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B-331902  
GAO-20-495T

March 11, 2020

The Honorable John Yarmuth  
Chairman  
The Honorable Steve Womack  
Ranking Member  
Committee on the Budget  
House of Representatives

Subject: *Testimony before the House Committee on the Budget—Congress’s Constitutional Power of the Purse and the Government Accountability Office’s Role to Serve that Power*

Chairman Yarmuth, Ranking Member Womack, and Members of the Committee:

Thank you for the opportunity to discuss Congress’s constitutional power of the purse and GAO’s role in serving this power.

The Role of the Government Accountability Office

The framers vested Congress with the power of the purse by providing in the Constitution that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>1</sup> As James Madison explained, the framers did so for two primary reasons.<sup>2</sup> First, this arrangement ensured that the government remained directly accountable to the will of the people: “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”<sup>3</sup> Second, Congress through its power of the purse holds a key check on the power of the other branches, allowing it to reduce “all the overgrown prerogatives of the other branches of government.”<sup>4</sup>

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<sup>1</sup> U.S. Const., art. I, § 9, cl. 7.

<sup>2</sup> The Federalist No. 58 (1788) (James Madison).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

The meaning of the Appropriations Clause is straightforward: “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”<sup>5</sup> Congress’s power of the purse vests in Congress the power and duty to affirmatively authorize all expenditures,<sup>6</sup> and the Constitution provides Congress with the power to enact statutes to protect and exercise this power.<sup>7</sup> Congress has largely done this through the annual budget and appropriations process and a series of permanent statutes that establish controls on the use of appropriated funds. The permanent fiscal statutes, found mostly in title 31 of the United States Code, implement Congress’s power of the purse.<sup>8</sup>

In 1921, Congress created the General Accounting Office—now the Government Accountability Office—through the Budget and Accounting Act to assist it in the discharge of its core constitutional powers, including the power of the purse.<sup>9</sup> Congress created this independent, nonpartisan office in the legislative branch “because it believed that it ‘needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations.’”<sup>10</sup> The Budget and Accounting Act vested GAO with the authority to “investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds . . . .”<sup>11</sup> In addition, this Act transferred from the Comptroller of the Treasury to the Comptroller General the authority to issue legal decisions to executive branch officials concerning the use and availability of public money.<sup>12</sup>

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<sup>5</sup> *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (citing *Reeside v. Walker*, 52 U.S. 272, 291 (1851)).

<sup>6</sup> U.S. Const., art. I, § 9., cl. 7.

<sup>7</sup> U.S. Const., art. I, § 8, cl. 18.

<sup>8</sup> See, e.g., 31 U.S.C. §§ 1301, 1341.

<sup>9</sup> Budget and Accounting Act, 1921, Pub. L. No. 13, title III, 42 Stat. 20, 23–27 (June 10, 1921). See 61 Cong. Rec. 1090 (1921) (statement of Rep. Good) (“It was the intention of the committee that the comptroller general should be something more than a bookkeeper or accountant; that he should be a real critic, and at all times should come to Congress, no matter what the political complexion of Congress or the Executive might be, and point out inefficiency, if he found that money was being misapplied—which is another term for inefficiency—that he would bring such facts to the notice of the committees having jurisdiction of appropriations.”).

<sup>10</sup> *Bowsher v. Synar*, 478 U.S. 714, 730–731 (1986) (quoting Harvey Mansfield, *The Comptroller General: A Study in the Law and Practice of Financial Administration*, 65 (1939)).

<sup>11</sup> Pub. L. No. 13, § 312(a), 42 Stat. at 25, codified at 31 U.S.C. § 712(1).

<sup>12</sup> Pub. L. No. 13, § 304, 42 Stat. at 24, codified at 31 U.S.C. § 3529(b).

Over the past century, Congress has continued to vest GAO with additional responsibilities to investigate and oversee the use of public money. For example, under the Congressional Budget and Impoundment Control Act of 1974, Congress provided that the Comptroller General will review any special messages submitted by the President pursuant to the act and report to Congress when a special message is either improperly classified or not transmitted at all.<sup>13</sup> And, in 2004, Congress amended the Antideficiency Act to require agencies to send to the Comptroller General a copy of each violation report on the same date the agency sends the report to the President and Congress.<sup>14</sup> Additionally, the Senate Appropriations Committee directed the Comptroller General to establish a central repository of Antideficiency Act violation reports and to track all reports, including responses to GAO legal decisions and opinions and findings in audit reports and financial statement reviews.<sup>15</sup>

Today, through these various statutory grants of authority, GAO continues to assist Congress in the discharge of its constitutional powers. GAO does much of this work through audits and investigations, either at the request of Congress or the Comptroller General.<sup>16</sup> In addition, GAO issues legal decisions on matters of appropriations law in response to congressional requests or requests from executive branch agencies, or under the Impoundment Control Act.

In the past year, GAO has issued decisions on a number of appropriations law matters, including, for example: whether actions taken during the fiscal year 2019 lapse in appropriations violated the Antideficiency Act and other fiscal statutes;<sup>17</sup> whether the Department of Housing and Urban Development violated the Antideficiency Act when it failed to notify Congress in advance of obligating funds to furnish the Secretary's office;<sup>18</sup> and whether the Environmental Protection Agency violated the anti-lobbying provision, and therefore the Antideficiency Act, when an agency official tweeted about the Senate confirmation of an official to the position of Deputy Administrator.<sup>19</sup> In addition to issuing these decisions, GAO publishes a multivolume treatise titled *Principles of Federal Appropriations Law* (often referred to as the "Red Book"), which is the premier reference on appropriations law matters for members of Congress and their staffs, agency practitioners, the federal judiciary, and for those outside of the federal government. We also teach a course on appropriations law at agencies across the

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<sup>13</sup> 2 U.S.C. §§ 685–686.

<sup>14</sup> Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004), *codified at* 31 U.S.C. § 1351.

<sup>15</sup> S. Rep. No. 108-307, at 43 (2004).

<sup>16</sup> 31 U.S.C. §§ 712, 717.

<sup>17</sup> See, e.g., B-330776, Sept. 5, 2019; B-330775, Sept. 5, 2019.

<sup>18</sup> B-329955, May 16, 2019.

<sup>19</sup> B-330107, Oct. 3, 2019.

federal government and each year we host over two hundred federal appropriations law practitioners at the daylong Appropriations Law Forum.

GAO's expertise with regard to appropriations law matters is widely understood and respected throughout the government. Indeed, Article III courts frequently cite to GAO's legal decisions and the Red Book in their decisions involving appropriations law. For example, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) relied on a line of decisions of the Comptroller General when it ruled that the Navy's appropriations were not available for the purchase of bottled water.<sup>20</sup> In support of its conclusion, the D.C. Circuit noted that these decisions are "expert opinion, which we should prudently consider."<sup>21</sup> Additionally, the Supreme Court has cited GAO's Red Book in support of its positions on appropriations law matters.<sup>22</sup>

### GAO's Role in Serving Respect for Congress's Constitutional Power of the Purse

GAO's role to provide information and legal analysis to Congress on appropriations law matters is essential to ensuring respect for Congress's constitutional power of the purse. This is evident in Congress's grant of authority to GAO under both the Impoundment Control Act of 1974 (Impoundment Control Act) and the Antideficiency Act.

In 1974, Congress enacted the Impoundment Control Act in response to attempts by the executive branch to thwart the will of Congress by refusing to spend congressionally-appropriated funds.<sup>23</sup> The Impoundment Control Act operates on the constitutional premise that the President is required to obligate funds appropriated by Congress, unless otherwise authorized to withhold.<sup>24</sup> The act permits the President to temporarily impound—withhold the obligation of—appropriated funds in certain circumstances if the President notifies the Congress by transmitting a "special message."<sup>25</sup> The act gives the Comptroller General the responsibility to review all special messages submitted pursuant to the Impoundment Control Act and to report to Congress when the Comptroller General determines the President has improperly withheld funds.<sup>26</sup> The act also authorizes the Comptroller General to bring a civil action

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<sup>20</sup> *Navy v. FLRA*, 665 F.3d 1339, 1342, 1349–1351 (D.C. Cir. 2012).

<sup>21</sup> *Id.*, at 1349 (quoting *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001)).

<sup>22</sup> See, e.g., *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 190–199 (2012).

<sup>23</sup> Pub. L. No. 93-344, title X, 88 Stat. 297, 332–339 (July 12, 1974), *classified at* 2 U.S.C. §§ 681–688.

<sup>24</sup> B-329092, Dec. 12, 2017.

<sup>25</sup> 2 U.S.C. §§ 681–688.

<sup>26</sup> *Id.* §§ 685–686.

to compel the release of any budget authority improperly withheld.<sup>27</sup> GAO's investigation of and reporting on potential impoundments alerts Congress to executive branch attempts to undermine Congress's power of the purse by refusing to spend budget authority appropriated by Congress. As a result, GAO's role under the Impoundment Control Act is essential to ensuring respect for Congress's constitutional power of the purse.<sup>28</sup>

Congress enacted the Antideficiency Act to protect and underscore Congress's constitutional prerogatives of the purse in response to various abuses.<sup>29</sup> Prior to the enactment of this act, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these "coercive deficiencies."<sup>30</sup> These were obligations to others who had fulfilled their part of the bargain with the United States and who now had at least a moral—and in some cases also a legal—right to be paid. Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget. As a result, Congress enacted the Antideficiency Act, which, in pertinent part, prohibits government officials from obligating or expending in excess of or in advance of appropriations.<sup>31</sup> The Antideficiency Act has been termed "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds."<sup>32</sup>

To further protect its constitutional prerogatives under the Antideficiency Act, Congress amended the Antideficiency Act in 2004 to require agencies to transmit copies of each violation report to GAO on the same date the agency reports the violation to the President and Congress.<sup>33</sup> Additionally, the Senate Appropriations Committee directed the Comptroller General to establish a central repository of Antideficiency Act violation reports.<sup>34</sup> Since then, if GAO concludes that an agency violated the Antideficiency Act in a decision and if the agency does not make its required report, we notify Congress of

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<sup>27</sup> *Id.* § 687.

<sup>28</sup> B-331564, Jan. 16, 2020.

<sup>29</sup> See U.S. Const., art. I, § 9, cl. 7 (power of the purse, statement and account of public money); B-328450, Mar. 6, 2018; B-317450, Mar. 23, 2009.

<sup>30</sup> Gary Hopkins & Robert Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 *Mil. L. Rev.* 51, 57–58 (1978); Louis Fisher, *Presidential Spending Power*, 232 (1975).

<sup>31</sup> 31 U.S.C. § 1341(a)(1)(A).

<sup>32</sup> Hopkins & Nutt, *at* 56.

<sup>33</sup> Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004).

<sup>34</sup> S. Rep. No. 108-307, at 43 (2004).

the violation.<sup>35</sup> GAO's reports on these violations help Congress learn which agencies have violated the Act and whether Congress needs to take additional action to ensure compliance with both the Antideficiency Act and its power of the purse.

When GAO finds that an agency has violated a fiscal statute, Congress may use its legislative powers to enforce GAO's decision and protect its power of the purse. For example, in 2011, the Department of Justice's Office of Legal Counsel issued a memorandum asserting that the Office of Science and Technology Policy (OSTP) did not violate a statutory provision prohibiting the use of appropriated funds "to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract . . . with China or any Chinese-owned company" when OSTP used appropriated funds to conduct the prohibited activities because OSTP conducted them in furtherance of the President's constitutional powers.<sup>36</sup> Weeks later, GAO issued a legal decision finding that OSTP violated this statutory provision and, therefore, also violated the Antideficiency Act.<sup>37</sup> Congress subsequently reduced OSTP's appropriations by about 33 percent.<sup>38</sup>

In addition, in 2014, GAO concluded that the Department of Defense violated a statutory provision when it transferred five individuals detained at Guantanamo Bay, Cuba, to the nation of Qatar without providing the statutorily required notice 30 days in advance to certain congressional committees.<sup>39</sup> Without the notice, no money was legally available for this purpose and DOD violated the Antideficiency Act.<sup>40</sup> The House of Representatives subsequently voted 249-163 to condemn and disapprove of DOD's actions.<sup>41</sup>

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<sup>35</sup> See, e.g., B-308715, Nov. 13, 2007.

<sup>36</sup> Memorandum Opinion for the General Counsel, Office of Science and Technology Policy, *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, OLC Opinion, Sept. 19, 2011.

<sup>37</sup> B-321982, Oct. 11, 2011.

<sup>38</sup> *Compare* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. B., title III, 125 Stat. 552, 622 (Nov. 18, 2011) (providing OSTP with \$4.5 million for its FY 2012 expenses), *with* Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, div. B, title III, § 1316, 125 Stat. 38, 125 (Apr. 15, 2011) (providing OSTP with \$6.660 million for its FY 2011 expenses).

<sup>39</sup> B-326013, Aug. 21, 2014.

<sup>40</sup> *Id.*

<sup>41</sup> H. Res. 644, 113th Cong. (2014); 160 Cong. Rec. H7325, H7335 (2014).

## The Gravity of GAO's Role

GAO takes seriously its role in protecting Congress's power of the purse. In 2018, for example, we reminded the executive branch that affirmative legislative action is required for a rescission of funds, noting that Congress does not "alter the fundamental details of its constitutional power of the purse through vague terms or ancillary provisions."<sup>42</sup> Recently, we warned agencies that their reluctance to provide fulsome responses to GAO's questions can have constitutional significance.<sup>43</sup>

During the fiscal year 2019 lapse in appropriations, executive branch agencies, in some cases, continued a number of activities that they had not undertaken in prior lapses. These executive branch agencies incurred obligations without the prior approval of Congress, in contravention of Congress's power of the purse. Congress was understandably concerned about the executive branch's actions and asked GAO to assess the legality of a number of these actions. Over the past few months, GAO has issued a number of decisions on the executive branch's actions under the lapse.<sup>44</sup> To date, all but one of the decisions we issued have concluded that the executive branch did not have the legal authority to carry out the activities it undertook during the lapse.<sup>45</sup> In many of these decisions, we also noted that the executive branch's disregard for the Antideficiency Act and other fiscal statutes during the lapse tore at the very fabric of Congress's constitutional power of the purse, and, as a result, we would consider the continuation of such activities in a future lapse to be a knowing and willful violation of the ADA.<sup>46</sup>

In late 2018, Chairman Yarmuth and Ranking Member Womack asked GAO whether the President had the legal authority under the Impoundment Control Act to withhold budget authority through its date of expiration.<sup>47</sup> We issued a decision concluding the President did not have such authority.<sup>48</sup> An interpretation of the act under which the President has the legal authority to withhold budget authority through its date of expiration would allow the President to effectively rescind budget authority without

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<sup>42</sup> B-330330, Dec. 10, 2018, at 12.

<sup>43</sup> B-331564, Jan. 16, 2020. See *also* B-330776, Sept. 5, 2019 (GAO "will not allow an agency's lack of cooperation to interfere with Congress's oversight of executive spending.").

<sup>44</sup> See, e.g., B-331132, Dec. 19, 2019; B-331093, Oct. 22, 2019; B-330693, Oct. 8, 2019; B-331094, Sept. 5, 2019; B-330776, Sept. 5, 2019; B-330775, Sept. 5, 2019.

<sup>45</sup> *Id.*

<sup>46</sup> *E.g.*, B-330776, Sept. 5, 2019.

<sup>47</sup> B-330330, Dec. 10, 2018.

<sup>48</sup> *Id.*

congressional action.<sup>49</sup> Such an interpretation would be inconsistent with the constitutional principles of bicameralism and presentment.<sup>50</sup> We also noted that if Congress intended to dedicate such broad authority to the President, the power of the purse requires that it do so through an affirmative action in legislation, not through congressional silence.<sup>51</sup>

In June 2019, the Office of Management and Budget (OMB) amended its Circular No. A-11 addressing agency reports of Antideficiency Act violations found by GAO. The June 2019 revision instructs agencies to report such violations only if “the agency, in consultation with OMB, agrees that a violation has occurred.”<sup>52</sup> This revision was a departure from longstanding instructions to agencies. OMB had long instructed each executive branch agency to submit such a report whenever GAO found an Antideficiency Act violation.<sup>53</sup> Since 2004, when Congress amended the Antideficiency Act, GAO’s practice has been that if GAO concludes that an agency has violated the Antideficiency Act and the agency does not make its required report, we notify Congress of the violation.<sup>54</sup> Reports of Antideficiency Act violations provide Congress with important information in its oversight of executive spending activity and underscore respect for Congress’s constitutional power of the purse.

In response to OMB’s June 2019 revision to Circular No. A-11, I transmitted a letter to agency general counsels explaining that GAO will continue to notify Congress of an agency’s Antideficiency Act violation if the agency does not do so, noting the agency’s failure to report.<sup>55</sup> The letter also noted that if GAO publishes a decision concluding that an Antideficiency Act violation occurred, we will contact the relevant agency to ensure a report of the violation, and if the agency does not report within a reasonable period, GAO will notify Congress of the violation.<sup>56</sup> While a GAO notification puts the violation

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, § 145.8 (June 28, 2019).

<sup>53</sup> See, e.g., GAO, *Anti-Deficiency Act: Agriculture’s Food and Nutrition Service Violates the Anti-Deficiency Act*, GAO/AFMD-87-20 (Washington, D.C.: Mar. 17, 1987) (citing OMB Cir. No. A-34, *Instructions on Budget Execution* (1987)); OMB Cir. No. A-11, pt. 4, § 145.8 (June 2018); OMB Cir. No. A-11, pt. 4, § 145.8 (July 2007) (revised Nov. 20, 2007); OMB Cir. No. A-34, *Instructions on Budget Execution*, pt. 2, § 22.8 (Nov. 7, 1997).

<sup>54</sup> See, e.g., B-308715, Nov. 13, 2007.

<sup>55</sup> B-331295, Sept. 23, 2019.

<sup>56</sup> *Id.*



before Congress, our reports, of course, would only include information in the record associated with a decision; they would not include other information Congress may find useful, like agency activity to prevent recurrence of the violation or administrative discipline imposed upon agency officials responsible for the violation.

### Legislative Proposals to Protect Congress's Power of the Purse

Congress has vested GAO with an important role to investigate and provide legal analysis on the use of public money. GAO takes this role seriously, and through our appropriations law work, we assist congressional oversight and serve Congress's constitutional power of the purse. To make sure that GAO is able to continue to advance and protect Congress's constitutional prerogatives, I would like to discuss some ideas that we have for legislative proposals that would help GAO carry out our work.

When GAO issues an appropriations law decision, we send a letter to solicit the agency's views of the facts and the law related to the decision. Recently, we have had difficulty getting timely responses from agencies, and, in some cases, we have not received responses at all. The delay in receiving these responses impedes our ability to issue decisions on a timely basis. To ensure that GAO receives timely responses to these letters, I might recommend a provision of law to require agencies to respond to our letters within a certain time period. I might also recommend that you consider imposing penalties or a reporting requirement on agencies that fail to respond to GAO.

Additionally, I would suggest that Congress consider some amendments to the Antideficiency Act. In its current form, the Act requires agencies to notify Congress when agencies identify violations, but is silent on what agencies should do when GAO finds a violation.<sup>57</sup> The June 2019 revisions to OMB Circular A-11 suggest that agencies may rely on this statutory silence to avoid reporting Antideficiency Act violations to Congress when GAO identifies a violation. Not only does this withhold important information from congressional oversight, it reflects diminished respect for Congress's constitutional power of the purse. I would recommend revising the Antideficiency Act to clearly require agencies to report when GAO finds a violation.

In 2007, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum concluding that a violation of a spending restriction that Congress enacted in a permanent statute does not violate the Antideficiency Act because the prohibition is not "in an appropriation."<sup>58</sup> This conclusion results in a rather anomalous policy that turns solely on Congress's choice of a legislative vehicle—permanent law or appropriations act—asserting, in effect, that Congress need not know of violations of

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<sup>57</sup> 31 U.S.C. §§ 1351, 1517(b).

<sup>58</sup> Memorandum Opinion for the General Counsel, Environmental Protection Agency, *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, OLC Opinion, Apr. 5, 2007, at 1.

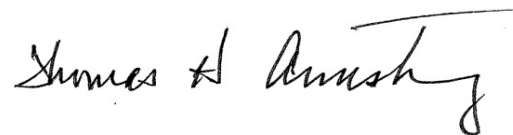
statutory restrictions, only appropriations act restrictions. This is not GAO's view.<sup>59</sup> As a result of OLC's conclusions, executive branch agencies do not report violations of funding restrictions that are not in an appropriation even though GAO would conclude those violations are also Antideficiency Act violations. I might offer that Congress could fix this underreporting of these violations by revising the Antideficiency Act, or enacting a permanent statute, to clarify that violations of funding restrictions—whether they are in an appropriation or not—are violations of the Act.

It has long been understood that the threat of criminal and civil penalties serves as an important deterrent for government officials and employees even though the Department of Justice has never brought charges against a government official or employee for a criminal violation of the Antideficiency Act. Lest the lack of prosecutions under the Antideficiency Act mitigate the deterrent effect, I might recommend requiring the Department of Justice to annually review reports in GAO's repository and issue a report to Congress, with a copy to GAO, on whether criminal charges should be brought for each Antideficiency Act violation reported to Congress.

Each of these legislative proposals would strengthen GAO's existing role to provide information and legal analysis to Congress regarding the spending of public money. But, more importantly, these proposals would also support and advance Congress's constitutional prerogatives.

### Conclusion

Chairman Yarmuth, Ranking Member Womack, and members of the Committee, this completes my prepared statement. I would be pleased to respond to any questions that you may have.



Thomas H. Armstrong  
General Counsel

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<sup>59</sup> B-317450, Mar. 23, 2009; B-300826, Mar. 3, 2005.