) requested a decision on whether appropriated funds may be used to install battery recharging stations on Capitol grounds for privately owned hybrid or electric vehicles. AOC also asked whether a program may be established where employees and Members of Congress reimburse AOC for the recharging and utility costs of their private electric or hybrid vehicles. To both questions, GAO answered that absent statutory authority to purchase and install recharging stations, or to establish a reimbursable program, AOC could not use appropriated funds for these purposes.

It is well established that an employee's commuting expenses are personal expenses, and absent specific statutory authority, personal expenses are not

payable from appropriated funds. GAO viewed the installation and operation of recharging stations for employees' and Members' personal vehicles as a personal expense facilitating their commute between home and work. This would be akin to providing fuel for personal vehicles. Congress, as a matter of public policy, may authorize agencies to use appropriations for expenses otherwise considered to be personal in nature, as it did in the Federal Employees Clean Air Incentives Act, authorizing transit pass programs.

Prohibitions on Publicity or Propaganda, and Lobbying

- *Department of Health and Human Services—Use of Appropriated Funds for “HealthReform.gov” Web site and “State Your Support” Web page, B-319075, Apr. 23, 2010*

Last year, GAO responded to several requests concerning the prohibitions against using appropriated funds for publicity or propaganda, and lobbying purposes. In the first of three opinions, GAO highlighted the distinction between gauging public opinion and encouraging the public to contact members of Congress. The decision addresses, also, the legitimate activity of informing and educating the public on the Administration's priorities, as well as explaining and defending those priorities.

In 2009, the Department of Health and Human Services (HHS) launched a Web site in support of the Administration's position on health care reform while reform legislation was pending before Congress. The site offered users the opportunity to endorse the Administration's position by electronically signing a form letter addressed to the President. The letter affirmed the user's commitment to “work with you [the President] and our Congressional leaders to enact legislation this year which provides affordable, high quality coverage for all Americans.”

The anti-lobbying prohibition found in 18 U.S.C. § 1913, as well as in section 717 of the Financial Services and General Government Appropriations Act, 2009, and section 503 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 2009, bars the use of appropriated funds for indirect or “grassroots” lobbying aimed at defeating or supporting legislation currently pending before Congress. In determining whether or not an agency has violated this prohibition, GAO has articulated a bright-line rule requiring evidence that the agency made a clear, explicit appeal to the public to contact Members of Congress in support of the agency's position on legislation pending before Congress. This rule balances the activity that the prohibitions are intended to address against the agency's responsibility to communicate with the American people on policies and priorities.

In this case, GAO recognized that some Web users might have inferred from the Web site a suggestion to contact members of Congress. However, the

Web site itself contained no explicit or direct appeal to the public to contact members of Congress in support of or opposition to pending legislation. Thus, it did not constitute grassroots lobbying.

Further, section 720 of the government-wide general provisions of the Omnibus Appropriations Act, 2009, prohibits the use of appropriated funds for publicity or propaganda purposes, including purely partisan purposes. While GAO thought some of the HHS materials unorthodox and declined to express an opinion as to their effectiveness to achieve HHS's stated goals, GAO found that the HHS materials were not purely partisan. For example, the Web site omitted some information regarding the impact of legislation on Medicare beneficiaries' coverage and costs and may have highlighted some of the positive aspects of Medicare changes. It also contained expressions of opinions from Members of both Democratic and Republican parties. Nevertheless, GAO could not say that the Web site was devoid of any connection with official agency functions or was completely political in nature. Thus, GAO found that the materials it contained were not purely partisan. The prohibition does not bar all materials that have some political content or express a certain point of view on a topic of political importance. To find otherwise, GAO said "would severely curtail legitimate communications of an agency's policies and its defense of those policies."

- *Department of Health and Human Services—Use of Appropriated Funds for Medicare Brochure*, B-319834, Sept. 9, 2010

In a second opinion, GAO concluded that while the Department of Health and Human Services' (HHS) Medicare brochure contained instances of abbreviated information and a positive view of the Patient Protection and Affordable Care Act (PPACA) not universally shared, nothing in the brochure constituted purely partisan, self-aggrandizing, or covert communications.

The brochure focused on the benefits of PPACA and gave a brief overview of PPACA. It did not provide a comprehensive summary of changes to Medicare to be implemented as a result of PPACA, and sometimes provided abbreviated information that omitted significant details about PPACA. By its nature, there is limited space in a brochure. It would not have been reasonable to expect the brochure to contain comprehensive information on PPACA. It referred beneficiaries to other official sources for further information.

The publicity or propaganda prohibition does not bar materials that support a particular view or justify the agency's policies. Indeed, 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.

- *Department of Health and Human Services—Use of Appropriated Funds for Technical Assistance and Television Advertisement*, B-320482, Oct. 19, 2010

In a third opinion regarding Department of Health and Human Services (HHS) activities, GAO determined that HHS did not violate the publicity or propaganda prohibition (1) when an HHS contractor, on his own accord and not pursuant to the contract or other direction from HHS, authored opinion pieces and gave congressional testimony in support of the Administration's health care policy proposals, or (2) when it used appropriations to produce and distribute television advertisements in support of the Administration's proposals, notwithstanding a lack of detail in the advertisements and some overstatements.

In March 2009, HHS contracted with an economist to produce technical memoranda on estimated changes in health insurance coverage and other associated costs and impacts of various health care policies under legislative consideration. Subsequent to the contract award, the economist authored opinion pieces appearing in national newspapers, and twice testified before a Senate committee on health care policy. He was not acting at the behest of HHS when he testified or wrote opinion pieces, nor did HHS contract with him to make public statements favorable to any HHS-favored policy. The facts here stand in contrast to the facts in B-305368, Sept. 30, 2005, where the Department of Education had contracted with a radio and television personality to comment regularly on the No Child Left Behind Act without assuring disclosure of the Department's role in the communication.

After the enactment of the Patient Protection and Affordable Care Act (PPACA) in December 2009, HHS retained an advertising firm to produce and air 30-second television ads aimed at Medicare beneficiaries, educating them on changes to Medicare as a result of the PPACA. Each ad began with the words, "An Important Message from Medicare," appearing on-screen in readable typeface for 4 seconds. Each ad ended with a picture of the HHS seal, the Medicare 800-number, the medicare.gov internet address and in the case of two of the ads, the words "Paid for by the U.S. Department of Health and Human Services" appeared as well.

GAO noted that agencies have a responsibility to inform the public about their policies and programs, and HHS has a responsibility to inform Medicare beneficiaries about the program. The advertisements were linked to responsibility, as they provided beneficiaries with some information regarding recent changes to the Medicare program while also directing beneficiaries to additional sources of information. GAO noted that the ads lacked detail about the changes and two of the three advertisements overstated one of the benefits of the changes in the law. However, notwithstanding the overstatements and the lack of detail in the advertisements, HHS had established a link between the content and its official functions and the content of the ads did not constitute a purely partisan message.

Local Taxes

- *Letter to the Attorney General of the District of Columbia—Use of GAO’s Appropriations to Pay the District of Columbia Stormwater Fee, B-320795, Sept. 29, 2010*

GAO determined that GAO’s appropriations were not available to pay a local tax for which Congress has not legislated a waiver of the sovereign immunity of the United States government, established in the Supremacy Clause of the U.S. Constitution. GAO informed both the Attorney General of the District of Columbia and the U.S. Department of the Treasury’s Commissioner of the Financial Management Service.

In March 2010, GAO was notified that beginning in fiscal year 2011 all government properties in the District of Columbia (District) would be assessed a stormwater fee by the District Department of the Environment (DDOE), and collected by the District Water and Sewer Authority (presently known as D.C. Water). DDOE uses amounts collected to defray costs of stormwater management activities required under a U.S. Environmental Protection Agency permit issued to the District.

GAO determined that the stormwater fee arose automatically from GAO’s status as a property owner, not upon the provision of a service or the granting of a privilege to GAO, and was assessed in order to raise revenue to fund core government functions. GAO noted that while section 313(a) of the Clean Water Act did waive sovereign immunity from many state and local environmental requirements, it did not explicitly waive the federal government’s sovereign immunity from taxation by state and local governments. In contrast, the impervious surface area charge for sewer services imposed by D.C. Water was not a tax. It was imposed on all rate payers to cover the costs of capital improvements to the sewer system and treatment facilities, and represents a fair approximation of services provided to GAO.

On January 4, 2011, Public Law 111-378 amended section 313, enacting a waiver of sovereign immunity for taxes such as this. The amendment also imposes several limitations: (1) payments or reimbursements of waived assessments may not be made using funds from “any permanent authorization account in the Treasury; and (2) each instrumentality of the federal government “shall not be obligated to pay or reimburse any fee, charge, or assessment [waived], except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment.”

II. AVAILABILITY OF APPROPRIATIONS: AMOUNT

Antideficiency Act: 31 U.S.C. § 1341

- *Election Assistance Commission—Obligation of Fiscal Year 2004 Requirements Payments Appropriation*, B-318831, Apr. 28, 2010

In this decision, GAO advised the Election Assistance Commission (EAC) that if it were unable to correct a violation of the purpose statute, 31 U.S.C. § 1301(a), through an account adjustment, the agency would be in violation of the Antideficiency Act.

In fiscal year 2004, Congress appropriated amounts “to carry out a program of requirements payments to States as authorized by section 257 of the Help America Vote Act [HAVA] of 2002.” HAVA section 257 established a mandatory grant program to make payments, called requirements payments, to states for election reform. EAC obligated some of these funds for poll worker and mock election grants, not requirements payments, in violation of the purpose statute. GAO said that EAC should adjust its accounts by charging the obligations for poll workers and mock election grants to its salaries and expenses appropriation, which was available for the purpose of poll work and mock election grants. If, after an account adjustment, insufficient funds were available, GAO recommended that EAC either report an Antideficiency Act violation, or request a congressional ratification of its fiscal year 2004 actions.

EAC agreed with GAO’s conclusion that the purpose statute was violated but it was unable to correct the violation through an account adjustment. On September 29, 2010, EAC reported an Antideficiency Act violation.

- *U.S. Secret Service—Statutory Restriction on Availability of Funds Involving Presidential Candidate Nominee Protection*, B-319009, Apr. 27, 2010

This opinion addresses the Antideficiency Act consequences for failure to limit obligations in accordance with amounts itemized in a conference report that were incorporated by reference into legislated reprogramming restrictions.

The opinion examined Presidential Candidate Nominee Protection obligations incurred by the United States Secret Service (USSS) and concluded that USSS violated the Antideficiency Act. Section 503(b) of the fiscal year 2010 Homeland Security Appropriations Act required USSS to notify the House and Senate Committees on Appropriations 15 days in advance of reprogrammings in excess of \$5 million among the activities itemized in the conference report accompanying the appropriations act. In this case, USSS spent \$5,100,000 more than was itemized for the Presidential Candidate Nominee Protection but failed to notify the committees of the reprogramming until 5 months after the fact. Because DHS and USSS notified Congress 5 months after

reprogramming amounts in excess of \$5 million, section 503(b) was violated, and the reprogrammed \$5.1 million for candidate protection was not legally available for obligation, resulting in an Antideficiency Act violation.

- *Department of the Army—The Fiscal Year 2008 Military Personnel, Army Appropriation and the Antideficiency Act*, B-318724, June 22, 2010

In this opinion, GAO concluded that an agency has violated the Antideficiency Act if the accounting records of the appropriation show that total obligations at the end of the fiscal year exceed the available balance of the appropriation even if the agency cannot identify the obligation that exceeded the amount available. If an agency manages its appropriation during the fiscal year by reference to estimated obligations or projections of obligations, the agency runs a risk of violating the Antideficiency Act.

GAO was asked whether the Army had sufficient funds in the fiscal year 2008 Military Personnel, Army (MPA) appropriation to cover costs related to bonuses and Permanent Change of Station (PCS) moves. The Army Budget Office (Army Budget) managed the MPA appropriation, but did not make decisions with respect to the particular activities under it. Rather, program managers at various offices incurred obligations against the appropriation and forwarded the information to Defense Finance and Accounting Service (DFAS) for payment. Army Budget, however, did not receive the same documentation from program managers supporting the recording of an actual obligation that program managers sent to DFAS. Instead, Army Budget recorded estimated obligations and then adjusted the estimates based on actual disbursement data from DFAS weeks or months later. In November 2008, Army Budget identified a \$200 million shortfall in the fiscal year 2008 MPA appropriation.

GAO concluded that the Army violated the Antideficiency Act. Army expense reports clearly showed that the MPA appropriation had less than \$200 million available at the end of fiscal year 2008. The Army, in a preliminary investigation, acknowledged that the account was overobligated. The Army explained that it relied on estimated obligations for accounting purposes rather than actual data provided by program managers because of inadequate financial management systems. The Army's practice of relying on estimated obligations does not relieve the Army of responsibility for complying with the Antideficiency Act. GAO recommended that the Army may wish to consider providing program managers with administrative subdivisions of the MPA account to help ensure that the Army complies with the Antideficiency Act.

Antideficiency Act, Voluntary Services Prohibition: 31 U.S.C. § 1342

- GAO, *Food and Drug Administration: Response to Heparin Contamination Helped Protect Public Health; Controls That Were Needed for Working With External Entities Were Recently Added*, GAO-11-95 (Washington, D.C.: October 2010)

In this report, GAO explained that the voluntary services prohibition of the Antideficiency Act is intended to protect the government from unexpected claims for compensation. An agency can accommodate the prohibition with a written agreement between the individual volunteer and the agency stipulating that the individual has no expectation of payment, will not file a claim against the government, and that the government has no liability for the services.

In 2008, the Food and Drug Administration (FDA) responded to a crisis involving the contamination of heparin, a medication used to prevent and treat blood clots. At the time, FDA engaged external scientists to provide the agency with technical and factual advice.

The Antideficiency Act prohibits the government from accepting voluntary services beyond those authorized by law except for emergencies involving the safety of human life or protection of property. GAO found that FDA's acceptance of voluntary services from the external scientists exposed the agency to the risk of claims for payment for services provided. The fundamental purpose of the voluntary services prohibition is to preserve the integrity of the appropriations process by preventing agencies from effectively incurring obligations in excess of or in advance of appropriations by accepting voluntary services with the expectation that Congress will later recognize a "moral obligation" to pay for the services rendered. Consistent with this underlying purpose, voluntary services are those that are not rendered under a prior contract, or with an advance agreement that they will be gratuitous.

FDA noted that it accepted voluntary services under the prohibition's emergency exception, pointing to the public health emergency that required the agency to quickly identify and assemble scientific expertise. While the existence of an emergency would provide a legal basis under the prohibition for an agency to accept voluntary services, it would not protect it from subsequent claims for payment. To the contrary, the acceptance of services under the emergency exception would still give rise to obligations for which payment must be made. The Antideficiency Act exception permits an agency, during an emergency to incur those obligations notwithstanding the lack of an appropriation to liquidate the obligations. To guard against future claims for compensation, an agency must obtain a written agreement from those providing voluntary services stating that the individual has no expectation of payment, will not file a claim against the government, and that the government has no liability.

In response to GAO's report, FDA adopted procedures for the acceptance of gratuitous services from external scientific and other experts in emergency situations.

III. AVAILABILITY OF APPROPRIATIONS: TIME

- *United States Capitol Police—Advances to Volpe Center Working Capital Fund*, B-319349, June 4, 2010

In this decision, GAO explained that funds advanced to a working capital fund through an interagency agreement retain their fiscal year characteristic until “earned” by the working capital fund. GAO was asked whether amounts advanced by the United States Capitol Police (USCP) from a fiscal year 2003 appropriation to the Department of Transportation’s Volpe Center Working Capital Fund (Volpe) were available to cover obligations incurred by Volpe in fiscal year 2009, after USCP’s fiscal year 2003 appropriation had been canceled by operation of law.

Pursuant to USCP’s account closing statute (2 U.S.C. § 1907(d)), which mirrors the general account closing statutes at 31 U.S.C. §§ 1551–1553, unexpended balances, both obligated and unobligated, are withdrawn by operation of law on September 30 of the fifth fiscal year following the fiscal year for which they were provided—in this case, September 30, 2008. The case turned on whether time-limited appropriations advanced into a “no-year” working capital fund assume the “no-year” character of the fund. If the amounts advanced in March 2007 took on the no-year character of Volpe’s working capital fund, USCP’s account closing law would not have barred Volpe from obligating the funds in fiscal year 2009. If the March 2007 advance retained its fiscal year 2003 character, however, USCP would need to use fiscal year 2009 or no-year appropriations to cover Volpe’s fiscal year 2009 agreement in order to avoid an Antideficiency Act violation.

Under 31 U.S.C. § 1532, when an agency withdraws funds from its appropriation and makes them available for credit to another appropriation, amounts withdrawn are available for obligation only during the fiscal year of availability of the appropriation from which the amount was drawn. We have previously held that withdrawn amounts retain their time character and do not assume the time character of the appropriation to which they are credited, unless otherwise specifically provided by law. Consequently, amounts withdrawn from a fiscal year appropriation and credited to a no-year fund retain their fiscal year identity until earned by the no-year fund.

Thus, the fiscal year 2003 funds advanced to Volpe would need to be used by Volpe in one of two ways no later than September 30, 2008. Volpe could incur costs to perform work for USCP and thus “earn” the advance. Alternatively,

Volpe could have entered into a contract or interagency agreement and obligated the funds by September 30.

- GAO, *Intragovernmental Revolving Funds: NIST's Interagency Agreements and Workload Require Management Attention*, GAO-11-41 (Washington, D.C.: October 2010)

In this report, GAO stressed that appropriated amounts advanced into an agency's working capital funds retain their fiscal year characteristic until "earned" by the working capital fund, at which time the earned amount becomes part of the working capital fund's corpus. Funds advanced are available to cover performance costs during the appropriation's period of availability plus five fiscal years. After that time, advanced amounts are canceled by operation of law and are no longer available to cover performance costs. Thus, agencies accepting advances should monitor the availability of funds advanced to ensure they are legally available when the performing agency bills against the amount.

GAO examined the National Institute of Standards and Technology's (NIST) growing carryover balance in its working capital fund. The working capital fund is largely comprised of amounts advanced to NIST from other federal agencies to pay for technical services. While some carryover in the working capital fund is expected given that the majority of NIST's interagency agreements have a period of performance crossing fiscal years, GAO found that NIST was not monitoring the period of availability of advances; rather NIST treated advances as no-year money as soon as the amounts were deposited into the working capital fund. Because NIST was not tracking availability of the advances and treated the amounts as no-year money, the agency ran the risk of using canceled amounts. GAO recommended that NIST improve internal monitoring and reporting.

- *Consumer Product Safety Commission—Period of Availability and Permissible Uses of Grant Program Appropriations*, B-319734, July 26, 2010

This decision addresses a conflict between an authorization act and language in an appropriations act. In this case, GAO explained that notwithstanding authorizing language, appropriations are understood to be available for one fiscal year unless Congress specifies otherwise in the appropriations, not the authorizing, act.

The Virginia Graeme Baker Pool and Spa Safety Act of 2007 (Safety Act) directed the Consumer Product Safety Commission (CPSC) to establish a grant program to provide financial assistance to states for pool and spa safety improvements. For each of fiscal years 2009 and 2010, the Safety Act authorized an appropriation of \$2 million for the grant program. In authorizing the appropriations, the authorization act stated that the amounts were to remain available until expended, and that CPSC could retain any unexpended

and unobligated amounts remaining at the end of fiscal year 2010 and credit them to the appropriation funding CPSC enforcement activities. In 2009, Congress enacted a \$2 million appropriation for the grant program as part of CPSC's fiscal year 2009 Salaries and Expenses appropriation. The appropriations act specified that the \$2 million was available for two fiscal years.

Appropriations in annual appropriations acts, such as the fiscal year 2009 CPSC Salaries and Expenses appropriation, are construed to be available for obligation only during the fiscal year for which they were appropriated, unless the act expressly provides otherwise. Indeed, CPSC's appropriations act stated: "None of the funds appropriated in this Act shall remain available for obligation beyond the current fiscal year [2009], nor may any be transferred to other appropriations, unless expressly so provided herein." In this case, the appropriations act expressly provided that the \$2 million appropriated for the Safety Act grant program be available for obligation for two fiscal years—2009 and 2010. It was the appropriations act language, not the no-year language of the authorization act, that governed the appropriations time period of availability.

IV. OBLIGATIONS

Termination Liability

- *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*, B-320091, July 23, 2010

In addition to this case's significance with regard to statutory construction, GAO also noted that a subsequent agreement to pay termination costs in excess of the total amount allotted to a cost reimbursement contract is an obligating event, and sufficient funds must be available to pay termination costs at the time of obligation, or an agency is at risk of violating the Antideficiency Act.

NASA entered into several cost-reimbursement contracts, under which the government reimburses the contractor for allowable costs incurred in performing the contract, up to a ceiling set in the contract. As required by the Federal Acquisition Regulation, the NASA contracts included a provision stating that the government is not obligated to reimburse the contractor for costs incurred in excess of the ceiling specified in the contract. This limitation on liability includes the contractor's termination costs. NASA recorded obligations for the entire amount allotted to the various contracts.

Some contractors asserted that NASA stated in written and oral communications that it would reimburse all contract termination costs, even if they exceeded the amount allotted to the contract. Though GAO took no position on whether NASA ever stated that it would reimburse such costs,

GAO noted that any agreement to pay termination costs in excess of the agreed-upon ceiling already specified in the contract would constitute a new obligating event. NASA would need to have sufficient funds available at that time to cover the additional amounts; otherwise, NASA would risk violating the Antideficiency Act.

V. IMPOUNDMENT CONTROL ACT

- *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*, B-320091, July 23, 2010

Addressing another question in *NASA, Part II*, GAO concluded that NASA did not incur a *de facto* impoundment when work under cost-reimbursement contracts associated with the Constellation program slowed. The President proposed a cancellation of the Constellation program in his fiscal year 2011 budget. Contractors were concerned about potential termination costs.

Under the Impoundment Control Act, agencies may withhold budget authority from obligation only if the President has first transmitted a rescission or deferral proposal in a special message to Congress. The President submitted no special message pertaining to NASA or the Exploration account. In the past, GAO has found instances where an agency violated the Impoundment Control Act when it withheld funds from obligation pending congressional action on a legislative proposal appearing in the President's budget request. In this case, though, NASA had not withheld any appropriations from obligation and, in fact, had obligated 83 percent of the Exploration funds by June 30, 2010. At that rate of obligation, it was likely NASA would obligate all funds by the end of fiscal year 2010. Thus, GAO saw no evidence that NASA withheld funds from obligation or violated the Impoundment Control Act.

VI. CONTINUING RESOLUTIONS

- *Election Assistance Commission—Obligation of Requirements Payments Under Continuing Resolutions in Fiscal Years 2009 and 2005*, B-318835, May 14, 2010

In this case, GAO highlighted some funding decisions a grantor agency may face during the pendency of a continuing resolution.

Like many other agencies, the Election Assistance Commission (EAC) operated under a continuing resolution for parts of fiscal years 2009 and 2005. One of EAC's primary responsibilities is to make mandatory payments to the states once a year for activities that improve the administration of federal elections. These payments are called "requirements payments." EAC calculates the amount of a payment to each state using a statutory formula, which depends in part on EAC's fiscal year appropriation for requirements payments. During the periods of the continuing resolutions in fiscal years 2009

and 2005, EAC delayed obligating funds for requirements payments until its full-year appropriation was enacted.

At issue here was whether EAC should have obligated amounts for requirements payments while operating under the continuing resolutions. Both continuing resolutions appropriated funds to EAC at a rate for operations provided in the previous fiscal year. Amounts appropriated by each continuing resolution, however, were also subject to the so-called “entitlements provision” included in the continuing resolutions, which required activities to continue at the rate necessary to maintain program levels under current law. Because states receive their entire requirements payments for a year in a single distribution, generally later in the fiscal year, GAO had no objection to the fact that in fiscal years 2009 and 2005, EAC waited to obligate funds until it had its regular appropriations for these years. This is consistent with other provisions in the continuing resolutions, such as implementing the most limited funding action.