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United States General Accounting Office  
Washington, DC 20548

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November 21, 2003

The Honorable Christopher S. Bond  
Chairman  
The Honorable Barbara A. Mikulski  
Ranking Minority Member  
Subcommittee on Veteran Affairs, HUD and Independent Agencies  
Committee on Appropriations  
United States Senate

Subject: *Financial Management: Information on the Mandated Transfer of HUD's Appropriation Law Function to the Chief Financial Officer*

The Departments of Veterans Affairs and Housing and Urban Development (HUD), and Independent Agencies Appropriations Act, 2003 (the Appropriation Act)<sup>1</sup> gave HUD's Chief Financial Officer (CFO), in consultation with the HUD Budget Officer, the "sole authority" to investigate potential or actual violations under the Anti-Deficiency Act<sup>2</sup> and all other statutes and regulations related to the obligation and expenditure of funds made available in any act. Further, the Appropriations Act provided that the CFO shall determine whether violations occurred and submit the final reports required by law. Finally, the Appropriation Act required the Secretary of HUD to transfer no fewer than four appropriation law attorneys from its Office of General Counsel (OGC) to its Office of Chief Financial Officer (OCFO).

These provisions and HUD's actions to implement the Appropriation Act's requirements raised a number of potential implementation issues and led to your request that we review and provide information on the impact that these provisions have had at HUD. Specifically, you asked for information pertaining to the following five questions, which we have provided in a question and answer format in this report. As discussed with your staff, the responses to these questions are primarily based on information obtained from interviews with various HUD and HUD Office of Inspector General (OIG) officials who were affected by the Appropriation Act.

1. What functions were transferred to OCFO and how has HUD implemented the administration of these functions within OCFO?

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<sup>1</sup> Pub. L. No. 108-7, Div. K, 117 Stat. 11, 474 (2003).

<sup>2</sup> 31 U.S.C. §§ 1341, 1342, 1350, 1517, 1519 (2000).

2. Is there any conflict between the CFO's traditional duties and responsibilities and (a) the sole authority to investigate and report on potential or actual violations of statutes and regulations related to the obligation and expenditure of funds or (b) the added responsibility of sole authority to opine on all appropriations law issues?
3. What steps has HUD taken to ensure that any conflict of interest has been identified and eliminated?
4. Are there any issues associated with removing the HUD General Counsel from being able to review any appropriations law actions of the CFO or the HUD Budget Officer and render timely, needed advice to the HUD Secretary on any aspect of appropriations law?
5. Does the "sole authority" to investigate and report provided to the CFO by the Appropriation Act conflict with or undermine the authority provided to the Inspector General by the Inspector General Act?

To address your request, we obtained and reviewed the relevant provisions of the Appropriation Act and related conference and committee reports. We interviewed several senior level HUD officials affected by the Appropriation Act's provisions, including the General Counsel and several other attorneys from HUD's OGC; HUD's Deputy Chief Financial Officer<sup>3</sup> and staff from his office, including the head appropriations law attorney and HUD's budget officer; and senior officials from HUD's program offices who receive legal services from HUD's attorneys. We also interviewed officials from HUD's OIG and reviewed the OIG's March 2002 report on the Office of Multifamily Housing Assistance Restructuring (OMHAR) Anti-Deficiency Act case.<sup>4</sup> We also reviewed the Anti-Deficiency Act, the Chief Financial Officers Act of 1990, and the Inspector General Act of 1978, as amended (IG Act). Finally, we reviewed the department's revised funds control handbook dated December 18, 2002, which was updated and issued just prior to the enactment of the Appropriation Act and which lays out HUD's process for handling future Anti-Deficiency Act issues.<sup>5</sup> We requested comments on a draft of this report from the Secretary of Housing and Urban Development and HUD's Inspector General or their designees. We conducted our work from August 2003 through November 2003 in accordance with U.S. generally accepted government auditing standards.

## Summary

There was general agreement among the HUD officials we spoke with that the OMHAR Anti-Deficiency Act investigation was contentious and highlighted the need for changes to strengthen the department's funds control system and to improve the

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<sup>3</sup> HUD's Chief Financial Officer position is currently vacant.

<sup>4</sup> HUD Office of Inspector General Audit Memorandum Report 2002-DE-0801 (March 22, 2002), "Alleged Violations of the Anti-Deficiency Act and the HUD Reform Act by the Office of Multifamily Housing Assistance Restructuring (OMHAR)." There was consensus among HUD officials that HUD's handling of this Anti-Deficiency Act case played a significant role in the events leading to enactment of the Appropriation Act's provisions that are the subject of this request.

<sup>5</sup> HUD is currently revising its funds control handbook (Handbook No. 1830.2 Rev-4) to incorporate the organizational changes mandated by the fiscal year 2003 Appropriation Act.

department's process for responding to Anti-Deficiency Act issues. Some HUD officials also told us that tension over the handling of Anti-Deficiency Act issues led to changes in OGC's provision of legal assistance to OCFO, which hindered timely, informal communications between OCFO and OGC's appropriation law attorneys. However, there were differing views on how to address these matters and on various implementation issues raised about provisions included in the Appropriation Act.

There was agreement on what functions and roles OCFO assumed pursuant to the Appropriation Act. HUD transferred four appropriations law attorneys from OGC to OCFO as required. Also, in addition to OCFO's typical responsibilities of accounting, financial reporting, budgeting, and establishing and maintaining the department's funds control system, the HUD officials concurred that OCFO is now responsible for all appropriation law matters, including providing legal interpretations on appropriation law to HUD's Secretary and program offices and leading all Anti-Deficiency Act investigations that may arise within the department. There also was general consensus that having OCFO as a designated focal point within HUD for addressing Anti-Deficiency Act matters was a positive development.

Regarding the remaining questions you raised, there was much less consensus concerning potential conflicts of interest and the respective roles of OCFO, OGC, and the IG. Responses to the remaining questions revealed different perspectives, most notably over the implication of the Appropriation Act providing OCFO with "sole authority" to investigate and determine violations of appropriation law and transferring attorneys from OGC to OCFO.

Certain HUD officials and the OIG officials we spoke with believe there is a conflict of interest, or at least the appearance of a conflict, by having OCFO solely responsible for investigating, determining, and reporting on potential or actual Anti-Deficiency Act violations in situations involving breakdowns in HUD's funds control system. The OIG officials cited the OMHAR Anti-Deficiency Act case as a prime example of the existence of a conflict as two of the four individuals deemed responsible for that violation worked within OCFO. Others, particularly within HUD's OCFO, while acknowledging these concerns, did not necessarily feel that the Appropriation Act's provisions created a conflict. Instead they said it was their management responsibility, even without the legislation, to be involved with and lead investigations of potential or actual Anti-Deficiency Act violations. Nevertheless, OCFO has taken certain steps that it believes will help minimize the potential for, or the appearance of, a conflict of interest by establishing and documenting the process that will be followed if and when future Anti-Deficiency Act violations arise. Additionally, OCFO is also now finalizing the establishment of a new division within OCFO that will be headed by an individual with no budgetary or funds control responsibilities to oversee and report on future Anti-Deficiency Act investigations.

The HUD program officials and most of the attorneys, including the head appropriations law attorney in OCFO, we spoke with who work with the program offices every day did say that despite HUD's best efforts to implement the new mandated structure and ensure collaboration among the two groups of attorneys, the transfer of the appropriations law attorneys from OGC to OCFO caused initial and lingering confusion over which group of attorneys should be consulted for legal assistance. According to the General Counsel, this confusion delays legal advice,

provides the opportunity for program officials to “shop” for legal interpretations, and hampers his ability to provide timely, needed legal advice not only to the Secretary but also to the HUD program offices. Further, numerous officials said they were not sure how differing legal views would be resolved. Historically, the General Counsel has made the final interpretation. On the other hand, officials from OCFO said the transfer of the appropriation attorneys was necessary because at some point during the OMHAR Anti-Deficiency Act investigation the General Counsel began restricting access to the appropriation law attorneys by requiring formal written requests for all appropriation law services. As a result, an official in HUD’s OCFO said that his office and the program offices could not obtain needed assistance on appropriation law issues in a timely manner.

Finally, OIG officials told us that they see two conflicts, or at least possible conflicts, between the literal language of the Appropriations Act and the language of the IG Act. First, they said that by providing OCFO with “sole authority” to investigate potential or actual Anti-Deficiency Act violations, the Appropriations Act conflicts with the language of the IG Act that generally authorizes the OIG to investigate HUD matters. In response to this conflict, the OIG is referring all potential Anti-Deficiency Act issues to HUD’s OCFO. Second, the OIG officials said they believe there is a possible conflict between OCFO’s sole authority to report on Anti-Deficiency Act violations under the Appropriation Act and the OIG’s authority to report criminal violations to the Attorney General under the IG Act. On the other hand, officials from HUD’s OCFO said that the OIG should not routinely be involved in an Anti-Deficiency Act violation until an official determination has been made by the department. At that time, the OCFO official said it would be appropriate for the OIG to review the work that went into the investigation, and more importantly and pursuant to their authority, to investigate and determine whether criminal acts may have been committed.

## **Background**

In its report<sup>6</sup> on the fiscal year 2003 Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill, the House Appropriations Committee noted that in prior years it and others, including GAO and the Office of Management and Budget (OMB), had raised concerns about HUD’s system of funds control and compliance with the Anti-Deficiency Act. Congress enacted the Anti-Deficiency Act and has amended it over many years to prohibit agencies from making obligations and expenditures in excess of the appropriations provided to them. Among other things, the Anti-Deficiency Act prohibits officers or employees of the United States government, unless otherwise authorized by law, from (1) making or authorizing an obligation or expenditure in excess of an available appropriation or fund, (2) involving the government in any contract or obligation in advance of appropriations, or (3) making obligations or expenditures in excess of an apportionment or the amount permitted by agency regulations. To help protect against violating the Anti-Deficiency Act’s prohibitions, Congress amended the Anti-Deficiency Act on several occasions to establish requirements for agency systems of funds control. When violations do occur, the Anti-Deficiency Act requires that agency heads report to the President and Congress and subjects the officers and

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<sup>6</sup> H.R. Rep. No. 107-740, at 78-79 (2002).

employees responsible for the violation to possible adverse personnel actions and criminal penalties.<sup>7</sup>

The House Appropriations Committee report also noted that these concerns and three recent Anti-Deficiency Act violations<sup>8</sup> that were brought to the Committee's attention prompted an investigation by the Committee's Survey and Investigations staff into HUD's procedures to investigate and enforce the Anti-Deficiency Act. According to the House Appropriations Committee report, the House investigators determined that HUD lacked adequate funds control policies and procedures with respect to oversight, checks and balances, automated systems, audits, and training.

On the basis of these findings, the House Appropriations Committee included bill language and additional funding to assist HUD's efforts to improve funds control and its financial management systems. Additional bill language vested the sole authority to investigate, determine, and report compliance with the Anti-Deficiency Act and all other appropriations law with HUD's OCFO. The bill language also required the transfer of no fewer than four appropriation law attorneys from OGC.

The Senate's version of the fiscal year 2003 appropriations bill for HUD did not contain any similar provisions. The Departments of Veterans Affairs and Housing and Urban Development, Independent Agencies Appropriations Act, 2003, was ultimately enacted on February 20, 2003, as part of the Consolidated Appropriations Resolution, 2003.<sup>9</sup> The appropriations for HUD "Management and Administration, salaries and expenses" essentially adopted the language from the House bill that involved OCFO's responsibilities for Anti-Deficiency Act and other appropriation law matters and the transfer of four appropriation law attorneys.<sup>10</sup> In the conference report<sup>11</sup> on the Consolidated Appropriations Resolution, 2003, the conferees reiterated the concerns expressed in the House report about the severe chronic funds control problems at HUD, including the department's failure to make timely, formal determinations of the violations of the Anti-Deficiency Act and other appropriations statutes. As of March 2003, HUD had completed the mandated transfer of the four appropriation law attorneys from OGC to OCFO.

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<sup>7</sup> OMB Circular A-11 provides requirements for funds control and instructions for required agency head reports if the agency head determines that an Anti-Deficiency Act violation occurred. For an extensive discussion of the Anti-Deficiency Act, see chapter 6 of GAO's *Principles of Federal Appropriations Law*.

<sup>8</sup> The most significant Anti-Deficiency Act violation involved HUD's Office of Multifamily Housing and Assistance Restructuring's (OMHAR) use of technical assistance grant funds. HUD's investigation into this matter was lengthy and resulted in mixed opinions about whether an Anti-Deficiency Act violation actually occurred. Both HUD's General Counsel and the Office of Inspector General concluded that with respect to the OMHAR case no Anti-Deficiency Act violation occurred. However, HUD's Secretary ultimately concluded there was an Anti-Deficiency Act violation and reported it.

<sup>9</sup> Pub. L. No. 108-7, Div. K, 117 Stat. 11, 474 (2003).

<sup>10</sup> 117 Stat. at 499-500.

<sup>11</sup> H.R. Conf. Rep. No. 108-10, at 1427 (2003).

## Questions and Answers

### **1. What functions were transferred to OCFO and how has HUD implemented the administration of these functions within OCFO?**

Provisions in the Appropriations Act, gave OCFO, in consultation with the Budget Officer, the “sole authority” to investigate potential or actual violations of the Anti-Deficiency Act and all other statutes and regulations related to the obligation and expenditure of funds. In addition, OCFO is to determine whether violations exist and is to submit the final reports on violations to the Secretary, the President, OMB, and Congress.

As required by the Appropriations Act, HUD transferred four attorneys from the Legislation Division, Office of Legislation and Regulations, Office of General Counsel to OCFO. Two of these attorneys had what HUD described as “significant” appropriations law experience, while the other two had lesser amounts of appropriations law experience. OCFO’s appropriations law function is now responsible for providing legal assistance on all appropriations law matters to HUD’s program offices as well as the HUD Secretary. The appropriation law attorneys are supervised by a GM-15 attorney and are currently reporting to HUD’s Deputy CFO, who is not an attorney.

### **2. Is there any conflict between the CFO’s traditional duties and responsibilities and (1) the sole authority to investigate and report on potential or actual violations of statutes and regulations related to the obligation and expenditure of funds or (2) the added responsibility of sole authority to opine on all appropriations law issues?**

HUD’s OCFO typically has been responsible for the department’s accounting, financial reporting, and budgeting functions, as well as for creating and maintaining HUD’s system of funds control to ensure appropriated funds are used lawfully and as intended. Given these responsibilities, several of the HUD officials and the OIG officials we interviewed told us that they do believe the new responsibilities provided in the Appropriation Act have led to or increased the potential for a conflict of interest or at least the appearance of a conflict of interest. A chief concern is that OCFO is now solely responsible for investigating potential Anti-Deficiency Act violations that involve breakdowns in the funds control system, which it is responsible for administering. Also, OCFO attorneys are now in the position of having to render legal interpretations that may directly implicate the performance of the CFO for whom they now work. Additionally, there were some concerns raised about the supervision and rating of the OCFO attorneys. The OIG officials cited the OMHAR Anti-Deficiency Act case as prime example of why the Appropriation Act created a conflict of interest. In the Secretary’s OMHAR Anti-Deficiency Act report, two of the four persons or positions deemed responsible for the violation worked within OCFO.

Others at HUD, principally in OCFO, told us they do not believe there is a clear conflict. Their belief is that since OCFO has been delegated responsibility for funds

control within the department, management of that responsibility dictates that OCFO should also be responsible for and involved with assessing where that system failed, and if an Anti-Deficiency Act violation occurred. Further, HUD's budget officer believes the Anti-Deficiency Act and OMB circulars make it clear that the funds control responsibilities rest within OCFO.

The Deputy CFO and some others said the Appropriation Act was useful in that it clearly establishes who within HUD has responsibility for leading and making future Anti-Deficiency Act violation determinations. During the OMHAR Anti-Deficiency Act investigation, these responsibilities were not clearly defined and this hampered the investigation. HUD's updated funds control handbook now specifies individuals' responsibilities with respect to future Anti-Deficiency Act issues. Further, the Deputy CFO stated that the appropriation law attorneys now assigned to his office can focus on reviewing newly required funds control plans, which he and others believe are a key component in strengthening HUD's system of funds control to prevent future Anti-Deficiency Act violations.

The Deputy CFO said that OCFO did recognize that others have concerns about the potential for an appearance of a conflict of interest and therefore, as discussed in the response to question 3, has taken or plans certain actions to help mitigate these concerns.

### **3. What steps has HUD taken to ensure that any conflict of interest has been identified and eliminated?**

Given the responsibilities of HUD's OCFO, it would be difficult to completely eliminate the potential for a conflict of interest or the appearance of a conflict of interest. However, HUD has taken or is planning to take certain steps to try to mitigate this risk. Specifically, we were told that OCFO is in the process of establishing a new division within OCFO that is to be headed by an individual with no funds control or budget responsibilities to lead future Anti-Deficiency Act inquiries. The investigative team is also to be comprised of staff not associated with the activity where the Anti-Deficiency Act violation is alleged. We were told that OCFO appropriations law attorneys would provide legal assistance to this group and the new division would submit its report – a report that we were told will serve as the department's report as required by the Anti-Deficiency Act and OMB Circular A-11-- to the CFO and HUD Secretary for acceptance. A HUD official told us that this division is staffed and ready to begin work pending notification to Congress.

Additionally, prior to the enactment of the Appropriations Act, HUD's OCFO made substantial revisions to its funds control handbook. Included in this revised handbook is a chapter that lays out the department's process for responding to future Anti-Deficiency Act issues. The process spells out who to notify when an Anti-Deficiency Act violation is suspected, delineates responsibilities for conducting the investigation, and prescribes the documentation that is to be maintained. HUD is now in the final stages of updating the funds control handbook again to reflect the organizational changes mandated by the Appropriations Act and the establishment of the new division within OCFO that will lead future Anti-Deficiency Act investigations.

**4. Are there any issues associated with removing the HUD General Counsel from being able to review any appropriations law actions of the CFO or the HUD Budget Officer and render timely, needed advice to the HUD Secretary on any aspect of appropriations law?**

In our discussions concerning this question, agency officials had different views. Most of the attorneys we interviewed from HUD's OGC, including the General Counsel, shared the opinion that the current organizational structure does not lend itself to ensuring the Secretary receives the best, most timely legal advice. In fact, there was broad consensus among those we spoke to that the current organizational structure is awkward. On the other hand, officials in OCFO said the transfer of attorneys was necessary because in the wake of the OMHAR Anti-Deficiency Act investigation, OGC restricted access to the appropriation law attorneys making it very cumbersome for OCFO staff and program office officials to obtain timely, needed advice on appropriation issues. We were told that collaboration occurred informally prior to the OMHAR Anti-Deficiency Act investigation. At some point during the OMHAR Anti-Deficiency Act investigation, OGC instituted a policy of requiring formal written requests for all appropriation law services.

The General Counsel expressed three key concerns about the change in organizational structure mandated by the Appropriations Act. First, he was concerned that under the current structure his office might not be informed of all legal issues that arise within the department, including those that should be elevated to the Secretary's attention. Second, he and others commented that now the Secretary and even the program assistant secretaries could be presented with two conflicting legal interpretations and that there is currently no mechanism for resolving these differences. In the past the General Counsel, after hearing the opposing views, would make the final interpretation of law. Third, he thought that under the current structure there was a greater risk for program office officials to "shop" for the legal interpretation that best met their goals. He said having all the attorneys placed within OGC reduces that risk because all legal issues ultimately were subject to review and resolution by the General Counsel.

Officials within OCFO told us that they believe the creation of a separate appropriations law function within OCFO has resulted in an increase in the level of legal staff effort and service devoted to appropriations law issues, and that this increased focus and effort should be sustained regardless of its organizational placement within HUD. An OGC official told us that prior to their transfer to OCFO, the four appropriation law attorneys assigned to her spent less than half their time on appropriation law issues.

Several HUD officials from both OGC and OCFO said that the OMHAR Anti-Deficiency Act investigation highlighted the need for additional resources and expertise in its appropriation law function and that prior to the enactment of the Appropriation Act, OGC had hired an additional attorney with considerable appropriations law experience to bolster that function. However, this attorney was not one of those transferred to OCFO because, according to HUD's General Counsel, at the time of the transfer this individual was not assigned to the division that was specifically identified in the Appropriation Act as having to transfer staff.

While most of the HUD attorneys we spoke with, including the head OCFO appropriations law attorney, believed that HUD has done its best under the new structure to ensure that coordination between the program attorneys and the appropriation law attorneys continues, nearly all acknowledged that there was initial and even lingering confusion in some situations as to what group of attorneys has responsibility over a particular issue. The HUD program office officials raised the same issue.

Two attorneys stated that it is often difficult to separate appropriation law issues from other legal issues, which highlights the need for good coordination and communication between all of HUD's attorneys. There was further concern raised that as the attorneys in OGC and OCFO change over time the level of coordination between the two groups could deteriorate under the current structure. Currently, OGC and OCFO attorneys have the benefit of long-standing working relationships with one another.

##### **5. Does the “sole authority” to investigate and report provided to the CFO by the Appropriations Act conflict with or undermine the authority provided to the Inspector General by the Inspector General Act?**

The IG Act provides that IGs shall have the duty and responsibility to “conduct, supervise, and coordinate ... investigations relating to the programs and operations of the agency.”<sup>12</sup> The IG Act also provides that an IG “shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.”<sup>13</sup> The OIG identified these provisions of the IG Act as being in conflict, or at least potentially in conflict, with the literal language of the Appropriations Act.

The HUD OIG officials we met with, including the counsel to the Inspector General, pointed to the language in the Appropriations Act that provides the OCFO with “sole authority to investigate potential or actual violations under the Anti-Deficiency Act” as conflicting with the language of the IG Act providing the IG with general authority to investigate HUD matters. They believe the literal language of the Appropriations Act precludes the OIG from investigating potential Anti-Deficiency Act violations, including those that might be identified during routine or ongoing OIG jobs or those that are reported via the Inspector General's fraud hotline. As a result, the OIG officials said they are referring all potential Anti-Deficiency Act matters to OCFO.

The OIG also brought up that, in addition to providing OCFO with the sole authority to investigate potential or actual Anti-Deficiency Act violations, the language in the Appropriations Act provides that OCFO shall determine whether violations exist and submit final reports on violations.<sup>14</sup> The OIG said that there is a possible conflict

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<sup>12</sup> 5 U.S.C. Appendix § 4(a)(1)(2000). Other provisions of the IG Act also support the IG's authority to investigate.

<sup>13</sup> 5 U.S.C. Appendix § 4(c).

<sup>14</sup> The Anti-Deficiency Act provides for heads of agencies to report violations to the President and Congress. 31 U.S.C. §§ 1351, 1517(b).

between this language and the language in section 4(c) of the IG Act, which directs the IG to report to the Attorney General if the IG reasonably believes there has been a violation of criminal law.<sup>15</sup> The OIG is unclear how to reconcile this provision with OCFO's current authority. OIG officials told us that they have not yet been faced with a situation that required resolution of this issue.

An OCFO official expressed a somewhat different view of the Appropriation Act's potential effect on the IG. The officials stated that the OIG should not routinely be involved in an Anti-Deficiency Act violation until the department has determined whether an actual violation has occurred. At that time, the OCFO official said it would be appropriate for the OIG to review the work that went into the investigation, and more importantly and pursuant to their authority to investigate, determine whether criminal acts may have been committed.

### **Agency Comments and Our Evaluation**

On November 19, 2003, HUD's Assistant Inspector General for Audits provided us with oral comments expressing the Office of Inspector General's agreement with the information presented that pertained to or was attributable to the OIG. HUD did not take an official position on the issues discussed in this report but instead provided separate letters containing technical comments from its Deputy Chief Financial Officer and the Deputy General Counsel. We considered these comments and as we deemed appropriate made revisions to the report.

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As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 14 days from its date. At that time, we will send copies to the Secretary of Housing and Urban Development, the Inspector General, and interested congressional committees. We will also provide copies to others on request. The report will also be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you have any questions about this report, please contact me at (202) 512-9508, or Phillip McIntyre, Assistant Director, at (202) 512-4373. You may also reach us by E-mail at [calboml@gao.gov](mailto:calboml@gao.gov) or [mcintyrep@gao.gov](mailto:mcintyrep@gao.gov). Other key contributors to this report were Jeffrey Jacobson and Jack Hufnagle.



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<sup>15</sup> An Anti-Deficiency Act violation may be subject to criminal penalty. 31 U.S.C. §§ 1350, 1519 (2000).

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