



Decision

Matter of: Office of Management and Budget/General Services Administration—
Reimbursement Requirement for the Technology Modernization Fund

File: B-333396

Date: July 14, 2022

DIGEST

The Office of Management and Budget (OMB) and the General Services Administration (GSA) permit agencies to provide GSA less than full reimbursement for amounts that GSA transfers to agencies from the government-wide Technology Modernization Fund (TMF). While interagency fund transfers are generally prohibited absent statutory authority, the National Defense Authorization Act for Fiscal Year 2018 provides such authority by establishing TMF for GSA to provide funds to agencies to improve information technology and to enhance cybersecurity across the federal government. TMF authorizing legislation directs agencies to reimburse TMF at rates set by OMB and GSA at a level to ensure TMF's solvency, which leaves OMB and GSA the discretion to set rates at less than full reimbursement. While minimum payments are not defined by law, the statute does not provide the discretion to totally waive reimbursement by an agency.

DECISION

This responds to a request for our decision regarding whether agencies receiving amounts from the Technology Modernization Fund (TMF) are required by TMF's authorizing statute to fully reimburse TMF for all funds received.¹ We conclude that the Office of Management and Budget (OMB) and the General Services Administration (GSA) may require less than full reimbursement, provided the reimbursement rates are sufficient to satisfy the statute's solvency requirement, and are not inconsistent with other statutory objectives. While minimum payments are not defined by law, the statute does not provide the discretion to totally waive reimbursement by an agency.

¹ Letter from Senators Portman and Hyde-Smith to Comptroller General (June 15, 2021).

Our practice when rendering decisions is to contact the relevant agencies to obtain factual information and their legal views on the subject of the request.² Accordingly, we reached out to OMB and GSA.³ In response, GSA and OMB provided factual information and their legal views on this matter.⁴

BACKGROUND

In December 2017, Congress created TMF “to improve information technology [and] to enhance cybersecurity across the [f]ederal [g]overnment”⁵ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, div. A, title X, subtitle G, § 1078(b)(1), 131 Stat. 1283, 1589 (2017) (Section 1078). Agencies can apply to TMF to fund IT projects that meet criteria outlined by OMB. *Technology Modernization Fund: OMB and GSA Need to Improve Fee Collection and Clarify Cost Estimating Guidance for Awarded Projects*, GAO-20-3, at 10–13 (2019) (GAO-20-3). Project proposals are reviewed by the Technology Modernization Board. *Id.* The Board then makes recommendations to GSA on which projects should be funded, and GSA then makes TMF awards and transfers amounts in line with the recommendations and budgetary resources of TMF. *Id.* All awardees are required to reimburse TMF. Section 1078(b)(5)(A)(i).

Initially, OMB and GSA sought full reimbursement of both the amounts transferred from TMF to agencies and TMF’s operating expenses. See GSA Response Letter, at 1–2; GAO-20-3, at 10. GAO reported in 2019, however that while GSA had obligated about \$1.2 million to cover TMF operating expenses, it had recovered only about 3 percent of those expenses through fee payments. GAO-20-3, at 19. Consistent with their practice at the time, GAO recommended that OMB and GSA develop a plan that outlined the actions needed to fully recover the operating expenses through fee collection in a timely manner. GAO-20-3, at 36.

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/gao-06-1064sp>.

³ Letter from Managing Associate General Counsel, GAO, to General Counsel, OMB (Sept. 15, 2021); Letter from Managing Associate General Counsel, GAO, to General Counsel, GSA (Sept. 15, 2021).

⁴ Letter from General Counsel, GSA, to Managing Associate General Counsel, GAO (Oct. 14, 2021) (GSA Response Letter); Letter from General Counsel, OMB, to Managing Associate General Counsel, GAO (Jan. 5, 2022) (OMB Response Letter).

⁵ TMF is set to sunset two years following the date on which GAO issues its third report on the fund. Section 1078(f).

In 2021, new Technology Modernization Board guidelines included partial or minimal reimbursement to TMF as potential repayment arrangements, along with full reimbursement. Technology Modernization Board, *Guidelines on the American Rescue Plan Funding*, available at [tmf.cio.gov/arp/](https://www.tmf.cio.gov/arp/) (last visited July 11, 2022); see also GAO, *Technology Modernization Fund: Implementation of Recommendations Can Improve Fee Collection and Proposal Cost Estimates*, GAO-22-105117, at 23–24 (2021) (GAO-22-105117). Partial reimbursement permits agencies to reimburse TMF less than they received, and minimal reimbursement would only require minimal necessary payments to TMF. See GAO-22-105117, at 23. GSA would decide at which level an agency would reimburse TMF—minimal, partial, or full—in its written agreement setting forth the terms of repayment. *Id.* at 12–13; OMB Response Letter, at 2. OMB and GSA told us they began to permit partial or minimal reimbursement to allow for a more diverse set of projects to be funded, as the full reimbursement requirement prevented many agencies from applying for funds.⁶ OMB Response Letter, at 5; GSA Response Letter, at 2. OMB and GSA both explained in their responses that the statute would not permit, and they were not contending, that they could totally waive repayment by agencies.

DISCUSSION

At issue in this decision is the interpretation of the requirements for agencies to reimburse the TMF under Section 1078, specifically whether this section requires agencies to fully reimburse TMF. Section 1078 states, “[t]he head of an agency shall reimburse [TMF] for any transfer made . . . including any services or work performed in support of the transfer . . . in accordance with the terms established in a written agreement” Section 1078(b)(5)(A)(i). The statute goes on to provide that, “[b]efore the transfer of funds to an agency . . . , [GSA], in consultation with [OMB] and the head of the agency[,] shall enter into a written agreement—documenting the purpose for which the funds will be used and the terms of repayment, which may not exceed 5 years unless approved by [OMB].” Section 1078(b)(6)(A)(i).

In order to draw up the repayment terms, “[GSA], in consultation with [OMB], shall establish amounts to be paid by an agency under . . . the terms of repayment for activities funded . . . , including any services or work performed in support of that development . . . , at levels sufficient to ensure the solvency of [TMF], including operating expenses.” Section 1078(b)(5)(B)(i). As described above, OMB and GSA

⁶ In their responses to us, OMB and GSA both assert that while this is a change in TMF’s operations, it has been their longstanding interpretation of Section 1078 that full reimbursement is not required. OMB Response Letter, at 2–5; GSA Response Letter, at 1, 4. OMB pointed us to conversations and statements it has made to the Senate Homeland Security and Governmental Affairs Committee on this same question as well as other statements by the agency that asserted this position. OMB Response Letter, at 2–4.

have interpreted this statute to permit minimal, partial or full reimbursement by agencies to TMF, although not full waivers of repayments.

The question of agency reimbursements to other agencies and their appropriations accounts involves several fundamental questions of fiscal law, including transfers, the purpose statute, 31 U.S.C. § 1301(a), and the miscellaneous receipts statute, 31 U.S.C. § 3302(b).

Transfers of appropriated funds from one account to another are prohibited unless specifically authorized by law. 31 U.S.C. § 1532. Even when transferred, appropriated funds are still required to be used for the purposes originally appropriated, unless otherwise provided. 31 U.S.C. § 1532; 31 U.S.C. § 1301(a). These statutes were enacted to facilitate congressional control over appropriated funds and agency programs. They do so by keeping agency programs at levels approved by Congress and preventing agencies from circumventing congressional decisions about the use of appropriations. Agencies are also prohibited by the miscellaneous receipts statute from retaining funds from outside sources, thus preventing them from accepting reimbursements, unless specifically authorized by law. 31 U.S.C. § 3302(b). However, Congress has provided numerous statutory authorities permitting transfers on a government-wide and agency-specific basis, and each authority has unique applications and restrictions. See, e.g., B-331739, Mar. 18, 2021 (determining whether the U.S. Chemical Safety and Hazard Investigation Board had agency specific transfer authority); B-330862, Sep. 5, 2019 (discussing transfer authority of the Department of Defense). Prior decisions of our office provide examples of how we have interpreted such statutory authorities.

One significant statutory authority that permits payments between agencies for the provision of services or goods is the Economy Act. The Economy Act specifies that payment for interagency agreements authorized under the Act may be made in advance or by reimbursement and “shall be on the basis of the actual cost of goods or services provided.” 31 U.S.C. § 1535(b). In interpreting the meaning of “actual cost”, we have sought to apply the concept in a manner consistent with the statutory objectives and legislative history, recognizing that agencies may not augment one another’s appropriations. 57 Comp. Gen. 674, at 681 (1978) (finding the only elements of cost required to be included under the Act are those that accomplish the identified congressional goals). Accordingly, we found the interpretation and application of “actual cost” to be flexible, consisting of both generally required costs— that is, direct costs borne by the performing entity—and certain indirect costs that, based on the particular situation, are determined to be permissible. For example, a component of the Federal Aviation Administration (FAA) could include depreciation and interest in fees collected from other FAA components renting airport space in view of Congress’s goal that the airports be self-sustaining. *Id.* at 683 (noting the Economy Act does not require a blanket rule for recovering costs throughout the government). Significantly, the term “actual cost” is interpreted and applied in a flexible manner and recognizes distinctions or differences in the nature

of the performing agency and the purpose or goals intended to be accomplished. *Id.* at 685.

Where a statute provides for reimbursement in more general terms, we have looked to this analytical framework for guidance, recognizing that where a transaction is governed by another statutory authority, the Economy Act's actual cost basis does not control, but rather, the starting point is the text of the particular statute. For example, the Nuclear Regulatory Commission (NRC) entered into an agreement with the Department of Energy (DOE) under statutory authority that required DOE to provide services on a reimbursable basis. We concluded that DOE's interpretation that it could assess an "added factor" comprised of certain administrative and overhead costs was a permissible construction of the statute. 72 Comp. Gen. 159, at 163 (1993) (noting that neither the statute nor legislative history appeared to require the exclusion of these otherwise appropriate costs). In another case, we did not object to the Tennessee Valley Authority's (TVA) determination of the appropriate rate to charge where the relevant statute specified TVA was to charge rates to produce revenue "sufficient to provide funds for operation, maintenance, and administration of its power system . . ." among other things. The statute in that case provided that, "subject only to the provisions of [the Act]", TVA was to enter into arrangements "upon such terms and conditions . . . as it may deem necessary." Based on this language, we concluded that TVA had discretion to set rates consistent with the statute's requirement to charge sufficient amounts to produce revenue to cover the various items delineated. 44 Comp. Gen. 683 (1965) (finding TVA was to set rates in accordance with the statute without regard to the actual cost principles of the Economy Act).

Here, Section 1078 states that TMF was established "for technology-related activities, to improve information technology, to enhance cybersecurity across the [f]ederal [g]overnment, and to be administered in accordance with guidance issued by [OMB]." Section 1078(b)(1). Of particular relevance, the provision provides that agencies "shall reimburse [TMF] for any transfer . . . in accordance with the terms established in a written agreement," which the agency must enter into with GSA, in consultation with OMB. Section 1078(b)(5)(A)(i), (b)(6)(A). With respect to reimbursement, the provision goes on to provide that GSA and OMB "shall establish amounts to be paid by an agency . . . and the terms of repayment," and must at a minimum, designate repayment terms at a level that ensures the solvency of TMF, including operating expenses. Section 1078(b)(5)(B)(i). This language in the statute guides the discretion that is afforded to OMB and GSA.

Similar to our determination of the meaning of actual costs under the Economy Act, we conclude there is flexibility here with respect to the amounts to be paid under Section 1078's reimbursement requirement. The statute's direction with respect to repayment identifies OMB and GSA as the agencies that have the discretion to determine and implement the repayment terms, including the amounts. There is a mandate for agencies to make repayments in the language stating "[t]he head of an agency shall reimburse [TMF] for any transfer made..." Section 1078(b)(5)(A)(i).

With that mandate, OMB and GSA cannot totally waive amounts to be repaid by agencies, as they have recognized. The statute does not further define what the amounts to be repaid must be, only that they must at a minimum, designate repayment terms at a level that ensures the solvency of TMF, including operating expenses. Section 1078(b)(5)(B)(i).

Notably, the Antideficiency Act requires GSA and OMB to ensure that transfers from the fund do not exceed amounts available in the fund, and that the balance of the fund is sufficient to cover its obligations. See 31 U.S.C. § 1341 (prohibiting obligations and expenditures in excess or in advance of amounts available). Thus, the solvency of the fund is already required under fiscal law. Nevertheless, Section 1078 provides that OMB and GSA are to establish the terms of repayment and the amounts to be paid, and that these terms must be such that they ensure the solvency of the fund. To give meaning to the solvency requirement as well as the direction to establish both repayment terms *and* amounts, we read Section 1078 to permit OMB and GSA to establish amounts to be paid that are less than the full amount of a transfer and operating expenses, otherwise both the amount language and solvency requirement are unnecessary. See *TRW, Inc. v. Andrews*, 534 U.S. 19, at 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal quotation marks omitted)).

OMB and GSA’s discretion to establish the amounts to be paid by an agency and the terms of the repayment is not unbounded, as they recognize. The statute does not permit them to entirely waive repayment by an agency, but there is a range of discretion they can determine and implement. OMB and GSA have explained that they have exercised this discretion to permit minimal, partial or full reimbursement by agencies to TMF, although not full waivers of repayments. With full reimbursements, the continued solvency of the fund would not be at issue, because, under the Antideficiency Act, transfers would be required to be limited to available amounts, and under the full reimbursement model, all transfers and operating expenses would be recouped. Whereas, with partial or minimal reimbursements, without specifying that OMB and GSA must set reimbursement at levels to ensure the solvency of the fund, including operating expenses, transfers could, while still complying with the Antideficiency Act, potentially diminish TMF’s operating capacity. When Congress appropriates additional amounts to the fund, as it did in the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 80 (Mar. 11, 2021), this concern is eliminated, as long as TMF retains sufficient amounts to continue operating. The amounts to be reimbursed to TMF will affect the amounts that will be available for future projects, unless Congress appropriates additional funding or agencies repay additional amounts. But, as additional appropriations cannot be assured, OMB and GSA have to manage the fund as though no future appropriations will be forthcoming. Thus, the solvency requirement serves to limit the degree to which OMB and GSA may waive repayment in establishing the amounts to be paid. That

is, whatever the amounts required, they must be sufficient to ensure the solvency and continued operation of the fund.

This construction is consistent with the stated objectives of TMF. Namely, there is no indication that requiring less than full reimbursement will prevent the use of the fund to improve information technology and enhance cybersecurity. To the contrary, according to the Technology Modernization Board guidelines, the aim of the flexibility was to allow for proposals addressing the most urgent cybersecurity and modernization issues, which may not have easily-realized cost-savings for the proposing agency. Technology Modernization Board, *Guidelines on the American Rescue Plan Funding*, available at tmf.cio.gov/arp/ (last visited July 11, 2022). Congress recently, in the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 4011, 135 Stat. at 80, appropriated an additional \$1,000,000,000 to GSA to carry out the purposes of the fund, which the Board guidelines contend were intended to “address urgent IT modernization challenges, bolster cybersecurity . . . and improve the delivery of COVID-19 relief,” and the various levels of repayment risk and payment flexibilities were introduced with these goals in mind. Technology Modernization Board, *Guidelines on the American Rescue Plan Funding*, available at tmf.cio.gov/arp/ (last visited July 11, 2022).

There is also support for this interpretation in legislative history related to the statute. The committee report accompanying H.R. 2227, a bill for the Modernizing Government Technology Act of 2017,⁷ noted the purposes of the bill were to “(1) assist the federal government in modernizing federal IT to mitigate current operational and security risks; (2) incentivize cost-savings in federal IT through modernization; and (3) accelerate the acquisition and deployment of modernized IT solutions, such as cloud computing, by addressing impediments in the area of funding, development, and acquisition practices.” H.R. Rep. No. 115-129, pt.1, at 11 (2015). According to the committee report, this was to be accomplished through the creation of both TMF and individual agency working capital funds authorized to be established for IT modernization purposes. While agency IT working capital funds are available for reimbursing TMF, they are also available for other purposes, and agency IT working capital funds are only to be used to reimburse TMF with certain approval. Pub. L. No. 115-91, § 1077(b)(3). Notably, the committee report also describes the authorization of appropriations in the bill for TMF for fiscal years 2018 and 2019 as “seed money to kick-start modernization efforts at agencies,” noting the committee expected “to see results in terms of savings and increased security before authorizing more funding.” H.R. Rep. No. 115-129, pt.1, at 8.

OMB and GSA’s determination to allow partial or minimal reimbursement to facilitate funding a more diverse set of projects, for which agencies would otherwise not apply for funding if full repayment was required, is not incompatible with the purposes underlying TMF. Several factors underlie this conclusion. IT modernization may be

⁷ H.R. 2227 was not enacted, but its provisions regarding TMF are similar to those in Section 1078 establishing TMF.

accomplished through TMF, as well as through agency working capital funds, coupled with the legislative history indicating the possibility of future appropriations to TMF; indeed, Congress did appropriate additional amounts in fiscal year 2021. Thus, we conclude it is reasonable to construe Section 1078 as allowing OMB and GSA to require less than full reimbursement. As with the statutes authorizing reimbursement in the NRC and TVA decisions, the language in Section 1078 affords OMB and GSA discretion. Namely, under Section 1078, we agree that OMB and GSA may establish amounts to be paid and terms of repayment requiring less than full reimbursement, but not a total waiver of reimbursement by agencies, as long as the terms and amounts are consistent with the other statutory parameters.⁸

CONCLUSION

Section 1078 gives OMB and GSA discretion to set reimbursement terms and amounts to be paid subject to other statutory requirements, which may include allowing less than full reimbursement.⁹ However, as they have recognized, OMB and GSA may not totally waive reimbursement by agencies. In setting the reimbursement amounts and terms, OMB and GSA must ensure the solvency of TMF, including operating expenses.



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⁸ OMB and GSA informed us of the steps they take to ensure TMF remains solvent. According to the agencies, first TMF maintains a positive cash balance within the Treasury. Second, TMF maintains positive budgetary resources at all times. See *generally* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 1, § 20.3 (Aug. 2021) (budgetary resources are amounts available to incur obligations in a given year). Third, TMF maintains budgetary resources sufficient to pay for existing and anticipated obligations through the fund's existence as set by statute. Fourth, operational expenses are set aside (*i.e.*, not available for transfer to agencies) for the current fiscal year and the next fiscal year to ensure adequate funding. Finally, repayments from agencies are not made available for transfer until the year following the year when the repayment is recorded to ensure that plans are not made for resources that are not yet realized. OMB Response Letter, at 6; GSA Response Letter, at 3. We note that under fiscal statutes such as the recording statute, 31 U.S.C. § 1501, and provisions of the Antideficiency Act, *e.g.*, 31 U.S.C. § 1514, agencies are responsible for tracking and recording obligations and generally carrying out a system of funds control to ensure they are operating within the levels set by Congress and uniformly recording their obligations.

⁹ It is important to note, however, that our legal conclusion here does not negate the concerns raised in our 2021 GAO report stating that TMF operating expenses continue to outpace offsetting fee collections. GAO-20-3, at 36.