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UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

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OCT 2 1974

B-179708 8-am., July 10, 1975

TO : General Counsel

FROM : Director, FGMS Division - D. L. Scantlebury

SUBJECT: Request for an Opinion on the Legality of Crediting Reimbursements to the Appropriation Year Collected and on Other Matters Related to Congressman Mahon's Request of May 31, 1974 (B-179708)

Reference is made to Mr. Kensky's letter of July 23, 1974, which transmitted a request from the Chairman of the House Appropriations Committee asking that you rule on the legality of applying collected reimbursements to the current appropriation.

On August 19, 1974, members of my staff met with Mr. Henry Wray of your office to discuss this request in more detail. In accordance with the agreements reached during this meeting, we are requesting legal opinions on the following additional issues relating to the Chairman's request:

1. Deobligation and Write Off of Obligations and Receivables. The balance of the Navy's Operation and Maintenance M account consists only of unpaid obligations and accounts receivable from the current lapsing appropriation account, together with the total of unpaid obligations applicable to foreign national employees. The policy of recording only the current lapsing year obligation and receivable amounts in the M account will also be applied to the RDT&E and Procurement appropriations which are lapsing for the first time during fiscal years 1974 and 1975, respectively. All lapsed unpaid obligations and receivables, other than the aforementioned, were or will be deobligated or written off by the Navy. If an amount deobligated is subsequently paid, the Navy makes a simultaneous obligation and expenditure. When receivables which were previously written off are collected, a simultaneous earning and receipt are recorded.

We also found that the Army writes off all accounts immediately after lapsing. Subsequent collections are treated as a reduction of M account disbursements.

Section 1311(b) of the Supplemental Appropriation Act of 1955 (31 U.S.C. 200) provides that:

> "Hereafter, in connection with the submission of all requests for proposed appropriations to the Bureau of the Budget, the head of each Federal agency shall report that any statement of obligations furnished therewith consists of valid obligations as defined in subsection (a) of this section."

Section 1311(c) provides that:

> "Each report made pursuant to subsection (b) of this section shall be supported by certifications of the officials designated by the head of the agency, and such certifications shall be supported by records evidencing the amounts which are reported therein as having been obligated. Such certifications and records shall be retained in the agency in such form as to facilitate audit and reconciliation for such period as may be necessary for such purposes. The officials designated by the head of the agency to make certifications may not redelegate the responsibility."

Section 1311(e) provides that:

> "Any statement of obligation of funds furnished by any agency of the Government to the Congress or any committee thereof shall include only such amounts as may be valid obligations as defined in subsection (a) of this section."

We believe that the Navy's deobligation of unpaid obligations and the write off of receivables by the Army and Navy in the M account do not meet the intent or reporting requirements of section 1311. Navy officials contend that obligations and receivables which have been in the M account for a year are probably not valid. We agree that amounts which are no longer valid should be deobligated or written off. We believe, however, that this action should be based on a review of the unliquidated obligations and accounts receivable and not on an arbitrary determination that certain amounts are no longer valid.

2. Use of "Free Assets." 31 U.S.C. 686(b) as amended provides that:

> "Where materials, supplies, or equipment are furnished from stocks on hand the amounts received in payment thereof shall be credited to appropriations or funds, as may be authorized by other law, or if not so authorized, so as to be available to replace the materials, supplies, or equipment, except that where the head of any such department, establishment, bureau or office determines

that such replacement is not necessary the amounts paid shall be covered into the Treasury as miscellaneous receipts."

The Surveys and Investigations Staff of the House Appropriations Committee issued a report on the management of M and related Surplus Fund accounts in the Federal government, a copy of which was previously provided to Mr. Wray. As discussed on page 39 of the report, the Department of Defense financial accounting systems are not designed to identify those reimbursements from the sale of stock on hand that are not used for replacement purposes. The military services use reimbursables from inventory items that are not replaced in the same manner as other reimbursements. For example, in the Air Force when a customer order is filled from inventory on hand, without concurrent replacement of the inventory, the resulting reimbursement represents a "free asset" to the reimbursed appropriation and is programed and used to fund direct expenses.

The Surveys and Investigations Staff report states the officials of your office acknowledged that to comply with 31 U.S.C. 686 reimbursements arising from transfers of materiels, supplies or equipment from stock on hand, if not used for replacement of the items transferred, should be deposited in the Treasury as miscellaneous receipts.

Our discussions with military service officials, however, have raised several questions concerning the intent of 31 U.S.C. 686 and the feasibility of identifying "free assets." Accordingly, we would like your opinion on the following issues:

1. What constitutes concurrent replacement? The replacement of materials furnished from stock on hand may not be simultaneous. Timing differences can cause replacement in a fiscal year other than the year the materials were provided and the reimbursement earned. Under the military services' current accounting systems, procurement actions are not specifically related to the replacement of stocks furnished under a reimbursable program. Also, the replacement item may not be identical to the material furnished under the reimbursable program, but may be a similar item or serve a similar purpose.

2. Is it the intent of 31 U.S.C. 686 that agency accounting and management systems be able to match the sale of materials from stocks on hand to replacement actions? It appears that only through a system of this type could there be any assurance that "free assets" were being properly identified and deposited in the Treasury. Military service officials believe that such a requirement is impractical. They claim that "free asset" balances are not significant and that the matching of sales of stocks on hand to replacements may not be feasible.

3. Stock Fund Credits. Department of Defense Directive 7420.1, section XI, paragraph K provides that appropriations be credited for the value of materiels returned to the stock fund. Specifically:

> "Credit shall be made available to fund allotments or expense budget authority of returning activities. Credits will be granted by the stock fund inventory manager after receipt, inspection and recording in the accountable stock records. The credit allowed will be reflected in the next following billing and collection cycle."

The Air Force credited its fiscal year 1972 Military Personnel appropriation with $3.99 million, representing the value of clothing returned to the stock fund by enlisted personnel during fiscal years 1967 through 1972. The failure to grant credits during each fiscal year materiel was returned was apparently due to an administrative error by either Air Force or stock fund personnel. When the mistake was discovered in May 1972, the entire credit was granted to the current appropriation (fiscal year 1972). The Deputy Assistant Secretary of Defense (Audit) informally reported that only $621,000 should have been credited to the fiscal year 1972 appropriation, with the balance ($3,369,000) being credited to fiscal year 1967 through 1971 appropriations. The Air Force General Counsel ruled that the credit to the current appropriation was proper, citing as authority 10 U.S.C. 2208(g) which provides that:

> "The appraised value of supplies returned to working-capital funds by a department, activity, or agency may be charged to that fund. The proceeds thereof shall be credited to current applicable appropriations and are available for expenditure for the same purposes that those appropriations are so available."

The Air Force General Counsel further stated that:

> "Although the credits were attributable to prior years, they were not in fact granted until FY 1972. Since the statute provides for crediting the current applicable appropriation, we have no legal objection to crediting the FY 1972 military personnel appropriation with the total amount."

By failing to properly account for stock fund credits when earned, the Air Force in effect augmented their fiscal year 1972 appropriations. We would like your opinion on this matter. If legal, we believe that consideration should be given to recommending a change in 10 U.S.C. 2208 which would require that credits for materiel returned to the stock fund must be applied to the fiscal year the materiel was returned.

4. Apportionment of Reimbursable Obligational Authority. In addition to direct appropriations, the military services are apportioned funded and automatic reimbursable obligational authority by OMB. Funded reimbursable authority is subject to a dollar limitation. Amounts are available for obligation only to the extent that applicable orders have been received or estimates established. Any differences between the amount of funds cited on the orders received and the actual amount ultimately earned is adjusted in order that the unobligated balance of available funds are not augmented or depleted. Direct appropriations must be used by the performing activity to finance any funded reimbursements earned in excess of the apportioned limitation. Automatic reimbursements are not subject to a dollar limitation. Obligational authority is automatically increased by receipt of automatic reimbursable orders.

Army and Navy officials indicate that while considering the apportionment to be binding during the current year, once the account has expired, they no longer feel restricted by the funded reimbursable limitation. We do not yet have the Air Force's position on this matter. Army Circular 37-83, which covers fiscal year-end accounting and reporting, provides that adjustment of prior fiscal year funded reimbursement orders for expired accounts will be given the same general ledger treatment as adjustments of automatic reimbursement orders. We were told that under this procedure obligational authority will be automatically increased as a result of upward adjustments to a funded reimbursable earning regardless of the availability of remaining apportioned authority.

We discussed this matter with OMB officials who, although stating that funded obligational authority must be apportioned, were not definitive as to the use of reimbursable authority in expired appropriations. OMB Circular A-34 is silent on this matter.

We would like to know if the apportionment is still applicable with regard to funded reimbursable authority in the expired and M accounts.

We have reviewed a draft of this submission with Mr. Wray who stated that adequate information is provided to resolve the legal questions posed.

cc: Mr. Kensky, FGMSD
Mr. Lowe, FGMSD
Mr. Wray, OGC

JUL 10 1975

Indorsement

Director, FGMSD

Returned. Your questions are answered, in the order presented, as follows:

1. Deobligation and Write Off of Obligations and Receivables. The procedures applicable to fixed-year appropriation accounts upon expiration of their period of availability are set forth in 31 U.S.C. §§ 701 et seq. (1970). Subsection 701(a) provides:

> "(a) The account for each appropriation available for obligation for a definite period of time shall be closed as follows:
>
> "(1) The obligated balance shall be transferred * * * [for any fiscal year or years ending on or before June 30, 1976, or that June 30 which falls in the first month of June which occurs twenty-four months after the end of such fiscal year or years] to an appropriation account of the agency or subdivision thereof responsible for the liquidation of the obligations, in which account shall be merged the amounts so transferred from all appropriation accounts for the same general purposes; and
>
> "(2) Upon the expiration of the period of availability for obligation, the unobligated balance shall be withdrawn and, if the appropriation was derived in whole or in part from the general fund, shall revert to such fund, but if the appropriation was derived solely from a special or trust fund, shall revert, unless otherwise provided by law, to the fund from which derived: Provided, That when it is determined necessary by the head of the agency concerned that a portion of the unobligated balance withdrawn is required to liquidate obligations and effect adjustments, such portion of the unobligated balance may be restored to the appropriate accounts."

Under subsections 701(b)(2) and (d), the withdrawals required by subsection (a)(2) are to be made not later than September 30 (or November 15 for fiscal years commencing on or after October 1, 1976) of the fiscal year following expiration of the period of availability for obligation, and are to be accounted for and reported as of the fiscal year in which the appropriations expire for obligation. Section 703(a) provides, quoting from the Code:

"(a) Appropriation accounts established pursuant to sections 701-708 of this title shall be reviewed periodically, but at least once each fiscal year, by each agency concerned. If the undisbursed balance in any account exceeds the obligated balance pertaining thereto, the amount of the excess shall be withdrawn in the manner provided by section 701(a)(2) of this title; but if the obligated balance exceeds the undisbursed balance, the amount of the excess, not to exceed the remaining unobligated balances of the appropriations available for the same general purposes, may be restored to such account. A review shall be made as of the close of each fiscal year and the restorations or withdrawals required or authorized by this section accomplished not later than September 30 of the following fiscal year, but the transactions shall be accounted for and reported as of the close of the fiscal year to which such review pertains. A review made as of any other date for which restorations or withdrawals are accomplished after September 30 in any fiscal year shall be accounted for and reported as transactions of the fiscal year in which accomplished: Provided, That prior to any restoration under this subsection the head of the agency concerned shall make such report with respect thereto as the Director of the Bureau of the Budget may require."

Section 701(c) states in part, quoting from the Code:

"(c) For the purposes of sections 701-708 of this title, the obligated balance of an appropriation account as of the close of the fiscal year shall be the amount of unliquidated obligations applicable to such appropriation less the amount collectible as repayments to the appropriation; the unobligated balance shall represent the difference between the obligated balance and the total unexpended balance. Collections authorized to be credited to an appropriation but not received until after the transfer of the obligated appropriation balance as required by subsection (a)(1) of this section, shall, unless otherwise authorized by law, be credited to the account into which the obligated balance has been transferred, except that any collection made by the General Accounting Office for other Government agencies may be deposited into the Treasury as miscellaneous receipts."

It is clear that the concept of obligated balances for purposes of the foregoing provisions is that set forth in section 1311 of the Supplemental Appropriation Act, 1955, as amended, 31 U.S.C. § 200 (1970). Thus 31 U.S.C. § 701(c) formerly expressly described the term "obligated balance" as used therein by reference to annual reports on obligated balances

required by section 1311(b) of the Supplemental Appropriation Act. See 70 Stat. 648. This reference was deleted only because the requirement for such annual reports under section 1311 was repealed in favor of the present certification requirement. See §§ 210(a) and (b) of the Act approved July 8, 1959, Pub. L. No. 86-79, 73 Stat. 167.

We agree that the arbitrary deobligation and "write off" actions to which you refer are inconsistent with the statutory provisions described above; and that implementation of such statutory provisions must be based upon specific review of appropriation accounts. Enactment of section 1311 of the Supplemental Appropriation Act, supra, was motivated primarily by concern that agencies were overstating "obligations." The criteria for obligations established by section 1311 and accompanying reporting (certification) requirements are undoubtedly designed to assure generally more accurate accounting practices, so that, for example, obligation figures should neither be overstated nor understated. The House Appropriations Committee described the provision enacted as section 1311 in part as follows:

> "* * * Definition of obligations.--Over a period of years numerous loose practices in handling appropriated funds have grown up in the various agencies of the government. The most difficult problem in this area arises from the recording of various types of transactions as obligations of the government when, in fact, no real obligation exists. This situation has become so acute as to make it next to impossible for the Committee on Appropriations to determine with any degree of accuracy the amount which has been obligated against outstanding appropriations as a basis for determining future requirements. It has become necessary to set forth definitively in the law the types of transactions which will be recognized as true obligations and secure accurate reporting thereon in order that it may be possible for the Committee on Appropriations to have a sound basis for its operations. * * *." H. Rep. No. 2266, 83d Cong., 2d Sess., 49-50 (1954).

Accordingly we believe that accounting figures governed by section 1311 must not only meet the statutory criteria for obligations but also include all transactions meeting such criteria, at least absent compelling circumstances justifying some other treatment. Compare 51 Comp. Gen. 631 (1972).

As already noted, the term "obligated balance" as used in 31 U.S.C. §§ 701 et seq. is in effect governed by section 1311 of the Supplemental Appropriation Act. However, the conclusions expressed above are even more specifically applicable to accounting procedures under 31 U.S.C. §§ 701 et seq. since section 701(c) thereof, supra, expressly provides that

the term "unobligated balance" as used in these sections represents the difference between the obligated balance and the unexpended balance. The requirements for periodic reviews and adjustments under section 703(a), supra, reenforces the conclusion that the statutory accounting procedures may not be implemented arbitrarily. While the express provisions of 31 U.S.C. §§ 701 et seq. do not deal with collections and receivables in as much detail as obligated and unobligated balances as such, the general conclusions stated herein would also seem applicable to the former.

Finally, the Army and Navy practices which you describe might be contrasted with the following statement from the report of the Senate Government Operations Committee on its version of the legislation from which 31 U.S.C. §§ 701 et seq. derive:

> "The bill recognizes that due to events which may occur after the reporting date, it is not always possible to report obligated balances of appropriations with precise accuracy. In consequence, amounts ultimately required for liquidation of obligations may fluctuate. The bill provides for this contingency by permitting agencies to utilize savings resulting when obligations are liquidated at less than the reported obligations to offset extra costs occasioned by underestimating obligations * * * and by permitting restoration of amounts withdrawn from the appropriations as unobligated, when determined necessary by the head of the agency concerned to meet obligations made in prior years. The committee is of the opinion that the provisions permitting restoration of amounts previously withdrawn will seldom, if ever, be invoked. * * *." S. Rep. No. 2266, 84th Cong., 2d Sess., 4-5 (1956).

In our view, the Army and Navy practices, by de-emphasizing precise accounting in favor of general reliance upon restorations for adjustments, represent an abuse of the flexibility afforded, and a basic departure from the approach contemplated, under the statute.

2. Use of "Free Assets." We believe that 31 U.S.C. § 686, including the provision of subsection (b) relating to reimbursements, has limited bearing upon the accrual of "free assets" to the military departments. 31 U.S.C. § 686, the so-called "Economy Act," constitutes general authority for the inter-agency and intra-agency furnishing of goods or services on a reimbursable basis. Thus its application is restricted to situations in which both the requisitioning and requisitioned sources are Federal agencies or subdivisions of one agency. Even then, section 686 may not apply to the extant that particular inter-agency or intra-agency transactions

are subject to some other basic authority. Therefore, in order to respond to your second question, it is necessary to consider the specific statutory authorities under which "free assets" may arise from reimbursements.

Military assistance transactions. We understand that the accrual of "free assets" to which you refer is most significant with respect to the use of DOD stocks in connection with military assistance activities, particularly under the Foreign Military Sales Act. Military assistance activities generally cannot be characterized as Economy Act transactions. Thus the treatment of reimbursements thereunder is governed by the particular statutory authorities involved, as discussed hereinafter, rather than 31 U.S.C. § 686 referred to in your submission.

a. Military sales. The Foreign Military Sales Act of 1968, as amended, 22 U.S.C. §§ 2761 et seq., authorizes various types of transactions involving the sale of defense articles and services to friendly foreign countries and international organizations. 22 U.S.C. § 2761 (1970) provides, inter alia, for cash sales of defense articles from stocks, at not less than their value in United States currency, with payment to be made in advance or within 120 days after delivery. 22 U.S.C. § 2762 (Supp. III, 1973) authorizes, inter alia, the procurement of defense articles upon a dependable undertaking to pay the full contract price for the procurement or any liability thereunder. Subsection 2762(c) provides that DOD appropriations may be used to initially meet payments required by such contracts and shall be reimbursed by the amounts subsequently received from the purchaser.

22 U.S.C. § 2777(a) (1970) provides, inter alia, that cash payments received under sections 2761 and 2762, supra, shall be available for payments to suppliers (including the military departments). 22 U.S.C. § 2403 contains definitions applicable generally to military assistance authorizations, including the Foreign Military Sales Act. Of particular relevance to sales of defense articles, 22 U.S.C. § 2403(m) (Supp. III, 1973), defines the term "value" to mean, inter alia—

> "(1) with respect to an excess defense article, the actual value of the article plus the gross cost incurred by the United States Government in repairing, rehabilitating, or modifying the article * * *;
>
> "(2) with respect to a nonexcess defense article delivered from inventory to foreign countries or international organizations under this chapter, the acquisition cost to the United States Government, adjusted as appropriate for condition and market value; [and]
>
> "(3) with respect to a nonexcess defense article delivered from new procurement to foreign countries, or international organizations under this chapter, the contract or production costs of such article * * *."

It appears that "free assets" would accrue as a result of military sales transactions either where defense articles sold are not replaced or where replacements can be effected at less cost than the selling price. See USAAACIR 36-371-36 (February 28, 1975), pp. 47 et seq. ("Augmentation and Modernization (AM) Sales"). "Free assets" or "profits" so accruing to DOD appropriations or funds become a source of obligational authority and thus represent an augmentation of such appropriations or funds. See 10 U.S.C. §§ 2205, 2208(c), 2210 (1970), discussed infra. Nevertheless, we must conclude that this result necessarily flows from the operation of the title 22 provisions described above, and is therefore lawful.

b. Military grant assistance. Various statutory provisions govern the furnishing of military grant assistance and reimbursement therefor. One such basic provision is section 108 of the Mutual Security Appropriation Act, 1956, 69 Stat. 438, as amended by section 106 of the Mutual Security Appropriation Act, 1957, 70 Stat. 735, which authorizes DOD to incur obligations pursuant to Military Assistance Program (MAP) orders and in anticipation of reimbursement for the value of such orders from reserved military assistance appropriations. Also, section 506 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C.A. § 2318 (Pam. ed., February 1975), authorizes the President to order the furnishing of defense articles from DOD stocks subject to reimbursement from subsequent military assistance appropriations. Subsection (b) of this section further authorizes DOD to incur obligations in anticipation of reimbursements to applicable appropriations, funds, or accounts from appropriations made to the President in amounts equivalent to the value of orders placed.

The basic provision concerning reimbursements for military grant assistance is 22 U.S.C. § 2392(d) (1970), which provides:

> "Except as otherwise provided in section 2318 of this title, reimbursement shall be made to any United States Government agency, from funds available for use under subchapter II of this chapter, for any assistance furnished under subchapter II of this chapter from, by, or through such agency. Such reimbursement shall be in an amount equal to the value (as defined in section 2403(m) of this title) of the defense articles or of the defense services (other than salaries of members of the Armed Forces of the United States), or other assistance furnished; plus expenses arising from or incident to operations under subchapter II of this chapter. The amount of such reimbursement shall be credited to the current applicable appropriations, funds, or accounts of such agency."

As indicated, specific criteria and requirements governing the determination of "value" for military grant assistance transactions, applying in part to reimbursement calculations, are set forth in 22 U.S.C. § 2403(a) (Supp. III, 1973).

None of the statutory provisions described above expressly limit the retention of reimbursements to replacement needs; nor is there any indication that such a limitation is implied. On the contrary, it is notable that 22 U.S.C. § 2392(c) (1970)--the basic authority governing reimbursements in development (nonmilitary) foreign assistance transactions and thus the counter-part to subsection 2392(d), discussed supra--contains language similar to 31 U.S.C. § 686(b) providing for deposit as miscellaneous receipts of reimbursements to the extent that replacement is deemed unnecessary. The presence of such language in the development assistance provision tends to reenforce the conclusion that such a limitation was deliberately left out of the parallel military assistance provision. Accordingly, we must again conclude that retention of reimbursements accruing from military grant assistance transactions is not contingent upon replacement needs.

Working capital fund transactions. Section 405 of the National Security Act Amendments of 1949, approved August 10, 1949, ch. 412, 63 Stat. 587, authorized the Secretary of Defense to establish working capital funds for the provision of common goods and services among DOD components. This authority is now contained in 10 U.S.C. § 2208 (1970). Pursuant to this authority, one stock fund has been established for DOD and for each of the military services. See DOD Directive No. 7420.1 ("Regulations Governing Stock Fund Operations") (January 25, 1967), §§ I, IV. As discussed hereinafter, these stock funds operate on a self-sustaining revolving fund basis under their specific statutory authority, and no additional authority is necessary to provide for their operations and reimbursements thereto. Accordingly, while such funds finance inter- and intra-agency transactions, they do not come within the purview of the Economy Act, supra. Cf., 31 Comp. Gen. 83, 87 (1950).

Subsection (c) of 10 U.S.C. § 2208 provides:

> "Working-capital funds shall be charged, when appropriate, with the cost of--
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> "(1) supplies that are procured or otherwise acquired, manufactured, repaired, issued, or used; and
>
> "(2) services or work performed;

> including applicable administrative expenses, and be reimbursed from available appropriations or otherwise credited for those costs, including applicable administrative expenses and costs of using equipment."

The House Armed Services Committee in its report on the 1949 legislation H.R. Rep. No. 1064, 81st Cong., 1st Sess., 7 (1949), observed as follows with respect to subsection (c):

> "Charges and reimbursements.--This subsection provides legal authority for the operation of the funds. The subsection provides that the working-capital funds shall be charged in appropriate circumstances with the cost of stores, supplies, materials, and equipment which are procured or otherwise acquired or which are manufactured, repaired, issued, or consumed. It also provides that the working-capital funds shall be charged for services rendered or work performed. Provision is also made for reimbursing the funds from available appropriations or otherwise crediting them (such as by payments received in kind or in cash) for the cost of stores, supplies, materials, or equipment furnished by the inventories, or for the cost of services rendered or work performed by such activities. The amounts which are to be charged or reimbursed to the funds are to include applicable administrative expenses involved. The operations of these funds are required to be reported annually to the President and to the Congress."

Neither subsection (c) nor any other provision of 10 U.S.C. § 2208 limits the retention of stock fund reimbursements to those involving a replacement need. The legislative history is also silent on this point.

Of some relevance in this regard is 10 U.S.C. § 2210(b) (1970), which provides:

> "Obligations may, without regard to fiscal year limitations, be incurred against anticipated reimbursements to stock funds in such amounts and for such period as the Secretary of Defense, with the approval of the Director of the Bureau of the Budget, may determine to be necessary to maintain stock levels consistently with planned operations for the next fiscal year."

10 U.S.C. § 2210 derives originally from section 645 of the Department of Defense Appropriation Act, 1954, approved August 1, 1953, ch. 305, 67 Stat. 357, which repealed the series of "replacing accounts" then in effect to cover reimbursements in favor of extending and facilitating the use of stock funds. See H.R. Rep. No. 680, 83d Cong., 1st Sess., 11 (1953). The legislative history of section 645 reflects congressional concern over augmentations resulting from the accrual of reimbursements under the "replacing account" system for items not in need of replacement; and, in fact, rescissions were made to remedy overcapitalization of stock funds as a result of this problem. Id. at 10-11.

However, in providing for expanded and facilitated use of stock funds, there was no specific mention of any prohibition against retention by the stock funds of reimbursements in excess of replacement needs. In fact, the legislative history might be read to suggest that the only remedy anticipated in this regard was the periodic rescission of stock fund capital. Moreover, the express language of 10 U.S.C. § 2210(b), providing authority to incur obligations against anticipated stock fund reimbursements in amounts determined "necessary to maintain stock levels consistently with planned operations for the next fiscal year," seems to suggest that the use of reimbursements is not necessarily limited to replacement of those stocks to which such reimbursements were attributable. Therefore, in the absence of any specific statutory provision or legislative history to the contrary, we must conclude that reimbursements to stock funds may be retained without regard to particular replacement needs.

Appropriation transactions. Inter- or intra-agency transactions in which a requisitioned military component provides goods or services financed by direct appropriations--as opposed to pure working capital fund transactions, discussed hereinabove--are subject to 31 U.S.C. § 686. Reimbursements arising from such transactions are also subject to 10 U.S.C. § 2205 (1970), which provides:

> "Reimbursements made to appropriations of the Department of Defense or a department or agency thereof under section 686 of title 31, or other amounts paid by or on behalf of a department or agency of the Department of Defense to another department or agency of the Department of Defense, or by or on behalf of personnel of any department or organization, for services rendered or supplies furnished, may be credited to authorized accounts. Funds so credited are available for obligation for the same period as the funds in the account so credited. Such an account shall be accounted for as one fund on the books of the Department of the Treasury."

The title 10 provision, being more specific than 31 U.S.C. § 686 with respect to the treatment of reimbursements, would be considered controlling to the extent that the two statutes might be inconsistent. However, we find nothing in the title 10 provision which appears to be inconsistent with subsection (b) of the Economy Act, 31 U.S.C. § 686(b) (1970), which provides in part:

> "* * * Where materials, supplies, or equipment are furnished from stocks on hand, the amounts received in payment therefor shall be credited to appropriations or funds, as may be authorized by other law, or, if not so authorized, so as to be available to replace the materials, supplies, or equipment, except that where the head of any such department, establishment, bureau, or office determines that such replacement is not necessary the amounts paid shall be covered into the Treasury as miscellaneous receipts."

Accordingly, we turn to the specific parts of your second question.

31 U.S.C. § 686(b) constitutes general authority to credit payments received from a requisitioning agency pursuant to subsection (a) thereof in order to replenish stocks on hand used in Economy Act transactions. On the other hand, the last clause of subsection 686(b)--"except that where the head of any such department, establishment, bureau, or office determines that such replacement is not necessary the amounts paid shall be covered into the Treasury as miscellaneous receipts"--has the effect, in our view, of limiting the authority to credit payments to cases in which replacement is necessary. Thus, although subsection (b) apparently reflects the assumption that replacement will ordinarily be necessary, we believe that the "except" clause would be meaningless unless it at least requires some mechanism or procedure to screen out payments representing furnished stocks which need not be replaced. Therefore, in response to the second part of your question, we agree in principle that, in order to comply with 31 U.S.C. § 686(b), agency accounting systems must be able to relate credits from the use of stocks on hand in Economy Act transactions to replacement needs.

With reference to the first part of your question, we are not in a position to prescribe specific requirements which might be necessary to an accounting system in order to adequately relate reimbursement credits to replacements. However, we are not convinced that any "concurrent replacement" requirement follows from consideration of 31 U.S.C. § 686(b). The crucial factor with respect to implementation of the statute is the determination that replacement is necessary--or, more precisely, not unnecessary--rather than the actual replacement transaction. Thus we

believe that the statutory requirement is satisfied by some mechanism for screening out payments for stocks not in need of replacement and insuring that such payments are treated as miscellaneous receipts rather than credits. Once this is accomplished, we think the timing of replacements, including fiscal year differences, is essentially immaterial, except perhaps to the extent that time lapses are so great as to be relevant from an audit standpoint in terms of the validity of the determination that replacement was necessary. Finally, we perceive no objection to the fact that replacement items might not be identical to the materials furnished from stocks so long as there is sufficient similarly to justify a bona fide replacement relationship.

3. Stock Fund Credits. 10 U.S.C. § 2208(g) provides that the appraised value of supplies returned to working capital funds may be charged to such funds, and the proceeds shall be credited to current applicable appropriations. As noted in our answer to your second question, 10 U.S.C. § 2208 derives originally from the National Security Act Amendments of 1949. The Senate Armed Services Committee explained the provision substantively the same as present 10 U.S.C. § 2208(g) in relevant part as follows:

> "Credits for items returned to inventory.--This subsection provides that where stores, supplies, materials, or equipment are returned to inventories, their appraised value may be charged to the working-capital fund concerned and the proceeds thereof shall be credited to proper appropriations. Sums so credited will be available for expenditure for the same purposes as the appropriations credited. This subsection is intended to encourage the return to inventories of materials which have been issued and charged, and which are found not to be immediately needed for consumption. This will make such returned materials available for issue to other users and will reduce the temptation to overbuy.* * *."
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> S. Rept. No. 366, 81st Cong., 1st Sess., 18 (1949).

The same explanation was provided by the House Armed Services Committee in its report. H. Rep. No. 1064, 81st Cong., 1st Sess., 8-9 (1949).

The statute clearly contemplates that supplies will be charged and credited in the same year that they are returned. Thus the "current" appropriations to be credited would ordinarily be synonomous with the appropriation current when supplies were returned. The Air Force legal opinion to which you refer apparently accepts this premise since it states:

> "It should be emphasized that this opinion [i.e., approving credits to the accounts current when the mistakes were discovered] is based upon the specific understanding that the failure to grant credits at the time clothing was returned was caused by honest mistake. It is obviously improper intentionally not to grant credits in years when additional funds are not needed in the military personnel account so that a larger credit can be available in a later year when additional funds are needed in such account."

The basic rationale for the approach sanctioned by the Air Force opinion appears to be that the statute does not expressly limit the term "current applicable appropriations" to those current when supplies were returned and credits should have been granted.

The alternative approach would be to treat the mistake as the basis for adjustments to the lapsed appropriation accounts which were current at the time credits should have been granted. This approach would, of course, be of no "benefit" to the Air Force in terms of providing new obligational authority (although the credits would be available to offset any upward adjustment of charges against the prior year accounts). However, this alternative would avoid an augmentation of appropriations current at the time the mistake was discovered.

As a technical legal matter, we feel constrained to accept the alternative of adjusting prior year accounts over the Air Force approach of applying belatedly granted credits to current appropriations. We have recognized that the operation of 10 U.S.C. § 2208(g) condones the augmentation of current appropriations when items furnished in 1 fiscal year are returned in subsequent fiscal years. See B-132900-O.M., February 1, 1974. However, in the instant circumstances, we must conclude that the approach adopted by the Air Force in "correcting" the mistake and the resulting augmentation go beyond the reasonable contemplation of the statute. In the absence of any clear indication of intent to the contrary, we believe, for the reasons stated above, that 10 U.S.C. § 2208(g) must be construed as authorizing credits to current appropriations only where such credits are actually granted in the year that supplies are returned. We also note that the granting of credits is clearly optional rather than mandatory. Thus it seems that the failure, for whatever reason, to grant credits in a timely manner must be treated as an opportunity foregone for purposes of acquiring new obligational authority.

Notwithstanding the foregoing conclusions, we do not regard the action taken by the Air Force in this particular case, in reliance upon its legal opinion, as entirely unreasonable since, as the Air Force legal opinion

points out, the statute does not literally restrict the application of credits to appropriations current at the time supplies are returned. Accordingly, we suggest that GAO need not formally take exception to the action of the Air Force in this particular case. However, we recommend that no such actions be accepted once the views expressed herein have been communicated to the military departments. Also, in order to assure that such future actions will not occur in the future, it might be recommended that the phrase "* * * shall be credited to current applicable appropriations * * *" in 10 U.S.C. § 2208(g) be amended to read: "* * * shall be credited to applicable appropriations current at the time such supplies were returned * * *."

4. Apportionment of Reimbursable Obligational Authority.

We considered the instant question in connection with GAO's review of an Army Audit Agency audit disclosing apparent violations of the Antideficiency Act, 31 U.S.C. § 665 (1970). The initial report on our review to the Chairman of the House Appropriations Committee, B-132900, September 28, 1973, pointed out that obligations against the fiscal year 1970 Military Personnel, Army (MAP) appropriation at the end of fiscal year 1970 equalled the amount of OMB's apportionment, including anticipated reimbursements. In July 1970 Army charged additional obligations against the MAP appropriation and also recorded additional amounts representing reimbursements for subsistence provided to other DOD components. Our report concluded that, notwithstanding assertions of historical practice to the contrary, Army lacked authority to increase fund availability after the end of the fiscal year by recording earned reimbursements in excess of amounts of anticipated reimbursements apportioned by OMB, so that such excess reimbursements recorded after the end of fiscal year 1970 could not be applied to offset overobligation of the MAP account.

By letter dated November 30, 1973, the Assistant Secretary of the Army (Fiscal Management) disputed the conclusion in our report as follows:

> "Your position as to the $29.8 million of recorded obligations is that the reimbursements received after the end of the fiscal year did not have the effect of increasing the total availability of the appropriation, thus permitting upward obligation adjustments found to be necessary. The latter contends that the amount stated in the apportionment continued to be controlling after the end of the fiscal year. It is the Army view that the purpose of the apportionment process is to control the amount of obligations made during the fiscal year; at the end of the fiscal year, the apportionment has served its purpose and should no longer be considered

as limiting proper obligations adjustments; and that the controlling factor after the end of the fiscal year is the amount available in the appropriation. The wording of the Anti-Deficiency Act makes clear that its purpose is to limit obligations to the amount available in the appropriation, and that the apportionment is merely a device to accomplish that purpose. For example, subsection (a) prohibits expenditures or obligations under any appropriation or fund 'in excess of the amount available therein'; and subsection (c) states that appropriations or funds shall be so apportioned as to prevent obligation or expenditure in a manner indicating need for a deficiency or supplemental appropriation. If the position stated in your letter is correct, the only way in which obligation adjustments, exceeding the original apportionment, could be made after the end of the fiscal year would be by obtaining a reapportionment in the increased amount. Under existing procedures of the Office of Management and Budget, it is not possible to obtain such a reapportionment. In fact, section 41.1 of Circular A-34 of the Office of Management and Budget, dated July 1971, states that accounts which have expired for obligation purposes will not be apportioned. Several other sections in that circular make it clear that it does not apply to appropriations no longer available for obligation. Thus, the position taken by you challenges procedures applicable to all executive departments and establishments. One effect of that position, as an example, would be to preclude the payment of increased amounts due under the terms of a contract after the end of the fiscal year, where the payment would exceed the amount of the apportionment. The government would thus be unable to meet its contractual obligations to the contractor and pay him amounts legally due, even though adequate funds were available in the appropriation. The Army does not believe that the intent of the Anti-Deficiency Act was to produce such unfortunate results."

In B-132900-O.M., February 1, 1974, we advised you concerning the Assistant Secretary's position as follows:

"We agree that the apportionment device will have served its purpose at the end of the fiscal year in that thereafter no additional obligations properly may be entered into. However, there would be no occasion to disregard such apportionment after the close of the fiscal year, as now urged by the

> Assistant Secretary, except for the fact that the amount of the obligations entered into during the period of availability of the appropriation exceeded the amount apportioned--which action is expressly prohibited by paragraph (h) of the Antideficiency Act. This overobligation of the apportionment during the fiscal year must be reported to the President and to the Congress as a violation of the Antideficiency Act. We agree, however, that under OMB Circular A-34 the apportionment does not preclude the payment of valid obligations after the end of the fiscal year involved where there are adequate funds available in the appropriations. But there would be no necessity for making payments in excess of the apportionments, if the provisions of the Antideficiency Act had been complied with during the fiscal year involved."

Accordingly, we reaffirmed the conclusion stated in the September 1973 report that obligational authority comprised of anticipated reimbursements apportioned by OMB is limited to the amounts so apportioned during the fiscal year and thereafter. While the specific amounts involved in the apparent overobligation of the 1970 MAP appropriation have subsequently been affected by other factors, our conclusion in principle as to the treatment of apportioned anticipated reimbursements remained the same. See our letter to the Secretary of Defense of January 6, 1975, B-132900.

We still adhere to the views expressed in B-132900-O.M., supra, and would only add the following observations. The authority to incur obligations against anticipated reimbursements to stock funds does not, at least in some circumstances, derive from annual appropriations, but in effect rests upon permanent appropriations. For example, with respect to stock funds, 10 U.S.C. § 2210(b) (1970), provides:

> "Obligations may, without regard to fiscal year limitations, be incurred against anticipated reimbursements to stock funds in such amounts and for such period, as the Secretary of Defense, with the approval of the Director of the Bureau of the Budget, may determine to be necessary to maintain stock levels consistently with planned operations for the next fiscal year."

Whatever may be the merits of the Assistant Secretary's contentions as quoted hereinabove concerning the relationship between apportionments and obligational adjustments to appropriations generally (and we here express no view thereon), such contentions have no application to the unique obligational

authority provided by 10 U.S.C. § 2210(b).* By the express terms of this statute, such obligational authority exists only "in such amounts and for such period" as OMB approves (through apportionment). Thus, unlike the result which obtains as to appropriations generally, the amount of obligational authority represented by anticipated reimbursements and the amount of the OMB apportionment thereof are necessarily one and the same. It follows that there would never exist an excess of potential obligational authority over the amount apportioned which could accommodate adjustments after expiration of the apportionment even assuming arguendo that adjustments would otherwise be permissible.

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Considering the complex nature of the legal issues discussed herein, and the fact that we do not have DOD's formal views, DOD's formal comments should be obtained on any draft report incorporating our legal analysis of these issues prior to final issuance of the report.

PAUL G. DEMBLING

Paul G. Dembling
General Counsel

Attachments