

Appropriations Law Year-in-Review

2012 APPROPRIATIONS LAW FORUM
YEAR-IN-REVIEW

I. AVAILABILITY OF APPROPRIATIONS: PURPOSE

Necessary Expense Rule

- *U.S. Commodity Futures Trading Commission—Availability of the Customer Protection Fund*, B-321788, Aug. 8, 2011

At issue in this decision was the third part of the “necessary expense” analysis—that is, whether another appropriation is more specifically available for a particular purpose.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act established the Customer Protection Fund (Fund), a revolving fund available to the Commodity Futures Trading Commission (CFTC) to pay whistleblower awards and to fund customer education initiatives. CFTC asked GAO if the Fund could be used to establish an office and hire personnel to carry out these two programs.

GAO applied the three-part test to determine whether a specific expenditure is a necessary expense of an appropriation. First, the expenditure must bear a logical relationship to the appropriation sought to be charged. GAO found that the administrative and personnel costs were necessary and incident to achieving the purposes for which the Fund was established. Second, the expenditure must not be prohibited by law. GAO did not identify any law prohibiting CFTC from using the Fund for this purpose. Third, the expenditure must not be provided for by another appropriation. CFTC’s general lump sum appropriation is available for personnel and administrative costs generally and, arguably, could be available for administrative expenses incident to customer education initiatives and whistleblower incentive awards. GAO concluded that the fund is the more specific of the two appropriations. GAO noted that the primary costs of customer education initiatives would be personnel costs and that parallel construction between customer education initiatives and the whistleblower incentive awards would suggest reading the statute to make the Fund available for the personnel and administrative costs of making whistleblower payments.

- *Department of the Navy v. Federal Labor Relations Authority*, No. 10-1304 (D.C. Cir. Jan. 13, 2012)

In this decision, the U.S. Court of Appeals for the District of Columbia Circuit, applying the necessary expense rule, concluded that the Navy's appropriation is not available to purchase bottled water for employees if tap water at the Navy's facilities is safe and drinkable. The court held that the Appropriations Clause of the U.S. Constitution and the federal statutes that implement it, including the purpose statute and the Antideficiency Act, prohibit an agency from engaging in collective bargaining over matters that would violate federal appropriations law.

The Navy asked the court to review a decision by the Federal Labor Relations Authority (FLRA) that the Navy had a duty to bargain with unions before ceasing to provide bottled water to employees. The Navy had begun providing bottled water at its Naval Undersea Warfare Center Division in Newport, RI, in the mid-1990s after discovering the water fountains in the Division's buildings were made with components containing lead. In 2005, the Navy replaced the water fountains with lead-free models and tested the tap water. In 2006, after determining the tap water was safe to drink, the Navy stopped providing bottled water.

Employee unions filed grievances, and an arbitrator asserted that the Navy was required to bargain over any change to its practice of providing bottled water. The Navy challenged the arbitrator's decision. The FLRA affirmed the arbitrator's decision and rejected the Navy's argument on the grounds that none of the Comptroller General's decisions permits unilateral termination of the Navy's practice of providing bottled water. The Navy then filed suit.

The court cited to the U.S. Constitution, federal statutes and case law, and decisions and opinions of the Comptroller General to explain that funds from the U.S. Treasury may only be expended pursuant to appropriations made by law. In that regard, the court held that an agency's responsibilities under federal collective bargaining law are constrained by the limits imposed by federal appropriations law.

The court turned to a discussion of the necessary expense rule in GAO's Red Book that bottled water is a personal expense and appropriations are not available for bottled water unless safe drinking water is not otherwise available. The court said that GAO's decisions should be viewed as those of an expert, and that GAO's reasoning in this regard reflected the goal to ensure public confidence in the use of taxpayer money. The court noted that the Navy, represented by the Department of Justice, concurred in GAO's reasoning. The court concluded that if the tap water at the Navy's Newport facilities is safe and drinkable, the purchase of bottle water with appropriated funds would violate federal appropriations law, and thus, the Navy would have

no authority or duty to bargain with the unions before ceasing to provide bottle water to its employees.

Expenditure Otherwise Prohibited

- *Office of Science and Technology Policy—Bilateral Activities with China*, B-321982, Oct. 11, 2011

In an opinion issued to the Chairman of the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, GAO determined that the Office of Science and Technology Policy (OSTP) violated an appropriations restriction and, as a result, the Antideficiency Act. (The Antideficiency Act violation is discussed below in Section II.)

The Department of Defense and Full-Year Continuing Appropriations Act, Public Law 112-10 (Apr. 15, 2011), contained a provision prohibiting OSTP from using appropriated funds to engage in bilateral meetings with the government of the People's Republic of China. At issue was OSTP's involvement in two meetings in May 2011: the U.S.-China Dialogue on Innovation Policy and the U.S.-China Strategic and Economic Dialogue. GAO found that OSTP's participation in the events contravened the plain meaning of the appropriations restriction. In addition, because the restriction barred all use of OSTP's fiscal year 2011 funds for bilateral engagements with China, OSTP's participation in the two events violated the Antideficiency Act.

While OSTP did not deny that its actions were prohibited by the appropriations provision, OSTP asserted that the provision was an unconstitutional infringement on the President's constitutional authority to conduct foreign affairs. In response, GAO emphasized that legislation passed by Congress and signed by the President is entitled to a heavy presumption of constitutionality. Because no court of jurisdiction had held the provision to be unconstitutional, GAO applied the law as written to the facts presented.

- *Administrative Office of the U.S. Courts—California E-Waste Recycling Fee*, B-320998, May 4, 2011

In this decision GAO determined that appropriated funds are not available to pay an advance electronic waste (e-waste) recycling fee assessed by the State of California in connection with its purchase in California of computer monitors. GAO concluded that the e-waste recycling fee was a tax, the legal incidence of which fell directly on the federal government as a vendee.

Under the California Electronic Waste Recycling Act of 2003 (EWRA) retailers were required to charge and collect from California consumers an e-waste recycling fee at the point of sale of each covered electronic device (CED).

The state used amounts collected to, among other things, make payments to authorized providers of e-waste collection and recycling services to cover costs incurred in managing discarded e-waste. Payment of the e-waste recycling fee by consumers was not linked to a specific benefit or service provided by the State of California to the payers of the fee. California acknowledged as much, stating that “[t]he fee is not designed to be strictly tied to the device the fee was levied upon” and that CED purchasers are a “relatively anonymous population.” Further, consumers were not guaranteed cost-free recycling services in California, nor were they entitled to a refund of the fee if they elected not to avail themselves of recycling services in California. Rather, recycling services from authorized providers were offered to the public at large and no distinction was made between those who had paid the e-waste recycling fee and those who had not. Thus, the benefit of the e-waste recycling fee was not narrowly circumscribed to the consumers paying the e-waste fee, but rather, was conferred on the general public.

CED purchasers bore the legal incidence, as well as the economic burden, of the California tax, because EWRA required the retailer to collect the tax from its customers at the point of sale. It is well-established that if the vendee is legally responsible for the payment of the tax, the federal government as a buyer cannot be held responsible for such payment absent a legislated waiver of sovereign immunity. Other states that have enacted e-waste recycling legislation impose the legal incidence of the charge on manufacturers (vendors) who then pass on this business cost (the economic burden) to consumers through an increased purchase price.

Finally, GAO noted that while section 6001(a) of the Resource Recovery and Conservation Act of 1976 (RCRA), 42 U.S.C. § 6961(a), did waive sovereign immunity for many state and local requirements respecting hazardous waste disposal and management, including reasonable service charges such as permit fees, it does not explicitly waive immunity from taxation. Such a waiver must clearly and expressly confer the privilege of taxing the federal government. The e-waste recycling fee was not a regulatory fee constituting a “reasonable service charge” within the scope of section 6001(a) of RCRA, but was, instead, a vendee tax.

II. **AVAILABILITY OF APPROPRIATIONS: AMOUNT**

Antideficiency Act: No Money Available for a Specified Purpose

- *Office of Science and Technology Policy—Bilateral Activities with China*, B-321982, Oct. 11, 2011

In addition to a purpose violation (discussed above in Section I), the Office of Science and Technology Policy (OSTP) violated the Antideficiency Act when

it used appropriations to fund OSTP involvement in a series of meetings in May 2011 with officials of the Chinese government. Section 1304(a) of the Department of Defense and Full-Year Continuing Appropriations Act, Public Law 112-10 (Apr. 15, 2011), prohibited OSTP from using its appropriations for this purpose; OSTP, consequently, incurred obligations in excess of an available appropriation.

On October 31, 2011, OSTP reported the violation in accordance with the Antideficiency Act. In the report, OSTP noted its disagreement with GAO's conclusion. OSTP asserted that its actions were taken in reliance on an informal opinion from the U.S. Department of Justice (DOJ) that concluded that OSTP's involvement in the May 2011 meetings fall under the President's exclusive constitutional authority. According to DOJ, section 1304(a) is unconstitutional to the extent that it interferes with the President's exclusive constitutional authority to conduct the foreign relations of the United States.

Antideficiency Act: Open-Ended Indemnification

- *Department of the Army—Escrow Accounts and the Miscellaneous Receipts Statute*, B-321387, Mar. 30, 2011

The Army violated the Antideficiency Act when it agreed to an open-ended indemnification provision in an escrow agreement entered into in September 2006.

In an escrow agreement with InSitech Inc. (an Army lessee) and the Picatinny Federal Credit Union (escrow agent), the Army and its lessee agreed to indemnify and hold the escrow agent harmless "from and against any and all liabilities." Such an open-ended indemnification commits the government to unlimited liability. In July 2009, Army amended the agreement, removing the open-ended indemnification provision. Army has not reported the violation it had incurred in 2006, but corrected in 2009.

This decision also addressed a violation of the miscellaneous receipts statute, which we discuss below.

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

- *Federal Election Commission—Dual Offices and Voluntary Services Prohibition*, B-321744, June 23, 2011

In this decision, GAO addressed the intersection of the Antideficiency Act's voluntary services prohibitions and the statutory prohibition on dual compensation. At issue was whether the Federal Election Commission (FEC) would violate the voluntary services prohibition if FEC's incumbent Chief Information Officer (CIO) served simultaneously as FEC's Staff Director, but was compensated only at the higher CIO salary.

The statutory dual compensation prohibition provides that "an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week." 5 U.S.C. § 5533(a). The Attorney General has held, and GAO has concurred, that the prohibition, nevertheless, inferentially recognizes dual office-holding. However, the dual office-holder may be compensated only for one position.

Because the dual compensation statute bars compensation for both positions, the voluntary services prohibition is not implicated. Congress enacted the voluntary services prohibition to preclude so-called "coercive deficiencies." Prior to enactment of the prohibition agencies might coerce employees to "volunteer" their services. These employees would later demand that Congress enact additional appropriations to pay their salaries for the "volunteered" time. The voluntary services prohibition acts to prevent these "coercive deficiencies." We have found that where a statute bars compensation, as does the prohibition on dual compensation, the risk of coercive deficiencies is mitigated.

Thus, GAO determined that the incumbent CIO is not waiving the Staff Director salary or volunteering in that position. Rather, his uncompensated service is compelled by the dual compensation statute.

Miscellaneous Receipts

- *Department of the Army—Escrow Accounts and the Miscellaneous Receipts Statute*, B-321387, Mar. 30, 2011

The miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires agencies upon receipt of money for the government, to deposit the money in the Treasury "as soon as practicable without deduction for any charge or claim."

This opinion highlights the fact that the requirement of the miscellaneous receipts statute applies whether the correct account for deposit is the general fund of the Treasury or some other account authorized by statute.

Section 2667(a) of title 10 authorizes each Secretary of the armed forces to lease real property that is not currently needed for public use. The statute provides that the Secretary may receive cash or in-kind consideration in exchange for the lease. However, all money rentals received must be deposited into a special account in the Treasury established for the Secretary concerned. The cash consideration deposited in the special account is available to the Secretary only to the extent provided in appropriations acts and for specific enumerated purposes relating to real property construction, maintenance services, lease of facilities, or payment of utility services. Conversely, in-kind consideration may be accepted at any property or facilities under the control, and for the benefit, of the Secretary. The term “payment in kind” is not defined in section 2667; however, the statute does enumerate examples of acceptable forms of in-kind consideration, all of which describe the provision of services.

Under this authority, the Army entered a real property lease for cash consideration. The terms of the lease directed the lessee to deposit the cash consideration into an escrow account in the name of both the Army and the lessee. The escrow funds represented payment in full of the rent consideration by the lessee. The lessee had no right to the escrow funds or the distributions from the escrow fund. The escrow agent was authorized to disburse escrow funds, as directed by the Army, either (1) to a third-party contractor as payment for services rendered by such contractor to property under the control of the Army, or (2) to the Army as a cash payment. Thus, the Army had control over the disposition of the escrow funds which, except for the payment of expenses of the escrow agent, were to be used solely for the benefit of the Army.

The Army asserted that the cash deposited into the escrow account constituted in-kind consideration because the funds would be used to pay for services performed on Army property by contractors identified by the lessee. GAO determined that the Army, in fact, had received cash consideration. The fact that the rent consideration, paid in cash, ultimately may be used to compensate third-party contractors that provide the types of services that are permissible under section 2667 did not change the essential nature of the transaction: the Army had granted a leasehold interest in real property in exchange for cash consideration.

Accordingly, under section 2667 the Army was required to deposit such amounts in the Army’s special account in the Treasury established for such purpose. By diverting the cash to an escrow account under the control of the Army rather than depositing such amount in the special account, the Army violated the miscellaneous receipts statute, 31 U.S.C. § 3302(b), diverting money from the appropriations process. By spending such funds, the Army improperly augmented its appropriations.

Supplemental Appropriation

- *Securities and Exchange Commission—Supplemental Appropriation*, B-322062, Dec. 5, 2011

In this decision, GAO addressed the nature of a supplemental appropriation and whether a supplemental appropriation should be considered a separate appropriation, apart from the original appropriation.

For fiscal year 2009, SEC received its regular, lump sum, no-year "Salaries and Expenses" (S&E) appropriation. Later in the fiscal year, after the enactment of the Fraud Enforcement and Recovery Act (FERA), which authorized additional appropriations to enhance the investigation and enforcement of financial fraud, Congress passed the 2009 Supplemental Appropriations Act, enacting a two-year appropriation of \$10 million to SEC to investigate securities fraud.

SEC began fiscal year 2009 using its S&E appropriation to investigate securities fraud, but once the supplemental appropriation was enacted, SEC started using the supplemental appropriation as well. At issue here was whether the supplemental appropriation, which was enacted for a more narrow purpose than the lump sum appropriation, was a second, more specific appropriation, prohibiting SEC from drawing from the lump sum appropriation for the investigation of securities fraud.

GAO concluded that the language of the Supplemental Appropriations Act made clear that the \$10 million appropriation was to be in addition to amounts available in SEC's S&E appropriation. The fact that the Supplemental Appropriations Act directed a specific use for the \$10 million did not change its supplemental nature. The legislative history of the Supplemental Appropriations Act and the language of FERA confirmed this view. GAO noted that the regular and supplemental appropriations were available for different periods of time, however, and should be managed consistent with the account closing laws. 31 U.S.C. §§ 1551–1555.

III. AVAILABILITY OF APPROPRIATIONS: TIME

Bona Fide Need: IDIQ Contracts

- *U.S. Small Business Administration—Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum*, B-321640, Sept. 19, 2011

A valid obligation must reflect a *bona fide* need at the time the obligation is incurred. Thus, the guaranteed minimum amount in an indefinite-delivery indefinite-quantity (IDIQ) contract must not only constitute sufficient consideration to make the contract binding, but also reflect the *bona fide*

needs of the agency at the time of execution of the contract. In this decision, GAO concluded that the U.S. Small Business Administration (SBA) violated the *bona fide* needs rule where it did not have a *bona fide* need for the guaranteed minimum quantities specified in an IDIQ contract in fiscal years 2009 and 2010.

SBA executed an IDIQ contract on September 21, 2009 for computer hardware and software that SBA intended to purchase, as necessary, by the issuance of task orders. The contract was for one base year and four one-year options. The IDIQ contract initially provided for a \$290,000 guaranteed minimum. However, on September 28, 2009, SBA executed a contract modification that increased the minimum from \$290,000 to \$1,315,000. SBA obligated \$1,291,000 of the \$1,315,000 guaranteed minimum against its fiscal year 2009 appropriations, and the remaining \$24,000 was obligated against no year funds. In September 2010, SBA exercised option year one and modified the IDIQ Contract on three separate occasions during a span of two weeks to change the guaranteed minimum. As a result of these contract modifications, SBA obligated \$1,860,000 of its fiscal year 2010 funds.

The totality of the facts and circumstances in this case suggested that a *bona fide* need in the amount of \$1,291,000 did not exist at the end of fiscal year 2009, nor did a *bona fide* need in the amount of \$1,860,000 exist at the end of fiscal year 2010. Indeed, SBA did not issue its first task order until fiscal year 2010 and expended \$1,109,899.90 in fiscal year 2009 funds for task orders issued in fiscal year 2010. SBA did not offer an explanation as to why fiscal year 2009 funds were charged for task orders issued in fiscal year 2010. Further, the majority of the fiscal year 2010 funds obligated in September 2010 were expended on task orders issued in fiscal year 2011. SBA acknowledged that its actions were inconsistent with the *bona fide* needs rule and adjusted its appropriations accounts to ensure that task orders were charged to appropriations for the fiscal year in which the task order was issued.

Training in subsequent fiscal year

- *National Labor Relations Board—Recording Obligations for Training and Court Reporting*, B-321296, July 13, 2001

At issue in this decision was whether the National Labor Relations Board (NLRB) properly obligated its fiscal year 2010 appropriation for training scheduled to be delivered in January 2011. The agency justified using its 2010 appropriations by pointing out that it identified the need for training in fiscal year 2010. GAO concluded that the training was a *bona fide* need of fiscal year 2011 and, therefore, that NLRB should not have recorded these obligations against its fiscal year 2010 appropriation.

As a general matter, the relevant date to ascertain whether training is a *bona fide* need of a particular fiscal year is the date that the training is delivered, not the date when the agency decides to enroll staff in the training. This is because, generally, when an agency enters into a contract in one fiscal year for services that will not be performed until the succeeding fiscal year, the agency may not charge the first fiscal year's appropriation with the cost of the contract. GAO noted that training may, however, be a *bona fide* need of the fiscal year prior to its delivery, if the training provider requires the agency to register during the expiring fiscal year, the date offered is the only one available, and the time between the registration and the training is not excessive.

In this case, the training did not occur until fiscal year 2011, and the training provider did not require NLRB to register for the training during the previous fiscal year. In fact, the training provider specifically did not require NLRB to register until after the beginning of fiscal year 2011. Therefore, the training was a *bona fide* need of fiscal year 2011, not of fiscal year 2010.

This decision also addresses recording of obligations, which we discuss below.

IV. **OBLIGATIONS**

Recording Full Liability

- *Securities and Exchange Commission—Recording of Obligation for Multiple-Year Contract*, B-322160, Oct. 3, 2011

This decision serves as a reminder that unless an agency has specific statutory authority otherwise, it must record an obligation at the time it entered into a contract for the full amount of its contractual liability. GAO concluded that the Securities and Exchange Commission (SEC) failed to fully record its obligation when it entered into a 10-year lease for real property. After signing a 10-year lease, SEC recorded an obligation for only a small fraction of the government's total liability under the contract because, in SEC's view, the amount recorded was the only payment due to the lessor in the lease term. The agency argued that its independent leasing authority gave it flexibility in recording its liabilities. GAO disagreed.

GAO, citing the recording statute, 31 U.S.C. § 1501(a)(1), explained that an agency must record an obligation of the full amount of a contractual liability against funds available at the time a contract is executed. To record less than the full amount of the government's contractual liability requires explicit statutory authority. One example is the Federal Acquisition Streamlining Act, codified at 41 U.S.C. § 3903, which permits an agency to enter into a contract

for a term of up to five years and to obligate an amount equal to the liability for the first year of contract performance plus estimated termination costs. This authority is not available for a ten-year contract like SEC's lease. Another example is 40 U.S.C. § 585, which authorizes the General Services Administration (GSA) to enter into real property leases for periods of up to 20 years and to record obligations on a year-by-year basis. SEC, however, had not sought a delegation of authority from GSA to cover the lease at issue.

Although SEC's independent leasing authority permits the agency to enter into multiple-year leases "notwithstanding any other provision of law," it did not achieve the degree of specificity found in the Federal Acquisition Streamlining Act or GSA's authority, and GAO was unwilling to read it to allow SEC to obligate its contract liability on a year-by-year basis. In addition, the fact that SEC noted its lease obligation practice in its annual budget submission did not serve to release SEC from the requirement that it record the government's entire contractual obligation at the time the lease was signed.

Recording Estimated Liability

- *National Labor Relations Board—Recording Obligations for Training and Court Reporting*, B-321296, July 13, 2001

In addition to a *bona fide* need issue (discussed above in Section III), this decision addresses when an agency may record an obligation based on an estimated, rather than an actual amount. In this case, GAO concluded that the National Labor Relations Board (NLRB) properly recorded obligations for contracts based upon a reasonable estimate of its ultimate liability. NLRB entered into court reporting contracts, which were proper severable services contracts under 41 U.S.C. § 3902. At the time NLRB entered into each of the contracts, it did not know with certainty the total amount it would ultimately spend for the services ordered under the contract. The amount of NLRB's liability depends on various factors not definite at the time of contract award, including the number of proceedings, the length of proceedings, the number of exhibits, etc. In a case like this, NLRB properly recorded obligations based upon estimates of the total amount of court reporting services it would need under a particular contract. As the performance period continues, NLRB should deobligate amounts if it realizes that has overestimated the cost of services it would order under the contracts. Conversely, if NLRB subsequently determines that it needs to order more services than initially estimated, it should obligate additional funds in accordance with a revised estimate. Any adjustments to the obligations must be made against the same funds that were initially obligated for the contracts.

V. STATUTORY CONSTRUCTION

- *Letter to the Acting Attorney General for the District of Columbia—Public Law 111-378 and Payment of the Stormwater Charge*, B-321685, Mar. 14, 2011

In this case, GAO rejected a literal reading of statutory language, which could have frustrated the overarching purpose of the statute, reading the language, instead, in the broader context of the statute as a whole.

The language at issue appeared in an amendment to section 313 of the Clean Water Act. Section 313(a) provides that federal instrumentalities “shall be subject to, and comply with, all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution . . . including the payment of reasonable service charges.” 33 U.S.C. § 1323(a). Public Law 113-78 added a new subsection (c) to section 313, 33 U.S.C. § 1323(c), to extend this waiver of sovereign immunity to the payment of local stormwater taxes. It redefines the term “reasonable service charges” to expressly include stormwater tax assessments within the ambit of the term “reasonable services charges” that federal agencies are required to pay under section 313(a). See 33 U.S.C. § 1323(c)(1). In addition, section 313(c)(2)(B), 33 U.S.C. § 1323(c)(2)(B), provides that 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.*” This language raised the question of whether a specific appropriation for the payment of stormwater taxes now covered by the waiver of sovereign immunity is required before appropriations may be used to pay a stormwater tax.

GAO concluded that, when subsection (c)(2)(B) is read within the context of subsection (c) specifically and section 313 generally, it can reasonably be interpreted, not as conditioning the waiver of sovereign immunity for stormwater taxes on a specific appropriation for such purpose, but rather as emphasizing that like other “reasonable service charges” covered by the waiver in section 313(a), federal agencies are to pay stormwater assessments from their existing appropriations available for operational expenses. To interpret subsection (c)(2)(B) as making the duty to pay stormwater taxes contingent on a specific appropriation would frustrate the expanded waiver of sovereign immunity provided by section 313(c)(1). GAO noted, “It would be anomalous for Congress on the one hand to waive sovereign immunity, and then in the other hand seemingly take it away.”

- *Denali Commission—Fiscal Year 2011 Rescission*, B-322162, Sept. 19, 2011
A provision in an appropriations act will be considered permanent if the nature of the provision makes clear that Congress intended the provision to be permanent, even in the absence of words of futurity. While the language of

the statute is the crucial determinant, other factors may also be taken into consideration.

Section 1477 of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, enacted a \$15 million rescission “[o]f the unobligated balances from prior year appropriations” of the Denali Commission. On the date section 1477 was enacted, the Commission’s unobligated balance of prior year appropriations was \$1,187,098. The Commission promptly returned that amount. The question for the Commission was how to satisfy the rescission’s remaining balance, because GAO was unwilling to interpret section 1477 as expiring at the end of fiscal year 2011.

Specifically, provisions in an annual appropriations act are presumed to have effect only for the fiscal year covered by the act because appropriations acts are, by their nature, nonpermanent legislation. GAO will consider a provision in an appropriations act as permanent if the statutory language or nature of the provision makes clear that Congress intended the provisions to be permanent. The presence of words of futurity is not the only indication of permanence. For example, the prospective character of statutory language may indicate an intention of permanence. The fact that the provision does not restrict the use of appropriations enacted in the act may indicate permanence as well. Here, GAO viewed the language of section 1477 as permanent in nature because it was not a restriction on the use of appropriations enacted in the appropriations act; rather the Commission was required to take a specific substantive action. GAO noted, also, that there remained opportunities beyond the end of the fiscal year to ensure rescission of the entire \$15 million.

For example, the Denali Commission, a grant-making agency, could deobligate unneeded grant funds through the regular grant close-out process at the end of a grant period; it could adjust recorded obligations by substituting no-year funds appropriated in fiscal year 2011 funds for no-year funds appropriated in prior-years to free up prior-year balances for rescission; and there might be opportunities to cancel grants. GAO stressed that section 1477 imposed an affirmative requirement on the Commission to rescind \$15 million, even if it could not achieve the rescission until a subsequent fiscal year.

Impact of Appropriations Prohibitions: A Case Study



GAO

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United States Government Accountability Office
Washington, DC 20548

B-321982

October 11, 2011

The Honorable Frank R. Wolf
Chairman, Subcommittee on Commerce
Justice, Science, and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *Office of Science and Technology Policy—Bilateral Activities with China*

This responds to your request for our opinion on the propriety of activities undertaken in May 2011 by the Office of Science and Technology Policy (OSTP) with representatives of the government of the People's Republic of China. Letter from Representative Wolf to the Comptroller General (May 11, 2011) (Request Letter). Specifically, you point to meetings with Chinese representatives during the U.S.-China Dialogue on Innovation Policy (Innovation Dialogue) and the U.S.-China Strategic and Economic Dialogue (S&ED) held in Washington, D.C., in May 2011. You ask whether OSTP violated section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act, 2011. Section 1340 prohibits the use of OSTP appropriations for bilateral activities between OSTP and China, or Chinese-owned companies, unless specifically authorized by laws enacted after the date of the appropriations act. Pub. L. No. 112-10, div. B, title III, 125 Stat. 38, 123 (Apr. 15, 2011).

As explained below, we conclude that OSTP's use of appropriations to fund its participation in the Innovation Dialogue and the S&ED violated the prohibition in section 1340. In addition, because section 1340 prohibited the use of OSTP's appropriations for this purpose, OSTP's involvement in the Innovation Dialogue and the S&ED resulted in obligations in excess of appropriated funds available to OSTP; as such, OSTP violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A).

Our practice when rendering legal opinions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this case, OSTP provided us with its legal views and relevant supporting materials. Letter from General Counsel, OSTP to Assistant General Counsel, GAO, *Re: B-321982, Office of Science and Technology Policy – Bilateral Activities with China* (June 23, 2011) (OSTP Response). We also

spoke by telephone with OSTP's General Counsel to ask questions about OSTP's June letter. Telephone Conversation with General Counsel, OSTP (Aug. 4, 2011) (August Conversation). See also Letter from General Counsel, OSTP to Senior Attorney, GAO, *Re: Follow-up to August 4, 2011, Telephone Call* (Aug. 29, 2011) (OSTP August Letter).

BACKGROUND

The Presidential Science and Technology Advisory Organization Act of 1976¹ established OSTP to “serve as a source of scientific and technological analysis and judgment for the President with respect to major policies, plans, and programs of the Federal Government.” 42 U.S.C. § 6614(a). Part of the agency's mission is to “advise the President of scientific and technological considerations involved in areas of national concern including . . . foreign relations. . . .” 42 U.S.C. § 6613(b)(1).

Between May 6 and 10, 2011, OSTP “led and participated in a series of meetings with Chinese officials” as part of the Innovation Dialogue and the S&ED. OSTP Response, at 3. On May 6, 2011, the OSTP Director and Chinese Minister of Science and Technology participated in the Innovation Dialogue. According to OSTP, a goal of the Innovation Dialogue was to “serve as a forum for persuading the rollback of discriminatory, counterproductive Chinese procurement and intellectual property policies. . . .” OSTP Response, at 3. Among the topics discussed were “market access and technology transfer; innovation funding and incentives; standards and intellectual property; and government intervention.” OSTP Response, at 4. OSTP informed our office that the OSTP Director opened and closed the Innovation Dialogue and served on discussion panels. OSTP August Letter, at 1. OSTP staff helped the Director prepare for and participate during the meetings. *Id.* See OSTP Response, at 5.

On May 8, 2011, OSTP hosted a dinner to honor Chinese dignitaries. Six U.S. participants attended the dinner, along with an unidentified number of “staff-level employees from other federal agencies.” OSTP Response, at 4, n.13. The Director is the only listed dinner attendee from OSTP. There were six Chinese invitees. *Id.*

On May 9 and 10, 2011, OSTP participated in the S&ED. The purpose of the S&ED was to bring together various U.S. and Chinese government officials to “discuss a broad range of issues between the two nations,” including on matters regarding trade and economic cooperation. U.S. Department of the Treasury, *U.S. –China Strategic and Economic Dialogue*, available at www.treasury.gov/initiatives/Pages/china.aspx (last visited Oct. 4, 2011). The Secretary of the Treasury and the Secretary of State co-chaired the S&ED along with the Vice Premier and State Councilor of the People's Republic of China. *Id.* Topics of discussion included “enhancement of trade and investment cooperation;

¹ Pub. L. No. 94-282, title II, 90 Stat. 459, 463-68 (May 11, 1976), 42 U.S.C. §§ 6611–6624

an overview of bilateral relations; military-to-military relationships; cooperation on clean energy, energy security, climate change, and environment; customs cooperation; and energy security.” OSTP Response, at 4. The OSTP Director spoke many times during the various sessions, including on U.S.-China cooperation on climate science. August Conversation. OSTP also had at least one staff member attend the S&ED in addition to the Director. *Id.*

The Full-Year Continuing Appropriations Act, 2011, enacted into law on April 15, 2011, included appropriations for OSTP for fiscal year 2011 in title III of division B. Pub. L. No. 112-10, div. B. Section 1340 of title III provides:

“None of the funds made available by this division may be used for the National Aeronautics and Space Administration or the Office of Science and Technology Policy to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company unless such activities are specifically authorized by a law enacted after the date of enactment of this division.”

Pub. L. No. 112-10, § 1340.

OSTP informed us that it incurred costs of approximately \$3,500 to participate in the week’s activities, including the cost of staff time for nine employees preparing for and participating in the discussions, as well as the cost of the dinner OSTP hosted on May 8. OSTP Response, at 5.

DISCUSSION

At issue in this opinion is whether OSTP violated section 1340’s proscription, and, if so, whether the agency violated the Antideficiency Act.

As with any question involving the interpretation of statutes, our analysis begins with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S.113 (2009). When the language of a statute is “clear and unambiguous on its face, it is the plain meaning of that language that controls.” B-307720, Sept. 27, 2007; B-306975, Feb. 27, 2006; *see also Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

The plain meaning of section 1340 is clear. OSTP may not use its appropriations to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned companies. Here, OSTP’s participation in the Innovation Dialogue and S&ED contravened the appropriations restriction. The Director opened the Innovation Dialogue and moderated discussions therein. OSTP staff prepared materials for and attended the discussions. OSTP then invited U.S. and Chinese officials to a dinner that it paid for using its appropriation. Finally, OSTP participated in the S&ED, during which the Director spoke on multiple occasions, including on

climate science. OSTP did not identify, nor are we aware of, any specific authority to do so that was enacted after the date of the Continuing Appropriations Act, 2011.

OSTP does not deny that it engaged in activities prohibited by section 1340. OSTP Response; August Conversation. OSTP argues, instead, that section 1340, as applied to the events at issue here, is an unconstitutional infringement on the President's constitutional prerogatives in foreign affairs.² OSTP Response, at 1; August Conversation; Letter from Director, OSTP, to the Speaker of the House of Representatives, *Re: Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011* (May 16, 2011) (OSTP May 16 Letter). OSTP claims that section 1340 is "unconstitutional to the extent its restrictions on OSTP's use of funds would bar the President from employing his chosen agents for the conduct of international diplomacy." OSTP Response, at 1. OSTP asserts that the President has "exclusive constitutional authority to determine the time, place, manner, and content of diplomatic communications and to select the agents who will represent the President in diplomatic interactions with foreign nations." OSTP May 16 Letter. OSTP argues that, for this reason, Congress may not "use its appropriations power to infringe upon the President's exclusive constitutional authority in this area." *Id.*

It is not our role nor within our province to opine upon or adjudicate the constitutionality of duly enacted statutes such as section 1340. See B-300192, Nov. 13, 2002; see also B-306475, Jan. 30, 2006. In our view, legislation that was passed by Congress and signed by the President, thereby satisfying the Constitution's bicameralism and presentment requirements, is entitled to a heavy presumption in favor of constitutionality. B-302911, Sept. 7, 2004. See *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988). Determining the constitutionality of legislation is a province of the courts. U.S. Const. art. III, § 2. *Cf. Fairbank v. United States*, 181 U.S. 283, 285 (1901). Therefore, absent a judicial opinion from a federal court

² The Department of Justice characterizes section 1340 as a "valid limitation on OSTP's use of appropriated funds only to the extent that its restrictions do not infringe upon the President's exclusive constitutional authority over international diplomacy." Letter from Assistant Attorney General, Office of Legislative Affairs to Representative Wolf (June 28, 2011). Justice advised OSTP that OSTP was "permitted to engage in diplomatic activities with Chinese representatives to the extent that it would be doing so as an agent of the President for diplomacy with China, notwithstanding Section 1340." *Id.* See Memorandum Opinion for the General Counsel, OSTP, *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, OLC Opinion, Sept. 19, 2011, available at www.justice.gov/olc/memoranda-opinions.html (last visited Oct. 4, 2011). OSTP asserts that the U.S.-China Agreement on Cooperation in Science and Technology designates OSTP as the executive branch authority charged with "collaboration and coordination with China in support of U.S.-China science and technology policy cooperation." OSTP Response, at 3.

of jurisdiction that a particular provision is unconstitutional, we apply laws as written to the facts presented. See B-114578, Nov. 9, 1973. In 1955, for example, we stated that we “accord full effect to the clear meaning of an enactment by the Congress so long as it remains unchanged by legislative action and unimpaired by judicial determination.” B-124985, Aug. 17, 1955. We see no reason to deviate here. Indeed, we are unaware of any court that has had occasion to review the provision, let alone adjudicate its constitutionality, nor did OSTP advise of any judicial determination or ongoing litigation.

As a consequence of using its appropriations in violation of section 1340, OSTP violated the Antideficiency Act. Under the Antideficiency Act, an officer or employee of the U.S. Government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation. 31 U.S.C. § 1341. See B-300192, Nov. 13, 2002. If Congress specifically prohibits a particular use of appropriated funds, any obligation for that purpose is in excess of the amount available. 71 Comp. Gen. 402 (1992); 62 Comp. Gen. 692 (1983); 60 Comp. Gen. 440 (1981). By using its fiscal year 2011 appropriation in a manner specifically prohibited, OSTP violated the Antideficiency Act. Accordingly, OSTP should report the violation as required by the act.³

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn H. Gibson", written in a cursive style.

Lynn H. Gibson
General Counsel

³ See 31 U.S.C. § 1351. The Office of Management and Budget has published requirements for executive agencies for reporting violations. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, §§ 145, 145.8, available at www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc (last visited Oct. 4, 2011).

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

October 31, 2011

President Barack Obama
The White House
Washington, DC 20500

Dear Mr. President:

In accordance with OMB Circular A-11,¹ this letter reports the views of the Office of Science and Technology Policy (OSTP) in the Executive Office of the President regarding the conclusion of the U.S. Government Accountability Office (GAO) that OSTP violated the Antideficiency Act² by engaging in diplomatic activities purportedly prohibited by section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011.³ OSTP disagrees with the GAO's conclusion, which is contrary to the legal opinion of the Department of Justice.

On October 11, 2011, the GAO concluded that OSTP's use of appropriations to fund certain bilateral interactions with China violated the prohibition set forth in section 1340(a).⁴ Section 1340(a) prohibited OSTP from using appropriated funds "to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company unless such activities are specifically authorized by a law enacted after the date of enactment of this division."⁵

The GAO stated that it "is not our role nor within our province to opine upon or adjudicate the constitutionality of duly enacted statutes such as section 1340" and "absent a judicial opinion from a federal court of jurisdiction that a particular provision is unconstitutional, [the GAO applies] laws as written to the facts presented."⁶ The GAO observed that "legislation that was passed by Congress and signed by the President, thereby satisfying the Constitution's bicameralism and presentment requirements, is entitled to a heavy presumption in favor of constitutionality."⁷ The GAO thus concluded that OSTP's expenditure of funds during the U.S.-China Dialogue on Innovation Policy and the U.S.-China Strategic and Economic Dialogue in May 2011 violated section 1340(a) and resulted in obligations in excess of appropriated funds, in violation of the Antideficiency Act.

¹ OMB Circular No. A-11, § 145.8 (2011).

² 31 U.S.C. § 1341(a)(1)(A).

³ Department of Defense and Full-Year Continuing Appropriations Act, 2011, § 1340(a), Pub. L. No. 112-10, 125 Stat. 38, 123.

⁴ *Office of Science and Technology Policy-Bilateral Activities with China*, B-321982, 2011 WL 4826145 (Comp. Gen. Oct. 11, 2011).

⁵ Pub. L. No. 112-10, 125 Stat. 38, 123.

⁶ *Bilateral Activities*, B-321982.

⁷ *Id.*

OSTP disagrees with the GAO's conclusion. The OSTP discussions with Chinese officials that GAO claims violated the Antideficiency Act took place—on May 6-10, 2011—only after OSTP's receipt of an informal opinion from the Department of Justice. That informal opinion from the Department of Justice concluded that 1340(a) is unconstitutional to the extent that it interferes with the President's exclusive constitutional authority to conduct the foreign relations of the United States. The Department of Justice also concluded that OSTP's activities as the U.S. Executive Agent for the U.S.-China Science and Technology Cooperation Agreement and as the Administration's leader for the U.S.-China Dialogue on Innovation Policy fall under the President's exclusive constitutional authority.

Accordingly, OSTP testified before the House Appropriations Subcommittee on Commerce, Science and Justice on May 4, 2011, that OSTP would not comply with 1340(a) insofar as doing so would compromise the indicated Presidential authority. OSTP notified the Subcommittee in writing on May 5 of our intention to conduct meetings with Chinese officials in Washington, DC, starting on May 6, in connection with the U.S.-China Dialogue on Innovation Policy and the Strategic and Economic Dialogue (to which the innovation policy dialogue reports). OSTP also informed the Congressional leadership by letter on May 16, 2011, of OSTP's intent to continue not to comply with 1340(a) going forward.

The Department of Justice memorialized its informal legal opinion in a formal opinion issued on September 19, 2011 (some two weeks prior to the release of GAO's opinion, which nonetheless failed to directly address the Justice Department's arguments). The Justice Department's opinion concluded that section 1340(a) "is unconstitutional as applied to certain activities undertaken pursuant to the President's constitutional authority to conduct the foreign relations of the United States."⁸ GAO's assertion that OSTP is bound by section 1340(a) in the absence of a judicial ruling that the provision is unconstitutional is contrary to the longstanding view and practice of the Executive Branch to interpret and apply statutes consistent with the Constitution.

In particular, as the Justice Department has observed, the President "has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision"⁹ and "to refuse to enforce a law that he believes is unconstitutional."¹⁰ This authority derives from the President's Constitutional duty to "take Care that the Laws be faithfully executed,"¹¹ and the obligation to "preserve, protect and defend the Constitution of the United States"¹² contained in the President's oath of office.¹³ Indeed, "in serving as the executive created by the Constitution, the President is required to act in accordance with the laws—

⁸ *Re: Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, at 1 (Sept. 19, 2011), available at www.justice.gov/olc/opinions.htm.

⁹ *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202-03 (1994) ("*Unconstitutional Statutes*").

¹⁰ *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 46 (1990) ("*Foreign Relations Bill*").

¹¹ U.S. CONST. art. II, § 3.

¹² U.S. CONST. art. II, § 1.

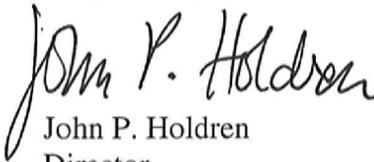
¹³ *Foreign Relations Bill*, 14 Op. O.L.C. at 46.

including the Constitution, which takes precedence over other forms of law.”¹⁴ Because of the constitutional defects with section 1340(a), the Justice Department advised OSTP that it could engage in bilateral interactions with China as the President’s agents insofar as appropriated funds were otherwise available.¹⁵

As an Executive Branch agency, OSTP is bound by the opinion of the Justice Department regarding the legality of its activities,¹⁶ not by the opinion of the GAO,¹⁷ which is an agency of the legislative branch. In light of the Justice Department’s conclusions as to how section 1340(a) must be interpreted and applied, OSTP has consistently maintained that “certain applications of Section 1340 . . . infringe upon the President’s exclusive constitutional authority over diplomatic relations.”¹⁸ Consistent with past Executive Branch interpretations and under the advice of counsel, OSTP stated that it would “not apply this provision where doing so would encroach upon the President’s exclusive constitutional authority over international diplomacy.”¹⁹ It is the conclusion of OSTP, in consultation with the Department of Justice, that it has not violated the Antideficiency Act.

Copies of this report are being simultaneously submitted to the President of the Senate, the Speaker of the House, and the Comptroller General.

Respectfully,


John P. Holdren
Director

¹⁴ *Unconstitutional Statutes*, 18 Op. O.L.C. at 200; see also *Foreign Relations Bill*, 14 Op. O.L.C. at 46-47 (“Where a statute enacted by Congress conflicts with the Constitution, the President is placed in the position of having the duty to execute two conflicting ‘laws’: a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed the Constitution—the supreme law of our Nation.”).

¹⁵ *Re: Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, at 1 (Sept. 19, 2011).

¹⁶ See *Use of General Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 151 (1997) (“In the event of a conflict between a legal opinion of the Attorney General and that of the Comptroller General, the opinion of the Attorney General is controlling for executive branch officers.”); see, e.g., 28 U.S.C. §§ 511-512 (establishing duty of the Attorney General to provide opinions on questions of law to the President and the heads of executive departments).

¹⁷ See *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986); *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984) (“the GAO’s advice is not binding upon the agency”) (citing *INS v. Chadha*, 462 U.S. 919 (1983)); Memorandum for the Heads of Executive Departments and Agencies from Peter R. Orszag, Director, Office of Management and Budget, *Re: Recent Government Accountability Office Decisions Concerning Small Business Programs* (July 10, 2009) (“The GAO’s decisions are not binding on Federal agencies”); Memorandum Opinion for the Acting General Counsel, Environmental Protection Agency, from Steven A. Engel, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property* at 6 n.5 (May 28, 2008) (“The decisions of the Comptroller General are not binding on the Executive Branch”), available at www.justice.gov/olc/opinions.htm.

¹⁸ Letter from OSTP Director John Holdren to Speaker John Boehner, *Re: Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011* (May 16, 2011).

¹⁹ *Id.*

Enclosures:

Letter from OSTP Director John Holdren to Speaker John Boehner, *Re: Section 1340 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011* (May 16, 2011).

Office of Science and Technology Policy-Bilateral Activities with China, B-321982, 2011 WL 4826145 (Comp. Gen. Oct. 11, 2011) (*Bilateral Activities*).

Re: Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, at 1 (Sept. 19, 2011), available at www.justice.gov/olc/opinions.htm.

Letter from OSTP Director John Holdren to Chairman Frank Wolf, *Re: OSTP's intention to meet with Chinese officials on May 6-10* (May 5, 2011).

cc: The Honorable Joe Biden, President of the Senate
The Honorable John Boehner, Speaker of the House
Mr. Eugene Louis Dodaro, Comptroller General

Responding to an Antideficiency Act Violation



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

July 14, 2011

The Honorable Gene L. Dodaro
Comptroller General of the United States
441 G. Street, NW
Washington, D.C. 20548

Dear Mr. Dodaro:

This letter is to report a series of violations of the Antideficiency Act, as required by section 1351 of Title 31, United States Code (U.S.C.).

Summary of Violations

Multiple instances of violation of 31 U.S.C. § 1341(a) at the appropriation level occurred in a variety of Department of Health and Human Services (HHS) accounts, and one violation occurred at the apportionment level. The violations occurred in prior, multiple fiscal years, up to and including 2010. In general, the violations encompass improper incremental and forward funding practices, as well as the obligation of expired funds.

Factors Leading to Violations

There was a substantial lack of understanding throughout the Department of the legal limits on funding contracts; in particular, contracts that required effort or deliverables over a period of several years. This problem was compounded because earlier iterations of the HHS Acquisition Regulation (HHSAR) Subpart 332.7 (Contract Funding) provided guidance regarding various methods of funding contracts, and the guidance did not completely align with legal restrictions on the use of appropriated funds. Although amended from time to time, generally speaking, that HHSAR guidance was Departmental policy for over 20 years and provided an imperfect framework by which its agencies budgeted and allocated funds from annual appropriations and structured contracts.

In recent years, the Department amended the HHSAR to improve its contract funding coverage. However, in 2008, the HHS Senior Procurement Executive (SPE) became aware that despite such revisions, various agencies within the Department might still be funding contracts improperly. As a result, the SPE sponsored a multi-disciplinary, HHS-wide "Tiger Team" to review HHS contracts to determine whether problems with contract funding still persisted and if additional guidance was necessary.

The Tiger Team reviewed 176 multiple-year, high dollar value contracts across the Department which were candidates for heightened concern. The results of the review indicated that several agencies were, in many cases, funding contracts using unauthorized incremental or forward

funding practices. In July 2009, the SPE shared the results of the Tiger Team with senior management, HHS' Heads of Contracting Activity, and leadership within the Offices of Finance, Budget, the Inspector General (OIG), and the General Counsel (OGC). The SPE also disseminated draft acquisition guidance regarding funding of multiple-year contracts to the HHS acquisition community at large.

In August 2009, to closely examine the results of the Tiger Team review, HHS contracted for an independent assessment of the same contracts reviewed by the HHS Tiger Team. This independent assessment confirmed that about half of the contracts identified as problematic by the Tiger Team appeared to be improperly funded. In parallel with this independent assessment, the OIG conducted an audit of National Institutes of Health's use of appropriated funds for the same contracts reviewed by the HHS Tiger Team. The OIG is in the process of completing its reviews.

Once the independent assessment was complete, the Office of the Assistant Secretary for Financial Resources requested that the OGC assess whether any of the apparent deviations from appropriation laws and regulations identified by the Tiger Team, the independent assessment, and OIG constituted reportable Antideficiency Act violations. The OGC assessment identified instances of unauthorized incremental and forward funding practices. Additional OGC assessments into other contracts revealed the obligations of expired funds and an obligation in excess of an apportionment.

The enclosed summary chart provides detailed information about contracts that, as a result of this review process and OGC's legal assessment, HHS found violative of the Antideficiency Act. Furthermore, the information provided in the enclosed chart represents and categorizes the three main types of improper contract funding practices that occurred at HHS during the time period specified in this report: forward funding, incremental funding, and a combination of the two. Two additional types of violation, "use of expired funds" and "obligation in excess of an apportionment," also occurred. We explain each type of improper funding practice and the resultant Antideficiency Act violations which they cause in turn, as follows:

Forward Funding

As used in this letter and the corresponding attachments, "forward funding" refers to the obligation of annual (or multiple-year) appropriations to procure severable services which represent a *bona fide* need for a future year for which no appropriation has been made.

The Antideficiency Act (Act) prohibits, in pertinent part, an officer or employee of the government from involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law (31 U.S.C. § 1341(a)(1)(B)). In addition, the Act also prohibits, in pertinent part, making or authorizing an expenditure from, or creating or authorizing

an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law (31 U.S.C. § 1341(a)(1)(A)).

As a general rule, severable services are the *bona fide* need of the fiscal year in which they are performed. For obligation purposes, except in accordance with express statutory authority, severable services are charged to the appropriation available at the time the services are performed. Thus, in a contract for severable services, base and option periods are funded out of the appropriation available at the time of contract award or option exercise. However, such funds are available for up to twelve months, in accordance with the statutory exception at 41 U.S.C. § 3902, which permits agencies to obligate funds current at the time of contract award to fund a severable services contract and cross fiscal years, provided the performance period does not exceed one year.

The contracts referenced on the attachment as “forward funded” all suffered from the same defects. That is, agencies obligated annual appropriations to cover performance in excess of twelve months and additionally in some instances, to use current year appropriations to fund contract performance that would not begin until a subsequent fiscal year. As noted, these types of “forward funding” are problematic, as annual funds obligated on a contract for severable services are only available for twelve months after obligation (*i.e.*, after contract award or option exercise). Thus, on these contracts, annual funds were used not only to fund the *bona fide* need for the year in which the obligation was made, but also to fund the *bona fide* need of future fiscal years. As a result, agencies obligated the government to acquire severable services for future fiscal years in which no appropriation had yet been made, and thus obligated funds *in advance* of appropriations which could be used for such services. In addition, agencies also obligated funds to acquire severable services in an amount that exceeded and could be charged to the annual appropriation in question.

Incremental Funding

As used in this letter and the corresponding attachments, “incremental funding” refers to the obligation of two or more annual appropriation accounts to procure services during a performance period, which should have been fully funded using only the initial annual appropriation. When the violation identified refers only to “incremental funding,” it refers to the obligation of two or more annual appropriation accounts to procure non-severable services.

The Antideficiency Act prohibits, in pertinent part, making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law (31 U.S.C. § 1341(a)(1)(A)).

Agencies must fund contracts for non-severable services with funds available for obligation at the time the contract is awarded. This is because non-severable services represent an entire undertaking and a *bona fide* need of the year in which the obligation is made. Thus, contracts for non-severable services may not be severed, unless pursuant to express statutory authority (e.g. 41 U.S.C. § 3903.)

The contracts referred to in the attachment as “incrementally funded” refer to contracts for non-severable services which were not fully funded from funds available for obligation at the time of award. Rather, such contracts were funded incrementally (*i.e.*, out of annual appropriations from successive fiscal years). Thus, agencies did not obligate sufficient funds for these contracts at the time of award, and obligated funds in succeeding fiscal years, which were not available to fund the requirement in question.

Incremental Funding and Forward Funding

We note that in some cases the attachment refers to contracts that were both “forward” and “incrementally” funded. This category refers to contracts in which agencies made an obligation with annual funds to procure severable services in excess of twelve months, and did not fully fund the increment that was contracted for at the time of execution.

Use of Expired Funds

For the purposes of this letter, this category refers to a very specific set of obligations made after the resolution of bid protests. On a limited number of contracts, one agency awarded contracts at the end of a fiscal year using annual appropriations and such contracts were protested by disappointed offerors at the Government Accountability Office (GAO).

Pursuant to 31 U.S.C. § 1558, annual funds “available to the agency for a contract at the time a protest is filed in connection with . . . award of such a contract would otherwise expire, such funds shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest.”

After final rulings were made on these protests by GAO, the agency made contract awards in accordance with the disposition of the protests in the following fiscal year with the prior year funds. However, the agency awarded new contracts outside the 100 day limit set by 31 U.S.C. § 1558 (which would have otherwise allowed use of the expired funds). As a result, the agency obligated funds which were not available at the time that award was ultimately made.

Obligation in Excess of an Apportionment

For the purpose of this letter, this category refers to the award of a contract for non-severable services which was not fully funded at award. One agency awarded a contract for a non-severable service, but erroneously treated the requirement as a severable service and structured the contract to include a base and option periods. Consequently, the requirement was not fully funded at award. Because the obligation for a non-severable service was incurred upon award of the contract, the entire amount of the task should have been recorded as the amount obligated on that date. Since the Department recorded an obligation in an amount less than the total amount of the task, the Department must adjust its records to reflect the actual obligation that occurred upon award. As adjusted, the Department's records will reflect that, on the date of award, an obligation was incurred in excess of the amount that had been apportioned.

Organizational Responsibility for the Violations

Since the problems were systemic, the Department has concluded that responsibility for the violations cannot fairly be attributed to specific individuals. In addition, the Department found no evidence that the violations were committed willfully and knowingly.

Corrective Actions

We have shared the results of the Tiger Team review across HHS and across the functional disciplines involved in the acquisition process (*i.e.*, budget, program, contracting, and finance). In addition, the Department revamped its existing contract funding guidance, revised its HHSAR provisions regarding contract funding, and issued a detailed and extensive Acquisition Policy Memorandum to explain how contracting officials should apply the new HHSAR guidance. Further, the Department has provided technical assistance to Heads of Contracting Activity and their staff, conducted continuous education and outreach sessions across the Department, shared pertinent legal advice with the acquisition community, and identified, tailored, and adopted best practices from other federal agencies.

At the agency level, our Heads of Contracting Activity have mirrored the Department's cross-functional risk mitigation approach by: issuing local procedural guidelines to implement our expanded acquisition guidance; conducting or arranging for local appropriation law training; and working closely with their agency budget, program, and finance communities to align business practices with appropriation laws and regulations.

In coordination with HHS' budget, program, contracting, and finance offices, the Department will ensure that all new contracts awarded in fiscal year (FY) 2011 (and beyond) are properly funded in compliance with laws and regulations. Moreover, if additional funds are required to be obligated to complete an existing contract awarded prior to FY 2011 beyond obligations already recorded, the proper appropriation will be obligated and the contract will be restructured, or

terminated, as needed to ensure that there are no further violations of the Antideficiency Act. If additional funds are required to be expended to fulfill an obligation that was already recorded to an improper account, the Department will continue to make payment from the appropriation initially charged because at this time our judgment is that doing otherwise would have serious programmatic repercussions.

Including some of the actions stated above, HHS has taken the following corrective actions to safeguard against future violations:

- 1) Improved the process for review and approval of appropriation-related acquisition regulations and guidance, including closer consultation with OGC and budget/finance officials. Recently, the Department reorganized its management structure to more closely align acquisition, budget, and financial management activities. (November 2009)
- 2) Revised the HHSAR coverage on contract funding, based on consultation with OGC and the acquisition community, to make it consistent with applicable laws and regulations and easier to understand. In addition, HHS issued an Acquisition Policy Memorandum regarding funding of contracts exceeding one year of performance, which provided detailed guidance regarding pertinent HHSAR coverage. (Drafted/coordinated starting June 2009 – issued June 2010)
- 3) Developed and implemented an appropriation law decision tree for use by the HHS budget, program, acquisition, and finance communities. (June 2010)
- 4) Enhanced HHS' standard Acquisition Plan template to: (a) ensure that program and contracting officials are actively considering appropriation issues as early as possible in the acquisition cycle; and (b) reinforce the need for proper, informed funds review and certification. (October 2010)
- 5) Developed an on-line Appropriation Law course tailored to the HHS environment, which serves as the basis for future instructor-led training. (February 2011)

As discussed above, the deficiencies were caused by a combined lack of understanding throughout the Department of the legal limits on funding contracts and the failure of the Department's guidance to clearly set forth the legal parameters of funding contracts, or in some instances, the misapplication of the Department's guidance. To ensure this does not happen again, the Department is also taking the following steps:

- 1) Sharing successful appropriation-related business practices, adopting quality assurance procedures, and providing technical assistance across the Department to ensure full compliance with appropriation law. (July 2009 – ongoing)

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- 2) Developing an HHS-wide, web-enabled appropriation law decision tree with links to applicable guidelines. (Underway, and will be completed July 2011)
- 3) Conducting procurement management and internal control reviews to validate full compliance with appropriation laws and regulations. (March 2010 – ongoing)

I was extremely concerned that these violations of appropriation law had occurred as a function of long-standing problems cited above. Rest assured that my commitment to the proper and lawful funding of contracts has been made clear to senior managers across HHS. Identical letters are being sent to the President, President of the Senate, and Speaker of the House of Representatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen Sebelius". The signature is written in a cursive, flowing style.

Kathleen Sebelius

Enclosure

HHS Violations of 31 USC 1341(a)

HHS Agency	Title of the Appropriation or Fund Account	Fiscal Year	Contract Number	Date of Contract Award	Total Value of Contract Award	Value of Portion with ADA Issues	Description of ADA Issue
AHRQ	Healthcare Research and Quality	2004	290-04-0005	8/1/2004	\$27,793,999	\$5,184,690	Forward Funding
AHRQ	Healthcare Research and Quality	2004	290-04-0012	9/30/2004	\$6,202,337	\$1,350,000	Incremental Funding
AHRQ	Healthcare Research and Quality	2004	290-04-0020	9/30/2004	\$3,813,716	\$60,000	Forward Funding
AHRQ	Healthcare Research and Quality	2004	290-04-0021	9/30/2004	\$7,411,326	\$4,047,828	Forward Funding
AHRQ	Healthcare Research and Quality	2005	290-05-0015	9/30/2005	\$24,314,149	\$84,149	Incremental Funding
AHRQ	Healthcare Research and Quality	2006	HHSA290200600009C	9/26/2006	\$27,778,058	\$5,239,956	Forward Funding
AHRQ	Healthcare Research and Quality	2006	HHSA290200600002C	9/27/2006	\$9,713,299	\$3,190,103	Incremental Funding
AHRQ	Healthcare Research and Quality	2006	HHSA2902006000025C	9/27/2006	\$9,671,973	\$3,630,064	Forward Funding
AHRQ	Healthcare Research and Quality	2007	HHSA290200710005C	7/11/2007	\$22,545,290	\$3,722,305	Forward Funding
AHRQ	Healthcare Research and Quality	2007	HHSA290200710024C	9/25/2007	\$17,541,200	\$300,000	Forward Funding
AHRQ	Healthcare Research and Quality	2007	HHSA290200710057I	8/4/2007	\$11,307,305	\$203,077	Forward Funding
ASPE/PSC	General Department Management	2010	HHSP23320095642WC	9/30/2010	\$9,073,961	\$6,448,961	Obligation in Excess of Apportionment
CDC	Disease Control, Research, and Training	2006	HHSD200200618797C/200-2006-18797	8/31/2006	\$9,751,578	\$4,435,193	Forward Funding
CDC	Disease Control, Research, and Training	2006	HHSD200200619096C/200-2006-19096	9/15/2006	\$3,046,520	\$1,898,275	Incremental Funding
NIH	National Institute of Allergy and Infectious Diseases	2003	00266200309D266030068	9/30/2003	\$98,139,454	\$54,746,316	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2005	00266200109D266015416	9/30/2006	\$355,251,758	\$159,939,931	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2005	HHSN2662005000022C (NO1-AI-500022)	7/15/2005	\$244,524,657	\$67,561,617	Forward Funding
NIH	National Institute of Child Health and Human Development	2005	HHSN275200503395C (NO1-HD-53395)	9/28/2005	\$114,374,356	\$8,676,785	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2006	HHSN2662006000011C	9/14/2006	\$56,889,147	\$38,574,776	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2006	HHSN2662006000015C	9/27/2006	\$49,806,823	\$30,028,652	Incremental Funding
NIH	National Institute on Drug Abuse	2007	HHSN271200700009C	7/7/2007	\$27,086,505	\$15,938,325	Forward Funding
NIH	National Library of Medicine (NIDDK)	2007	HHSN267200700014C	9/14/2007	\$169,426,868	\$79,024,601	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2008	HHSN272200800013C	2/29/2008	\$54,792,673	\$18,858,073	Forward Funding
NIH	National Institute of Child Health and Human Development	2002	HHSN275033345 (NO1-HD-33345)	10/30/2002	\$164,700,000	\$15,500,000	Forward Funding
NIH	National Cancer Institute	2006	HHSN261200622012C	9/1/2006	\$51,590,181	\$1,100,000	Incremental Funding
NIH	National Institute of Allergy and Infectious Diseases	2003	HHSN266030052 (NO1-AI-30052)	9/30/2003	\$71,292,000	\$31,317,827	Incremental Funding
NIH	National Heart, Lung and Blood Institute	2008	HHSN268200700012C	8/28/2008	\$3,460,652	\$2,723,161	Incremental Funding
NIH	National Cancer Institute	2008	HHSN26120080001E	9/24/2008	\$5,254,137,266	\$758,189,865	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2002	00283200202D283029025	2/22/2002	\$94,758,310	\$580,618	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2002	00283200209D283029026	9/12/2002	\$112,617,859	\$11,174,000	Forward and Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2003	HHSS270200300049	9/29/2003	\$45,663,201	\$8,845,585	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2003	00270200309C0002270036000/27003600C	9/29/2003	\$36,257,856	\$9,810,187	Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2003	00280200309C0003280031600/28003160C	9/30/2003	\$13,607,970	\$3,024,190	Forward and Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2003	00280200309C0002280033600/28003360C	9/30/2003	\$15,781,244	\$580,618	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS283200400022C	12/15/2003	\$255,590,276	\$5,775,061	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS277200406091C	7/12/2004	\$70,630,545	\$22,805,080	Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS270200404049C	9/22/2004	\$19,718,521	\$148,734	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS270031000HSS2700011/27003100C	9/29/2004	\$20,568,543	\$1,290,910	Forward and Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHS280034200HSS28000002/28003420C	9/30/2004	\$22,888,752	\$9,840	Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS280020500HSS28000002/28002050C	9/30/2004	\$12,512,405	\$250,000	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2005	HHSS270200500134C	9/15/2005	\$20,303,191	\$675,000	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2007	HHSS283200700030I/HHSS28300001T	8/1/2007	\$49,091,609	\$9,820,743	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2007	HHSS283200700020I/HHSS28300002T	9/4/2007	\$4,515,175	\$2,253,444	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2009	HHSS283200700003I/HHSS28300002T	7/6/2009	\$76,252,618	\$14,272,629	Use of Expired Funding
SAMHSA	Substance Abuse and Mental Health Services	2009	HHSS277200800004C	9/1/2009	\$61,209,189	\$9,322,894	Use of Expired Funding
SAMHSA	Substance Abuse and Mental Health Services	2009	HHSS270200800003C	9/8/2009	\$6,313,391	\$2,148,702	Use of Expired Funding
SAMHSA	Substance Abuse and Mental Health Services	2009	HHSS283200700003I/HHSS28342001T	9/15/2009	\$19,691,868	\$4,569,545	Use of Expired Funding