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United States Government Accountability Office  
Washington, DC 20548

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April 27, 2010

The Honorable Robert C. Byrd  
Chairman, Subcommittee on Homeland Security  
Committee on Appropriations  
United States Senate

The Honorable George V. Voinovich  
Ranking Minority Member, Subcommittee on Homeland Security  
Committee on Appropriations  
United States Senate

The Honorable David Price  
Chairman, Subcommittee on Homeland Security  
Committee on Appropriations  
U.S. House of Representatives

The Honorable Harold Rogers  
Ranking Minority Member, Subcommittee on Homeland Security  
Committee on Appropriations  
U.S. House of Representatives

Subject: *U.S. Secret Service—Statutory Restriction on Availability of Funds Involving  
Presidential Candidate Nominee Protection*

The conference report, H.R. Conf. Rep. No. 111-298, at 92 (2009), accompanying the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142 (Oct. 28, 2009), directed GAO to examine whether the Department of Homeland Security (DHS) and the United States Secret Service (USSS) violated section 503 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, div. D, 122 Stat. 3652, 3680 (Sept. 30, 2008) and the Antideficiency Act, 31 U.S.C. § 1341.<sup>1</sup> For the reasons set out below,

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<sup>1</sup> In addition to this legal opinion, GAO is examining DHS's and USSS's financial management practices, as well as DHS policy and procedures related to communications with its component agencies. See H.R. Conf. Rep. No. 111-298, at 92 ("conferees direct the Comptroller General to . . . identify all actions taken or recommended to be taken to address and correct any violation").

we conclude that DHS and USSS violated both section 503(b) and the Antideficiency Act.

Our practice when rendering opinions is to obtain the views from the relevant agency to establish a factual record and the agency's legal position on the subject matter. 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](http://www.gao.gov/legal/resources.html). In this regard, we conducted meetings with both USSS and DHS officials, requesting and receiving from both agencies accounting reports, policy and procedure documents, and copies of relevant internal correspondence.

## BACKGROUND

Both the Antideficiency Act and section 503(b) restrict the availability of funds for obligation and expenditure. The Antideficiency Act prohibits an officer or employee of the United States Government from making or authorizing an expenditure or obligation in excess of or in advance of available appropriations. 31 U.S.C. § 1341(a)(1). Thus, an appropriation must be available for an agency to incur an obligation or the Antideficiency Act will be violated.

Section 503(b) states:

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

Pub. L. No. 110-329, § 503(b).

This section, which applies to amounts greater than \$5 million, restricts the availability of funds for obligation (and expenditure) by means of reprogramming of programs, projects, and activities (PPAs) until proper notice is provided. The amounts designated for PPAs are found in the explanatory statement<sup>2</sup> accompanying DHS's fiscal year 2009 appropriations act. Section 503(e) of the appropriations act provides that “such dollar amounts specified in this Act and accompanying explanatory statement shall be subject to the conditions and requirements . . . of this section.” *Id.* at § 503(e).

USSS falls under the direction of the Secretary of Homeland Security, 18 U.S.C. § 3056(g), and is required, among other things, to protect presidential and vice presidential candidates along with their spouses and children, 18 U.S.C. § 3056(a).

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<sup>2</sup>152 Cong. Rec. H9,801 (daily ed. Sept. 28, 2008).

For fiscal year 2009, USSS received a fiscal year appropriation of \$1,408,729,000. Pub. L. No. 110-329, 122 Stat. at 3667. The explanatory statement itemizes \$41,082,000 for the Presidential Candidate Nominee Protection PPA. 154 Cong. Rec. H9,801. Obligations in connection with presidential candidate nominee protection end with the inauguration of the President and Vice President, in the present case, on January 20, 2009. Letter from Undersecretary of Management, Department of Homeland Security, to the Chairman, Subcommittee on Homeland Security, Committee on Appropriations, United States Senate, June 30, 2009 (Reprogramming Notification).

On June 30, 2009, 5 months after its presidential candidate nominee protection ended, DHS notified the Subcommittees on Homeland Security of the House and Senate Appropriations Committees that USSS had expended \$5,100,000 more than had been designated for the Presidential Candidate Nominee Protection PPA.<sup>3</sup> Reprogramming Notification. DHS explained that USSS had used balances from another USSS PPA to “cover [a] shortfall in funding this fiscal year as a result of the protective efforts for the 2008 Presidential Campaign.” *Id.*

## DISCUSSION

At issue here is whether (1) DHS and USSS violated section 503(b), and (2) if so, whether a violation of section 503(b) constitutes a violation of the Antideficiency Act.

### Section 503(b)

On June 30, 2009, DHS notified the House and Senate Subcommittees on Homeland Security of a reprogramming of \$5.1 million to cover a shortfall in the USSS Presidential Candidate Campaign Protection PPA. Section 503(b) requires the Secretary of Homeland Security to provide a 15-day advance notification of proposed PPA reprogrammings in excess of \$5 million. As noted above, the 2008 presidential campaign officially ended on January 20, 2009, and all USSS obligations for candidate protection had been incurred by that time. Nevertheless, 5 months elapsed between the end of the campaign and notification of the \$5.1 million reprogramming for the Presidential Candidate Nominee Protection PPA.

While it is unclear from the documentation provided to us by USSS and DHS when USSS exceeded the section 503(b) \$5 million threshold, the threshold had to have been exceeded by the Inauguration on January 20, 2009, when candidate protection ended. According to DHS, USSS used amounts from its National Special Security Events PPA to cover its candidate protection obligations that exceeded the

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<sup>3</sup> On some fiscal management issues, USSS does not act independently of its parent agency, DHS. Meeting between DHS Directorate of Management, Budget and Finance, and GAO, Jan. 12, 2010. DHS requires its component agencies, including USSS, to submit a written reprogramming request to the DHS Directorate of Management, Budget and Finance. DHS submits all reprogramming notifications required under section 503(b) to the House and Senate Appropriations Committees. *Id.*

\$41 million itemized in the explanatory statement for the presidential candidate protection PPA. Reprogramming Notification. However, section 503(b) specifically provides that *no funds are available* through a reprogramming in excess of \$5 million *unless* House and Senate Appropriations Committees are notified 15 days *in advance* of the reprogramming. Since DHS failed to notify the appropriations committees 15 days in advance of the obligation of the reprogrammed funds, and USSS incurred obligations in excess of the \$5 million threshold more than 15 days prior to congressional notification of the reprogramming, we conclude that DHS and USSS violated section 503(b).

### Antideficiency Act

The second question asks whether a violation of section 503(b) constitutes a violation of the Antideficiency Act. If an agency incurs an obligation in excess or advance of amounts that are legally available to the agency, the agency has violated the act. B-317450, Mar. 23, 2009. The Antideficiency Act extends to all provisions of law that implicate the availability of agency appropriations and “agencies must consider the effect of all laws that address the availability of appropriations.” *Id.*, at 5. Section 503(b) is one such law. Under section 503(b), none of the funds appropriated to DHS in fiscal year 2009 were legally available for obligation through a reprogramming in excess of \$5 million “unless the Committees on Appropriations of the Senate and House of Representatives are notified 15 days in advance of such reprogramming.” Pub. L. No. 110-329, § 503(b).

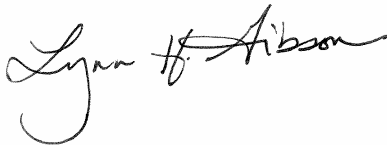
In B-290600, July 10, 2002, we addressed a situation similar to the one at issue here. In that decision, we determined that both the Air Transportation Stabilization Board (ATSB) and the Office of Management and Budget (OMB) violated the Antideficiency Act when OMB apportioned and ATSB obligated an appropriation in advance of its legal availability. The Air Transportation Safety and System Stabilization Act of 2001 authorized ATSB to issue subsidies and loan guarantees to air carriers that incurred losses as a result of the September 11, 2001, terrorist attacks. Pub. L. No. 107-42, title I, § 101(a)(1), 115 Stat. 230 (Sept. 22, 2001). Congress enacted budget authority for this purpose but the act provided that the budget authority would be available only to the extent that the President notified Congress of a need to use the budget authority to make a loan guarantee. *Id.* at § 101(b). In January 2002, after enactment, OMB apportioned funds to ATSB, and ATSB signed a loan guarantee obligating \$172 million. B-290600. However, it was not until 4 months later, in May 2002, that the President transmitted to Congress the required notification. *Id.* As a result, when OMB apportioned and ATSB obligated the \$172 million in January 2002, the budget authority was not legally available. *Id.* The result was an Antideficiency Act violation. *Id.* Because the President’s notification followed rather than preceded the obligation of budget authority, ATSB obligated funds in advance of the legal availability of the appropriation.

We arrive at a similar conclusion in this case. Like ATSB, USSS obligated funds that were unavailable for obligation because DHS had not satisfied the section 503(b) notification requirement. USSS reprogrammed and obligated \$5.1 million to cover

shortfalls in the Presidential Candidate Nominee Protection PPA, yet these funds could not be reprogrammed until DHS *notified Congress 15 days in advance of the reprogramming*. Thus, USSS and DHS violated the Antideficiency Act.

The Antideficiency Act requires that the agency head “shall report immediately to the President and Congress all relevant facts and a statement of actions taken.” 31 U.S.C. § 1351. In addition, the agency must send a copy of the report to the Comptroller General on the same date it transmits the report to the President and Congress. 31 U.S.C. § 1351, *as amended by* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004). *See also* B-304335, Mar. 8, 2005.

Sincerely yours,

A handwritten signature in cursive script that reads "Lynn H. Gibson". The signature is written in black ink and is positioned above the typed name.

Lynn H. Gibson  
Acting General Counsel