

**Digests of GAO Appropriations Law
Decisions and Opinions**

Matter of: U.S. Army Corps of Engineers—Statutory Restrictions on the Use of Appropriated Funds for Welded Shipboard Anchor and Mooring Chain

File: B-328485

Date: Apr. 24, 2017

Section 2434 of title 10 of the U.S. Code, recurring provisions in the annual DOD appropriations acts, and section 108 of the Energy and Water Development and Related Agencies Appropriations Act, 2016 restrict the purchase of "welded shipboard anchor and mooring chain." USACE's obligation of fiscal year (FY) 2015 Corps of Engineers—Civil, Operation and Maintenance funds for "buoy anchor chain" did not run afoul of any of these provisions. USACE did not violate them because it obligated amounts for a purpose, mooring a buoy, and from an appropriation, FY 15 Corps of Engineers—Civil, Operation and Maintenance funds, both of which were not subject to the statutory restrictions.

Matter of: Election Assistance Commission—Payments to States under the Help America Vote Act of 2002

File: B-328615

Date: May 9, 2017

Payments made to states under the Help America Vote Act of 2002 (HAVA) are grants. Such payments are distributed "to carry out a public purpose of support or stimulation authorized by a law of the United States" and the federal government does not expect "substantial involvement" when states carry out activities authorized by HAVA.

31 U.S.C. § 6304.

Matter of: U.S. Department of Agriculture—Economy Act Transfers for Details of Personnel

File: B-328477

Date: Sept. 26, 2017

The U.S. Department of Agriculture (USDA) violated the purpose statute, improperly augmented several of its appropriations, and potentially violated the Antideficiency Act when it obligated several of its appropriations for the expenses of separately funded USDA offices. Specifically, USDA improperly relied on the Economy Act to enter into interagency agreements, under which the agency obligated its appropriations for (1) Rural Development Salaries and Expenses, (2) Food and Nutrition Service, Nutrition Programs Administration, and (3) Office of Civil Rights, for personnel details that did not actually occur. Instead, these appropriations were used for the salaries and benefits of employees performing work for separately funded USDA offices. USDA improperly relied on the Economy Act as authority to transfer its appropriations. The agency violated the purpose statute when it did not use the correct appropriation for the salaries and benefits in question and improperly augmented the appropriations of these other USDA offices. If upon adjusting its accounts to charge the correct appropriations, USDA has incurred obligations in excess of those appropriations, the agency must report its Antideficiency Act violation(s).

Matter of: Air Force Reserve Command—Disposable Plates and Utensils

File: B-329316

Date: Nov. 29, 2017

Air Force Reserve Command may not use appropriated funds to purchase disposable plates and utensils where potable water was not available in the building but was provided via bottled water. Disposable plates and utensils, like food, are personal expenses of individual employees. An agency may not use appropriated funds to purchase items considered personal expenses without specific statutory authority to do so, unless the agency can demonstrate that the provision of items that would otherwise constitute a personal expense directly advances the agency's statutory mission and the benefit accruing to the agency clearly outweighs the ancillary benefit to the employee.

Matter of: Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018

File: B-329092

Date: Dec. 12, 2017

Agencies may only withhold budget authority from obligation if the President has transmitted a special message to Congress. See Pub. L. No. 93-344, title X, §§ 1001–1017, 88 Stat. 297, 332 (July 12, 1974), classified at 2 U.S.C. §§ 681-688. ARPA-E withheld the obligation of \$91 million without the President transmitting a special message to Congress. Accordingly, ARPA-E violated the Impoundment Control Act. Because we have confirmed that the funds are now available for obligation, we are not transmitting a report to Congress under the Impoundment Control Act.

The President's budget request for FY 2018 proposed the elimination of ARPA-E, an agency within the Department of Energy. The budget request asks that Congress cancel more than \$46 million of ARPA-E's unobligated balances and require that another \$45 million of ARPA-E's unobligated balances be used to ensure full closure of ARPA-E by mid-2019. ARPA-E told us that it withheld the obligation of \$91 million in FY 2017, per the Department of Energy's instructions, in anticipation of the enactment of the legislative proposals in the budget request. The Department of Energy acknowledged that although the budget authority was fully apportioned and allotted, "limited oral conversations regarding whether to withhold any budget authority in the ARPA E appropriation during FY 2017 pursuant to the FY 2018 President's Budget did occur." We found that ARPA-E's withholding violated the Impoundment Control Act.

Matter of: U.S. Department of Transportation—Violation of Governmentwide Anti-Lobbying Provision

File: B-329368

Date: Dec. 13, 2017

The U.S. Department of Transportation (DOT) violated an anti-lobbying provision in the Financial Services and General Government Appropriations Act, 2017, when it "retweeted" and "liked" a tweet urging followers to "[t]ell Congress to pass" pending legislation. Although DOT was not the author of the tweet, DOT, by retweeting and liking it, not only endorsed the message, but also created agency content. Because DOT obligated and expended appropriated funds in violation of a statutory prohibition, DOT also violated the Antideficiency Act and should report accordingly.

Matter of: National Labor Relations Board—Provision of Space to the National Labor Relations Board Federal Credit Union

File: B-328566

Date: Dec. 14, 2017

The National Labor Relations Board's (NLRB) appropriations were available to continue to provide the NLRB Federal Credit Union with space and associated services where the credit union did not maintain a certain membership standard continuously. The Federal Credit Union Act of 1934 authorizes agencies to provide space and services to a credit union that, upon application, meets a certain membership standard. 12 U.S.C. § 1770. The law does not require the credit union to maintain the membership standard after the initial application.

Matter of: Commodity Futures Trading Commission—Liabilities Outside of the Government's Control

File: B-328450

Date: Mar. 6, 2018

When it entered into leases for real property, the Commodity Futures Trading Commission (CFTC) agreed to liabilities whose total final amount was out of CFTC's control. CFTC did not place a limit or cap on the total amount of CFTC's final liability for some of these liabilities. For example, CFTC agreed to make payments to its landlords for specified real property taxes incurred by the property owner. These amounts were both outside of CFTC's control and were not subject to any contractual limitation on amount. In some other lease clauses, CFTC also agreed to liabilities whose final amount was within CFTC's control; however, these liabilities were subject to fixed limits that were ascertainable when CFTC agreed to them. For example, in one lease, CFTC agreed to pay a share of the building's operating costs, with the amount being capped at five percent of CFTC's total base rent for each lease year.

The Antideficiency Act bars federal employees from creating or authorizing an obligation in excess of, or in advance of, an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1). CFTC violated the Antideficiency Act when it agreed to liabilities where both the total final amount was outside of CFTC's control and where the total liability was not subject to a fixed limit ascertainable when CFTC agreed to assume the liability. However, CFTC did not violate the Antideficiency Act when it agreed to liabilities whose total amount was out of CFTC's control, but were subject to a fixed and ascertainable limit. To comply with the recording statute, 31 U.S.C. § 1501, CFTC should have recorded an obligation for the amount of that fixed, ascertainable limit.

For those lease clauses that are uncontrolled and uncapped liabilities, CFTC should report Antideficiency Act violations, as required by 31 U.S.C. § 1351. CFTC also should ensure that it records its future obligations in a manner consistent with this opinion.

GAO Appropriations Law Decisions and Opinions
(March 9, 2017 to March 8, 2018)

U.S. Army Corps of Engineers—Statutory Restrictions on the Use of Appropriated Funds for Welded Shipboard Anchor and Mooring Chain
B-328485, Apr. 24, 2017

Election Assistance Commission—Payments to States under the Help America Vote Act of 2002
B-328615, May 9, 2017

U.S. Department of Agriculture—Economy Act Transfers for Details of Personnel
B-328477, Sept. 26, 2017

Air Force Reserve Command—Disposable Plates and Utensils
B-329316, Nov. 29, 2017

Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018
B-329092, Dec. 12, 2017

U.S. Department of Transportation—Violation of Governmentwide Anti-Lobbying Provision
B-329368, Dec. 13, 2017

National Labor Relations Board—Provision of Space to the National Labor Relations Board Federal Credit Union
B-328566, Dec. 14, 2017

Commodity Futures Trading Commission—Liabilities Outside of the Government's Control
B-328450, Mar. 6, 2018

Liabilities Outside of the Government's Control

Chart Accompanying:
 B-328450, Mar. 6, 2018:
 Commodity Futures
 Trading Commission —
 Liabilities Outside of the
 Government's Control

Is it possible to ascertain the government's limit on liability
 within the agreement?

YES, Ascertainable:

NO, Not Ascertainable:

Rule: Record an obligation for the fixed amount at the obligational event

- Examples: Firm fixed-price contract; grant award
- See the Recording Statute, 31 U.S.C. § 1501(a), and GAO's *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7, § 3.3 (Criteria for Valid Obligations)

Rule: Record an obligation for the government's maximum potential liability at initial obligational event

- Examples: Cost-reimbursement contracts; *DoD Bonuses* (B-325526, July 16, 2014); *AmeriCorps* (B-300480, Apr. 9, 2003)
- See 31 U.S.C. § 1501(a) and GAO's *Budget Glossary* definition of "obligation": "duty . . . that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States" (emphasis added).

Rule: Record the best estimate or contractual minimum at the obligational event, and control the obligation rate consistent with available budget authority (adjusting obligational estimate as needed)

- Examples: IDIQ contracts; *NLRB Court Reporters* (B-321296, July 13, 2011); *National Mediation Board Arbitrators* (B-305484, June 2, 2006); *AOUSC Attorneys* (50 Comp. Gen. 589 (1971))
- See 31 U.S.C. § 1501(a) and GAO's *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7, § 3.5(D) (*Estimating Obligations*)

Rule: Legally impermissible as an open-ended liability

- Example: *Hercules Inc. v. United States*, 516 U.S. 417 (1996)
- See the Antideficiency Act, 31 U.S.C. § 1341(a), and GAO's *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7, § 3.4 (*Control Over Obligations*)

After signing the agreement, does the government completely control the total amount of its liability, either because liability is fixed or because the government controls any additional incurrence of liability?

YES, Controlled:

NO, Not Controlled:

Liability Arises Outside of an Agreement

Rule: Do not record an obligation until liability occurs

- Examples: Pending and unadjudicated claims, certain federal insurance programs
- See GAO's *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7, § 3.5(C) (*Contingent Liabilities*)

Disaster Relief Funding: A Case Study

RECENT DISASTER RELIEF FUND APPROPRIATIONS (EXCERPTS)

Department of Homeland Security Appropriations Act, 2017 Pub. L. No. 115-31, Div. F (2017)

DISASTER RELIEF FUND

For necessary expenses in carrying out the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), \$7,328,515,000, to remain available until expended, of which \$6,713,000,000 shall be for major disasters declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) and is designated by the Congress as being for disaster relief pursuant to section 251(b)(2)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985.

Supplemental Appropriations for Disaster Relief Requirements Act, 2017 Pub. L. No. 115-56, Div. B (2017)

DISASTER RELIEF FUND

For an additional amount for “Disaster Relief Fund” for major disasters declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), \$7,400,000,000, to remain available until expended: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985...

Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017 Pub. L. No. 115-72, Div. A (2017)

DISASTER RELIEF FUND

For an additional amount for “Disaster Relief Fund” for major disasters declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), \$18,670,000,000, to remain available until expended... The amount provided under this heading is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

Further Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2018 Pub. L. No. 115-123, Div. B, Subdivision 1 (2018)

DISASTER RELIEF FUND

For an additional amount for “Disaster Relief Fund” for major disasters declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), \$23,500,000,000, to remain available until expended... *Provided further*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

MISSION ASSIGNMENT AUTHORITIES - MAJOR DISASTERS (EXCERPTS)

42 U.S.C. § 5170a(1)-(2) (Pub. L. No. 93-288 § 402(1)-(2))

In any major disaster, the President may--

(1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance response or recovery efforts, including precautionary evacuations;

(2) coordinate all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments, including precautionary evacuations and recovery...

42 U.S.C. § 5170b(a) (Pub. L. No. 93-288 § 403(a))

(a) In general

Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster, as follows:

(1) Federal resources, generally

Utilizing, lending, or donating to State and local governments Federal equipment, supplies, facilities, personnel, and other resources, other than the extension of credit, for use or distribution by such governments in accordance with the purposes of this chapter.

(2) Medicine, food, and other consumables

Distributing or rendering through State and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations medicine¹ durable medical equipment, food, and other consumable supplies, and other services and assistance to disaster victims.

(3) Work and services to save lives and protect property

Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including--

(A) debris removal;

(B) search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine¹ durable medical equipment, and other essential needs, including movement of supplies or persons;

(C) clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services;

(D) provision of temporary facilities for schools and other essential community services;

(E) demolition of unsafe structures which endanger the public;

(F) warning of further risks and hazards;

(G) dissemination of public information and assistance regarding health and safety measures;

(H) provision of technical advice to State and local governments on disaster management and control;

(I) reduction of immediate threats to life, property, and public health and safety; and

- (J) provision of rescue, care, shelter, and essential needs--
- (i) to individuals with household pets and service animals; and
- (ii) to such pets and animals.

(4) Contributions

Making contributions to State or local governments or owners or operators of private nonprofit facilities for the purpose of carrying out the provisions of this subsection.

42 U.S.C. § 5173 (Pub. L. No. 93-288 § 407)

(a) Presidential authority

The President, whenever he determines it to be in the public interest, is authorized--

(1) through the use of Federal departments, agencies, and instrumentalities, to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters; and

(2) to make grants to any State or local government or owner or operator of a private nonprofit facility for the purpose of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters.

MISSION ASSIGNMENT REIMBURSEMENT (EXCERPTS)

42 U.S.C. § 5147 (Pub. L. No. 93-288 § 304)

Federal agencies may be reimbursed for expenditures under this chapter from funds appropriated for the purposes of this chapter. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this chapter shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies.

44 C.F.R. § 206.8(c)

(c) Expenditures eligible for reimbursement. The Administrator... may approve reimbursement of the following costs which are incurred in providing requested assistance.

- (1) Overtime, travel, and per diem of permanent Federal agency personnel.
- (2) Wages, travel, and per diem of temporary Federal agency personnel assigned solely to performance of services directed by the Administrator...the major disaster or emergency area...
- (3) Travel and per diem of Federal military personnel assigned solely to the performance of services directed by the Administrator...emergency area...
- (4) Cost of work, services, and materials procured under contract for the purposes of providing assistance directed by the Administrator, Assistant Administrator for the Disaster Assistance Directorate, or the Regional Administrator or the Regional Director.
- (5) Cost of materials, equipment, and supplies (including transportation, repair, and maintenance) from regular stocks used in providing directed assistance.
- (6) All costs incurred which are paid from trust, revolving, or other funds, and whose reimbursement is required by law.
- (7) Other costs submitted by an agency with written justification or otherwise agreed to in writing by the Administrator...

SURGE CAPACITY FORCE

6 U.S.C. § 711 (Pub. L. No. 109-295 § 624)

(a) Establishment

(1) In general

Not later than 6 months after October 4, 2006, the Administrator shall prepare and submit to the appropriate committees of Congress a plan to establish and implement a Surge Capacity Force for deployment of individuals to respond to natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents.

(2) Authority

(A) In general

Except as provided in subparagraph (B), the plan shall provide for individuals in the Surge Capacity Force to be trained and deployed under the authorities set forth in the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

(B) Exception

If the Administrator determines that the existing authorities are inadequate for the training and deployment of individuals in the Surge Capacity Force, the Administrator shall report to Congress as to the additional statutory authorities that the Administrator determines necessary.

(b) Employees designated to serve

The plan shall include procedures under which the Secretary shall designate employees of the Department who are not employees of the Agency and shall, in conjunction with the heads of other Executive agencies, designate employees of those other Executive agencies, as appropriate, to serve on the Surge Capacity Force.

(c) Capabilities

The plan shall ensure that the Surge Capacity Force--

(1) includes a sufficient number of individuals credentialed in accordance with section 320 of this title that are capable of deploying rapidly and efficiently after activation to prepare for, respond to, and recover from natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents; and

(2) includes a sufficient number of full-time, highly trained individuals credentialed in accordance with section 320 of this title to lead and manage the Surge Capacity Force.

(d) Training

The plan shall ensure that the Administrator provides appropriate and continuous training to members of the Surge Capacity Force to ensure such personnel are adequately trained on the Agency's programs and policies for natural disasters, acts of terrorism, and other man-made disasters.

(e) No impact on agency personnel ceiling

Surge Capacity Force members shall not be counted against any personnel ceiling applicable to the Federal Emergency Management Agency.

(f) Expenses

The Administrator may provide members of the Surge Capacity Force with travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of Title 5 for the purpose of participating in any training that relates to service as a member of the Surge Capacity Force.

(g) Immediate implementation of Surge Capacity Force involving Federal employees

As soon as practicable after October 4, 2006, the Administrator shall develop and implement--

(1) the procedures under subsection (b) of this section; and

(2) other elements of the plan needed to establish the portion of the Surge Capacity Force consisting of individuals designated under those procedures.

Telework: Fiscal Law Considerations

Telework at the USPTO

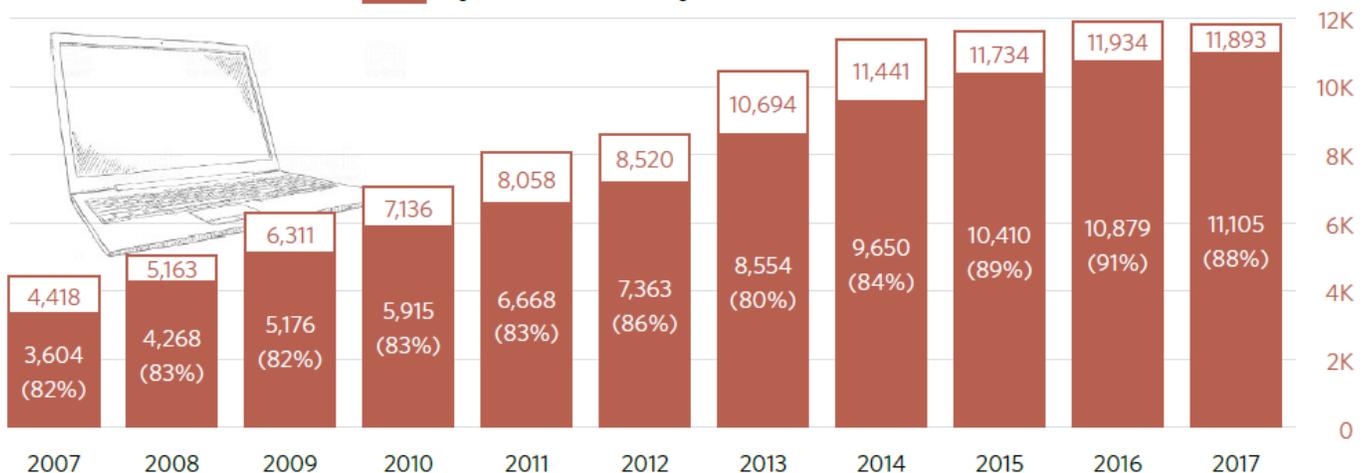
Telework at USPTO began in 1997, with 18 Trademark examining attorneys. Twenty years after the inception of the original telework pilot, the USPTO now has nearly 13,000 employees with 88 percent working remotely between one and five days a week. Telework at the USPTO is a data-driven business strategy, which supports mission achievement and goal fulfillment via a distributed workforce.

4th Quarter Telework Statistics FY 2017

Number of Teleworkers at USPTO	11,105
Number of Eligible Positions at USPTO	11,893
Percent of Positions at USPTO that are Eligible	94.66%
Percent of Positions at USPTO that are Teleworking (Agency-wide)	88.39%
Total Number of Patent Teleworkers	8,910
Percent of Eligible Patent Positions that are Teleworking	93.94%
Total Number of Trademark Teleworkers	705
Percent of Eligible Trademark Positions that are Teleworking	96.05%
Number of Patent Positions Teleworking 4 or 5 days per week	5,712
Number of Trademark Positions Teleworking 4 or 5 Days per Week	491

TELEWORK GROWTH

Positions Eligible to Telework
 Eligible Positions Teleworking



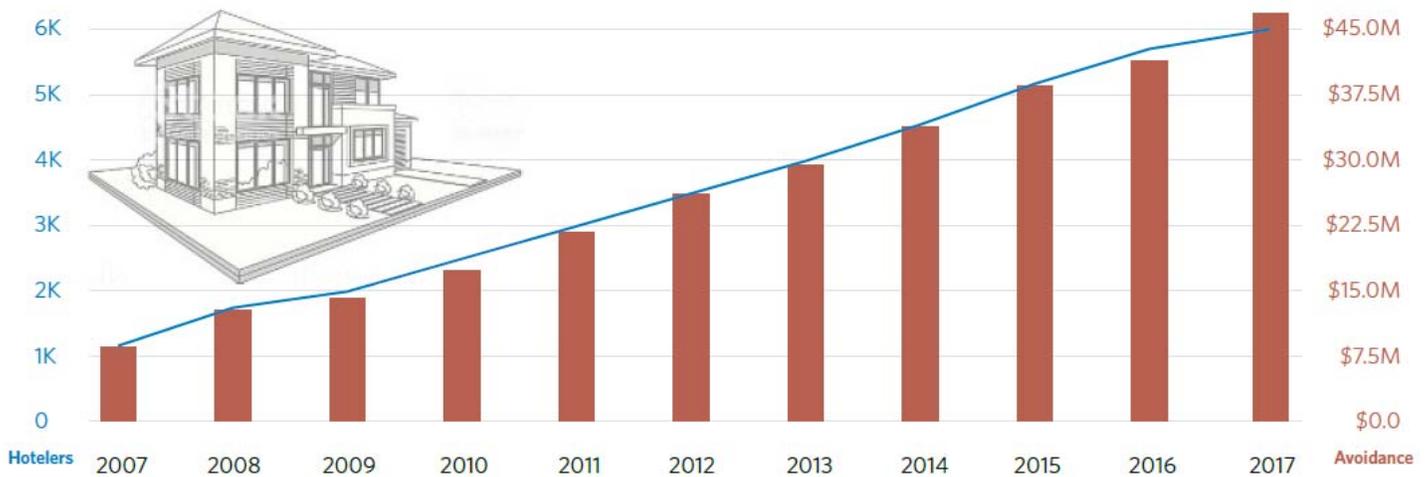
UNITED STATES
PATENT AND TRADEMARK OFFICE



The USPTO Telework Program provides the USPTO with numerous benefits and cost avoidances including real estate from full-time teleworking employees relinquishing office space, Trademark TEAPP participants' salary differentials from living in lower cost of living areas, and transit subsidies savings due to no bi-weekly reporting requirements for participating 50-mile Program and TEAPP employees. Additionally, with more than 11,000 employees teleworking, there are major positive environmental impacts in the Washington D.C. metropolitan area.

Cost Avoidance	FY 2012 Estimated Savings/ Benefits	FY 2013 Estimated Savings/ Benefits	FY 2014 Estimated Savings/ Benefits	FY 2015 Estimated Savings/ Benefits	FY 2016 Estimated Savings/ Benefits	FY 2017 Estimated Savings/ Benefits
Salary Differential (Trademarks TEAPP Participants)	\$289,525	\$199,000	\$239,560	\$176,174	\$319,615	\$449,525
Real Estate	\$7,446,128	\$28,900,000	\$34,200,000	\$38,200,000	\$41,722,795	\$46,169,053
Transit Subsidy	\$46,000	\$46,300	\$48,000	\$44,232	\$58,752	\$63,420

ANNUAL REAL ESTATE COST AVOIDANCE DUE TO FULL-TIME TELEWORK



FY17 Environmental Impact*
 93 M miles avoided driving in a year
 \$7.3 M saved in gas a year
 47K tons of reduced emissions in a year

*In the Washington D.C. Metropolitan Area

A structured telework program provides cost savings by reducing the need for additional office space, enhancing recruitment and retention, fostering greater efficiency in production and management, and providing opportunities for expanded work flexibility and better work-life balance for participating employees.

Internet Service Provider (ISP) Reimbursement

In FY18 Q1, the total amount disbursed to Patent hoteling program employees for ISP Reimbursement was **\$333,596.97**.



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Patent and Trademark Office—High-speed Internet Access in Employees' Homes

File: B-308044

Date: January 10, 2007

DIGEST

The United States Patent and Trademark Office (PTO) may reimburse employees for high-speed internet service at employees' homes incident to the agency's telework program. We recommend that PTO periodically review reimbursements to ensure that it has adequate safeguards against private misuse and is reimbursing employees for home internet service used for official purposes.

DECISION

The Acting Chief Financial Officer of the United States Patent and Trademark Office (PTO) has requested an advance decision under 31 U.S.C. § 3529 on the propriety of reimbursing its employees for costs associated with maintaining high-speed internet access at employees' homes incident to the agency's telework program. Letter from Barry K. Hudson, Acting Chief Financial Officer, United States Patent and Trademark Office, to Anthony H. Gamboa, General Counsel, GAO, June 15, 2006 (Hudson Letter). As we explain below, PTO may reimburse employees for high-speed internet access, but we recommend that PTO periodically review reimbursements to ensure that it has adequate safeguards against private misuse and is reimbursing employees for internet service used for official purposes.

Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, [GAO-06-1064SP](#) (Washington, D.C.: Sept. 2006). In this regard, PTO supplied additional information, including a draft statement of policy and procedures for its proposed reimbursement program, in September 2006. Letter from James A. Toupin, General Counsel, PTO, to Thomas H. Armstrong, Assistant General Counsel for

Appropriations Law, GAO, Sept. 6, 2006 (Toupin Letter), *enclosing* PTO Internet Service Provider Reimbursement Policy for Patents Hoteling Programs (Policy).

BACKGROUND

The Patent and Trademark Office is a federal agency within the Department of Commerce charged with promoting the progress of science and the useful arts by securing for limited times to inventors the exclusive right to their discoveries.¹ PTO proposes a telecommuting program that would permit its employees to telecommute up to 4 days per week from an approved designated alternative work site, typically the employee's home. Hudson Letter. The agency believes the program will improve workforce recruitment and retention, reduce traffic congestion and pollution in the metropolitan Washington, D.C., area, and realize substantial cost savings to PTO. *Id.* PTO expects to have 3,300 employees participating in the program by 2011. *Id.* PTO would require employees to maintain high-speed internet access meeting certain minimum technical requirements at their residence or other designated alternative work site. *Id.* As part of the telecommuting program, PTO proposes to reimburse participating employees for the costs employees incur to maintain such internet access. *Id.*

Employees requesting reimbursement must submit copies of invoices from their internet service provider (ISP) and attest to the appropriate percentage of ISP services used for work-related purposes. *Id.*, Toupin Letter. Employees would be eligible for only 50 or 100 percent reimbursement for ISP connection depending on the amount of monthly business use of the internet service. Toupin Letter. For example, employees requesting the full 100 percent reimbursement would attest to the following: "I hereby certify that my Internet service connection for which I am requesting reimbursement has been used solely for official USPTO purposes (including 'limited personal use' allowed by the USPTO's 'Rules of the Road')." Policy at ¶ 1. Alternatively, employees could sign the following certification for 50 percent reimbursement: "I hereby certify that my Internet service connection for which I am requesting reimbursement has been used in part for official USPTO purposes. Personal use was less than 50% of the total usage." *Id.*

The program would only reimburse the basic rate for ISP connection services per billing period. *See* Policy at ¶12. That is, PTO would not reimburse charges or costs associated with service initiation, activation, installation, or deactivation; taxes; equipment rental fees; or any other miscellaneous charges or fees. *Id.* at ¶ 14; Hudson Letter. Reimbursements also would be limited to the amount PTO would have had to pay to procure these services directly. *Id.* The maximum allowable

¹ *See generally* www.uspto.gov (last visited Dec. 14, 2006). PTO's statutory authorities are found in title 35 of the United States Code.

reimbursable amount for high-speed internet access would be \$100 per month. Policy at ¶ 5.

To ensure that the program only covers ISP connection costs, PTO would deduct amounts from reimbursement requests based on certain required employee disclosures. For example, participating employees would be required to disclose any “free” equipment or other promotional items or rebates that they receive from their ISP. *Id.* at ¶12. PTO would deduct amounts based on the facts and circumstances of each case, including fair market value of the equipment, service agreement terms, and other items. *Id.* Employees also would be required to disclose whether the ISP provides “bundled” services, for example, cable television and/or telephone service along with high-speed internet connection; only the *pro rata* share of ISP costs would be reimbursable. *Id.* at ¶¶ 4(a), 11. Also, if the ISP offers a discount for bundled services, the *pro rata* share of the discount would be applied to the ISP costs to determine the reimbursable amount. *Id.* If bundled services do not provide pricing information sufficient to determine the *pro rata* costs of the ISP component, no ISP costs would be reimbursable. *Id.* at ¶ 4(b).

PTO has imposed other controls that it believes will help ensure that ISP services are reimbursed only for work-related purposes. For example, PTO would measure the productivity of participating employees biweekly, quarterly, and annually. Toupin Letter at 2. Employee performance plans establish standards for required production rates. *Id.* Patent examiners’ work, for example, is primarily production-oriented, measured in precisely defined actions taken with respect to patent applications. *Id.* Examiners’ patent files are also tracked in the agency’s Patent Automated Locating and Monitoring (PALM) system. *Id.* To participate in the telework program, an employee must be rated at least “fully successful” overall in the most recent performance evaluation, not be under any performance or conduct warnings, and must agree to give up the employee’s individual office at PTO headquarters. *Id.* at 3.

DISCUSSION

The Patent and Trademark Office asks whether it may use its appropriations to reimburse employees for home high-speed internet access under its proposed telecommuting program.

Public Law 104-52 authorizes federal agencies to use appropriated funds to install telephone lines and “necessary equipment” and to pay monthly charges in any residence of an employee authorized to work at home, provided that the agency “certifies that adequate safeguards against private misuse exist, and that the service is necessary for direct support of the agency’s mission.” Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, title VI, § 620, 109 Stat. 468, 501 (Nov. 19, 1995), *reprinted at* 31 U.S.C. § 1348 note.

PTO has determined that internet access is “necessary equipment” for PTO employees authorized to work at home and necessary for direct support of PTO’s mission as required by section 620 of Public Law 104-52. Internet service has become an essential tool in today’s workplace. As PTO explains, patent examiners must have high-speed internet access to telework without diminished performance. We agree. Like telephone service, internet access is necessary for PTO employees, regardless of worksite, and in particular to telework without diminished performance.²

The question remains whether PTO can certify, as section 620 requires, that its proposal provides “adequate safeguards against private misuse.” Over the years, our Office has issued a number of decisions concerning adequate safeguards for cost reimbursements of items and services that would otherwise be considered a personal expense of federal employees. Consistent with section 620, we have not objected to reimbursement plans, for example, for use of personal cell phones for official purposes where adequate safeguards prevent improper reimbursement for personal use.

We found adequate safeguards in a Nuclear Regulatory Commission (NRC) proposal to reimburse employees for the actual costs of maintaining personal cell phone service for official use and the additional costs of official calls actually made or received on the employees’ cell phones. B-291076, Mar. 6, 2003. NRC proposed to (1) reimburse the costs of the employees’ activation plan at an amount no greater than what NRC itself would have paid; and (2) adjust the costs of an activation plan to deduct the value of so-called “free” telephones and accessories, rationalizing that such equipment is not actually free but factored into the plan’s cost by the service provider. *Id.* Importantly, the NRC plan required employees to submit a monthly itemization of calls so that NRC could verify which calls were personal and which were official in nature. *Id.* We advised NRC that where monthly itemizations are unavailable, prorating government-related calls to personal calls with additional tracking and accounting procedures might prove an acceptable safeguard to prevent abuse. *Id.*, citing B-287524, Oct. 22, 2001.

In another case, we objected to a Western Area Power Administration (WAPA) proposal to reimburse employees for government use of personal cell phones at a flat rate, without additional tracking and accounting procedures. B-287524, Oct. 22, 2001. Without those additional procedures, WAPA’s proposal failed to provide

² *See, e.g.*, Department Of Transportation and Related Agencies Appropriations, 2001, Pub. L. No. 106-346, § 359, 114 Stat. 1356, 1356A-36 (Oct. 23, 2000) (requiring executive agencies to establish policies under which eligible employees “may participate in telecommuting to the maximum extent possible without diminished employee performance.”)

adequate safeguards to verify government calls and separate them from personal calls. *Id.*

Here, PTO has proposed a number of safeguards similar to those we considered in NRC's cell phone reimbursement plan. *See* B-291076, Mar. 6, 2003. PTO's proposal would require employees to sign an attestation certifying the employees' proration of business to personal use of ISP services. The agency also would monitor employee performance and productivity on a biweekly, quarterly, and annual basis. *See* 68 Comp Gen. 502 (1989).³

We do not object to PTO's telecommuting program proposal, but recommend that PTO periodically review ISP reimbursements. Periodic reviews, which could include such things as analyses of payment trends, would help support PTO's factual basis for certifying that it has adequate safeguards against private misuse and it is reimbursing employees for home internet service used for official purposes. Pub. L. No. 104-52, § 620. *See also* 35 U.S.C. §§ 3512 (b), (c) (requiring federal agencies to maintain internal controls); GAO, *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7 (Washington, D.C.: May 18, 1993), *available at* www.gao.gov/decisions/ppm7.pdf (last visited Dec. 18, 2006).

CONCLUSION

We do not object to PTO's proposal to reimburse employees for high-speed internet service at the employees' home incident to the agency's telework program. We recommend that PTO periodically review the reimbursements to ensure that it has adequate safeguards against private misuse and it is reimbursing employees for home internet service used for official purposes.



Gary L. Kepplinger
General Counsel

³ Our 1989 decision predates the telework statutes cited above, but its logic remains relevant. We did not object to the compensation of federal employees for work done at home when, among other things, the agency could verify and measure the performance of assigned work against established quantity and quality norms. 68 Comp. Gen. 502.

**Communicating with the Public:
Publicity or Propaganda and
Grassroots Lobbying Considerations**

Navigating Traditional Publicity or Propaganda and Grassroots Lobbying Restrictions in a Social Media Era

1. An agency may not make a clear appeal to the public to contact Congress in support of, or in opposition to, pending legislation.
2. Communication primarily to emphasize the importance of the agency or activity in question is not permitted.
3. Communication designed to aid a political party or candidate is not permitted.
4. Agencies must identify themselves to the target audience in their communication. The nature of the social media platform has a role in defining the target audience.
5. Restrictions in annual appropriations acts apply to the use of appropriated funds; they are not dependent on the title of the communicator or on the platform.
6. Understand the platform that you are using, including its features and the ways your message may be displayed.
7. Prior to posting or sharing your message, identify the informational purpose. Know why you are sharing this message and how it relates to official functions.
8. Know when you are speaking for the agency, rather than in a personal capacity. Consider whether you are posting a relevant message to a personal account during work hours or whether you are a public-facing official.
9. Just because you technically can, does not mean that you should. Exercise caution, and do not get into the habit of approaching the line.
10. A small violation is still a violation.
11. Actively monitor your social media accounts. Be cognizant of what you have posted, shared, liked, and hyperlinked.
12. Establish internal controls and develop an agency policy regarding social media. Share the policy across your agency.
13. An agency may not pay someone to do what it may not legally do itself.
14. Your appropriation may contain additional restrictions on the use of funds for agency communications.
15. But, by all means, please do continue to use social media!



Impoundment Control Act: Update



B-329092

December 12, 2017

Congressional Committees

Subject: *Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018*

This letter is to inform you of an impoundment in the Advanced Research Projects Agency-Energy (ARPA-E) appropriation in fiscal year (FY) 2017. As explained in more detail below, ARPA-E withheld from obligation \$91 million of budget authority in violation of the Impoundment Control Act. See Pub. L. No. 93-344, title X, §§ 1001-1017, 88 Stat. 297, 332 (July 12, 1974), *classified at* 2 U.S.C. §§ 681-688. Since we have confirmed that the funds have been made available for obligation, we are not transmitting a report under the Impoundment Control Act because the impoundment is no longer taking place.

On May 23, President Trump submitted his budget request for FY 2018 to Congress. The budget request proposes the elimination of ARPA-E, an agency within the Department of Energy. The budget request asks that Congress cancel \$46.367 million of ARPA-E's unobligated balances and require that another \$45 million of ARPA-E's unobligated balances be used for "program direction,"¹ which will be used "to ensure full closure of ARPA-E by mid-2019."² In September, we received an inquiry about the status of these amounts.³ We contacted ARPA-E

¹ *Appendix, Budget of the United States Government for Fiscal Year 2018* (May 23, 2017), at 380-81, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/doe.pdf (last visited Dec. 11, 2017).

² *2018 Major Savings and Reforms, Budget of the United States Government for Fiscal Year 2018* (May 23, 2017), at 33, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf (last visited Dec. 11, 2017).

³ GAO is also currently conducting an audit engagement related to the Department of Energy's review of ARPA-E's funding opportunity announcements.

officials who told us that, per the Department of Energy's instructions, ARPA-E was withholding the obligation of more than \$91 million of budget authority in anticipation of congressional enactment of the legislative proposals in the budget request. We conclude that this withholding violated the Impoundment Control Act. The Department of Energy recently acknowledged that while ARPA-E's appropriation was fully apportioned and allotted in FY 2017, "limited oral conversations regarding whether to withhold any budget authority in the ARPA-E appropriation during FY 2017 pursuant to the FY 2018 President's Budget did occur." Letter from Acting General Counsel, Department of Energy, to Managing Associate General Counsel, GAO (Nov. 29, 2017).

All funds impounded in response to the President's budget request have been released. The Department of Energy provided us with an FY 2018 apportionment schedule and allotment record, showing that all of ARPA-E's unobligated balances, carried forward from previous fiscal years, are currently available for obligation. ARPA-E officials also orally confirmed that such budget authority is now available.

Background on the Impoundment Control Act

The Impoundment Control Act operates on the premise that when Congress appropriates money to the executive branch, the President is required to obligate the funds. See 2 U.S.C. §§ 681–688; B-203057, Sept. 15, 1981.⁴ In other words, an agency must make funds available for obligation unless otherwise authorized to withhold. The act authorizes the President to impound, or withhold the obligation of funds, in certain circumstances.⁵ The Impoundment Control Act separates

⁴ See also U.S. Const. art. II, § 3, cl. 5 (the President "shall take care that the laws be faithfully executed"); *Train v. City of New York*, 420 U.S. 35 (1975) (President Nixon improperly directed the Administrator of the Environmental Protection Agency to allot to the states only about half of funds appropriated for water pollution assistance).

⁵ The law includes this disclaimer: "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as . . . superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder." 2 U.S.C. § 681(4). The Comptroller General and the federal courts have interpreted this disclaimer to mean that the President may not use the Impoundment Control Act to withhold funds for formula grants. GAO, *President's Eighth Special Message for Fiscal Year 1982*, OGC-82-9 (Washington, D.C.: Mar. 10, 1982) ("[T]he executive branch may not violate specific statutory requirements while it seeks to have Congress change those requirements"); GAO, *President's Eleventh Special Message for FY 1981*, OGC-81-14 (Washington, D.C.: July 30, 1981 (agency may not withhold mandatory grants to states pending congressional consideration of rescission proposal); *Maine v. Goldschmidt*, 494 F.Supp. 93 (D. Me. 1980) (lawsuit in response to President Carter's proposal to defer the obligation of grants to states under the Federal-Aid Highway Act).

impoundments into two exclusive categories—deferrals and rescissions. If the President wishes to temporarily postpone the obligation of budget authority, he may propose a deferral. 2 U.S.C. § 684. Deferrals are permissible only to provide for contingencies, to achieve savings made possible by or through changes in requirements or greater efficiency of operations, or as specifically provided by law. *Id.* § 684(b). Any amount of budget authority deferred must be prudently obligated before the end of the period of availability. *Id.*; 54 Comp. Gen. 453 (1974).⁶

If the President wants Congress to permanently cancel the availability of budget authority, he may propose a rescission. 2 U.S.C. § 683. A rescission may be proposed for any reason, including policy reasons. Any amount of budget authority proposed to be rescinded must be made available for obligation unless Congress, within 45 legislative days, completes action on a bill rescinding all or part of the amount proposed for rescission. *Id.* § 684(b).

The President notifies Congress of his proposed deferral or rescission by transmitting a “special message.” The special message must describe, among other things, the amount of budget authority proposed for deferral or rescission, the relevant account and “specific project or governmental functions involved,” the reasons why the budget authority should be deferred or rescinded, the “estimated fiscal, economic, and budgetary effect” of the proposed deferral or rescission, and any other “relevant facts, circumstances, and considerations.” *Id.* §§ 683 (rescissions), 684 (deferrals).

The Comptroller General has a number of statutory responsibilities under the Impoundment Control Act. The Comptroller General is required to review each special message and report findings to Congress as soon as practicable. *Id.* § 685(b). The Comptroller General also ensures that the impoundment is not misclassified, such as a rescission proposal reported as a deferral. *Id.* § 686(b). In addition, if the Comptroller General becomes aware of an unreported impoundment, the Comptroller General must “make a report on such reserve or deferral and any available information concerning it to both Houses of Congress.” *Id.* § 686(a).

⁶ Not all delays constitute a reportable impoundment under the Impoundment Control Act. Legitimate programmatic delays may occur when the agency is taking reasonable and necessary steps to implement a program, even though funds temporarily go unobligated. GAO, *Impoundment Control: Deferral of DOD Budget Authority Not Reported*, GAO/OGC-91-8 (Washington, D.C.: May 7, 1991), at 3–4; GAO, *Impoundment Control: President’s Third Special Impoundment Message for FY 1990*, GAO/OGC-90-4, (Washington, D.C.: Mar. 6, 1990), at 9–10 (design modification); B-115398.51, Sept. 28, 1976 (low number of loan applications). Similarly, the Impoundment Control Act does not apply to delays or lapsing of budget authority resulting from ineffective program administration, unless there is “concrete evidence of an intent to withhold budget authority.” B-229326, Aug. 29, 1989.

Since the enactment of the Impoundment Control Act, our practice has been to review withholdings brought to our attention by concerned Members or congressional committees, intended recipients, or auditors. See, e.g., B-320091, July 23, 2010; GAO, *Comments on Unreported Impoundment of DOD Budget Authority*, GAO/OGC-92-11 (Washington, D.C.: June 3, 1992). In those situations, we review the agency's actions to determine if it has complied with the Impoundment Control Act and ultimately confirm that funds are made available for obligation.

Application to ARPA-E

ARPA-E historically receives an annual lump-sum, no-year appropriation for its programs. For instance, in FY 2017, ARPA-E received "\$306,000,000, to remain available until expended" for "Department of Energy expenses necessary in carrying out the activities authorized by section 5012 of the America COMPETES Act (Public Law 110-69)." Pub. L. No. 115-31, div. D, title III, 131 Stat. 135, 312 (May 5, 2017). ARPA-E's lump-sum appropriation also historically includes a line-item for "program direction," an amount which is available for two fiscal years. See, e.g., *id.* ("Provided, That of such amount, \$29,250,000 shall be available until September 30, 2018, for program direction").⁷

In mid-September, we received an inquiry about the status of \$91 million of ARPA-E's unobligated balances—\$46.367 million of which was proposed for cancellation and \$45 million of which was proposed to be used for "full closure of ARPA-E by mid-2019" in the President's budget request.⁸ We contacted ARPA-E officials, who told us that the Department of Energy had directed ARPA-E to withhold the obligation of all \$91 million in anticipation of congressional enactment of such proposals. On September 28, we communicated our concerns to the Department of Energy's Office of General Counsel. On October 4, we sent a letter to the Acting General Counsel to seek additional facts and legal views from the Department of Energy. On November 29, after conducting a review and consulting with the Office of Management and Budget (OMB), the Acting General Counsel responded:

"Our review found that all funds for that appropriation in FY 2017 were fully apportioned to DOE and fully allotted within DOE. Our review

⁷ The Department of Energy explains that "[p]rogram direction funds are utilized for salaries and benefits of federal staff; travel; support services contracts to provide technical advice and project management assistance; and other related expenses, including the DOE Working Capital Fund." Department of Energy, *FY 2017 Congressional Budget Request*, vol. 4, at 415 (Feb. 2016), available at www.energy.gov/sites/prod/files/2016/02/f29/FY2017BudgetVolume%204.pdf (last visited Dec. 11, 2017).

⁸ See notes 1 and 2, *supra*.

revealed that limited oral conversations regarding whether to withhold any budget authority in the ARPA-E appropriation during FY 2017 pursuant to the FY 2018 President's Budget did occur. Upon learning this, our office immediately apprised the relevant parties of the legal requirements of the Impoundment Control Act and the [OMB's] guidance on the same, contained in [C]ircular A-11, § 112.2. Those offices then took appropriate steps to be in compliance and have confirmed that all funds for this appropriation have been allotted in the current fiscal year, and that they are available for obligation.”

Until the Department of Energy's Office of the General Counsel intervened, ARPA-E improperly withheld the obligation of budget authority in connection with the President's proposed elimination of ARPA-E and a so-called “cancellation proposal” in the President's budget request. OMB describes a cancellation proposal as “a proposal by the President to reduce budgetary resources that are not subject to the requirements of Title X of the Congressional Budget and Impoundment Control Act.” OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 3, § 112.2 (July 2017), available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf (last visited Dec. 11, 2017). We have previously concluded that amounts withheld as a consequence of a “cancellation proposal” constitute impoundments that agencies may make only after the President transmits a special message to Congress under the Impoundment Control Act. B-308011, Aug. 4, 2006 (agency withheld \$2 million from a no-year account for several months pending congressional action on a proposed cancellation in the President's budget request); B-307122, B-307122.2, Mar. 2, 2006 (agencies withheld over \$470 million in budget authority, affecting 12 programs, for approximately two months pending congressional consideration of the President's proposed cancellations to offset Hurricane Katrina relief). OMB has reached a similar conclusion concerning the import of a cancellation proposal, instructing agencies that “[a]mounts proposed for cancellation are not to be withheld from obligation.” OMB Circular No. A-11, pt. 3, § 112.2.

We note that the Impoundment Control Act applies to ARPA-E's funds despite the fact that they were made available without fiscal year limitation. The law applies by its express terms to all budget authority. 2 U.S.C. §§ 683 (rescission), 684 (deferral). See also GAO, *Deferral of SPR Budget Authority Not Reported to Congress*, GAO/OGC-83-11 (Washington, D.C.: May 5, 1983) (reporting a deferral of \$800 million of no-year budget authority in the Strategic Petroleum Reserve account); B-200685, Dec. 23, 1980 (stating that any executive action or inaction is subject to the Impoundment Control Act “even if the budget authority involves no-year funds” and noting that “of the 132 deferrals and rescissions reported by the President during [FY] 1980, over half involved no-year funds”). Violations of the Impoundment Control Act hinge on whether the agency clearly intended to withhold

the obligation of budget authority. B-229326, Aug. 29, 1989.⁹ ARPA-E stated that it deliberately withheld the obligation of \$91 million in FY 2017, per the Department of Energy's instructions.

CONCLUSION

Agencies may only withhold budget authority from obligation if the President has transmitted a special message to Congress. 2 U.S.C. §§ 683 (rescission), 684 (deferral). ARPA-E withheld the obligation of \$91 million without the President transmitting a special message to Congress. Accordingly, ARPA-E violated the Impoundment Control Act.

Since the purpose here is to ensure funds are made available for obligation and we have confirmed that the agency has done so, we are not transmitting a report to Congress under the Impoundment Control Act. In the past, we have declined to transmit a report to Congress under similar circumstances. See B-307122, B-307122.2. The Department of Energy's recent apportionment schedule and allotment record show that all of ARPA-E's unobligated balances from previous fiscal years are currently available for obligation. ARPA-E officials also orally confirmed that the budget authority is now available.

If you have any questions, please contact Julia C. Matta, Managing Associate General Counsel, at (202) 512-4023.

Sincerely,



Thomas H. Armstrong
General Counsel

⁹ See note 6, *supra*.

List of Congressional Committees

The Honorable Lisa Murkowski
Chairman
The Honorable Maria Cantwell
Ranking Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Lamar Alexander
Chairman
The Honorable Dianne Feinstein
Ranking Member
Subcommittee on Energy and Water Development
Committee on Appropriations
United States Senate

The Honorable Lamar Smith
Chairman
The Honorable Eddie Bernice Johnson
Ranking Member
Committee on Science, Space, and Technology
House of Representatives

The Honorable Mike Simpson
Chairman
The Honorable Marcy Kaptur
Ranking Member
Subcommittee on Energy and Water Development, and Related Agencies
Committee on Appropriations
House of Representatives